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CONTENTS

TABLE OF CASES

EDITORIAL

The *African Human Rights Law Reports* include cases decided by the International Court of Justice, the United Nations human rights treaty bodies, the African Commission on Human and Peoples' Rights, the African Court on Human and Peoples' Rights, the African Committee on the Rights and Welfare of the Child, sub-regional courts in Africa and domestic judgments from different African countries. The *Reports* are a joint publication of the African Commission on Human and Peoples' Rights and the Centre for Human Rights, University of Pretoria, South Africa. PULP also publishes the French version of these *Reports, Recueil Africain des Décisions des Droits Humains*.

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Editorial changes have been kept to a minimum, and are confined to changes that are required to ensure consistency in style (with regard to abbreviations, capitalisation, punctuation and quotes) and to avoid obvious errors related to presentation.

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USER GUIDE

The cases and findings in the *Reports* are grouped together according to their origin, namely, the United Nations, the African Commission on Human and Peoples' Rights, the African Court on Human and Peoples' Rights, sub-regional courts and domestic courts.

The *Subject index* is divided into two parts — general principles or procedural issues, and substantive rights. Decisions dealing with a specific article in an international instrument are to be found in the list of *International instruments referred to*. A table that lists *International case law considered* is also included. In these tables case references are followed by the numbers of the paragraphs in which the instruments or cases are cited.

A headnote, to be found at the top of each case, provides the full original title of the case as well as keywords noting the primary issues in the case. These are linked to the keywords in the *Subject index*. Keywords are followed by the numbers of the paragraphs in which a specific issue is dealt with. In instances where the original case contains no paragraph numbers these have been added in square brackets.

The date at the end of a case reference refers to the date the case was decided. The abbreviation before the date indicates the jurisdiction.

ABBREVIATIONS

ACHPR	African Commission on Human and Peoples' Rights
CCPR	International Covenant on Civil and Political Rights
ACtHPR	African Court on Human and Peoples' Rights
ACERWC	African Committee on the Rights and Welfare of the Child
ECOWAS	Economic Community of West African States
KeHC	High Court, Kenya
SySC	Supreme Court of Seychelles

CASE LAW ON THE INTERNET

Case law concerning human rights in Africa may be found on the following sites:

African Commission on Human and Peoples' Rights
www.achpr.org

African Court on Human and Peoples' Rights
www.african-court.org

African Case Law Analyser
caselaw.ihrda.org

Association des Cours Constitutionelles
www.accpuf.org

Centre for Human Rights, University of Pretoria
www.chr.up.ac.za

Commonwealth Legal Information Institute
www.commonlii.org

Constitutional Court, South Africa
www.constitutionalcourt.org.za

Court of Appeal, Nigeria
www.courtofappeal.gov.ng

Interights
www.interights.org

Nigeria Internet Law Reports
www.nigeria-law.org/LawReporting.htm

Oxford Reports on International Law (ORIL)
www.oxfordlawreports.com

Southern African Legal Information Institute
www.saflii.org

United Nations High Commissioner for Human Rights
www.ohchr.org

ALPHABETICAL TABLE OF CASES

SUBJECT INDEX

This index is divided into two parts; the first deals with general principles and procedural issues, and the second part with substantive rights

GENERAL PRINCIPLES AND PROCEDURAL

Evidence

No response to depositions of affidavit will be deemed uncontroverted and admitted

Osman v Minister of State for Provincial Administration and Internal Security and Others (2011) AHRLR 217 (KeHC 2011)

Presumption of state responsibility for injuries while in custody

Egyptian Initiative for Personal Rights and Interights v Egypt I (2011) AHRLR 42 (ACHPR 2011)

Interpretation

Interdependency of rights

Osman v Minister of State for Provincial Administration and Internal Security and Others (2011) AHRLR 217 (KeHC 2011)

International law

Egyptian Initiative for Personal Rights and Interights v Egypt II (2011) AHRLR 90 (ACHPR 2011)

IHRDA and Another v Kenya (2011) AHRLR 181 (ACERWC 2011)

Jurisdiction

Continuing violation

Zitha v Mozambique (2011) AHRLR 138 (ACHPR 2011)

Failure to notify family of execution

Spilg and Others v Botswana (2011) AHRLR 3 (ACHPR 2011)

No victim requirement, *actio popularis*

Spilg and Others v Botswana (2011) AHRLR 3 (ACHPR 2011)

Submission of communication by non-citizen

Spilg and Others v Botswana (2011) AHRLR 3 (ACHPR 2011)

Limitation of rights

Enjoyment of rights is subject to law necessary in democratic society

Gill v Registrar of Political Parties (2011) AHRLR 225 (SySC 2011)

Provisional measures

Relation to merits

African Commission on Human and Peoples' Rights v Libya (2011) AHRLR 175 (ACtHPR 2011)

Where there is imminent risk of loss of human life

African Commission on Human and Peoples' Rights v Libya (2011) AHRLR 175 (ACtHPR 2011)

Egyptian Initiative for Personal Rights and Interights v Egypt I (2011) AHRLR 42 (ACHPR 2011)

Without request from the Commission

African Commission on Human and Peoples' Rights v Libya (2011) AHRLR 175 (ACtHPR 2011)

INTERNATIONAL INSTRUMENTS REFERRED TO

UNITED NATIONS

Universal Declaration of Human Rights

Article 8

Osman v Minister of State for Provincial Administration and Internal Security and Others (2011) AHRLR 217 (KeHC 2011), 14, 43

Article 10

Ameganvi and Others v Republic of Togo (2011) AHRLR 203 (ECOWAS 2011), 24, 57, 62, 43

Article 19

Egyptian Initiative for Personal Rights and Interights v Egypt II (2011) AHRLR 90 (ACHPR 2011), 244

Article 25

Egyptian Initiative for Personal Rights and *Interights v Egypt II* (2011) AHRLR 90 (ACHPR 2011), 262

International Covenant on Civil and Political Rights

Article 4

Egyptian Initiative for Personal Rights and Interights v Egypt I (2011) AHRLR 42 (ACHPR 2011), 109

Article 6

Spilg and Others v Botswana (2011) AHRLR 3 (ACHPR 2011), 140

Article 7

Spilg and Others v Botswana (2011) AHRLR 3 (ACHPR 2011), 147

Egyptian Initiative for Personal Rights and Interights v Egypt II (2011) AHRLR 90 (ACHPR 2011), 208

Article 14

Egyptian Initiative for Personal Rights and Interights v Egypt I (2011) AHRLR 42 (ACHPR 2011), 125

Article 17

Osman v Minister of State for Provincial Administration and Internal Security and Others (2011) AHRLR 217 (KeHC 2011), 13

Article 19

Egyptian Initiative for Personal Rights and Interights v Egypt II (2011) AHRLR 90 (ACHPR 2011), 244

Article 24

IHRDA and Another v Kenya (2011) AHRLR 181 (ACERWC 2011), 47

COUNCIL OF EUROPE

European Convention on Human Rights

ORGANISATION OF AMERICAN STATES

American Convention on Human Rights

Inter-American Convention to Prevent and Punish Torture

SUB-REGIONAL ECONOMIC COMMUNITIES

ECOWAS

Protocol of ECOWAS on Democracy and Good Governance

Article 1

Ameganvi and Others v Republic of Togo (2011) AHRLR 203 (ECOWAS 2011), 2, 20, 21, 57

Article 33

Ameganvi and Others v Republic of Togo (2011) AHRLR 203 (ECOWAS 2011), 2, 20, 21, 33

Supplementary Protocol on the Community Court of Justice

Article 9

Ameganvi and Others v Republic of Togo (2011) AHRLR 203 (ECOWAS 2011), 19, 39

Article 10

Ameganvi and Others v Republic of Togo (2011) AHRLR 203 (ECOWAS 2011), 19, 39

Rules of Procedure of the ECOWAS Court of Justice

Article 9

Ameganvi and Others v Republic of Togo (2011) AHRLR 203 (ECOWAS 2011), 43

Article 59

Ameganvi and Others v Republic of Togo (2011) AHRLR 203 (ECOWAS 2011), 41

INTERNATIONAL CASE LAW CONSIDERED

Constitutional Rights Project v Nigeria
Egyptian Initiative for Personal Rights and Interights v Egypt I (2011) AHRLR 42 (ACHPR 2011), 68, 96
Egyptian Initiative for Personal Rights and Interights v Egypt II (2011) AHRLR 90 (ACHPR 2011), 85
IHRDA and Another v Kenya (2011) AHRLR 181 (ACERWC 2011), 26

Darfur Relief and Documentation Centre v Sudan
Zitha v Mozambique (2011) AHRLR 138 (ACHPR 2011), 113

Doebbler v Sudan
Spilg and Others v Botswana (2011) AHRLR 3 (ACHPR 2011), 79
Egyptian Initiative for Personal Rights and Interights v Egypt II (2011) AHRLR 90 (ACHPR 2011), 188
Zitha v Mozambique (2011) AHRLR 138 (ACHPR 2011), 42

Forum of Conscience v Sierra Leone
Zitha v Mozambique (2011) AHRLR 138 (ACHPR 2011), 38

Free Legal Assistance Group and Others v Zaire
Spilg and Others v Botswana (2011) AHRLR 3 (ACHPR 2011), 75, 175
Egyptian Initiative for Personal Rights and Interights v Egypt I (2011) AHRLR 42 (ACHPR 2011), 189
Muzerengwa and Others v Zimbabwe (2011) AHRLR 160 (ACHPR 2011), 65
IHRDA and Another v Kenya (2011) AHRLR 181 (ACERWC 2011), 59, 64

Good v Botswana
Egyptian Initiative for Personal Rights and Interights v Egypt II (2011) AHRLR 90 (ACHPR 2011), 216, 247, 248
Muzerengwa and Others v Zimbabwe (2011) AHRLR 160 (ACHPR 2011), 78

Gumne and Others v Cameroon
Spilg and Others v Botswana (2011) AHRLR 3 (ACHPR 2011), 100, 110

Huri-laws v Nigeria
Egyptian Initiative for Personal Rights and Interights v Egypt I (2011) AHRLR 42 (ACHPR 2011), 109
Egyptian Initiative for Personal Rights and Interights v Egypt II (2011) AHRLR 90 (ACHPR 2011), 188

Ilesanmi v Nigeria
Spilg and Others v Botswana (2011) AHRLR 3 (ACHPR 2011), 102

Institute of Human Rights and Development in Africa and Interights v Mauritania
Zitha v Mozambique (2011) AHRLR 138 (ACHPR 2011), 104

Institute for Human Rights and Development (on behalf of Jean Simbarakiye) v Democratic Republic of Congo
Zitha v Mozambique (2011) AHRLR 138 (ACHPR 2011), 39

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

Claude Reyes et al v Chile
Egyptian Initiative for Personal Rights and Interights v Egypt II (2011) AHRLR 90 (ACHPR 2011), 251

Downer & Tracey v Jamaica
Spilg and Others v Botswana (2011) AHRLR 3 (ACHPR 2011), 115

Lorenzo Enrique Copello Castillo et al v Cuba
Egyptian Initiative for Personal Rights and Interights v Egypt I (2011) AHRLR 42 (ACHPR 2011), 125

Maria da Penha and Maia Fernandes v Brazil
Egyptian Initiative for Personal Rights and Interights v Egypt II (2011) AHRLR 90 (ACHPR 2011), 158, 164

Ovelario Tames v Brazil
Zitha v Mozambique (2011) AHRLR 138 (ACHPR 2011), 90

European Court of Human Rights

Ahmed and Others v the United Kingdom
Gill v Registrar of Political Parties (2011) AHRLR 225 (SySC 2011), 38

Assenov and Others v Bulgaria
Egyptian Initiative for Personal Rights and Interights v Egypt II (2011) AHRLR 90 (ACHPR 2011), 53, 228

Bekos and Koutropoulos v Greece
Egyptian Initiative for Personal Rights and Interights v Egypt II (2011) AHRLR 90 (ACHPR 2011), 81

Campbell and Cosans v UK
Egyptian Initiative for Personal Rights and Interights v Egypt II (2011) AHRLR 90 (ACHPR 2011), 200

Colibaba v Moldova
Egyptian Initiative for Personal Rights and Interights v Egypt I (2011) AHRLR 42 (ACHPR 2011), 117, 168

Cyprus v Turkey
Zitha v Mozambique (2011) AHRLR 138 (ACHPR 2011), 78

Goodwin v the United Kingdom
Gill v Registrar of Political Parties (2011) AHRLR 225 (SySC 2011), 38

Harutyunyan v Armenia
Egyptian Initiative for Personal Rights and Interights v Egypt I (2011) AHRLR 42 (ACHPR 2011), 136, 214

European Commission of Human Rights

AFRICAN COMMISSION DECISIONS ACCORDING TO COMMUNICATION NUMBERS

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

BOTSWANA

Spilg and Others v Botswana

(2011) AHRLR 3 (ACHPR 2011)

Communication 277/2003, *Spilg, Mack & Ditshwanelo (on behalf of Lehlohonolo Bernard Kobedi) v Botswana*

Decided at the 10th extraordinary session, 12 to 16 December 2011

Death penalty

Jurisdiction (no victim requirement, *actio popularis* 74-78, 81, 82; submission of communication by non-citizen, 79, 83, 84)
Life (imposition of death penalty, 164; least possible suffering, 166, 167, 169, 170; death row phenomenon, 172, 173; failure to notify family of execution, 174-177; most serious crimes, 202-204)

Summary of facts

1. The communication is submitted by Brian Spilg an advocate in South Africa and Unoda Mack, an attorney with Mack Bahuma & Moncho based in Botswana. The authors of the communication are appointed *pro deo*[1] representatives for Mr Lehlohonolo Bernard Kobedi (hereinafter Kobedi), now deceased.

2. The complainants allege that on the 14 October 1998, Kobedi was convicted and sentenced to death by the High Court of Botswana for murder of a sergeant of the police force of Botswana — Sgt Kebotsetswe Goepamang on 22 May 1993.

3. According to the complainants, it is alleged that Sgt Kebotsetswe Goepamang died as a result of a bullet wound, received during the course of a police manhunt on the 22 May 1993 from Kobedi who had escaped from custody. The complainants however maintained that the shot had been fired by another policeman and not by Kobedi. They claim that he had been wrongly charged with the murder of Sgt Kebotsetswe Goepamang.

4. The complainants submit that Sgt Goepamang had been shot by a high velocity firearm, AK 47, a type used by the police force and not

[1] Counsel appointed at the instruction of the Court and whose legal cost is paid by the state due to the indigence of the accused/victim.

a low velocity firearm such as found in possession of the accused/ victim which was a *Kalashnikov* 9mm. It is further submitted by the complainants that were it not for gross medical mismanagement by the hospitals and medical staff treating sergeant Goepamang, he would not have died from injuries. The complainants state that during the trial, crucial ballistic analysis and expert medical evidence was adduced which revealed a contradiction in the initial ballistic analysis relied upon by the Court to convict Kobedi. They claim that there was gross medical negligence towards Sgt Goepamang during his time in hospital.

5. However, the complainants allege that the Court refused to receive or test the said objective, material and compelling evidence thereby violating articles 4, 5 and 7 of the African Charter on Human and Peoples' Rights (hereinafter the African Charter). They claimed that this evidence was critical to proving the innocence of Kobedi and to addressing the question whether the death sentence was the most appropriate punishment.

6. The complainants also submit that the compulsory requirement under Botswana legislation for Court to impose a death sentence for murder where no extenuating circumstances are shown violates article 2, 3, 4, 5 and 7 of the African Charter.

7. Furthermore, the complainants submit that Kobedi was living under fear of the imposition of the death sentence for over a decade since he was first arrested and was on death row since September 1998. The complainants allege that the long delay in trying Kobedi also exposed him to unnecessary cruel, inhuman and degrading treatment for the reason that he had lived for an unconscionable amount of time awaiting the imposition of a death sentence.

8. It is also allege by the complainants that Kobedi was likely to suffer unnecessary inhuman treatment and punishment not only because the execution will be carried out by the cruel method of death by hanging, but also because he was aware that his medical ailment would have caused him greater and more prolonged agony during the execution than if he were medically fit.

9. Kobedi was executed before the African Commission on Human and Peoples' Rights (hereinafter the African Commission or the Commission) could initiate an appeal for provisional measures.

10. From the foregoing, the complainants request the African Commission to:

(a) Hold that there has been a violation of articles 2, 3, 4, 5 and 7 of the African Charter by the respondent state.

(b) Urge the respondent state not to impose the death sentence on the victim and not to carry out the death sentence by the method of hanging.

(c) Adopt such further or other recommendations and procedures as to protect the victim's rights under the African Charter.

Complaint

11. The complainants allege a violation of article 2, 3, 4, 5 and 7 of the African Charter.

Procedure

12. The communication was received at the Secretariat of the African Commission on 18 July 2003.

13. On 21 July 2003, the Secretariat of the African Commission wrote to the complainants acknowledging receipt of the communication and requesting information as to the veracity of the information received at the Secretariat of the African Commission that Kobedi had been executed on the 18 July 2003. There was no response from the complainants in this regard.

14. At its 34th ordinary session held from 6 to 20 November 2003 in Banjul, The Gambia, the African Commission decided to be seized of the matter.

15. On 7 November 2003, the Secretariat of the African Commission received a letter from the complainants in response to its letter of 21 July 2003 which tried to confirm the execution of Kobedi.

16. On 14 November 2003, the Secretariat of the African Commission received a letter from the complainants indicating that Ditshwanelo, a human right NGO based in Botswana was an interested party in this communication and is therefore authorised to access any information relating to the communication.

17. On 4 December 2003, the parties to the communication were informed accordingly and requested to forward their written submissions on admissibility of the communication within three months.

18. By email dated 4 March 2004, the complainants forwarded a copy of their submissions on admissibility of the communication. Annexes to the submissions were transmitted by fax on the same day.

19. On 8 March 2004, the Secretariat of the African Commission acknowledged receipt of the complainants submissions and forwarded a copy of the said submissions to the responsible state by DHL courier service.

20. By *note verbale* dated 25 May 2004, the Secretariat received a preliminary response from the respondent state on the admissibility of the communication. It also requested the African Commission to defer consideration of the communication to the next session in order to enable it to submit supplementary arguments after obtaining the original complaint submitted by the complainants.

21. At its 35th ordinary session held in Banjul, The Gambia from 21 May to 4 June 2004, the African Commission considered the

request for deferment from the respondent state and decided to defer consideration of the communication on the admissibility to the 36th ordinary session so as to allow the respondent state to forward exhaustive written submissions on admissibility.

22. By *note verbale* dated 15 June 2004, the respondent state was notified of the African Commission's decision and a copy of the communication as well as the complainants' submissions on admissibility were also transmitted to the respondent state.

23. By letter dated 15 June 2004, the complainants were also notified of the decision of the African Commission.

24. By *note verbale* of 16 September 2004 the Secretariat of the African Commission reminded the respondent state to submit all its arguments on admissibility.

25. At the 36th ordinary session held in Dakar, Senegal from 23 November to 7 December 2004, the African Commission heard oral submissions from the respondent state only and deferred its decision on the matter pending a response from the complainants on the observations made by the respondent state regarding the issue of the complainants' *locus standi*.

26. By *note verbale* dated 13 December 2004, the respondent state was notified of the decision of the African Commission. By letter of same date the Secretariat of the African Commission by DHL courier service forwarded the preliminary submission of the state on the question of *locus standi* and its decision to defer consideration on admissibility pending the complainants' response on the respondent state's submissions on *locus standi*.

27. On 12 January 2005, the complainants acknowledged receipt of the Secretariat's letter of 13 December 2004 and indicated that a proper response would be sent in due course.

28. By the letter dated 28 February 2005, the Secretariat reminded the complainants to submit their observations on the question of *locus standi* before 13 March 2005 and informed them that the African Commission would consider the admissibility of the communication at its 37th ordinary session.

29. On 29 April 2005, the Secretariat of the African Commission received the complainants' response to the respondent state's observation on *locus standi*.

30. At its 37th ordinary session held in Banjul from 27 April to 11 May 2005, the African Commission deferred consideration of the communication pending the finalisation of a study on the question of *locus standi* and legal interest within the context of its communication procedure.

31. By *note verbale* dated 10 June 2005, the respondent state was notified of the decision of the African Commission and by the letter of the same date the complainants were also notified of the African Commission's decision.

32. During the 38th ordinary session, the African Commission considered the communication in light of the objections raised by the respondent state regarding the issue of *locus standi* of the complainants and decided to declare the communication admissible.

33. By *note verbale* and letter dated 15 December 2006, the respondent state and the complainants were notified of the African Commission's decision.

34. At its 39th ordinary session held in May 2006, the African Commission considered the communication, and decided to defer further consideration thereon to its 40th ordinary session.

35. At its 40th ordinary session, the African Commission further considered the communication and deferred further consideration to its 41st ordinary session.

36. By *note verbale* and a letter dated 9 February 2007, the parties were reminded of the African Commission's decision on admissibility and were requested to submit their arguments on the merits by 8 April 2007, for the African Commission's consideration at its 41st ordinary session.

37. By *note verbale* and a letter dated 27 April 2007, the African Commission reminded the parties of its request for their arguments on the merits and requested them to make their submissions latest by 10 May 2007.

38. At its 41st ordinary session, the African Commission considered the communication and deferred further consideration to its 42nd ordinary session to allow both parties submit on the merits.

39. By *note verbale* and a letter dated 10 July 2007, both parties were notified of the African Commission's decision.

40. By *note verbale* and a letter dated 11 September 2007, the African Commission reminded both parties to submit their arguments on the merits.

41. By email of 3 October 2007, the Secretariat received the submissions on the merits from the complainants.

42. By *note verbale* dated 17 October 2007, the African Commission forwarded the complainants' submissions to the respondent state and by a letter of the same date acknowledged receipt of the complainant's submission on the merits.

43. By *note verbale* of 22 October 2007, the respondent state acknowledged receipt of the complainants' submissions on the merits, but informed the African Commission that the submissions

were received after the deadline had passed and requested that the communication be deferred to the 43rd ordinary session to give it time to submit its own arguments on the merits.

44. By *note verbale* of 29 October 2007, the Secretariat of the African Commission acknowledged receipt of the respondent state's *note verbale* and informed the respondent state that a decision on its request will be made by the African Commission during its 42nd ordinary session.

45. At its 42nd ordinary session, the African Commission considered the communication and deferred its decision to the 43rd ordinary session to allow the respondent state to submit its arguments on the merits.

46. On 13 May 2008, the Secretariat of the African Commission received the respondent State's submissions on the merits.

47. At its 43rd ordinary session, the African Commission considered the communication and decided to defer further considerations to the 44th ordinary session to allow the complainants to be served with the respondent state's submissions on the merits.

48. By a letter dated 17 June 2008, the complainants were notified and served with a copy of the respondent state's submission on the merits.

49. At its 44th ordinary session, the African Commission considered the communication and decided to defer further consideration of same to its 45th ordinary session to allow the complainants to respond to the respondent state's submissions on the merits.

50. By *note verbale* and a letter dated 5 January 2009, both parties were informed of this decision and the complainants were requested to send their response before 5 March 2009.

51. At its 45th ordinary session, the African Commission considered the communication and deferred further consideration, thereon, to its 46th ordinary session to allow the African Commission to prepare a decision on the merits.

52. At its 46th ordinary session, the African Commission considered the communication and again deferred its decision on the merits to its 47th ordinary session.

53. By *note verbale* and a letter dated 14 December 2009, the Secretariat of the African Commission notified both parties of its decision.

54. At its 47th ordinary session, the African Commission considered the communication and decided to defer its decision on the merits to its 48th ordinary session.

55. At its 48th ordinary session, the African Commission considered the communication and decided to defer its decision on the merits to its 49th ordinary session.

56. At its 49th ordinary session, the African Commission considered the communication and decided to defer decision on the merit to the 50th ordinary session, and by a *note verbale* and a letter dated 16 August 2011, both the complainant and the respondents were informed of the Commission's decision.

57. At its 50th ordinary session, the African commission considered the decision on the merits and made comments. The Commission requested the Secretariat to incorporate its comments on the communication and present it to the 10th extraordinary session for revision and adoption.

58. At its 10th extra-ordinary session held from 12 to 16 December 2011, in Banjul, The Gambia, the African Commission considered and adopted the communication on merit.

Submissions on *locus standi*

Respondent state's submissions on *locus standi*

59. The African Commission was seized of this communication at its 34th ordinary session held in Banjul, The Gambia from 6 to 20 November 2003.

60. In its preliminary submissions, the respondents state argues that the communication should be declared inadmissible on the ground that the authors lacked *locus standi* to submit or assume authorship of the communication. The respondent state argues that both Unoda Mack, a national of Botswana, and Brian Spilg SC, a national of South Africa were briefed as *pro deo* to argue the appeal of Kobedi before the Botswana Court of Appeal at the instance of the Registrar of the High Court of Botswana. The respondent state argues that though Kobedi accepted to have them as his legal representatives, they were not, as it were, the personal choice of Mr Kobedi.

61. The respondent state submits that the communication dated 11 July 2003 and addressed to the African Commission was signed by Kobedi. However, it argues that paragraph 15 of the complainants written submissions on admissibility sent by email on 4 March 2004 lists the two lawyers as the authors of the communication. The respondents state assert that the said written submissions, do not, indicate to the African Commission the legal interest that Messrs Brain Spilg SC and Unoda Mack, jointly and severally, have in the communication such that they should assume authorship of it, and the basis and source of that legal interest. The respondent state argues that, instead, what Brian Spilg SC and Unoda Mack attempt to do in

paragraph 3-14 of the submissions on admissibility is to make a case for the African Commission to hear a matter originated by the deceased.

62. The respondent state adds that Brian Spilg SC is a national of a foreign country, and as such, the only connection he has with Botswana is in relation to the privilege accorded him by Botswana to appear before her courts. The respondent state therefore questions whether Brian Spilg SC has any legitimate legal interest in the affairs of the country?

63. The respondent state further argues that neither the laws of Botswana nor international laws incorporate the *actio popularis* doctrine. Consequently, Messrs Brain Spilg SC and Unoda Mack must demonstrate a sufficient legal interest in the communication for them to possess *locus standi* to author it. The respondent state contends that in adhering to the African Charter, it did not understand that it was giving strangers the *carte blanche* to occupy Botswana and utilise its resources in dealing with communications of this nature.

64. Accordingly, the respondent state submits that although the communication was originally and properly before the African Commission, it does not have an author to pursue it, as Brian Spilg SC and Unoda Mack do not have the competency to pursue the matter on behalf of Kobedi who is now deceased.

Complainants' submissions on *locus standi*

65. In response to the respondent state's submissions, the complainants confirmed they were appointed by the Registrar of the High Court of Botswana to represent Kobedi during the proceedings before the Botswana courts. They argue that Brian Spilg SC has practiced law in Botswana since 1982, and in spite of the changes in the law affecting practice by non-resident practitioners, Brian Spilg SC had continued to receive instructions from the government of Botswana and its parastatal bodies, ordinary corporations and individuals. The complainants said the facts that advocate Brian Spilg SC is not a citizen of Botswana is irrelevant to the authorship of this communication because it is not a requirement under the African Commission's communication procedure. Indeed the complainants states that the victim (Kobedi), as well as other accused persons whose capital cases have not been finally disposed of, are non-citizens of Botswana.

66. On the question of lack of interest, the complainants aver that the information on the communication procedures prepared by the Secretariat of the African Commission does not require the author to indicate their legal interest when submitting a communication. They argue that by requiring complainants to indicate their legal interest,

the respondent state challenges the very purpose and function for which the African Commission was established.

67. Additionally, the complainants argue that article 56 of the African Charter which governs the admissibility of a communication lists only seven admissibility requirements, and that 'legal interest' or 'citizenship of the complainant' are not included in that list. They argue further that article 56 provides a minimum threshold requirement, which is intended to encourage, rather than stifle the submission of allegations of human rights violations before the African Commission. Furthermore, stated that article 56 assist the African Commission to ensure that vexatious communications are sifted out, and allow issue-driven communications to be entertained by it.

68. Regarding the respondent state's argument that *actio popularis* is not part of their domestic law, the complainants submit that this assertion is irrelevant because the respondent state did not sign a domestic document, but sign an international human rights document, which by its very nature is intended to have remedial consequences. This requires signatory states to submit themselves to scrutiny by the African Commission in respect of the alleged violations of human and peoples' rights.

69. In conclusion, the complainants assert that by requiring the complainants to demonstrate direct legal interest in a communication would be restrictive and 'impermissibly narrow which will fail to have regard to the accepted constitutional norms and the express provisions of the African Charter.' Furthermore, the complainants submit that such an approach would also fail to take into account the function and purpose of the African Commission. Consequently, it is the complainants' prayers that a generous and purposive construction be given to article 56 in order to give effect to the spirit of the African Charter.

70. The thrust of the respondent state's submissions is that though originally properly before the African Commission, the communication is now without an author to pursue it as a result of Kobedi's execution. Accordingly, the communication should be declared inadmissible because the present authors pursuing the matter are without a mandate cum *locus standi*.

71. The objection raised by the respondent state raises the issue of whether or not the complainants' in this communication have *locus standi* before the African Commission, that is, whether Messrs Brian Spilg SC and Unoda Mack have any legal interest in the matter so as to assume authorship of it on Kobedi's behalf. This issue also interrogates the principle of *actio popularis* within the context of the African Charter.

African Commission's ruling on the preliminary determination on *locus standi*

72. Having looked at the admissibility requirement under article 56 and bearing in mind the objections raised by the respondent state on the *locus standi* of the complainants, the African Commission decides as follows:

73. The African Commission notes that neither the African Charter nor its Rules of Procedure makes provisions on the *locus standi* of parties before it. In fact, the only Charter provision that could bear any relevance to the issue of *locus standi* is article 56(1) of the African Charter. This provision relates to authors of a communication submitted before the African Commission and provides: 'Communications relating to Human and Peoples' Rights referred to in article 55 received by the Commission shall be considered if they: (1) indicate their authors even if the later request anonymity; ...'

74. It is very clear that article 56(1) simply requires that the communication indicate its author(s), even if they would like to remain anonymous. This provision does not specify which parties have standings before the African Commission. Indeed nowhere is it stated within the African Charter or African Commission's Rules that there should be a link between the author of a communication and the victim of a human rights violation.

75. In fact, the African Commission has interpreted the relevant article 56(1) of the African Charter, and also addressed the question of *locus standi* before it in the consolidated case of communication 54/91, 61/91, 98/93, 164/97, to 196/97, 210/98.[2] In this case, the African Commission held that:

> Article 56(1) of the Charter demands that anyone submitting communications to the Commission relating to human and peoples' rights must reveal their identity. They do not necessarily have to be victims of such violations or members of their families. This characteristic of the African Charter reflects 'sensitivity to the practical difficulties that individuals can face in countries where human rights are violated. The national or internationals channels of remedy may not be accessible to the victims themselves or may be dangerous to pursue.'[3] There is therefore no requirement of legal interest for the authorship of a communication.[4]

76. Consequently, the African Commission has, through its practice and jurisprudence, adopted a generous access to its complaint procedure. It has adopted the *actio popularis* principle, allowing everyone the legal interest and capacity to file a communication, for its consideration. For this purpose, non-victim individuals, groups and NGOs constantly submit communications to the African Commission.

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2 *Malawi African Association and Others v Mauritania* [(2000) AHRLR 149 (ACHPR 2000)].

3 As above.

4 See also communication 25/89, 47/90, 56/91, 100/93, *Free Legal Assistance Group and Others v Zaire* [(2000) AHRLR 74 (ACHPR 1995)].

More so, the African Commission, has, through its Guidelines on the Submission of Communications,[5] encouraged the submission of communications on behalf of victims of human rights violations, especially those who are unable to represent themselves.

77. In communication 155/966,[6] for example, the African Commission endorsed the *actio popularis* doctrine when it 'thank(ed) the two human rights NGOs who brought the matter under its purview: the Social and Economic Rights Action Center (Nigeria) and the Center for Economic and Social Rights (USA). Such is the demonstration of the usefulness to the African Commission and individuals of *actio popularis*, which is wisely allowed under the African Charter.' The *actio popularis* doctrine allows persons interested in the protection of human rights in Africa to seize the African Commission on behalf of persons who for one reason or the other, cannot do so on their own.

78. The rationale for this broad approach to *locus standi* is in view of the fact that the African Commission, mandated to promote and protect human and peoples' rights in Africa,[7] bears in mind the fact that in some instances, individuals in Africa whose rights are violated, may be faced with practical difficulties that may preclude them from pursuing national or international legal remedies on their own behalf. The African Commission has therefore adopted the practice of entertaining communications from persons who are interested in protecting human rights on the continent. These may be the victims themselves or civil society organisations acting on behalf of victims of the alleged violations.[8] This *actio popularis* principle has been confirmed in various subsequent decisions of the Africa Commission.[9]

79. Also in relation to the requirement of citizenship, the African Commission has made it clear through its jurisprudence that the person or NGO filing the communication need not be a national or be registered in the territory of the respondent state. An endless list of

5 African Commission on Human and Peoples' Rights Information Sheet 2.

6 Communication 155/96, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* [(2001) AHRLR 60 (ACHPR 2001)], 15th Annual Activity Report of the African Commission on Human and Peoples' Rights 2001-2002, para 49.

7 See art 30 of the African Charter on Human and Peoples' Rights.

8 See for instance communication 137/94, 156/96, 161/97, *International PEN, Constitutional Rights Project, Civil Liberties Project and Interights (on behalf of Ken Saro-Wiwa Jnr) v Nigeria* [(2000) AHRLR 212 (ACHPR 1998)].

9 Communications 64/92, 68/92, 78/92, *Kristan Achutcan on Behalf of Aleke Banda, Amnesty International on behalf of Orton and Vera Chirwa v Malawi* [(2000) AHRLR 144 (ACHPR 1995)]; communications no 54/91, 61/91, 98/93, 164-169/97, 210/98, *Malawi African Association and Others v Mauritania* [(2000) AHRLR 149 (ACHPR 2000)].

examples of this would include the many cases submitted to the African Commission by individuals and NGOs of non- African origin.[10]

80. The African Commission, therefore, notes that the foregoing was its approach to *locus standi* when it became seized of the present communication, and is still its current approach to the issue. Accordingly, the African Commission would address this communication in light of its broad approach to *locus standi* at the time it became seized of this communication.

81. The African Commission further disagrees with the respondent state's assertion that neither the laws of Botswana nor international law incorporates the *actio popularis* doctrine, and notes that this is a common practice within regional and international human rights systems which is aimed at conferring legal standing to certain groups who will not be required to have a sufficient interest in a case or to maintain the impairment of a right. To this effect, different bodies had setup different criteria with regards to accessibility to their complaint mechanisms. The African Commission notes that, the European human rights system[11] and the UN Human Rights Committee,[12] generally requires that the person submitting a case to be a victim of the violation. But there are exceptions to this rule, where non-victims may bring a complaint on behalf of the victim(s).[13] On the other hand, the American Convention of Human Rights permits any person or group of persons, or any non-governmental entity legally recognised in one or more member states of the organisation to submit a matter before the Inter-American Commission.[14] The practice of the African Commission though somewhat similar to the *actio popularis* position under the Inter-American system, is even wider as it places no restriction as to who can bring a communication before it. As long as the conditions under article 56 of the African Charter are met by the person standing before it, the African Commission will enter the communication. The rationale for the Commission's comparative broader approach to the issue of *locus*

10 See for instance communication 31/89, *Maria Baes v Zaire* [(2000) AHRLR 72 (ACHPR 1995)], instituted by a Danish national and communication 235/2000, *Curtis Doebbler v Sudan* [2000 [(2003) AHRLR 153 (ACHPR 2003)] instituted by an American citizen.

11 See art 34 of the European Convention on Human Rights.

12 See art 1 of the Optional Protocol to the International Convention on Civil and Political Rights

13 See for example, art 2 of the European Convention on Human Rights, which guarantees the right to life. Also, under the International Covenant on Civil and Political Rights, Fact Sheet 7 provides for situations whereby a non-victim may bring a claim on behalf on behalf [sic] of another person, with or without the victim's written consent. In certain cases, you may bring a case without such consent — Office of the High Commissioner for Human Rights, Fact Sheet 7 www.unhchr.ch/html/menu6/2/fs7.htm (accessed on 8 April, 2011). See also Fact Sheet 15, Centre for Human Rights, 1991, Geneva.

14 See art 44 of Inter-American Convention on Human Rights.

standi has been associated with the peculiarity of the African situation, and the perceived generous intent of the African Charter.[15]

82. From the foregoing, the African Commission will entertain the communication brought by Messrs Brian Spilg SC and Unoda Mack, being non-victims, with no legal interest, because its jurisprudence makes it clear that there is no requirement of 'legal interest' for authorship of a communication.[16]

83. The African Commission holds the fact that Mr Brain Spilg SC is not a citizen of Botswana as argued by the respondents will have [no] bearing on this communication. It is simply not a requirement for authorship of a communication. Any interested individual can bring a communication on behalf of a victim and such individuals need not be citizens of states parties to the African Charter. The fact that Mr Brian Spilg SC is a national of another country is immaterial. As long as he satisfies the conditions set out in article 56 of the African Charter, the African Commission will entertain the communication as it has done, in several other cases where communications have been instituted by non-nationals of states against whom the communication is being instituted.[17]

84. The African Commission is therefore unable to agree with the respondent state's argument which seems to infer that citizenship of the authors of the communication is a criterion within the provision of article 56(1) of the African Charter. This would not only be tantamount to reading new criteria into the provision, but would also restrict the open-ended spirit found therein. Consequently, the respondents state's argument that the communication is now without an author to pursue it as a result of Kobedi's execution is also unsustainable as the present communication is properly before the African Commission in terms of article 56(1) of the African Charter.

85. The African Commission hereby concludes that the complainants in this matter possess *locus standi* before it, and will however proceed to examine the communication in view of the other admissibility requirements.

The law on admissibility

Complainants' submissions on admissibility

86. The complainants submit that they have fulfilled all the requirements of article 56 of the African Charter.

15 See generally, 'Capacity to bring a communication before the African Commission on Human and Peoples' Rights (*Locus Standi*), Working Document of the African Commission', 40th Session, 15 – 29 November, 2006, Banjul, The Gambia.

16 Para 69-73 above.

17 n 9 above.

87. The complainants submit that the communication is jointly presented by Advocate Brian Spilg SC assisted by Attorney Unoda Mack and Ms Alica Mogwe (on behalf of Ditshwanelo). By detailing their contact email addresses as spilg@law.co.za for Brian Spilg SC and legal.ditshwanelo@info.bw for Ditshwanelo, the complainants argue that they complied with article 56(1) of the African Charter.

88. With regards to article 56(2) of the African Charter, the complainants contend that not only have they outlined the Charter provisions which are allegedly violated by the respondent state to include articles 1, 2, 3, 4, 5 and 7 of the African Charter, but that they have also made submissions in support of the alleged violations. The complainants submit that the communication, therefore, satisfies the requirements of article 56(2) of the African Charter.

89. With regards to the requirement of decorum, the complainants submit that the tone of language used in the communication meets the requirement of article 56(3) of the African Charter.

90. Concerning the requirement of evidential weight envisaged under article 56(4) of the African Charter, the complainants aver that the communication is based on primary evidence that has been either verified under oath or is within the personal knowledge of the authors. While conceding that there is a single reference to a media article, the complainants argued that not only is that information tangential, but also that the source of the article is verified under oath by the newspaper's editors and forms part of the records of the Botswana Court of Appeal. The complainants submit that the provisions of article 56(4) have been adequately met.

91. On the requirement of exhaustion of local remedies under article 56(5) of the African Charter, the complainants aver that they have exhausted all available local remedies with respect to Kobedi's case. In particular, aver the complainants, the highest court in Botswana, the Court of Appeal, has determined the case. They therefore submit that the communication satisfies the requirements of article 56(5) of the African Charter.

92. With regards to the reasonable time factor under article 56(6) of the African Charter, the complainants argue that the communication was submitted within a period of four months since the Kobedi's stay of execution appeal was disposed of by the Botswana Court of Appeal. The communication, argues the complainants, also meets the requirements of article 56(6) of the African Charter.

93. With regards to article 56(7) of the African Charter, the complainants submit that the instant case has not previously been determined by the African Commission and there are no other international avenues that are being explored by the complainants as far as this matter is concerned. The communication, contends the

complainants, satisfies the provision of article 56(7) of the African Charter.

Respondent state's submissions on admissibility

94. In its written submission dated 25 May 2004 the respondent state asserted that it did not concede the other grounds upon which the complainants rely for the admissibility of the communication.

95. However, in its oral submission made at the African Commission's 36th ordinary session held from 23 November to 7 December 2004 in Dakar, Senegal, the respondent state opted not to furnish further submissions apart from those on *locus standi*. The respondent state stated that in the event that the African Commission rules in favour of the complainants on the issue of *locus standi*, they would not contest the admissibility of the communication.

Commission's decision on admissibility

The admissibility of the communications submitted before the African Commission is governed by the seven conditions set out in article 56 of the African Charter.

96. The current communication is submitted pursuant to article 55 of the African Charter which allows the African Commission to receive and consider communications, other than from states parties. Article 56 of the African Charter provides that the admissibility of a communication submitted pursuant to article 55 is subject to seven conditions.[18] The African Commission has stressed that the conditions laid down in article 56 are conjunctive, meaning that if any one of them is not satisfied, the communication will be declared inadmissible.

97. Article 56(1) of the African Charter requires that a communication received under article 55 of the African Charter shall be considered if it 'indicates their authors even if the latter requests anonymity.' Article 56(1) of the African Charter will, therefore, be satisfied if the communication discloses the identity and details of the authors thereof.[19] The purport and intent of article 56(1) of the African Charter is to ensure that the African Commission is in communication with the author. It is only through this medium of communication that the African Commission will be assured of the author's continued interest in the case, or to request, as provided for under rule 104 of the Rules of Procedure, supplementary information if the case so requires.[20]

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18 See art 56 of the African Charter on Human and Peoples' Rights.

19 See communications 54/91, 61/91, 98/93, 164/97, 210/98, *Malawi African Association and Others v Mauritania* [(2000) AHRLR 149 (ACHPR 2000)], para 78, 13th Activity Report.

20 See communication 108/93, *Joana v Madagascar* [(2000) AHRLR 141 (ACHPR 1996)], para 6, 10th Activity Report.

98. In the instant communication, the complainants have disclosed that it is jointly presented by Advocate Brain Spilg SC assisted by Attorney Unoda Mack and Ms Alica Mogwe (on behalf of Ditshwanelo). The communication also discloses the contact email addresses of the complainants as spilg@law.co.za for Brian Spilg SC and legal.ditshwanelo@info.bw for Ditshwanelo. The African Commission is, therefore, holds that the complainants have complied with article 56(1) of the African Charter.

99. Article 56(2) of the African Charter requires that the communication must be compatible with the Constitutive Act of the African Union and with the African Charter. With respect to the Constitutive Act, the African Commission will not receive any communication brought before it, which seeks a prayer a remedy of which will contravene any provision of the said Constitutive Act. Thus, in *Katangese's Peoples' Congress v Zaire*,[21] a redress which infringed on the doctrine of *uti possidetis juris*[22] enshrined in article 3 of the OAU Charter and now in article 4(b) of the Constitutive Act, was rejected and the case declared inadmissible.

100. In *Gumne* et al *v Cameroon*,[23] the African Commission, drawing inspiration from its previous decisions affirmed that, the condition relating to compatibility with the Charter, basically requires that: (a) the communication should be brought against a state party to the African Charter;[24] (b) the communication must allege *prima facie* violations of rights protected by the African Charter;[25] (c) the communication should be brought in respect of violations that occurred after ratification of the African Charter or where violations that began before the state party ratified the African Charter have continued even after such ratification.[26] To be in conformity with the African Charter also requires the petition to contain a certain degree of specificity, and that the allegations are not vague.[27]

101. A careful consideration of the facts and submissions from both parties to the present communication do not show that the instant communication is at variance with any part of the Constitutive Act of the African Union or the African Charter. The Commission is therefore of the view that the present communication satisfies the provision of article 56(2) of the Charter.

21 Communication 75/92 [(2000) AHRLR 72 (ACHPR 1995)], 8th Activity Report.

22 A principle under international law which states that, colonially inherited boundaries are inviolable.

23 Communication 266/2003 [(2009) AHRLR 9 (ACHPR 2009)], para 38, 38th session.

24 Communication 5/88, *Prince JN Makoge v USA* (ACHPR).

25 Communication 1/88, *Frederick Korvah v Liberia* [(2000) AHRLR 140 (ACHPR 1988)].

26 Communication 97/93 (ACHPR), *John K Modise (2) v Botswana* [(2000) AHRLR 25 (ACHPR 1997)].

27 Communication 35/89, *Seyoum Ayelle v Togo* [(2000) AHRLR 315 (ACHPR 1994)], para 2 (ACHPR); see also communication 142/94, *Muthuthurin Njoka v Kenya* [(2000) AHRLR 132 (ACHPR 1995)], para 4.

102. Article 56(3) of the African Charter requires that the communication should be presented with a certain degree of decorum. This article prohibits the use of disparaging and/or insulting language in presenting a communication. Although article 56(3) does not define what constitutes disparaging or insulting language, the African Commission in the case of *Ilesanmi v Nigeria*[28] the Commission held *inter alia*, that, to be insulting, the language must be aimed at undermining the integrity and status of the institution (respondent state) and bring it into disrepute.[29] In this case, the African Commission held the complainant's averments that,

> the police and customs officials are corrupt, that they deal with drug smugglers, that they extort money from motorists and that the President himself was corrupt and had been bribed by the drug smugglers

as an insulting language. In *Ligue Camerounaise des Droits de l'Homme v Cameroon*,[30] the African Commission also held that averments such as 'Paul Biya must respond to crimes against humanity', '30 years of the criminal neo-colonial regime incarnated by the duo Ahidjo /Biya', 'regime of torturers', and 'government barbarisms'[31] as insulting language.

103. However, in *Bakweri Land Claims Committee v Cameroon*[32] the African Commission held that the use of strong language such as 'no judge ... will risk his/her career, not to mention his/her life, to handle this politically sensitive matter ...' per se will not amount to disparaging and insulting language.[33]

104. After a careful examination of the tone of the language used in presenting the communication, the African Commission is satisfied that the complainants have met the requirements under article 56(3) of the African Charter.

105. Article 56(4) of the African Charter requires that any communication brought pursuant to article 55 of the African Charter will be considered if the facts are not based exclusively on information from the mass media. This requires that the complainants must prove that, the evidence of the facts constituting the alleged violations, are not based exclusively on information from the mass media. While conceding that there is a single reference to news obtained from the mass media, the complainants have argued that this communication is based on primary evidence within the knowledge of the complainants.

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28 Communication 268/2003 [(2005) AHRLR 48 (ACHPR 2005)], 18th Activity Report.
29 As above, para 39.
30 Communication 65/92 [(2000) AHRLR 61 (ACHPR 1997)], 10th Activity Report.
31 As above, para 18.
32 Communication 260/02 [(2004) AHRLR 43 (ACHPR 2004)] 43.
33 As above, para 48.

106. In the case of *Jawara v Gambia*[34] the African Commission held that while it will be dangerous to rely exclusively on news disseminated through the mass media, it would be equally damaging if the African Commission were to reject a communication because some aspects of it are based on news disseminated through the mass media. For this reason, the African Commission believes that the present communication meets complainants the requirements of article 56(4) of the African Charter.

107. Article 56(5) of the African Charter on its part requires that communications brought under article 55 of the African Charter shall be considered only if they 'are sent after the exhaustion of local remedies, if any, unless it is obvious that this procedure is unduly prolonged.' The relevance of article 56(5) of the African Charter is to ensure that international mechanisms are not substitutes for domestic implementation of human rights, but should be seen as tools to assist the domestic authorities to develop a sufficient protection of human rights in their territories.

108. The African Commission notes that the submissions of the complainants that Kobedi's case has been dealt with by the Botswana Court of Appeal, the apex court in the respondent state, are relevant to the issue of exhaustion of local remedies. The African Commission is, therefore, satisfied that the communication has not contravened the provision of article 56(5) of the African Charter.

109. According to article 56(6) of the African Charter, article 55 communications will be considered if submitted to the African Commission within a reasonable time after the exhaustion of local remedies. While the African Charter is silent as to what amounts to a reasonable time, it is important to note here that, the issue of reasonable time is determined on a case to case bases taking into consideration all the relevant facts. The present communication was submitted within four months following the decision of the Botswana Court of Appeal. The period of four months in the circumstances of this case is reasonable. The African Commission, therefore, holds that the complainants have satisfied article 56(6) of the African Charter.

110. By virtue of article 56(7) of the African Charter, article 55 communication will be considered if the communication does not deal with cases that have already been settled by African Commission or another international settlement body. The requirement under article 56(7) of the African Charter is founded on the *non bis in idem* rule[35] which ensures that no state may be sued or condemned more than once for the same alleged human rights violations. The rule also seeks to uphold and recognise the *res judicata*[36] status of decisions

34 Communication 149/96 [(2000) AHRLR 107 (ACHPR 2000)], 13th Activity Report.

35 Also known as the Principle or Prohibition of Double Jeopardy.

36 The principle that a final judgment of a competent court or tribunal is conclusive on the parties in any subsequent litigation involving the same cause of action.

issued by international and regional tribunals and/or bodies such as the African Commission. Accordingly, the African Commission will not entertain any communication with the same facts and parties[37] as that, which has been settled by another international body.

111. In *Njoku v Egypt*[38] the African Commission noted that article 56(7) of the African Charter '... talks about cases which have been settled ...'[39] and not cases which are still pending before other international mechanisms.

112. The African Commission is satisfied that the complainants, in their written submissions, have exhaustively addressed the seven admissibility requirements under article 56 of the African Charter and hereby declares the communication admissible under article 56 of the African Charter.

Submissions on the merits

Complainants' submissions on the merits

113. The complainants submit that the compulsory requirement under Botswana law for the courts to impose the death penalty for murder, where no extenuating circumstances are shown; the adoption of the doctrine of '*functus officio*' by the Court of Appeal of the respondent state with regards to the trial of Kobedi; the clemency petition process and the use of hanging as a method of execution of Kobedi violates articles 2, 3, 4, 5 and 7 of the African Charter.

Alleged violation of articles 2 and 3 (right not to be discriminated and right to equality before the law)

114. The complainants argue that the compulsory requirement under Botswana legislation that a court must impose the death penalty for murder, absent only extenuating circumstance limits the factors that can be taken into consideration in respect of sentencing. They submit that the exclusion of considerations such as rehabilitation or such other factors personal to the victim violates articles 2 and 3 of the African Charter. They submit that the distinction between taking into account extenuating circumstances and not taking into account mitigating factors is both arbitrary and discriminative.

37 Communication 266/02, *Kevin Mgwanga Ngumne* et al *v Cameroon*, para 55.
38 Communication 40/90 [(2000) AHRLR 83 (ACHPR 1997)], (ACHPR) 11th Activity Report.
39 As above, para 56; see also communication 260/02, *Bakweri Lands Claim Committee v Cameroon* [(2004) AHRLR 43 (ACHPR 2004)], para 52.

Alleged violation of article 4 (right to life)

115. The complainants argue that because the imposition of the death penalty is qualitatively different from any other sentence or sanction that may be imposed by a court of law, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case. The complainants rely on the decision of the Inter-American Commission on Human Rights in *Downer & Tracey v Jamaica* to argue the fact that the death penalty is an exceptional form of punishment which must also be considered in interpreting article 4 of the African Charter.

116. The complainants refer the African Commission to the of case of *Maauwe & Motswetla* concluded in 2006 by the Court of Appeal of the respondent state to buttress the point that the criminal justice system in the respondent state is not infallible. They argue that, because the criminal justice system is capable of being fallible, the courts should not ignore subsequent cogent evidence which if admitted could lead to the imposition of a lesser sentence other than the death penalty. It is forcefully submitted by the complainants that article 4 of the African Charter will be violated where a state party through its judiciary imposes the death penalty pursuant to an institutionalised process that can result in an innocent person, or a person not deserving of the death penalty, being executed because material facts revealed post-appeal cannot be considered by the Court.

117. The complainants further submit that the reception of such evidence seeks to ensure that only a person, who remains, up to the time of his execution, guilty beyond all reasonable doubts of the crime and is deserving of no penalty other than the death sentence, should be hanged. They argue that if it should arise prior to the date of his hanging that the certainty of the conviction or appropriateness of the sentence is cast into doubt by right thinking people, then such evidence must be investigated and tested, otherwise, they submit, the execution will violate article 4 of the African Charter.

118. It is argued by the complainants that, if before his execution, it can be demonstrated by credible and cogent evidence that there was an incorrect conviction or that the condemned man is deserving of a lesser sentence than the death penalty, then the right to life protected under article 4 of the African Charter can only have content if such evidence can be tested. It is contended by the complainants that the application of the doctrine of *functus officio* to exclude fresh, credible and cogent evidence that could have the effect of a lesser sentence violates article 4 of the African Charter.

119. It is averred further by the complainants that as far as the trial of Kobedi is concerned, this fresh evidence includes, crucial ballistic

analyses that Sgt Goepamang was struck by a high velocity firearm, AK 47, a type used by the police force and not a low velocity firearm, Kalashnikov 9mm, found in possession of the victim; vital ballistic analyses that Sgt Goepamang was shot from the side and not from the front as contained in the High Court judgment; and expert medical evidence of gross medical negligence towards Sgt Goepamang during his time in hospital.

120. In arguing that the death penalty cannot be imposed for attempted murder in the respondent state, the complainants make the point that even if the culprit/victim with premeditated intent, wished to kill his victim, but the victim was saved by the skills of brilliant doctors, the Court has no power to sentence the culprit to death. In the case of Kobedi, they argue that during his trial, crucial expert medical evidence was adduced revealing gross medical negligence towards Sgt Goepamang during his time in hospital and that were it not for gross medical mismanagement by the hospitals and medical staff treating Sgt Goepamang, he would not have died from the injuries he sustained.

121. The complainants further argue that the imposition of the death penalty on Kobedi without recourse to any meaningful post-conviction enquiry as to the appropriate sentence to be imposed by the courts in the respondent state also offends article 4 of the African Charter.

Alleged violation of article 5 (torture, cruel, inhuman and degrading treatment)

122. The complainants contend that Kobedi, according to his medical report suffers from a weak heart condition. They also state that the medical report proves that Kobedi does not only have an A-V shunt but also needs surgery. They inform the African Commission that the medical report presents the following conditions of Kobedi: left subclavian arteriovenous shunt with no present evidence of heart failure or arrhythmia; irritable bowel syndrome; and mild degenerative osteoarthritis of the spine. It is submitted by the complainants that Kobedi was a sick man whose health condition ought to have been taken into consideration in deciding the method to be adopted for his execution.

123. The complainants further submit that the adoption of hanging as a method of executing the death penalty, and the failure of the courts in the respondent state to have regard to the medical condition of Kobedi violates article 5 of the African Charter, not so much because he is aware that his medical ailment will cause him greater and more prolonged agony during the execution than if he were medically fit, but also because execution by hanging exposes the condemned man to a higher likelihood of unnecessarily painful and torturous death through strangulation.

124. The complainants aver that the post-appeal process dealing with clemency petitions also constitutes a violation of article 5 of the African Charter in that the victim, his lawyers and family members were not informed of the unsuccessful outcome of the clemency petition, thus, depriving the convict and his family members the important opportunity to have closure with the dignity of their last farewells.

125. It is submitted by complainants that the victim had been under the fear of the death penalty for over a decade since he was first arrested and that this prolonged delay constitutes cruel, unusual or degrading punishment or treatment for the reason that he lived for an unconscionable amount of time awaiting the potential imposition of a death sentence, rendering the victim's execution a violation of article 5 of the African Charter.

Alleged violation of articles 7 (right to fair trial)

126. The complainants argue that the death penalty cannot be imposed for attempted murder in the respondent state, and that even if the culprit with premeditated intent, wished to kill his victim, but the victim was saved by the skills of brilliant doctors, the court has no power to sentence the culprit to death in terms of the criminal code of the respondent state. In further emphasising that during Kobedi's trial, crucial expert medical evidence was adduced revealing gross medical negligence towards Sgt Goepamang during his time in hospital and that were it not for gross medical negligence Sgt Goepamang, would not have died, the complainants submit that the lawyer who initially represented Mr Kobedi, not only failed to consider the above aspects, but that he did not also have access to the medical records of the deceased and lacked the resources to engage forensic experts.

127. The complainants submit that the above situation could only be made possible by one of two reasons; that counsel dealing with the matter at that initial stage did not have the necessary skills and competence required in defending a death penalty case; or the evidence could not be expected to have been acquired by the lawyer at that stage and therefore amounts to new evidence discovered after the appeal. They further argue that this lack of competence on the part of counsel vitiated the entire proceedings and amounted to a breach of the fair trial procedure provided for in article 7 of the African Charter.

128. The complainants also submitted that this fresh evidence was not only critical to the determination of Kobedi's guilt, and the question whether the death sentence was the most appropriate sentence in the circumstance, but that the refusal by the Court of Appeal of the respondent state to receive or test the said objective,

material and compelling evidence also violated Kobedi's fair trial rights guaranteed under article 7 of the African Charter.

129. The complainants submit that the test adopted by the Botswana Court of Appeal which required the victim to prove beyond all reasonable doubt on affidavit that the new evidence would upset the conviction, instead of the balance of probability test is overly broad. It is further submitted by the complainants that under the due process guarantees, the state ought to present evidence in rebuttal of the expert testimony presented in favour of Kobedi and that if the state had even presented such contrary expert evidence, there would still have been a need for an expert conference to determine if the experts can resolve points of departure, failing which the evidence should be tested. It is further argued by the complainants that the non-compliance with this procedure amounted to a violation of the fair trial rights of the victim protected under article 7 of the African Charter.

130. The complainants contends that by relying on the evidence of an unqualified forensic expert and by refusing to receive and test the evidence of a qualified forensic expert to determine the source and direction of the bullet which struck Sgt Goepamang, amounts to a fundamental miscarriage of justice and thus a violation of article 7 of the African Charter.

Respondent state's submissions on the merits

131. The respondent state submits as a preliminary issue, that the procedure adopted by the African Commission in dealing with the post-admissibility processes in this communication contravenes rule 119(2), (3) of the African Commission. It contends that by virtue of rule 119(2), once the African Commission decides on the admissibility of a communication, the respondent state shall file its submissions without any further reference to the complainants and the complainants should only be allowed to reply to the state's submission in terms of rule 119(3).

132. It is further contended by the respondent state that by virtue of the above, the complainants are required to disclose the full particulars of their complaint at the very initial stage. In submitting that the African Commission erred when it simultaneously asked both the complainants and the respondent state, to make their submissions on the merits, the respondent state prays the African Commission to purge and expunge from its records any submissions made by the complainants in this regard.

133. With regards to the substantive matter, the respondent state argues that the compulsory requirement under Botswana law for the courts to impose the death penalty for murder, where no extenuating circumstances are shown; the adoption of the doctrine of *functus*

officio by the Court of Appeal of the respondent state with regards to the trial of Kobedi and the use of hanging as a method of execution of Kobedi does not in anyway contravene articles 2, 3, 4, 5 and 7 of the African Charter.

On the alleged violation of articles 2 and 3 (right not to be discriminated and right to equality before the law)

134. Concerning the alleged violation of articles 2 of the African Charter, the respondent state submits that this article deals with the issue of discrimination, and argued further that the legislation in the respondent state did not in any way discriminate against the victim as the death penalty would be imposed on anyone found guilty of murder without any extenuating circumstance.

135. In reply to the alleged violation of article 3 of the African Charter, the respondent state, while noting that this article deals with the twin concepts of equality before the law and equal protection of the law, submitted that the victim's right to be treated equally before the law was not interfered with in anyway by the respondent state throughout the trial process.

136. Concerning the allegation that the victim was not afforded equal protection of the law, the respondent state contends that Mr Kobedi was at all times during the trial process provided with high quality legal representation and was not treated unequally *vis-à-vis* any other person in a similar situation. This, argues the respondent state, shows that the allegations of the complainants with regards to the allege violations of articles 2 and 3 of the African Charter are baseless.

On the alleged violation of article 4 (right to life)

137. In response to the alleged violation of article 4 of the African Charter, it is submitted by the respondent state, that not only is the imposition of the death penalty reasonable in the circumstance, but also that the procedures followed before the death sentence was carried out on Kobedi did not amount to the arbitrary taking of his life. The respondent state further contends that the trial of Kobedi went through the proper judicial process of the courts in Botswana and did not at anytime derogate from the procedures whatsoever.

138. The respondent state avers that the jurisprudence of the African Commission did not regard the death penalty as inherently contrary to the African Charter, but rather that such penalty should only be imposed with necessary due process safeguards being in place. In referring the Commission to the 13th Activity Report of the Commission,[40] the respondent state argues that the African

[40] Thirteenth Annual Activity Report of the African Commission on Human and Peoples' Rights, OAU doc AHG/Dec 153 (XXXVI) annex IV.

Commission did not declare the imposition of the death penalty a contravention of Charter rights, but urged states that still had the death penalty to among other things limit its imposition only to crimes of the most serious nature as well as to consider establishing a moratorium on executions.

139. The respondent state argues that because due process was followed and safeguarded by the judicial system of Botswana in the trial of Kobedi, his execution cannot amount to a contravention of article 4 of the African Charter as alleged by the complainants.

On the alleged violation of article 5 (torture and cruel, inhuman and degrading treatment)

140. In view of the alleged violation of article 5 of the African Charter, the respondent state, whilst referring the African Commission to article 6 of the International Covenant on Civil and Political Rights, argues that, the death penalty is expressly recognised and not prohibited under international human rights law. It is averred by the respondent state that since the African Charter[41] provides that the African Commission shall draw inspiration from international law and human rights, including international instruments in interpreting Charter rights, the African Commission should not read article 5 of the African Charter as prohibitive of the death penalty.

141. It is submitted by the respondent state that, because the African Charter and other international instruments recognises the death penalty as a form of punishment, its application cannot amount to inhuman or degrading treatment prohibited by article 5 of the African Charter if it is administered according to the law.

142. It is also argued by the respondent state that, the communication does not reveal facts of any inhuman conditions or treatment whilst the victim was in prison custody. It submits that even if fear, despair and mental anguish are the inevitable concomitants of the sentence of death, the complainants have not demonstrated that in all circumstances of the case, the delay since the passing of the death penalty sentence on the victim goes beyond what is constitutionally permissible. In referring the African Commission to Supreme Court decision in Zimbabwe[42] it is further argued by the respondent state that an element of delay between the lawful imposition of a sentence of death and the exhaustion of available remedies is inherent in the review of the sentence; thus, even prolonged periods of detention under a severe custodial regime on death row cannot generally be considered to constitute cruel, inhuman or degrading treatment if the convicted person is merely

41 See art 60 of the African Charter.

42 *Catholic Commission for Justice and Peace in Zimbabwe v Attorney General, Zimbabwe & Others* 1993 (4) SA 239 (ZS) [(2001) AHRLR 248 (ZwSC 1993)].

availing himself of appellate remedies. Thus, it is contended that article 5 of the African Charter has not been violated in any way.

On the alleged violation of articles 7 (right to fair trial)

143. In conceding that there was indeed a long delay in the trial of Kobedi, the respondent state argues that, such delays were occasioned by the defence and not by the state. For example, the respondent state submits that there was a delay of up to six months between July and December 2001 when Mr Brian Spilg SC was appointed *pro deo* to represent the victim because the victim rejected several *pro deo* counsels including Mr Joina and insisted on having Mr Brian Spilg SC appointed *pro deo* to represent him. Again, it argues that there was another delay of up to 16 months between November 1999 and July 2001 in the trial because no opposing affidavits were filed on behalf of the victim. It is contended by the respondent state that because these delays were due in part by the indolent acts of Kobedi and his lawyers, they cannot amount to a contravention of the fair trial rights guaranteed under article 7(1)(d) of the African Charter.

144. The respondent state contends that, in refusing the new evidence from the complainants the Court was using tried and tested principles of law and was more than sure that this new evidence would not change the outcome of the case if a retrial was ordered. In arguing that the trial judge properly exercised his discretion in refusing to order a retrial, the respondent state submits that the due process rights of the victim protected under article 7 of the African Charter was therefore not violated in anyway.

The Commission's decision on the merits

145. The respondent state had raised as a preliminary issue challenging any consideration by the African Commission of any further submissions filed by the complainants in terms of rule 119(2) and (3) of the African Commission's Rules of Procedure. They argue that by virtue of rule 119(2), only the respondent state is required to make submissions after the African Commission's decision on admissibility and the complainants are only accorded a right to reply pursuant to rule 119(3). In requesting that the submissions made by the complainants in this direction should be expunged, it contends that by requesting both parties to submit their arguments on the merits, the African Commission did not properly apply rule 119(2) & (3) of the Rules of Procedure of the African Commission.

146. The complainants on their part did not address the African Commission on this.

Decision of the African Commission on alleged procedural irregularity

147. In dealing with this issue, the African Commission will refer itself to rule 119 of the Rules of Procedure (1995) of the African Commission which provides:

> (1) If the Commission decides that a Communication is Admissible under the Charter, its decision and text of the relevant documents shall as soon as possible, be submitted to the State Party concerned, through the Secretary. The author of the Communication shall also be informed of the Commission's decision through the Secretary.
>
> (2) The State Party to the Charter concerned shall, within the 3 ensuing months, submit in writing to the Commission, explanations or statements elucidating the issue under consideration and indicating, if possible, measures it was able to take to remedy the situation.
>
> (3) All explanations or statements submitted by a State Party pursuant to the present Rule shall be communicated, through the Secretary, to the author of the Communication who may submit in writing additional information and observations within a time limit fixed by the Commission.
>
> (4) States Parties from whom explanations or statements are sought within specified times shall be informed that if they fail to comply within those times the Commission will act on the evidence before it.

148. The African Commission notes that while the afore cited rule 119(2) only makes reference to the state party, and rule 119(3) limits the choice of the complainants to a reply only, it is important to point out here that, the communication procedure under the African Charter is dealt with in three distinct phases — seizure, admissibility and merits. There are different requirements to be satisfied at each of these phases. As such, the African Commission has adopted a practice that does not require the complainants to make a full submission in their initial address to the African Commission. This is one reason why the African Commission will not expunge the submissions on the merits made by the complainants.

149. Furthermore, the African Commission believes that it will only insist on the mechanical application of its rules where to do otherwise would occasion substantial injustice to one or both of the parties. The respondent state has not shown that the non-compliance with rules 119(2) & (3) as it were, has caused a travesty of justice in this case or has in any other way adversely affected their rights. The African Commission maintains that the primary duty of all adjudicatory bodies whether national or international, is to ensure that substantial justice and not technical justice, is done to all the parties in a case. The African Commission will therefore not allow technicalities based on perceived procedural irregularities to stand on the course of justice.

150. In view of the above, the African Commission holds that the preliminary issue raised by the respondent state lacks merits in the circumstances of this case and will therefore discountenance the same.

Decision of the African Commission on the substantive claim

151. By this communication, the African Commission has been invited to determine whether or not the compulsory requirement under Botswana law for the courts to impose the death penalty for murder, where no extenuating circumstances are shown; the adoption of the doctrine of '*functus officio*'[43] by the Court of Appeal of the respondent state with regards to the trial of Kobedi; and the use of hanging as a method of execution of Kobedi, constitutes a violation of articles 2, 3, 4, 5 and 7 of the African Charter.

Alleged violation of articles 2 and 3

152. Article 2 of the African Charter provides:

> Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

Article 3

(1) Every individual shall be equal before the law.

(2) Every individual shall be entitled to equal protection of the law.

153. Articles 2 and 3 of the African Charter, basically forms the anti-discriminatory and equal protection provisions of the African Charter. Whilst article 2 lays down a principle that is necessary for eradicating discrimination in all its guises, article 3 is important because it guarantees fair and just treatment of individuals within the legal system of a given country.

154. The complainants argue that the compulsory requirement under Botswana legislation that a court must impose the death penalty for murder, absent only extenuating circumstance limits the factors that can be taken into consideration in respect of sentencing. They submit that the exclusion of considerations such as rehabilitation or such other factors personal to the victim violates articles 2 and 3 of the African Charter. In this regard, they argue that the distinction between taking into account extenuating circumstances and not taking into account mitigating factors is both arbitrary and discriminative.

155. Concerning the alleged violation of article 2 of the African Charter, the respondent state submits that this article deals with the issue of discrimination, and argued that the legislation in the respondent state did not in any way discriminate against the victim as the death penalty would be imposed on anyone found guilty of murder without any extenuating circumstance.

[43] The doctrine of *functus officio* is dealt with more detail under the section dealing with the alleged violation of art 7.

156. In reply to the alleged violation of article 3 of the African Charter, the respondent state, while noting that this article deals with the twin concepts of equality before the law and equal protection of the law, submitted that the victim's right to be treated equally before the law was not interfered with in anyway by the respondent state throughout the trial process.

157. Concerning the allegation that the victim was not afforded equal protection of the law, the respondent state contends that Kobedi was at all times during the trial process provided with high quality legal representation and was not treated unequally *vis-à-vis* any other person in a similar situation. This, argues the respondent state shows that the allegations of the complainants with regards to the alleged violation of articles 2 and 3 of the African Charter are baseless.

158. The African Commission maintains that article 2 of the African Charter is a guarantee that every individual is entitled to enjoy all the rights provided for under the African Charter and that no person shall be deprived of the enjoyment of any of the Charter rights based on his/her race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status. Therefore, for there to be a violation of article 2 of the African Charter, it must be shown that the victim of the alleged violation has been deprived of the enjoyment of a Charter right on the basis of his/her race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

159. The African Commission further believes that the right to equal protection of the law envisaged under article 3 of the African Charter consists of the right of all persons to have the same access to the law and courts, and to be treated equally by the law and courts, both in procedures and in the substance of the law. While it is akin to the right to due process of law, it applies particularly to equal treatment as an element of fundamental fairness.[44] It is a guarantee that no person or class of persons shall be denied the same protection of the laws that is enjoyed by other persons or other classes in like circumstances in their lives, liberty and property.

160. The African Commission, therefore, believes that for there to be a violation of article 3 of the African Charter, it must be demonstrated that the victim of the alleged violation was not accorded the same protection or treatment that is usually accorded to other persons in like circumstances.

161. In the present communication it has not been shown how the victim was denied the enjoyment of any of the Charter rights based on his ethnic group, colour, sex, language, religion, political or any

[44] See the case of *Brown v Board of Education of Topeka* (1954) 347 US 483.

other opinion, national and social origin, fortune, birth or other status. It has not also been shown how the victim was accorded differential treatment or how the victim was discriminated against by the respondent state in anyway. Apart from making general conclusions, the complainants did not sufficiently present facts and evidence that would convince the African Commission of any violation of articles 2 and 3 of the African Charter. The African Commission therefore finds that there was no violation of articles 2 and 3 of the African Charter.

Alleged violation of article 5

162. According to article 5 of the African Charter

> every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

163. Although the African Charter fails to provide any definition of torture, cruel, inhuman or degrading treatment, the African Commission in its jurisprudence[45] has found that the prohibition of torture, cruel, inhuman or degrading treatment includes 'actions which cause serious physical or psychological suffering (or) humiliate the individual or force him or her to act against his or her will or conscience.'

164. While it is accepted that there is no rule of international law which prescribes the circumstances under which the death penalty may be imposed, the African Commission has cautioned that the death penalty should only be imposed after a full consideration of not only the circumstances of the individual offence, but also the circumstances of the individual offender.[46]

165. The complainants have made reference to the fact that the adoption of hanging as a method of executing the death penalty, and the failure of the courts in the respondent state to have regard to the medical condition of Kobedi violates article 5 of the African Charter.

166. By invoking article 60 of the African Charter, the African Commission will rely on the jurisprudence of the UN Human Rights Committee[47] to hold that where a death sentence has been imposed, it must be carried out in such a way as to cause the least possible physical and mental suffering. This approach was applied in *Ng v Canada*[48] wherein the UN Committee found that the particular

45 Communication 137/94, 139/94, 154/96 and 161/97, see *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria* [(2000) AHRLR 212 (ACHPR 1998)], para 79.

46 Communication 240/01 [(2003) AHRLR 55 (ACHPR 2003)], para 31.

47 Human Rights Committee, General Comment 20, para 6.

48 Communication 469/1991, Human Rights Committee, 7 January 1994, UN doc CCPR/C/49/D/469/1991, para 16.2 and 16.4.

method of gas asphyxiation amounted to cruel, inhuman and degrading treatment.

167. The African Commission, therefore, believes that, the carrying out of a death sentence using a particular method of execution may amount to cruel inhuman or degrading treatment or punishment if the suffering caused in execution of the sentence is excessive and goes beyond that is strictly necessary.

168. The African Commission holds that under the African Charter, a parallel obligation to prevent torture or ill-treatment derives from the undertaking given by the states parties in article 1 thereof 'to adopt legislative or other measures to give effect' to the rights contained in the Charter. The importance of such safeguards has been recognised by the African Commission in the Robben Island Guidelines.[49]

169. The African Commission is of the view that the execution of a death sentence by hanging may not be compatible with respect for the inherent dignity of the individual and the duty to minimise unnecessary suffering, because it is a notoriously slow and painful means of execution. If carried out without appropriate attention to the weight of the person condemned because hanging can result either in slow and painful strangulation, because the neck is not immediately broken by the drop, or, at the other extreme, in the separation of the head from the body.

170. However, the complainants have not demonstrated that the execution would be, or was, carried out without due attention to the weight of the condemned. In the circumstance, the African Commission holds that these submissions are speculative and cannot in the circumstance violate article 5 of the African Charter. It is for this reason that the African Commission finds that there has been no violation of article 5 of the African Charter in this regard.

171. It was also contended by the complainants that because the victim had been under the fear of the death penalty for over a decade since he was first arrested, this prolonged delay constitute cruel, unusual or degrading punishment or treatment for the reason that he lived for an unconscionable amount of time awaiting the potential imposition of a death sentence, rendering the victim's execution a violation of article 5 of the African Charter.

172. Whilst the above definition is useful, it fails to outline those categories of actions that would constitute a violation under article 5 of the African Charter. To resolve this issue, the African Commission will in terms of article 60 of the African Charter rely on the jurisprudence of the Human Rights Committee which has over the years, made a determination on whether the length of detention on

[49] Robben Island Guidelines, para 20.

death row amounted to a violation of the prohibition against 'torture or cruel, inhuman or degrading treatment or punishment'.[50] In *Randolph Barrett and Clyde v Jamaica*,[51] the Human Rights Committee held that in the review of criminal convictions and sentences, an element of delay between the lawful imposition of a sentence of death and the exhaustion of available remedies is inherent in the review of the sentence; thus, even prolonged periods of detention under a severe custodial regime on death row cannot generally be considered to constitute cruel, inhuman or degrading treatment if the convicted person is merely availing himself of appellate remedies.

173. The African Commission is of the view that the computation of time as far as the delays in executing the sentence is concern, will only start to run from the time the High Court passed the death sentence and not from when the victim was first arrested in 1993. The evidence before the African Commission indicates that the ensuing delay in carrying out the death sentence was because the victim had petitioned the Court of Appeal. The victim was partly responsible for these delays and was exercising his rights to appeal. For this reasons the African Commission finds that there is no violation of article 5 in this regard.

174. It was submitted by the complainants that failure to publish the unsuccessful outcome of the clemency petition and failure to give notice of the date and time of execution amounts to cruel, inhuman and degrading punishment and treatment in breach of article 5 of the African Charter as thus, depriving the convict and his family members of the important opportunity to have closure with the dignity of their last farewells.

175. The respondent state, failed to challenge the allegation that no reasonable notice or any notice at all was given of the date and time of execution of the victim. The African Commission has in many of its decisions[52] held that facts uncontested by the respondent state shall be considered as established. In view of the foregoing, the African Commission will therefore hold this fact as established.

176. In communication 240/01 *Interights (on behalf of Bosch) v Botswana*,[53] the African Commission observed that a justice system must have a human face in matters of execution of death sentences by affording a condemned person an opportunity to arrange his affairs, to be visited by members of his intimate family before he dies, and to receive spiritual advice and comfort to enable him to compose himself, as best as he can, to face his ultimate ordeal.

50 Under art 7 of the International Covenant on Civil and Political Rights.
51 Communication 270/271/1988 (30 March 1992).
52 See communications 25/89, 47/90, 56/91, 100/93, *Free Legal Assistance Group and Others v Zaire* [(2000) AHRLR 74 (ACHPR 1995)].
53 Para 41.

177. The African Commission is, therefore, inclined to hold the fact that the victim and his family members were never given the important opportunity to have closure with the dignity of their last farewells as inhuman treatment. Since the respondent state did not give any justifications, the African Commission finds that the failure to give notice of the date and time of execution of the victim amounts to cruel, inhuman and degrading punishment and treatment and therefore a violation of article 5 of the African Charter.

Alleged violation of article 7

178. The complainants contend that the fair trial rights of the victim were violated in that; (a) the Court of Appeal misdirected itself by wrongfully invoking the doctrine of *functus officio* and refusing to order a retrial in Kobedi's case in the face of strong, compelling and new contrary expert reports and instead relied on the testimony of an unqualified forensic expert; (b) the right to counsel was not fully respected; (c) there were inordinate delays in the trial process; (d) the Court placed a higher standard of proof — beyond reasonable doubts on the victim.

179. From the arguments and analysis of both the complainants and the respondent state, the essential question that must be asked here is whether the trial of the Kobedi complied with the provisions of article 7 of the African Charter.

180. Article 7 of the African Charter on Human and Peoples' Rights provides that:

> Every individual shall have the right to have his cause heard. This comprises:
>
> (a) The right to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by the conventions, laws, regulations, and customs in force;
>
> (b) The right to be presumed innocent until proven 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.

181. A holistic reading of article 7 brings to the fore one core issue — having access to appropriate justice. The notion of access to appropriate justice is an important indicator of a sound and effective criminal justice system. The African Commission bears this in mind in addressing the different heads of the alleged violation of article 7 of the African Charter as contended herein.

182. Before addressing the question of whether article 7 of the African Charter has been violated or not, it will perhaps be useful to start by considering the meaning and purpose of the doctrine of *functus officio* and the current trend of the law in relation to its

application in the context of judicial decision making processes by apex courts.

183. From the authorities[54] reviewed, the doctrine of *functus officio* provides that once a decision maker has done everything necessary to perfect his or her decision, he or she is then barred from revisiting that decision, other than to correct clerical or other minor errors. The policy rationale underlying this doctrine is the need for finality in proceedings.

184. For the doctrine of *functus officio* to be engaged, it is necessary that the decision in issue be final. In the context of judicial decision making, a decision may be described as final only when

> it leaves nothing to be judicially determined or ascertained thereafter, in order to render it effective and capable of execution, and is absolute, complete and certain.[55]

185. The modern trend of the law is to invest apex courts with 'review jurisdiction' by which the Court may review a decision made or given by it on certain grounds.[56] These factors may include, but are not limited to grounds such as exceptional circumstances which have resulted in miscarriage of justice; or discovery of new and important matter or evidence which after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him or her at the time when the decision was made.

186. Now, turning to the issue whether the application of the doctrine of *functus officio* by the Court of Appeal and its refusal to re-open the trial of Kobedi, was in the circumstance so fatal as to negate the right to fair trial in this case, the African Commission will formulate the issue for determination under this head as follows: does the refusal to order a retrial per se vitiate the holding of a fair trial in violation of article 7 of the African Charter?

187. To arrive at its decision not to re-open the case in the light of the fresh evidence adduced by counsel for Kodedi, the Court of Appeal had this to say:

> On the second aspect on which the appellant seeks to lead medical evidence, the opinion of the medical experts that the deceased's wounds were caused by a high velocity bullet and not a 9mn pistol as used by the appellant is based on their assessments of the medical records of the post-mortem findings. They did not see the wounds. The evidence given at the trial by the pathologist called by the State is also his opinion again based on the same records, the doctor who conducted the post- mortem examination having died before the trial. The assessment of the trial doctor and the Appellant's specialists differs and

54 *Chandler v Alberta Association of Architects*, [1989] 2 SCR 848, 861–862; *President of the Republic of South Africa v SARFU* (1999) ZACC 11; 2000 (1) SA 1 (CC); *Turquieza v Hernando* 97 SCRA 483 (1980); *Heirs of Patriaca v Court of Appeals* 124 SCRA 410 (1983); *Edra v Intermediate Appellate Court* 179 SCRA 344 (1989).

55 *Kurukkal v Canada* (Minister of Citizenship & Immigration) 2009 FC 695, [2010] 3 FCR 195.

56 See for example art 133 of the Ghanaian Constitution, 1992.

> while it may be the position that the specialists are more experienced than the trial doctor, their opinions are untested. It cannot be said that after due cross-examination their opinions would necessarily prevail and there is no doubt that this would affect the result of the trial. Their opinion remains what it is: mainly their opinion. It must be weighed against the direct evidence of the eye witnesses at the trial, which evidence was believed by the trial court and by this court on appeal, who testified that it was the appellant and nobody else who shot the deceased it cannot be said with any certainty that they are likely to be believed purely on the strength of medical opinions. This court cannot find that there is no doubt — or even a probability — that the evidence of the medical specialists would reverse the trial court's verdict and that therefore there is a miscarriage of justice. The evidence which the appellant now seeks to lead does not, on both aspects give rise to one of the exceptional cases where the court, being *functus officio*, might be constrained to re-open the case.

188. The African Commission finds that the direct evidence of the eye witnesses at the trial to the effect that it was the appellant and nobody else who shot the deceased was uncontroverted both at the lower court and before the Court of Appeal. Contrary to the assertion of counsel for Kobedi, the Court of Appeal did not rely on the testimony of an unqualified forensic expert but based it's decision on the unchallenged evidence of eye witnesses.

189. The African Commission consequently agrees with the conclusion of the Court of Appeal that

> the evidence which the appellant now seeks to lead does not give rise to one of the exceptional cases where the court being *functus Officio* might be constrained to re-open the case.

190. In the light of the foregoing the African Commission finds that the Court of Appeal did not misdirect itself by invoking the doctrine of *functus officio* and refusing to re-open the trial of Kobedi and that there was no miscarriage of justice in the circumstance of the case. The result is that the right to fair trial under article 7(1)(b) was not vitiated.

191. It is further submitted that were it not for gross medical mismanagement by the hospitals and medical staff treating Sgt Goepamang, he would not have died from injuries. The complainants submit that during the trial, crucial ballistic analyses and expert medical evidence was adduced by Kobedi's defence team revealing contravention of ballistic analysis and gross medical negligence towards Sgt Goepamang during his time in hospital.

192. In disregarding the medical opinion sought to be adduced by counsel for Kobedi to the effect that there was gross negligence in the treatment of the deceased at the hospital without which the deceased would not have died the Court of Appeal held:

> Mr Spilg did not contend that the negligence of the hospital staff and doctors, assuming there was such negligence, constituted a *novus actus interveniens*. Nor could he. It is clear on the evidence that the bullet with which he was shot caused the death of the deceased.

193. As to whether the hospital's negligence could be taken into account as an extenuating circumstance the Court of Appeal opined as follows:

> In the first place, I am unable to find that there is no doubt that better medical care might have saved the deceased's life. This is purely the untested opinion of the medical experts the appellant seeks to call. But, in any event, the conviction for murder included the finding that the appellant intended to kill the deceased or was at least reckless as to whether he did or not. That finding was confirmed by this court of appeal. I am unable to find that the fact that better medical care might have saved the deceased's life can be an extenuating circumstance or put otherwise, that there is no doubt, or at least a probability, that a court would find it to be so.

194. The African Commission finds no reason to depart from this conclusion arrived at by the Court of Appeal and in consequence holds that there has been no violation of article 7(1)(b) on this account.

Right to be assisted by counsel

195. On the question as to whether the appellant was adequately defended, the Court of Appeal of the respondent state had this to say:

> He was represented for some 5 1/2 months by Mr Dikgokgwane whose crossexamination of those witnesses who were recalled was searching and vigorous. The appellant in his evidence was well led and the submissions to the trial court were full and detailed. At no time during the trial was there any complaint by the appellant about the adequacy of Mr Dilegokgwane's services, nor at the appeal stage.
>
> Appellant only raised the matter in the proceedings before Kirby J. Like Kirby J, as stated earlier, I am of the view that the appellant was adequately represented — I am unable to find that he did not have a fair trial or that the adequacy or inadequacy of his defense was such that it constitutes a special circumstance as to why the doctrines of *functus officio* or *res judicata* do not apply and that on this ground he be allowed a retrial.

196. From this analysis of the Court of Appeal there is no doubt that the right of the appellant to counsel of his choice was not undermined and that his defence was conducted adequately. There was therefore no room for invoking special circumstances warranting the ordering of a retrial. In light of the above the African Commission finds that there was no violation of article 7(1)(c) of the African Charter.

Delays in the trial

197. While it is not contested that there were delays, it is evident from the records that most of the delay was the result of the appellants own doing. It is clear from the judgment that a delay of up to six months between July and December 2001 when Mr Brian Spilg SC was appointed *pro deo* to represent the appellant was caused because appellant rejected several *pro deo* counsels including Mr Jouna and insisted on having Mr Spilg SC appointed *pro deo* to represent him.

198. As at the time Mr Spilg accepted his mission, hearing had been set for the January 2002 session of the Court. While accepting his

mission, Mr Splig requested a postponement of the case to the July 2002 session of the Court on grounds of the voluminous nature of the records of proceedings, the fact that appellant's life was involved. During the intercession between January and July 2002, Mr Spilg and Mack were conducting further investigations on appellants behalf but once again the appellant was dissatisfied and dismissed them as his legal representatives as he felt his best interest were not being looked after. He later changed his mind and allowed them to continue to represent him. This caused another further postponement to January 2003 session of the Court at the instance of the defence.

199. At that session counsel filed arguments consisting of 52 pages on behalf of the appellant and 26 pages on behalf of the state with supporting documentation and authorities running over 1900 pages. In the circumstance, the Court was obliged to reserve its judgment.

200. In the light of the above, the African Commission finds that the delays since 1993 were largely caused by appellants own actions and consequently cannot amount to a violation of the fair trial rights guaranteed under article 7(1)(d) of African Charter.

Alleged violation of article 4

201. While the African Commission affirms that a higher threshold of rights is intended for those who are charged with capital offences,[57] and that the imposition of capital punishment in breach of the due process guarantees under article 7 of the Charter constitutes a violation of the right to life protected by article 4 of the Charter,[58] the African Commission finds that there were no such breaches of due process guarantees under article 7 of the African Charter in the instant case to warrant a violation of article 4 of the African Charter.

202. While further affirming that capital punishment would also constitute a violation of article 4 of the African Charter where the imposition of death sentence is disproportionate to the gravity of the offence committed,[59] the African Commission holds that the imposition of the death penalty to the 'most serious crimes' would not constitute a violation of the right to life protected under article 4 of the African Charter.[60]

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57 Communication 218/98, *Civil Liberties Organization and Others v Nigeria*, [(2000) AHRLR 243 (AHCPR 1999)], para 34.

58 Communications 137/94, 156/96, and 161/97, *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria* [(2000) AHRLR 212 (ACHPR 1998)] para 78; communication 61/91, 98/93, 164/97 à 196/97 and 210/98, *Malawi African Association and Others v Mauritania*, para 120; and Human Rights Committee [(2000) AHRLR 149 (ACHPR 2000)], General Comment 32, para 59.

59 Communication 240/2001, *Interights* et al *(on behalf of Bosch) v Botswana* [[(2003) AHRLR 55 (ACHPR 2003)]], para, 50.

60 See Thirteenth Annual Activity Report of the African Commission on Human and Peoples' Rights, OAU doc AHG/Dec 153 (XXXVI) annex IV.

203. Although the African Charter and the African Commission's Resolution on the Death Penalty[61] does not afford a definition of what constitutes 'most serious crimes', the African Commission holds that the phrase 'most serious crimes' should be interpreted in the most restrictive and exceptional manner possible and that the death penalty should only be considered in cases where the crime is intentional, and results in lethal or extremely grave consequences. In this regard the African Commission relies on article 60 of the African Charter to note that the Rome Statute[62] has identified murder, though in a slightly different context, as one of the 'most serious crimes' under international law.

204. The African Commission therefore identifies murder as one of the 'most serious crimes' under domestic and international human rights law, as it amounts to an arbitrary deprivation of life as protected under article 4 of the African Charter. In the same breath, the African Commission believes that domestic legislation allowing capital punishment for economic, nonviolent or victimless offences such as economic crimes and drug related offences would amount to a disproportionate imposition of the death penalty and thus a violation of the right to life under article 4 of the African Charter.

205. In view of the foregoing, the African Commission finds that the death penalty would not be disproportionate when applied in cases where the crime is intentional and involves the use of violence or firearms resulting in the death of another as in the instant case where the appellant was tried, convicted and sentenced to death on the crime of murder.

206. The African Commission having found that due process was followed and safeguarded by the judicial system of Botswana in the trial of Kodedi and in particular that the Court of Appeal rightly upheld the principle of *functus officio* and *res judicata*, and upon finding that the appellant was tried, convicted and sentenced to death on account of one of the 'most serious crimes', the African Commission holds that his execution cannot in the circumstances amount to a violation of article 4 of the African Charter.

For these reasons, the African Commission finds:

(a) There has been a violation of articles 5 of the African Charter by the respondent state;

(b) There has been no violation of articles 2, 3, 4 and 7(1)(d) of the African Charter by the respondent state;

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61 As above.

62 Art 7(1)(a) of the Rome Statute recognises murder as one of the 'most serious crimes' when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.

(c) Strongly urges the Republic of Botswana to take all measures to comply with the Resolution urging states to envisage a moratorium on the death penalty;

(d) Urges the respondent state to take urgent measures with a view to abolish the death penalty;

(e) Requests the Republic of Botswana to report back to the African Commission when it submits its report in terms of article 62 of the African Charter on measures taken to comply with this recommendation.

EGYPT

Egyptian Initiative for Personal Rights and Interights v Egypt I

(2011) AHRLR 42 (ACHPR 2011)

Communication 334/06, *Egyptian Initiative for Personal Rights and Interights v Arab Republic of Egypt*

Decided at the 9th extraordinary session, 23 February to 3 March 2011

Cruel inhuman and degrading treatment, torture, denial of fair trial, death penalty in relation to persons convicted of terrorism

Provisional measures (40, 52, 53, 78, 101)
Admissibility (exhaustion of local remedies, rationale, 87; no judicial appeal possible, 93-98; reasonable time, 99)
Evidence (presumption of state responsibility for injuries while in custody, 168, 169)
Torture (171, 189, 190)
Cruel, inhuman or degrading treatment (denial of medical treatment, 172-177; humiliating treatment, 190)
Personal liberty and security (safeguards for persons deprived of liberty, 174; access to legal counsel, 178-183; *habeas corpus*, 184-187)
Fair trial (independent and impartial tribunal, 197, 206, 207; special tribunal, 198, 199; appeal, 203, 220-223; legal counsel, 209-211; evidence obtained through coercion, 212-219)
Life (death penalty after unfair trial, 231, 232)

Summary of the complaint

1. This communication is brought before the African Commission on Human and Peoples' Rights (the African Commission or the Commission) on behalf of Mohamed Gayez Sabbah, Mohamed Abdalla Abu-Gareer and Ossama Mohamed Al-Nakhlawy (the victims), by the Egyptian Initiative for Personal Rights and Interights (the complainants).

2. The respondent state is Egypt, a state party to the African Charter on Human and Peoples' Rights (the African Charter or the Charter).

3. The complainants state that the victims were tried and sentenced to death after being accused of bombings which took place on 6 October 2004 and 23 July 2005 on the Sinai Peninsula in Egypt.

4. The complainants submit that on the night of 7 October 2004, three bombings took place in the Taba Hilton Hotel and in two tourist resorts (Al-Badia and Gozor Al-Qamer) near Nuweiba, on the Sinai Peninsula ('the Taba bombings'). They further state that as a result of the attacks, 34 people died and at least 157 were injured. The complainants say that the victims were Egyptian, Israeli and other foreign tourists and workers.

5. They allege that the security forces of the respondent state responded with a campaign of mass arrests and detentions in northern Sinai, from where the perpetrators of the attacks were believed to have originated. According to the complainants, among those taken into custody was the first victim, Mohamed Gayez Sabbah.

6. The complainants also state that on 23 July 2005, a series of new bombings took place in the city of Sharm El-Sheikh on the Sinai Peninsula, and that following those attacks, the security forces again arrested a large number of Egyptian citizens, including Ossama Mohamed Abdel-Ghani al-Nakhlawy (the second victim) and Younis Mohamed Abu-Gareer (the third victim), on 12 August and 28 September 2005, respectively.

7. According to the complainants, agents of the State Security Intelligence (the SSI) subjected the victims to various forms of torture and ill-treatment during their detention, in order to 'confess' before the state security prosecutor for their involvement in the Taba bombings. The complainants state that the victims were held *incommunicado* for a long period of time without access to a lawyer.

8. The complainants state that the victims were denied necessary medical attention as well forensic medical examination during interrogation sessions. They allege that the victims were charged with crimes in relation to the Taba bombings and were tried by the Supreme State Security Emergency Court in a trial characterised by procedural and substantive anomalies. They further allege that the Court's decision was based substantially on the 'confessions' obtained through torture and prolonged ill-treatment.

9. They state that on 30 November 2006, the victims were sentenced to death by hanging. The complainants state that the first victim, Mohamed Gayez Sabbah, was arrested on 22 October 2004 pursuant to an Administrative Order issued under Law 162/1958 of

the State of Emergency (the Emergency Law).[1] The complainants allege that the first victim was held *incommunicado* detention by SSI agents until March 2005. They state that SSI agents blindfolded and bound the first victim, and occasionally hung him from the ceiling by his arms and legs.

10. The complainants state that the first victim was held in these conditions for 96 days, being untied only during his interrogation by the state security prosecutor.

11. They further allege that SSI agents applied electrical shocks to several parts of his body. They state that beatings and torture took place before and after his interrogation sessions by state security prosecutors which started on 3 November 2004 and that most of the interrogation sessions took place around midnight and lasted for several hours each.

12. They allege that despite the fact that the first victim was tortured before these sessions, the interrogation sheet completed by the state security prosecutor in respect of the first victim indicated that there were no visible injuries on his body.

13. According to the complainants, during the first interrogation session, the first victim denied involvement in the Taba bombings. The complainants submit that it was during the second session, held on 4 November 2004 that the first victim 'confessed' to the state security prosecutor. The complainants also aver that the first victim was held *incommunicado*, without access to his family, legal counsel, medical care or a court until 24 March 2005. Requests for access to a defence lawyer by the first victim were ignored.

14. The complainants allege that a plea submitted by a group of human rights lawyers to the public prosecutor's Office, which exercises oversight over the state security prosecutor's office, requesting permission to represent the victims together with others whose names had been printed in the local press as the chief suspects in the investigation of the Taba bombings, went unanswered.[2]

15. Thus according to the complainants, from the date of arrest on 22 October 2004 to 24 March 2005, the first victim was denied access to counsel and that it was on 24 March 2005 that a lawyer attended the final interrogation hearing during which the first victim retracted his 'confessions'.

16. The complainants assert that the first victim also requested medical attention and a forensic examination in relation to his allegations of torture while in detention but the request for a forensic examination was rejected by the public prosecutor's Office according

1 The order was issued in accordance with art 3 of Law 162/1958 on the State of Emergency, as amended (hereinafter 'Emergency Law').

2 The plea, submitted on 24 November 2004, was registered under Number 16332.

to the viciously circular logic that only a legal representative (which he was also denied) could make such a claim.

17. According to the complainants, the charges against the victims and two other individuals in relation to the Taba bombings were referred to the Supreme State Security Emergency Court in Ismailiya on 30 March 2005, and listed as case 40/2005.[3] They state that the trial started on 2 July 2005 and it was at this time that the first victim appeared before a judge for the first time since his arrest, eight months earlier. The complainants also assert that during the first hearing on 2 July 2005 the first victim informed the Court that he had been tortured by SSI officers before and after interrogation sessions, in an attempt to force him to confess.

18. The complainants further state that the first victim told the prosecutor about his torture and requested medical attention, but the prosecutor denied his requests.

19. The complainants state that it was during this hearing that the first victim and his defence counsel requested that he be examined by a forensic expert. According to the complainants, the Court itself examined the first victim *in camera*, in the presence of his defence counsel as well as a lawyer attending the hearing on behalf of Human Rights Watch. They state that he was stripped of his clothes for the court to examine whether there were any physical signs of torture and that the Court found '… brown spots on his arms.'[4] The complainants further state that, as a result, the Court granted the application for a medical examination, and adjourned the trial to 24 July 2005.

20. The complainants aver that the Forensic Medical Authority (FMA) examination took place eight months after the victim's alleged torture and that the report, dated 5 July 2005, noted injuries that were consistent with the first victim having been subjected to torture, including 'healings' and 'dark discolourations' on his right and left forearms, right elbow, left thigh, upper left leg and left hip joint.[5]

21. The complainants also state that the two government examiners concluded that

> due to the long lapse of time and the fact that the marks were not examined at the time they occurred, it was not possible to determine with certitude the reason, manner or time of such marks.[6]

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3 The Supreme State Security Emergency Court was set up in accordance with the Emergency Law (n 1 above). The scope of the jurisdiction *ratione materiae*, composition of, and appointment procedures to, the Supreme State Security Emergency Court are discussed in sec III.B.1(a) on the right to an independent tribunal

4 See Forensic Report, Case 40/2005, 5 July 2005 (English translation) 2.

5 As above (English translation) 4.

6 As above.

According to the complainants, further charges were preferred against the first victim during his trial on 25 March 2006, in relation to the Taba bombings.

22. The complainants submit that the second victim, Ossama Mohamed Abdel-Ghani Al-Nakhlawy, was arrested on 12 August 2005 and placed under administrative detention pursuant to a decree of the Minister of Interior issued under the Emergency Law.

23. The complainants further submit that the second victim was also tortured by SSI officers during the initial period of his detention and interrogation, including the use of electric shocks, beatings and suspension from the roof in painful positions. They state that the second victim was only informed of the charges against him on 22 August 2005, when he first appeared before the state security prosecutor for interrogation.

24. The complainants assert that during the interrogation session, the second victim agreed to sign a written confession recounting his role in the Taba bombings. They state that during this session, the state security prosecutor indicated on the interrogation sheet that there were no visible injuries on the body of the second victim.

25. According to the complainants, the second victim was denied access to a lawyer during the interrogation sessions, which spanned a period of seven months and that during the session held on 19 March 2006, the second victim insisted on summoning lawyers to represent him and to that effect submitted the names and mobile phone numbers of two human rights lawyers.

26. The complainants further submit that on 25 March 2006, the state security prosecutor presented a 'complementary indictment' in relation to the Taba bombings in which the first victim had been charged (case 40/2005).

27. The complainants state that the second victim also retracted his 'confessions' before the Court on 26 March 2006 when he informed the Court that he had been tortured during his detention. The complainants say that the Court granted the second victim's request for a medical examination which took place two months later, nine months after the second victim's alleged torture. They state that the forensic medical report, dated 27 May 2006, noted 'darker intersecting discolourations all over the back' as well as an unhealed fracture in one of the toes of his left foot. The complainants submit that despite the findings, the report concluded that, due to the time lapse, it was not possible to determine precisely the cause or date of the discolourations.[7]

[7] See Forensic Report, case 40/2005, 27 May 2006.

28. The complainants state that the third victim, Younis Mohamed Abu-Gareer, was detained on 28 September 2005 under an Administrative Detention Decree issued under the Emergency Law.

29. According to the complainants, the period of their arrest was between 12 August and 28 September 2005. The complainants submit that the third victim was first interrogated by the state security prosecutor on 20 November 2005, 50 days after his arrest, at which point he was informed of the charges against him.

30. They state that on 25 March 2006 the third victim was referred to the Supreme State Security Emergency Court, as a result of the referral of the complementary indictment by the state security prosecutor.

31. They state that he had not been brought before a judge at any point during his six-month period of pre-trial detention. According to the complainants, he too was held in *incommunicado* detention without access to family members, lawyers or medical care.

32. The complainants state that all the victims informed the Court during the trial that they were subjected to beatings, electric shocks and different forms of cruel and degrading treatment, and that their requests for referral to the Forensic Medical Authority were consistently denied by the prosecution office, but on a referral by the Court the examination confirmed the presence of several injuries but was unable to decisively conclude the cause of injuries due to the long period of time that had elapsed.

33. The complainants allege that the repeated requests of the victims to obtain official copies of the transcript of the hearing of the trial were reportedly denied by the Court.

34. The complainants aver that despite the obvious anomaly of the trial of the victims and the objections raised by the defence with respect to procedural impropriety, the Court proceeded with the trial and adjourned on September 2006 to 30 November 2006 to seek the *Mufti*'s (Religious Adviser's) view on the proceedings in order to deliver its judgment. They state that according to article 381 of the Criminal Procedure Code, the Court is only obliged to seek the *Mufti*'s view when it intends to issue a death sentence, indicating that the Court had already reached verdict to sentence the victims to death.

35. According to the complainants the victims were charged with;

- belonging to a group established in violation of the provisions of the law and with the intention of flouting the provisions of the constitution and the relevant laws as well as violating personal freedoms and targeting foreign tourists and the police as well as tourist installations;
- premeditated murder, attempted premeditated murder, damaging property, illegal manufacture and possession of explosives and car robbery.

Articles alleged to have been violated

36. The complainants submit that the rights of the victims under articles 4, 5, 7(1)(a), (c) and 26 of the African Charter have been violated.

Prayers

37. The complainants seek the following reliefs:

(a) Recognition by the African Commission that the rights in the above mentioned articles in the Charter have been violated;

(b) An order for compensation in respect of the violations of the rights of the victims;

(c) Harmonisation of the respondent state's legislations in line with the Guidelines and Principles of the Rights to a Fair Trial and Legal Assistance adopted by the African Commission;

(d) Ensure that the appropriate mechanisms are implemented to avoid the reoccurrence of similar human rights violations.

Procedure

38. The complaint was received at the Secretariat of the African Commission on Human and Peoples' Rights (the Secretariat) during the Commission's 40th ordinary session, held from 15 to 29 November 2006, in Banjul, The Gambia. A provisional measure was requested to be taken under rule 111 of the African Commission's Rules of Procedure.

39. The African Commission decided to be seized of the communication at its 40th ordinary session, held from 15 to 29 November 2006, in Banjul, The Gambia.

40. The African Commission requested for provisional measures under rule 111(1) of its Rules of Procedure, via a letter dated 5 December 2006 addressed to the President of the Arab Republic of Egypt.

41. By letter dated 21 December 2006, the complainants were informed that the African Commission had decided at its 40th ordinary session to be seized of the communication and that a request for provisional measures had been sent to the President of the Arab Republic of Egypt, and requested the complainants to send their submissions on admissibility to the secretariat by 21 march 2007.

42. By *note verbale* dated 21 December 2006, the African Commission informed the respondent state its decision to be seized of the communication and brought to the attention of the government to the request for provisional measures that was previously sent, and requested that the submissions on admissibility of the respondent state be sent to the secretariat by 21 March 2007.

43. On 22 March 2007, the Secretariat received the submissions on admissibility of the complainants.

44. On 23 March 2007, the Secretariat received the submission on admissibility of the respondent state in Arabic language.

45. By *note verbale* and letter dated 29 March 2007, the Secretariat acknowledged receipt of the submissions on admissibility of both parties and forwarded the submission to the other party.

46. By letter dated 19 April 2007, the Secretariat transmitted to the complainants the translated version (from Arabic to English) of the respondent state's submissions on admissibility.

47. By letter dated 20 April 2007, the complainants acknowledged receipt of the African Commission's letter dated 19 April 2007, but informed the Secretariat that it had not received the previous letter dated 29 March 2007 by which the submissions on admissibility in original Arabic language were forwarded.

48. On 20 April 2007, the Secretariat forwarded again the original Arabic version of the respondent state's submissions on admissibility to the complainants.

49. During its 41st ordinary session, held from 16 to 30 May 2007 in Accra, Ghana, both parties made oral submissions before the African Commission to clarify on their written submissions on the admissibility of the communication. The representative of the respondent state also submitted in writing what was presented orally before the Commission on this occasion and this document was added to the file.

50. At its 41st ordinary session, held from 16 to 30 May 2007 in Accra, Ghana, the Commission declared the communication admissible.

51. By *note verbale* dated 8 June 2007, the Secretariat informed the respondent state of its decision on admissibility; the complainants were also informed in a letter dated 6 June 2007. Both parties were invited to make their submission on the merits.

52. On 7 June 2007, the Secretariat received from the complainants a letter addressed to the Chairperson requesting for renewal of the provisional measures under rule 111(1).

53. By letter dated 7 June 2007 addressed to HE President Hosni Moubarak, a request for provisional measures was made by the Commission.

54. On 24 October 2007, the embassy of the Arab Republic of Egypt to Dakar, Senegal, sent a *note verbale* to inquire about the submission if any, made by complainants.

55. At the 42nd ordinary session held in Brazzaville, Congo from 15 to 28 November 2007, the Commission deferred the communication to the 43rd ordinary session so as to allow the parties to make their

submissions on the merits. During that same session, the Secretariat received a submission on the merit from the respondent state.

56. By *note verbale* dated 20 March 2008 and letter dated 19 March 2008, the parties to the communication were informed that the 43rd ordinary session is scheduled to be held from 7 to 22 May 2008 in Ezulwini, Swaziland.

57. On 23 April 2008, the Secretariat received an electronic version of the submission on the merits from the complainants.

58. On 24 October 2008 the Secretariat transmitted to the respondent state the submission on the merits of the complainants.

59. By letter dated 24 October 2008, the complainants were informed that the 44th ordinary session will be held in Abuja, Federal Republic of Nigeria from 10 to 24 November 2008.

60. During the 44th ordinary session the African Commission considered the communication on the merits and deferred it to the 45th ordinary session scheduled to be held from 13 to 27 May 2009 in Banjul, The Gambia.

61 By *note verbale* and letter dated 19 December 2008, the Secretariat informed the parties of the decision to defer the consideration on the merit of the communication to the 45th ordinary session.

62. By *note verbale* and a letter both dated 24 April 2009, the parties were reminded that the communication will be considered on the merit at the 45th ordinary session to be held in Banjul, The Gambia from 13-27 May 2009.

63. By *note verbale* and letter dated 16 July 2009, the African Commission informed the parties of its decision to defer the communication to the 46th ordinary session, scheduled to take place from 11 to 25 November 2009.

64. By *note verbale* and letter dated 20 December 2009, the African Commission informed parties of its decision to defer consideration of this communication to the 47th ordinary session of the African Commission scheduled to take place from 12 to 26 May 2010.

65. By *note verbale* and letter dated 11 June, the African Commission informed parties of its decision to defer the communication to the 48th ordinary session scheduled to take place from 10 to 24 November 2010.

The law on admissibility

Submissions of the complainants on admissibility

66. The complainants submit that all the criteria of article 56 of the African Charter are satisfied and that therefore, the communication should be declared admissible.

67. On the issue of exhaustion of local remedies, the complainants state that under the Emergency Law (Law 162 of 1958 as amended), the President may decide to commute the sentence, revoke the judgment, or order a retrial by another circuit of the State Security Emergency Court. They submit that in the present case, the sentence imposed by the State Emergency Court on 30 November 2006 on the victims becomes final once it has been ratified by the President of the Republic and that there is no judicial right to appeal the decision of the State Security Emergency Court.

68. According to the complainants, the President's decision under the Emergency Law is not judicial in nature and therefore it cannot be defined as an available remedy for the complainants to pursue. They compare the facts of the present communication to those of *Constitutional Rights Project v Nigeria* in which the Commission described the power of the Governor to confirm or disallow the decision of a special tribunal in Nigeria as a 'discretionary, extraordinary remedy of a non-judicial nature' and where it was found that the Governor's decision was not a remedy of the nature that required exhaustion under article 56(5) of the African Charter. The complainants also refer to *Civil Liberties Organisation v Nigeria* wherein it was found that in the absence of a judicial body to adjudicate on the applicant's complaint, there was no effective remedy available.

69. The complainants further argue that the President's decision under the Emergency Law cannot be made subject to any appeal. Therefore, they submit that the victims are left without any judicial right to appeal the decision of the State of Emergency Court.

Respondent state's submissions on admissibility

70. The respondent state submits that the communication is inadmissible for two reasons: firstly, it was lodged before exhausting local means of redress as the sentence was not final; and secondly, the content of the communication is inaccurate.

71. In terms of the second ground the respondent state submits that certain facts of the communication are false. It argues that the victims were given due process before and during the trial and that they had access to lawyers during interrogations.

72. The respondent state submits that the victims had access to a forensic doctor and were examined. They further state that copies of

court proceedings were made available to the victims and their lawyers and they were properly remanded by a court prior to the commencement of interrogations commenced.

73. The respondent state asserts that trial of the victims was fair and was conducted in public.

74. On the issue of exhaustion of local remedies, the respondent state submits in its written statement that the judgment pronounced on 30 November 2006 by an Emergency Court is not final as it has not yet been endorsed.

75. The respondent state further explains that the Act 162 of 1958 stipulates that judgements by the State of Emergency Security Courts are only made final after being endorsed by the President of the Republic (article 42), and that the ratifying authorities may, in examining the judgment, mitigate the sentence, replace it by a more lenient punishment, rescind it or rescind part thereof or stop its implementation or a part thereof (article 14).

76. In addition, the respondent state points out that for endorsement, the law stipulates that all cases on which a ruling has been made must be examined by legal advisers assigned for this purpose to ascertain that the proper procedure was followed.

77. The respondent state also submits that the law allows the person convicted to submit a written appeal to the Office of the Public Prosecutor.

78. The respondent state confirmed that the request for provisional measures sent by the Chairperson in December 2006 to suspend the execution of the death penalty sentence while the communication was before the Commission had been received, and further explained that the request was transmitted to the President of Egypt who considered it.

The Commission's analysis on admissibility

79. The second ground submitted by the respondent state pertains to the merits of the case and is not relevant at the stage of admissibility.

80. The admissibility of communications within the African Commission is governed by the requirements of article 56 of the African Charter which provides for seven requirements to be met before a communication can be declared admissible. If any of the requirements set out in this article are not met, the African Commission declares the communication inadmissible, unless the complainant provides sufficient justifications why any of the requirements could not be met.

81. In the present communication, the complainants claim that this communication fulfils all the requirements of article 56 of the African

Charter. The respondent state on the other hand submits that the complainants have not fulfilled the requirements under article 56(5) and as such, the African Commission should declare the communication inadmissible. The Commission would thus analyse the arguments of both parties based on the provisions of article 56 of the Charter.

82. Article 56(1) of the African Charter states that

> Communication relating to human and peoples' rights … received by the Commission shall be considered if they indicate their authors even if the latter request anonymity …

This communication is brought before the African Commission by the Egyptian Initiative for Personal Rights and Interights, the complainants, on behalf of the victims. In this communication, the authors as well as the victims have been identified. The African Commission is therefore of the view that sub-article (1) of article 56 has been complied with.

83. Article 56(2) of the African Charter states that

> Communications … received by the Commission shall be considered if they are compatible with the Charter of the Organization of African Unity or with the present Charter.

The present communication sets out that articles 4, 5, 7(1)(a), and 26 of the African Charter have been violated. The communication is brought against the Arab Republic of Egypt a state party to the African Charter, and alleges violation of the rights of Mohamed Gayez Sabbah, Mohamed Abdallah Abu-Gareer and Ossama Mohamed Al-Nakhlawy who are in custody awaiting to be executed by the respondent state. The African Commission therefore holds that the requirements under article 56(2) have been fulfilled.

84. Article 56(3) of the African Charter states that

> Communications … received by the Commission shall be considered if they are not written in disparaging or insulting language directed against the state concerned and its institutions or to the Organisation of African Unity.

The present communication is not written in a disparaging or insulting language directed to the respondent state, its institutions or the AU and for these reasons the African Commission holds that the requirements of article 56(3) have been complied with.

85. Article 56(4) of the African Charter states that

> Communications relating to human and Peoples' Rights … shall be considered if they are not based exclusively on news disseminated through the mass media.

There is no evidence in this communication indicating that the allegations contained therein are based exclusively on news or news disseminated through the mass media. The complainants submit that the communication is based on eyewitness evidence, as well as documented reports, which they have submitted along with the communication as attachments. The respondent state has not

challenged this assertion. For these reasons, the African Commission holds that the requirements of article 56(4) have been fulfilled.

86. Article 56(5) of the African Charter states that

> Communications relating to human and Peoples' Rights … shall be considered if they are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged.

87. The rationale of the local remedies rule both in the Charter and other international instruments is to ensure that before proceedings are brought before an international body, the respondent state concerned must have had the opportunity to remedy the matters through its own local system. This prevents the Commission from acting as a court of first instance rather than a body of last resort. Three major criteria could be deduced from the practice of the Commission in determining this rule, namely: the remedy must be available, effective and sufficient.[8]

88. The only issue at stake at this stage of admissibility in the present case is the one of the exhaustion of local remedies.

89. It appears from the oral submissions of the respondent state that there is no local remedy left for the complainants to exhaust. They argued that the decision of the State of Emergency Court has been examined and confirmed by a legal adviser and the final procedure of endorsement (ratification by the President) of the decision of the State of Emergency Court what is a waiting. The outcome of these two procedures did not change the decision of the State of Emergency Court.

90. The fact that the endorsement of the Emergency Special Court in Egypt is of legal nature or not is not relevant for the examination of the communication by the Commission at this stage, because what is at stake is whether there are other remedies available that the applicants did not resort to. The clarifications brought before the Commission by the representatives of the respondent state during the 41st ordinary session led to the conclusion that there were no other local remedies available for the complainant to resort to. The endorsement process was completed and it was submitted by both parties that the complainants had already used the appeal that was available to them by bringing their grievance to the 'judgement ratification office' and that this remedy was unsuccessful.

91. Most of the submissions made by the respondent state and examined during the 41st ordinary session of the Commission refer to the notion of due process during the trial and would be examined at the merits stage. The respect of the rights of the complainants is indeed a matter relevant at the merits stage and irrelevant at the admissibility stage.

8 See *Jawara v The Gambia* [(2000) AHRLR 107 (ACHPR 2000)].

92. The African Commission in several communications held that the condition of exhaustion of local remedies 'should not constitute an unjustifiable impediment to access international remedies.' Therefore, article 56(5) should be applied concomitantly with article 7, which establishes and protect the right to fair trial.'[9] To this extent the African Commission, in determining whether local remedies have been exhausted takes into consideration the circumstances of each case, including the general context in which the formal remedies operate and the personal circumstances of the applicant.[10]

93. In communication 250/2002, *Zegveld v Eritrea*,[11] the African Commission confirmed that a domestic remedy is considered effective if it offers a prospect of success, and sufficient or adequate if it is capable of redressing the complaint.[12] In *Jawara v The Gambia*, the African Commission decided that the existence of a remedy must be sufficiently certain, not only in theory but also in practice, failing which, it will lack the requisite accessibility and effectiveness. In the instant case and consistent with the jurisprudence of the Commission, there are no remedies remaining for the complainants to pursue as they have no judicial right to appeal the decision of the State Security Emergency Court. What remains was for the President of the Republic to ratify the judgement to give force to it.

94. Therefore, if the victim cannot turn to the judiciary of his country because of lack of an effective legal remedy to address his fear and concerns, local remedies would be considered to be unavailable to him.

95. In the present case, the sentence imposed by the State Security Emergency Court on 30 November 2006 on the victims becomes final once it has been ratified by the President of the respondent state. Under article 14 of the Emergency Law (Law 162 of 1958 as amended), the President may decide to commute the sentence, revoke the judgment, or order a retrial by another circuit of the State Security Emergency Court. The President's decision is discretionary and cannot be made subject to any appeal.

96. The African Commission decided in communication 60/91, *Constitutional Rights Project v Nigeria*[13] that purely discretionary remedies of non-judicial nature where 'the object of the remedy is to obtain a favour and not to vindicate a right' are not of the kind contemplated by article 56(5). In this decision, the African

9 Communication 48/90, *Amnesty International v Sudan* [(2000) AHRLR 297 (ACHPR 1999)]31.

10 Communication 299/05, *Anuak Justice Council v Ethiopia* [(2006) AHRLR 97 (ACHPR 2006)]49.

11 Communication 250/2002 [(2003) AHRLR 84 (ACHPR 2003)] 37.

12 Communication 147/95, 149/96, *Jawara v The Gambia*, [(2000) AHRLR 107 (ACHPR 2000)] 32.

13 Communication 60/91 [(1994) AHRLR 241 (ACHPR 1999)].

Commission described the power of the Governor to confirm or disallow the decision of a Special Tribunal in Nigeria as a 'discretionary, extraordinary remedy of a non-judicial nature'.[14] The African Commission stated that the remedy was neither adequate nor effective because the Governor was under 'no obligation to decide according to legal principles'[15] and concluded that the Governor's decision was therefore not a remedy of the nature that required exhaustion under article 56(5) of the Charter.[16] In communication 87/93, *Civil Liberties Organisation v Nigeria*, the African Commission also found that in the absence of a judicial body to adjudicate the applicant's complaints, there was no effective remedy to which the applicant could have recourse.[17]

97. In the instant matter, the clarifications by the representatives of the respondent state during the 41st ordinary session led the Commission to the conclusion that there were no other local remedies available for the victims to resort to. The ratification process was completed and it has been submitted by both parties that the victims had already used the appeal that was available to them by bringing their grievance to the 'judgement ratification office' and that this remedy has proved unsuccessful.

98. The African Commission therefore concludes that since the decision of the Court is not appealable by any other judicial authority, the complainants have exhausted the requirements of article 56(5) of the Charter.

99. Article 56(6) of the African Charter states that

> Communications relating to human and Peoples' Rights … shall be considered if they: are submitted within a reasonable period from the time local remedies are exhausted, or from the date the Commission is seized with the matter.

The complainant states that the case has been decided by the State Security Emergency Court whose decision was awaiting the ratification by the President of the Republic. The Secretariat of the African Commission received this communication during the Commission's 40th ordinary session, held from 15 to 29 November 2006, in Banjul, The Gambia and acknowledged receipt by a letter dated 12 February 2007. The Charter does not provide for what constitutes a reasonable time, for a complainant to bring his/her complaint before the Commission. The Commission has however dealt with this issue, on a case by case basis. The communication got to the Commission ten months after the decision of the State Security

14 Communication 155/96, *SERAC v Nigeria* (2001) AHRLR 60 (ACHPR 2001).

15 See also *Constitutional Rights Project v Nigeria*, communication 87/93 (1994) [(2000) AHRLR 227 (ACHPR 1999)] in which the Commission affirmed this reasoning in the same language 8.

16 Communication 87/97.

17 Communication 129/94, *Civil Liberties Organisation v Nigeria* (1995) [AHRLR 188 (ACHPR 1995)] 9.

Emergency Court. The African Commission considers this to be a reasonable time, taking into consideration the complexities of getting a representation before an international body, and the challenges of communications system in Africa. The African Commission therefore holds that this provision has also been complied with.

100. Article 56(7) of the African Charter states that:

> Communications relating to human and peoples' rights … shall be considered if they: do not deal with cases which have been settled by these states involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organisation of African Unity or the provisions of the present Charter.

The complainants state that this communication has not been settled by any international body and as such this requirement has been met. The respondent state did not object to complainants assertion and there is no evidence before the Commission to show that the communication is being or has been settled by another international body. The Commission therefore holds that the requirement set out in article 56(7) has been fulfilled.

101. Therefore, since all, under article 56 have been met, the African Commission declares the communication admissible and maintains the request for provisional measures communicated to the respondent state on 5 December 2006, in order to prevent irreparable damages.

102. Other submissions which are made by the respondent state and examined during the 41st ordinary session of the Commission refer to the notion of due process during the trial and will be examined at the merits stage.

The merits

Complainants' submissions on the merits

103. The complainants submit that the manner in which the respondent state conducted the arrest, detention, interrogation, trial and sentencing of the victims violates articles 4, 5, 7(1)(a), (c) and 26 of the African Charter.

Alleged violation of article 5 (torture and cruel, inhuman or degrading treatment)

104. It is submitted by the complainants that, the first victim, Mohamed Gayez Sabbah, after his arrest on 22 October 2004 was held *incommunicado* by SSI (State Security Intelligence) agents until March 2005. SSI agents blindfolded and bound him, and occasionally hung him from the ceiling by his arms and legs. According to the complainants he was held in this condition for 96 days, being untied only during his interrogation by the state security prosecutor. They also allege that the SSI agents applied electric shocks to several parts

of his body. They further allege that this beatings and torture took place before and after his interrogation sessions by state security prosecutors which started on 3 November 2004.

105. The complainants also submit that the first victim initially denied involvement in the bombings but due to the beatings and torture was compelled to change his plea and confessed on 4 November 2004. They also submit that the first victim was not allowed access to his family, lawyers, medical care until 24 March 2005.

106. The complainants aver that the second victim, Ossama Mohamed Abdel-Ghani Al-Nakhlawy, who was arrested on 12 August 2005, was tortured by SSI officers during the initial period of his detention and questioning, includes the use of electric shocks, beatings and suspension from the roof in painful positions. They further submit that, during the interrogation session which spanned over seven months, the second victim was denied access to his legal counsel.

107. They submit on behalf of the third victim, Younis Mohamed Abu-Gareer, that between 28 September 2005 and 20 November 2005, he was questioned by SSI officers in at least twenty-five sessions and that he was subjected to electric shocks and suspended by the hands and legs in painful positions.

108. In arguing this case, the complainants further refer to the African Commission's jurisprudence[18] where it held that the prohibition of torture, cruel, inhuman or degrading treatment includes

> actions which cause serious physical or psychological suffering (or) humiliate the individual or force him or her to act against his or her will or conscience.

109. The African Commission was also referred to the absolute prohibition of torture and ill treatment as contained in the Robben Island Guidelines[19] and *Hurilaws v Nigeria*.[20] They further contend that the absolute character of the prohibition of torture and ill-treatment is recognised in other regional and international instruments including the RIG and CAT.[21] The complainants submit that even those instruments which, in contrast to the African Charter,

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18 Communications 137/94, 139/94, 154/96 and 161/97, see *International Pen, Constitutional Rights Project, Interights (on behalf of Saro Wiwa) v Nigeria* [(2000) AHRLR 212 (ACHPR 1998)] para 79.

19 Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading treatment or Punishment in Africa, adopted by the African Commission on Human and Peoples' Rights at its 32nd Session, 17-23 October 2002 (hereinafter 'Robben Island Guidelines') para 9.

20 Communication 225/98, *Hurilaws v Nigeria*, para 41.

21 Art 2(2) CAT; United Nations Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA res 3452 (XXX) of 9 December 1975, art 3.

allow for some derogation during times of national emergency explicitly exclude from the scope of permissible derogation, *inter alia*, the provisions prohibiting torture and ill-treatment.[22] The complainants argue that even the undoubted threat posed by terrorism, do not affect in any way the absolute prohibition on torture.[23]

110. The complainants further argue that, because of the importance of the values it protects, and as international courts and bodies have recognised, the prohibition of torture has now evolved into a peremptory norm or *jus cogens*, reflecting that the prohibition has become one of the most fundamental standards in the international community.[24]

111. The complainants submit that, not only is the respondent state required to refrain from torture and ill-treatment, but also that, it must take positive measures to effectively prevent and protect against it. They argue that, certain safeguards — such as access to counsel, courts and medical personnel, and the inadmissibility of evidence obtained through torture — are inherent aspects of the prohibition of torture and ill-treatment. They further submit that where torture or ill-treatment does arise, the respondent state is obliged to respond with effective investigation and remedial action. The importance of such measures they argue, lies firstly, in acting as a deterrent to the commission of torture and ill-treatment and, secondly, in ensuring that where torture and other ill-treatment occurs, it is investigated and documented. The complainants refer the African Commission to General Comment 2 of the Committee against Torture, which recognised judicial remedies and access to counsel and to medical assistance during detention as 'baseline' guarantees which the state is obliged to respect in order to give effect to the obligation to prevent and protect against torture or ill-treatment.[25]

112. The complainants argue that under the African Charter, a parallel obligation to prevent torture or ill-treatment derives from the undertaking given by the states parties in article 1 of the Charter 'to adopt legislative or other measures to give effect' to the rights contained in the Charter. The importance of such safeguards, the complainants argue, has been recognised by the African Commission

22 ICCPR, art 4; ECHR, art 15; ACHR, art 27.

23 *Saadi v Italy,* application 37201/06, ECtHR (Grand Chamber), judgment of 28 February 2008.

24 Committee Against Torture, General Comment 2: Implementation of article 2 by states parties, 23. November 2007, UN doc CAT/C/GC/2/CRP1/Rev4, para 1 (excerpted in the Annex of the complainants); International Criminal Tribunal for the Former Yugoslavia (ICTY), *Prosecutor v Furundzija* 10 December 1988, case IT-95-17/1-T, paras 153-154 (excerpted in the Annex the complainants).

25 Committee against Torture, General Comment 2, para 13.

in the Robben Island Guidelines.[26] The complainants aver that, the Commission itself has noted that while

> punishment of the torturer is important, … preventive measures such as halting of *incommunicado* detention, effective remedies under a transparent, independent and efficient legal system, and on-going investigations into allegations of torture[27]

are the best ways to deal with such atrocities.

113. It is submitted by the complainants that, the victims were subjected to torture and ill-treatment by state agents — members of the security forces — while they were in state custody. They argue that, the victims were subjected to repeated electric shocks, beatings, prolonged hanging, binding and blindfolding aimed at their complete disorientation. They further state that, this treatment, which was inflicted by state officials on the victims, which intended to elicit confessions and information, clearly meets the torture threshold.

114. The complainants also argue that, although the context of the victims *incommunicado* detention and interrogation is such that available evidence is necessarily limited, the allegations of torture and ill-treatment are supported by the victims' independent testimonies of similar ill-treatment. According to the complainants, the fact that the victims were held *incommunicado*, hidden from the outside world during the 6-9 months of pre-trial detention, and that access to medical professionals was persistently denied until during trial itself is indicative of ill-treatment. They submit that, the irregular nature of the 'interrogation' sessions which is also consistent with the decision to interrogate late at night is a form of ill-treatment.

115. The complainants submit that the Forensic Medical Report, following the examination of the first victim on 5 July 2005, nearly nine months after his injuries were sustained, noted 'healings' and 'dark discolourations' on his right and left forearms, right elbow, left thigh, upper left leg and left hip joint. The second report of the FMA of 27 May 2006, following examination of the second and third victims also nearly nine months after their torture, found that the second victim had a 'darker intersecting discolourations' all over his back, as well as an unhealed fracture in a left foot toe and that the third victim had dark discolourations in the chest, abdomen and upper arms. The complainants concede that, in both cases the government examiners concluded that the long time lapse between being examined and the injuries made it impossible to determine with certainty the reason, manner or time of such injuries.'

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26 Robben Island Guidelines, para 20.

27 Communications 48/90, 50/91, 52/91 and 89/93, see *Amnesty International and Others v Sudan* [(2000) AHRLR 297 (ACHPR 1999)], para 56.

116. The complainants aver that their allegations are consistent with reports of the systemic nature of torture by security forces in Egypt in cases such as the present one. By referring the African Commission to the 1996 findings into the use of torture in Egypt, in which it concluded that 'torture is systematically practiced by the security forces in Egypt, *in particular by State Security Intelligence*',[28] the complainants argue that human rights mechanisms consistently point to widespread and systematic torture in places of detention in Egypt. The complainants also refer the African Commission to the decision of the Committee Against Torture which found that

> Egypt resorted to consistent and widespread use of torture against detainees' and that '[r]isk of such treatment was particularly high in the case of detainees held for political and security reasons.[29]

117. The complainants aver that under international human rights law, 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. They argue that, it is incumbent on the state to provide a plausible explanation of how the injuries were caused.[30]

118. The complainants also argue that, the respondent state has failed to discharge this burden in that, they made no attempt to give satisfactory explanation of how the injuries were sustained, or to take any steps to investigate and address the surrounding circumstances. The complainants contend further that, the trial court did nothing to follow up on questions raised in the FMA reports or the victims' testimonies. They also argue that the SSI officers who were called to testify against the defendants in court were not asked to confront a single question with regard to the alleged torture and ill-treatment. They submit that the judgment fails to mention, still less to address, the allegations of ill-treatment; and that the authorities have continuously failed to take any steps to investigate the allegations of ill-treatment or the questions raised by the FMA reports.

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28 Activities of the Committee against Torture pursuant to art 20 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment: Egypt, 3 May 1996, UN doc A/51/44, para 220.

29 Communication 233/2003, *Agiza v Sweden,* Committee against Torture, decision of 24 May 2005, UN doc CAT/C/34/D/233/2003, para 13(4); see also Human Rights Committee, comments: Consideration of reports submitted by states parties under article 40 of the Covenant, UN doc CCPR/C/79/Add. 23, 9 August 1993, para 10; Committee against Torture, conclusions and recommendations on the fourth periodic report of Egypt, UN doc CAT/C/CR/29/4 (2002), in particular para 5; see also Amnesty International, 'Egypt: Systematic abuses in the name of security', AI Index MDE 12/001/2007 (April 2007) 18 (in support of the conclusion that 'torture and other forms of ill-treatment are systematic in detention centres'.)

30 *Colibaba v Moldova,* application 29089/06, ECtHR, judgment of 23 October 2007, para 43.

119. The complainants also contend that the carrying out of a death sentence using a particular method of execution may amount to cruel inhuman or degrading treatment or punishment if the suffering caused in execution of the sentence is excessive and goes beyond that strictly necessary. They further argue that where a death sentence has been imposed 'it must be carried out in such a way as to cause the least possible physical and mental suffering.'[31] This approach they submit was tested and applied in the case of *Ng v Canada* where it was found that the particular method of gas asphyxiation fell foul of it.[32]

120. The complainants submit that in the present case, the victims have been sentenced to death by hanging. Hanging, they contend, is a notoriously slow and painful means of execution. If carried out without appropriate attention to the weight of the person condemned, hanging can result either in slow and painful strangulation, because the neck is not immediately broken by the drop, or, at the other extreme, in the separation of the head from the body. The risk of either possibility is not compatible with respect for the inherent dignity of the individual and the duty to minimise unnecessary suffering.

Alleged violation of articles 7(1) and 26 (right to fair trial and independent judiciary)

121. The complainants argue that the victims' right to a fair trial was violated in that;

(a) they were tried by a court that was not independent and impartial and whose decisions is not subject to appeal;

(b) their right to a counsel was not fully respected;

(c) confessions made under torture or ill-treatment were used by the Court, and

122. The complainants also submit that by virtue of article 7(1)(d) of the African Charter, the victims have 'the right to be tried within a reasonable time by an impartial court or tribunal'. They also state that, the victims were tried by an exceptional security court, which failed to meet the minimum guarantees of an independent and impartial tribunal.

123. The complainants state that the requirement of impartiality in article 7 of the Charter is complemented by article 26 of the same which imposes on states parties 'the duty to guarantee the independence of the courts' in their respective territories. These obligations, they submit, are captured in the Commission's *Principles and Guidelines on Fair Trial* wherein the Commission *inter alia* stated that: 'judicial bodies shall be established by law to have adjudicative

31 Human Rights Committee, General Comment 20, para 6.

32 *Ng v Canada*, communication 469/1991, Human Rights Committee, 7 January 1994, UN doc CCPR/C/49/D/469/1991, para 16(2) and 16(4).

functions to determine matters within their competence on the basis of the rule of law and in accordance with proceedings conducted in the prescribed manner;[33] there should not be any inappropriate or unwarranted interference with the judicial process nor shall decisions be subject to revision except through judicial review;[34] all judicial bodies shall be independent from the executive branch[35] and the government shall respect that independence;[36] the process of appointments to judicial bodies shall be transparent;[37] the judicial body shall decide matters before it without any restrictions, improper influence, inducements, pressure, threats or interference, direct or indirect, from any quarter or for any reason.[38]

124. The complainants aver that, not applying these fair trial principles stated above, to special tribunals, violates article 7(1)(d) of the African Charter because their composition is at the discretion of the executive branch. They also contend that the removal of cases from the jurisdiction of the ordinary courts and placing them before an extension of the executive branch necessarily compromises their impartiality[39] and that '[the] very existence [of such special tribunals] constitutes a violation of the principles of impartiality and independence of the judiciary.'[40]

125. The complainants state that the above averments are founded on the jurisprudence of the African Commission and are equally reflected in broader international and comparative law approaches to the right to be tried by an independent and impartial tribunal. To support this position the complainants refer the African Commission to the jurisprudence and case law of other regional and international and human rights mechanisms. They argue that an interpretation of such a right under article 14(1) of the ICCPR has been deemed to be 'an absolute right that may suffer no exception,'[41] and that where the executive is able to 'control or direct' the judiciary, the notion

33 Principles and Guidelines on Fair Trial, sec A(4)(b).
34 As above, sec A(4)(f).
35 As above, sec A(4)(g).
36 As above, sec A(4)(a).
37 As above, sec A(4)(h) 33.
38 As above, sec (A)(4)(e) and (g) and (A)(5)(a).
39 See *International Pen and Others v Nigeria*, [(2000) AHRLR 212 (ACHPR 1998)] para 86.
40 Communications 54/91, 61/91, 98/93, 164-196/97 and 210/98, *Malawi African Association and Others v Mauritania*, 11 May 2000 [AHRLR 149 (ACHPR 2000)] para 98.
41 See *González del Río v Peru* (communication 263/1987), Human Rights Committee, 28 October 1992, para 20. The Inter-American Court of Human Rights has similarly recognised that the right to an impartial tribunal constitutes one of those fundamental judicial guarantees from which no derogation is allowed, including during times of emergency; see I-ACtHR, Advisory Opinion OC-8/87, 30 January 1987, *habeas corpus* in *emergency situations*; I-ACtHR, Advisory Opinion OC-9/87, 6 October 1987, *Judicial guarantees in states of emergency*, OAS/Ser.L/V/III.19 doc 13, 1988.

of an independent and impartial tribunal is violated.[42] This jurisprudence they submit has been followed by regional human rights treaty bodies such as the Inter-American and European Courts of Human Rights, which have similarly held that special courts with close ties to the executive branch violate provisions requiring an independent and impartial tribunal.[43]

126. The complainants state that the competence and procedures of the Supreme State Security Emergency Court, an exceptional court, which tried the victims fall far short of the above standards. They also argue that the Supreme State Security Emergency Court was established by the Emergency Law as a temporary court,[44] although, like the Emergency Law itself, it has been in force continually since 1981. The Emergency Law gives the Court the primary competence of ruling on crimes perpetrated in violation of decrees issued by the President of the Republic in application of the Emergency Law,[45] but the President of the Republic may also, at his/her discretion, refer any ordinary crime to the Supreme State Security Emergency Court.[46] According to Presidential Decree 1/1981 regarding the referral of some crimes to Emergency State Security Courts, all felonies and misdemeanours against the government's security or related to explosives shall be referred to State Security Emergency Courts, established under the Emergency Law.

127. It is further contended by the complainant that the composition of the Supreme State Security Emergency Court, and the procedure for appointments to it, illustrate the lack of independence. They state that while normally composed of three judges of the Court of Appeal,[47] the President of the Republic may order that the Security Court be formed of three judges of the Court of Appeal and two officers of the army,[48] or simply decide that it be formed of three military officers. [49] Before appointing the judges and/or military officers, the law provides that the President of the

42 See *Olo Bahamonde v Equatorial Guinea*, communication 468/1991 [(2001) AHRLR 21 (HRC 1993)], Human Rights Committee, 20 October 1993, para 9 (4).

43 *Lorenzo Enrique Copello Castillo et al v Cuba*, case 12.477, I-ACHR, report 68/06, OAE/Ser.L./V/II.127, doc 4 rev., paras 117–18 (2006); *Incal v Turkey,* application 22678/93, ECtHR, *Reports 1998-IV,* para 65 (holding that, in establishing whether a special tribunal satisfies requirements of independence, regard must be had as to the manner of appointment of its members, the existence of safeguards against outside pressures, and whether it presents an appearance of independence); *Öcalan v Turkey,* application 46221/99, ECtHR, *Reports 2005-IV,* paras 112–118.

44 See art 3b, Emergency Law.

45 As above, art 7.

46 As above, art 9.

47 As above, art 7.

48 As above, art 7.

49 As above, art 8.

Republic shall seek the opinion of the respective Minister of Justice and the Minister of War.[50]

128. The complainants also argue that, the degree of control which the President of the Republic exercises over the composition, conduct and outcome of proceedings before the State Security Court is antithetical to the notion of an independent and impartial judicial process because, the President, for example exercises the following powers: the President may suspend a case before it is submitted to Supreme State Security Emergency Court or order the temporary release of the accused person before referral of the case to the Supreme State Security Emergency Court;[51] decisions of the Supreme State Security Emergency Court are final only when they're approved by the President of the Republic, and cannot thereafter be challenged before any other court in Egypt;[52] the President of the Republic may commute, change, suspend or cancel such decisions. He may also order the release of defendants;[53] and or order the retrial of the case before another court.[54]

129. The complainants further aver that, this lack of independence and impartiality of the Supreme State Security Emergency Court has been identified and criticised by the Human Rights Committee when it expressed its 'alarm' at the fact that

> that Military Courts and State Security Courts have jurisdiction to try civilians accused of terrorism although there are no guarantees of those Courts' independence and their decisions are not subject to appeal before a higher Court.[55]

130. With regards to the right to a counsel, as enshrined in article 7(1)(c) of the African Charter,[56] the complainants contend that this right which underpins several others, such as freedom from ill-treatment and the right to prepare a defense,[57] should be observed during all stages of criminal prosecution 'including preliminary investigations in which evidence is taken, periods of administrative detention, trial and appeal proceedings.'[58] They submit that in proceedings relating to criminal charges, legal representation is the 'best means of legal defence against infringements of human rights and fundamental freedoms'.[59] They also argue that in cases involving

50 As above, art 7.
51 As above, art 13.
52 As above, art 12.
53 As above, art 14.
54 As above, art 15.
55 Human Rights Committee, Concluding Observations on Egypt, UN doc CCPR/CO/76/EGY (2002), para 16 (b).
56 Art 7(1) of the Charter guarantees 'the right to defence, including the right to be defended by counsel of his choice.'
57 *Amnesty International and Others v Sudan*, [(2000) AHRLR 297 (ACHPR 1999] para 64.
58 As above, sec N(2)(c).
59 Principles and Guidelines on Fair Trial, sec N(2)(a).

capital punishment, it is axiomatic that the accused must be effectively assisted by a lawyer at all stages of the proceedings'.[60]

131. They refer the African Commission to its decision in the matter of *Malawi African Association and Others v Mauritania,*[61] the complainants submit that the right to counsel in article 7 refers to the right to counsel of the detainee or defendant's choice and argues that where the accused either had no access, or only restricted or delayed access, to lawyers, there is a violation of article 7(1)(c). They contend that this right guarantees the right to timely and confidential consultations with that counsel.[62]

132. The complainants further argue that although the European system has recognised that in certain exceptional circumstances it may be necessary to limit the right to counsel, such restrictions can only be allowed if they are no more than strictly necessary and do not hinder the fairness of the proceedings.[63] The complainants refer the African Commission to the case of *Öcalan v Turkey*, where the Court held *inter alia* that the denial of access to a lawyer for ten days during interrogations, 'a situation where the rights of the defence might well be irretrievably prejudiced', interfered with the fairness of the proceedings and violated the defendant's human rights.[64]

133. In the instant matter, the complainants state that none of the victims had lawyers present at the critical early interrogation stage. They argue that on 23 November 2004 a group of human rights lawyers submitted a specific request to the Public Prosecutor's Office (registered under number 16332) to legally represent a number of individuals, including the first victim but received no response. They submit that the first victim was denied representation at interrogations for a period of 5 months until 24 March 2005 and the second and third victims had no access to counsel until 26 March 2006, when they first appeared in court.

134. The complainants submit that, even at the beginning of the trial, all three victims were denied the opportunity to consult with

60 Human Rights Committee, General Comment 32 on article 14: Right to equality before courts and tribunals and to a fair trial, UN doc CCPR/C/GC/32 (2007), para 38.

61 See *Malawi African Association v Mauritania*, [(2000) AHRLR 149 (ACHPR 2000) para 96.

62 As noted by the Human Rights Committee in relation to the right to a lawyer under the ICCPR '[c]ounsel should be able to meet their clients in private and to communicate with the accused in conditions that fully respect the confidentiality of their communications. Furthermore, lawyers should be able to advise and to represent persons charged with a criminal offence in accordance with generally recognised professional ethics without restrictions, influence, pressure or undue interference from any quarter' (Human Rights Committee, *General Comment 32* (above, n 60), para 34.

63 See *Öcalan v Turkey* (above, n 43), para 131; *Murray v United Kingdom,* Application 18731/91), ECHR (Grand Chamber), series A, 300-A, para 63.

64 *Öcalan v Turkey,* para 131.

counsel privately, in order to prepare their defence. They also submit that, the lawyer client communication took place through bars of the Court room, in the presence of, and within earshot security officials. It is submitted that the complete denial of access to counsel before their appearance in court and the restrictive access thereafter, violated the right to counsel and the right to a defence under article 7(1)(c).[65]

135. With regards to the issue of the State Security Emergency Court's reliance on the 'confessions' of the three victims, the complainants submit that 'any confession or other evidence obtained by any form of coercion or force may not be admitted as evidence or considered as probative of any fact at trial or in sentencing.'[66] They argue that 'any confession or admission obtained during *incommunicado* detention shall be considered to have been obtained by coercion.'[67] They further argue that any evidence and/or confessions obtained through torture or cruel, inhuman and degrading treatment cannot be used in judicial proceedings except for the purpose of prosecuting the act of torture or ill-treatment itself.[68]

136. Relying on decisions from European Court of Human Rights,[69] the complainants aver that the use of evidence obtained under torture or ill-treatment in criminal proceedings raises serious issues as to the fairness of such proceedings. They contend that any incriminating evidence — whether in the form of a confession or real evidence — obtained as a result of acts of violence or brutality or other forms of treatment which can be characterised as torture should never be relied on as proof of the victim's guilt, irrespective of its probative value.'[70] They further submit that the Egyptian Constitution of 1971 also stipulates that 'if a confession is proved to have been made by a person under any … forms of duress or coercion, it shall be considered invalid and futile'.[71]

137. The complainants submit that although the Committee Against Torture has affirmed in a number of cases that, 'it is for the author

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65 *Malawi African Association v Mauritania*, [(2000) AHRLR 149 (ACHPR 2000)] para 96.

66 *Principles and Guidelines on Fair Trial*, sec N (6)(d)(1).

67 As above, sec N (6)(d)(1).

68 They argue that an express prohibition of reliance on evidence obtained by torture is contained in article 10 of the Inter-American Convention to Prevent and Punish Torture of 9 December 1985, *OAS Treaty Series* No 67; *Concluding Observations of the Human Rights Committee: the Philippines*, UN doc CCPR/CO/79/PHL (2003), para 12.

69 *Jalloh v Germany,* application 54810/00, ECtHR, judgment of 11 July 2006 [GC], paras 99 and 104-106; *Harutyunyan v Armenia,* application 36549/03, ECtHR, judgment of 7 June 2007, para 63; *Concluding Observations of the Human Rights Committee: Philippines*, UN doc CCPR/CO/79/PHL (2003), para 12.

70 ECHR, *Harutyunyan v Armenia* (above 50), para 63.

71 See art 42 *in fine*.

to demonstrate that the allegations are well founded',[72] the duty is generally on the state to prove that the confessions were freely obtained.[73] In support of this view the complainants refer the Commission to observations of the Human Rights Committee that

> all allegations that statements of detainees have been obtained through coercion must lead to an investigation and such statements must never be used as evidence, except as evidence of torture, and the burden of proof, in such cases, should not be borne by the alleged victim.[74]

The African Commission was also referred to in the UN Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, who had noted that 'the applicant is only required to demonstrate that his or her allegations of torture are well founded.' This means that the burden of proof to ascertain whether or not statements invoked as evidence in any proceedings, including extradition proceedings, have been made as a result of torture shifts to the state.[75]

138. The complainants assert that the victims in this case all raised allegations of torture and ill-treatment and that these allegations are at least consistent with the circumstances of their case, such as the *incommunicado* nature of their detention and the reports of the FMA which, at a minimum, indicate a risk of ill-treatment. The complainants also state that despite these concerns, and the apparent inconsistency and unreliability of the evidence, the 'confessions' were admitted as evidence and appear to have formed at least part of the basis of their convictions and the imposition of the death penalty. The reliance on such evidence, they argue, violates article 7 of the Charter.

139. With regards to the right to appeal, the complainants aver that article 12 of the Egyptian Emergency Law stipulates that 'It is not allowed in any form to appeal the decisions pronounced by State Security Courts.' They argue that these laws, and its application in practice, violate article 7(1)(a) of the Charter, which provides for 'the right to an appeal to competent national organs against acts violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force'.

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72 *PE v France*, para 6(3); they also refer the Commission to *GK v Switzerland*, communication 219/2002, Committee against Torture, decision of 7 May 2003, UN doc CAT/C/30/D/219/2002, para 6(11).

73 *PE v France*, para 6(2); see also the slightly different formulation used by the Committee in *GK v Switzerland* 'the broad scope of the prohibition in article 15, proscribing function of the absolute nature of the invocation of any statement which is established to have been made as a result of torture as evidence 'in any proceedings', is a prohibition of torture and implies, consequently, an obligation for each state party to ascertain whether or not statements admitted as evidence in any proceedings for which it has jurisdiction, including extradition proceedings, have been made as a result of torture.'

74 Concluding Observations of the Human Rights Committee, para 12.

75 Report of the Special Rapporteur on Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment; UN doc A/61/259 (2006), Annex, para 63.

140. The complainants also submit that states parties should guarantee the right to appeal as well as provide for a genuine and timely review of the cases, including the facts and the law,[76] and that in extreme cases where life is at risk states parties should take steps to make appeals mandatory especially in death penalty cases.[77] The complainants refer the Commission to its decisions in *Law Office of Ghazi Suleiman v Sudan*[78] to highlight the importance of appeal rights in the Commission's jurisprudence, and to *Civil Liberties Organization and Others v Nigeria*[79] concerning the right to appeal in death penalty cases.

141. As a result of the above, the complainants submit that the court before which the victims were tried failed to meet the criteria which the Commission has identified as essential for an independent and impartial tribunal and urged the Commission to hold that the Arab Republic of Egypt has violated articles 7 and 26 of the African Charter.

Alleged violation of article 4 (right to life)

142. In support of the alleged violation of article 4 of the African Charter, the complainants contend that although the imposition of the death penalty is not *per se* unlawful under the Charter or broader international human rights law, certain circumstances, which are present in this case, will render it a breach of the right to life. For the purposes of this instant case the complainant argued that these special circumstances would include situations where the sentence was passed without meeting the requirements of a fair trial set out in article 7 of the African Charter; and where the death penalty is mandatory or automatic, imposed by law rather than being applied by a court of law in light of all relevant circumstances.

143. They submit that in criminal proceedings which may lead to the imposition of the death penalty, respect for due process is required to ensure that the right to life guaranteed under article 4 of the Charter is not violated. By referring the African Commission to its decisions in *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria*[80] and in *Malawi African Association and Others v Mauritania*, they argue that, where the death penalty is unlawfully imposed, article 4 is violated because the victims' rights under article 7 of the Charter had been denied.

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76 See Principles and Guidelines on Fair Trial (ACHPR) sec N(10)(a)(1).

77 As above, sec N (10)(b).

78 Communication 222/98 and 229/99, *Law Office of Ghazi Suleiman v Sudan* [(2002) AHRLR 25 (ACHPR 2002)], paras 53 and 65.

79 Communication 218/98, *Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v Nigeria* [(2000 AHRLR 241 (ACHPR 1999)], paras 33 and 34.

80 See communication 137/94, 139/94, 154/96 and 161/97 [(2000) AHRLR 212 (ACHPR 1998)].

144. The complainants submit that 'a higher threshold of rights is intended for those who are charged with crimes the sentence of which might be the death penalty',[81] which explains the need for 'scrupulous respect of the guarantees of fair trial' in capital offence cases. [82] It is submitted that the respondent state in a statement to the UN General Assembly in 2007 recognised the critical nature of respect for due process rights in capital offence cases.[83]

145. It is contended by the complainants that the imposition of the death sentence by the Supreme State Security Emergency Court in the particular circumstances of this case would amount to an arbitrary deprivation of life.

Respondent state's submissions on the merits

146. Concerning the alleged violation of article 5, the respondent state submits that article 42 of the Constitution of Egypt provides for and guarantees the right to security of the person and that if a confession is proved to have been made by a person under duress or coercion, it shall be considered invalid and futile. It is further submitted by the respondent state that article 57 of the same Constitution provides that

> any assault on individual freedom or on the inviolability of the private life of citizens and any other public rights and liberties guaranteed by the Constitution and the law shall be considered a crime, whose criminal and civil lawsuit is not liable to prescription. The state shall grant a fair compensation to the victim of such an assault.

147. Concerning the allegation that the victims were denied visits while in detention, the respondent state submit that the relatives of Ossama Mohamed al-Nakhlawy visited him 17 times, the relatives of Mohamed Gayez Sabah visited him 30 times and the relatives of Yunis Mohamed Abu Gareer visited him 16 times until April 2007. These, argues the respondent state shows that the allegations of the complainants are baseless.

148. The respondent state avers that its penal code criminalises acts of torture in articles 126 and 282, and that the same code further criminalises unjustified detention imposes penalties exceeding those decided by articles 127 and 280.

149. The respondent state contends that, the assessment, value and reliance on any confession as a piece of evidence in any criminal proceedings is an issue entirely at the discretion of the Court. It is argued that it is the judge who in exercise of this discretion decides

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81 *Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v Nigeria,* [(2000) AHRLR 241 (ACHPR 1999)] para 34, (citing *Constitutional Rights Project v Nigeria,* communication 10/91 and 87/93.

82 Human Rights Committee, General Comment 32, para 59.

83 See Official Records of the General Assembly, Sixty-second session; Summary Record of the 76th Plenary Meeting, 18 December 2007; UN doc A/62/PV.76, 24.

whether or not to accept and rely on the confession as reliable evidence for conviction.

150. It is contended by the respondent state that the judge's competence to assess the value of a confession entails as well his competence to interpret it, define its significance and explore its motives. This principle, argues the respondent state, applies whether the confession was judicial or non-judicial, whether it took place in the process of factual investigation, interrogation or even before a normal person. The judge, argues the respondent state, does not rely on a confession if he is not convinced with it even in the case where the accused person insists on his confession. In such a case, the judge may issue an acquittal and clarify in the causation why he did not take the confession into consideration. If it is proved that the confession was made under duress or coercion, it would be considered as invalid. But this does not prevent the Court from taking other evidences to prove the accusation.

151. It is argued by the respondent state that the Court judgment against the victims took into consideration all the circumstances related to the facts according to the satisfaction of the Court based upon the processes in the case, the investigations, the Court sessions and the related hearings of witnesses and the written and verbal pleadings of the defence in order to clarify the facts, the elements of the crime and the provisions of the law applicable thereon. The respondent state argues that the Court considered, scrutinised and analysed all the evidences of the subject matter of the complaint including the related medical and technical reports and the public prosecution investigations to reach the facts upon which its judgment was established.

152. It is further contended by the respondent state that the Court responded to all the pleas of the defence during the trial including the plea of the invalidity of the confessions, and that the Court was satisfied that the confessions of the victims and the other accused persons during the investigation were made by persons who have the will and the discernment and are fully aware of the charges against them.

153. The respondent state submits that when the accused persons first appeared before the public prosecutor they were free from any injuries. They further submit that the court was certain that the victims were fully aware that the investigations were made by the Public Prosecution Office (PPO) and that the PPO had informed them of the charges against them. The respondent state also stated that

> the Office of the Public Prosecutor in carrying out its investigations, interrogated the accused, Mohamed Gaiz Sabah in four sessions, Osama Abdel Ghani El-Nakhlawi in eight sessions and Mohamed Alyan Abu Garir in twenty five sessions. During these sessions, all the accused pleaded guilty of having committed the crimes attributed to them.

154. The respondent state contends that as a result of the findings of the PPO, the victims were referred to court in suit 40/2005 of breaching security under the state of emergency by committing capital offence. The court, the respondent state contends, had responded throughout its sittings to all the requests made by the victims. They also submit that the court had during deliberations allowed the victims and their defence to produce evidence in support of their case and to bring their own to witnesses. They further submit that the complainants were heard and that their request to be examined by a forensic doctor was also granted. They submit that the Court equally heard the complainants' submissions in defence of the victims in 12 sessions and that they were allowed access to visit victims whenever they requested. They also submit that the complainants were given copies of the minutes of investigations and all the records of court sittings as well as the witnesses and that the Court was convinced that their confessions were valid.

155. Concerning the complainants' allegation that the fair trial rights of the victims were violated, the respondent state adopted its earlier position that the victims had a fair and just trial before a legal, national and competent court. They submit that the trial sessions were public and were attended by the lawyers who represented the victims; and that, the trial was concluded within a reasonable period.

156. The respondent state argues that it is clear from the court processes that the victims were tried before a legal, national and independent court constituted of judges who enjoy judicial immunity. This according to the respondent state negates the allegation of any violation of article 26 of the African Charter.

The African Commission's analysis on the merits

157. In this communication, the African Commission is called upon to determine whether the arrest, pre-trial detention, trial and sentencing of the victims by the respondent state following their alleged involvement in a bomb attack on 6 October 2004, in the Taba and Noueiba' resorts of the Sinai Peninsula which led to the death of 34 and the injury of 105 Egyptian, Israeli and other foreigners, violates the victims' rights guaranteed under articles 4, 5, 7(1)(a), (c) and 26 of the African Charter as alleged by the complainants. The summary of the rights allegedly violated by the respondent state are *viz*:

> (a) The torture of the victims while in state custody, including electrical shocks, beatings, hanging from their hands and legs and prolonged sensory deprivation violates the prohibition of torture and cruel, inhuman or degrading treatment enshrined in article 5 of the Charter;
>
> (b) The denial of essential safeguards necessary to give effect to that prohibition, such as access to counsel, courts and medical personnel,

and the use in court of evidence obtained through torture, themselves amount to a violation of article 5 of the Charter;

(c) The character, procedures and conduct of the Office of the State Security Prosecutor and of the Supreme State Security Emergency Court violate the victims' rights to due process under article 7(1) of the Charter and the state's obligations to ensure the independence of the Courts under article 26;

(d) The denial of fair trial rights and the imposition of the death penalty which would constitute a breach of the right to life, as protected by articles 4 and 5 of the Charter.

158. The Commission will accordingly proceed to analyse each of the articles of the Charter alleged to have been violated by the respondent state.

Alleged violation of article 5

159. The complainants submit that the respondent state violated article 5 in that, the victims were held *incommunicado* and denied access to their families, lawyers and medical care by SSI agents. They state that they were beaten, tortured, blindfolded and occasionally hung from the ceiling by their arms and legs in painful positions by SSI agents who applied electrical shocks to several parts of their bodies.

160. Article 5 of the African Charter reads:

> Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

Article 42 of the 1971 Constitution of Egypt stipulates that:

> any citizen arrested, detained or whose freedom is restricted shall be treated in a manner concomitant with the preservation of his dignity. No physical or moral harm is to be inflicted upon him … [84]

161. In order to analyse the allegation of torture by the victims, the African Commission will look at what amounts to torture in accordance with the Charter and other international instruments. Article 60 of the Charter has drawn inspiration from broader international law to deal with specific issues. Substantive international jurisprudence and practice has therefore developed in recent years regarding the nature of the prohibition of torture and cruel, inhuman and degrading treatment and the obligations of states to protect its citizens against such treatment.

162. Convention against Torture and Other Cruel or Inhuman or Degrading Treatment (CAT) has defined 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

[84] See arts 126 and 127 of the Penal Code.

acquiescence of a public official or other person acting in an official capacity.[85]

163. The African Commission will now seek to address issues as outlined in the submissions of the complainants *viz*:

(a) the Arab Republic of Egypt, through its State Security Intelligence force tortured and/or ill-treated the victims;

(b) the state, through its intelligence services, Prosecutor's Office and Security Court, denied the victims the essential safeguards against torture and ill-treatment, including prompt access to counsel, to a court and to medical personnel, and has permitted the admissibility of 'confessions' obtained through torture in proceedings against them;

(c) the state has failed to conduct an effective investigation into these alleged acts of torture and ill-treatment and no diligent attempts have been made to hold anyone to account.

164. The facts of torture as contained in the complaints is that the SSI agents subjected the victims to repeated electrical shocks, beatings, prolonged hanging by the leg, binding and blindfolding aimed at their complete disorientation.

165. The respondent state on the other hand submit that the investigations carried out by the public prosecutor established that it has conducted external check on the accused persons immediately when they were brought before it and that it was confirmed that they were free from any external injuries. The question therefore that would follow is: who then inflicted the injuries that were subsequently found on the victims?

166. The victims' allegation is also consistent with the forensic reports which were eventually issued for each of the victims. The FMA report, following the examination of the first victim on 5 July 2005, nearly nine months after his injuries were sustained, noted 'healings' and 'dark discolourations' on his right and left forearms, right elbow, left thigh, upper left leg and left hip joint. The second report of the FMA of 27 May 2006, following examination of the second and third victim also nearly nine months after their torture, found that the second victim had a 'darker intersecting discolourations' all over his back, as well as an unhealed fracture in a left foot toe and that the third victim had dark discolourations in the chest, abdomen and upper arms.[86] However, in both cases the government examiners concluded that the long time lapse between being examined and the injuries made it impossible to determine with certainty the reason, manner or time of such injuries.[87]

167. The question therefore that begs the mind is who then is responsible for the dark colorations found on the bodies of the victims? Certainly this could not have been inflicted by the victims themselves, especially when it has been established that during all

85 Art 1 CAT.
86 See above, n 7 and accompanying text.
87 As above.

this time they were under the custody of the respondent state's agents.

168. It is a well-established principle of international human rights law, 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. As the European Court of Human Rights has recently noted:

> Where a person is injured while in detention or otherwise under the control of the police, any such injury will give rise to a strong presumption that the person was subjected to ill-treatment […]. It is incumbent on the State to provide a plausible explanation of how the injuries were caused, failing which a clear issue arises under article 3 of the Convention …[88]

169. The African Commission wishes to state that under such circumstance, the burden now shifts to the respondent state to convince this Commission that the allegations of torture raised by the complainants is unfounded. The context of the victims' *incommunicado* detention and interrogation is such that available evidence is necessarily limited. However, the allegations of torture and ill-treatment are supported by the victim's independent testimonies of similar ill-treatment. Their allegations fit also with the fact that they were held *incommunicado*, hidden from the outside world during the 6-9 months of pre-trial detention, and that access to medical professionals was persistently denied until during trial itself.

170. In the present case, the respondent state has made no attempt to give a satisfactory explanation of how the injuries were sustained, or to take any steps to investigate and address the surrounding circumstances. The trial court did nothing to follow up on questions raised in the FMA reports or the victims' testimonies.

171. In the light of the above the African Commission concludes that the marks on the victims evidencing the use of torture could only have been inflicted by the respondent state.

172. On the right to medical services, during detention, the African Commission and other international bodies have recognised and emphasises that such rights be provided 'promptly'. The Human Rights Committee, in its General Comment 20, has observed that protection of the detainee from torture and ill-treatment requires 'prompt and regular access' to doctors. The General Assembly has repeatedly underlined the importance of the right to prompt medical examination promptly following detention to prevent abuse of detainees.[89]

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88 *Colibaba v Moldova*, Application 29089/06, ECtHR, judgment of 23 October 2007, para 43.

89 Human Rights Committee, General Comment 20 on article 7 (1992), UN doc HRI/GEN/1/Rev. 6 (1994), 151, para 11.

173. In the presence of allegations or possible indications of abuse, the importance of prompt access to medical personnel becomes all the more critical. The Istanbul Protocol, a set of detailed guidelines on the investigation of torture and ill-treatment elaborated by an independent group of experts in 1999, recalls that

> [t]he investigator should arrange for a medical examination of the alleged victim. The timeliness of such medical examination is particularly important. A medical examination should be undertaken regardless of the length of time since the torture, but if it is alleged to have happened within the past six weeks, such an examination should be arranged urgently before acute signs fade.'[90]

174. The Robben Island Guidelines in its section 20, urges state parties to make sure that all persons who are deprived of their liberty by public order or authority should have that detention controlled by properly and legally constituted regulations. Such regulations should provide a number of basic safeguard, all of which shall apply from the moment when they are first deprived of their liberty. These include:

> (a) The right that a relative or relative or other appropriate third person is notified of the detention;
>
> (b) The right to an independent medical examination;
>
> (c) The right of access to a lawyer; and
>
> (d) Notification of the above rights in a language which the person deprived of their liberty understand.

175. In the present case, the victims were not examined by doctors at any point during their pre-trial detention. Even when they reported their torture and ill-treatment, they were still denied access to medical personnel by the authorities.

176. Only when the allegations of torture were made for the second time during the trial itself did the judge order the examination of the victims by the FMA. The forensic examination conducted by the authorities plainly did not satisfy the obligations set out above, as it was carried out more than six months after the victims complained that they were subjected to torture and ill-treatment and was, therefore, ineffectual as a method of prevention or investigation.

177. The African Commission therefore holds that the failure by the respondent state to provide prompt medical services to the victims while they were under detention violates the victims' rights to prompt medical services whiles under custody.

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[90] Istanbul Protocol — Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 9 August 1999 (reproduced as OHCHR, Professional Training Series No 8/Rev. 1, UN doc HR/P/PT/8/Rev.1, available at http://www.irct.org/Default.aspx?ID=2701), para 104. See also principle 2 of the Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (annexed to the Istanbul Protocol). See also Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and GA Res 61/153, 14 February 2007).

178. The African Commission also notes that the victims were denied counsel during their detention, including the critical interrogation sessions. In the Jamaican case of *Osbourne Wright and Eric Harvey v Jamaica*, adopted on 27 October 1995, the United Nations Human Rights Committee has held that the requirement that legal assistance must be made available to an accused faced with a capital crimes applies not only to the trail and relevant appeals, but also to any preliminary hearing relating to the case.

179. The African Commission, therefore, notes that there is no dispute that the victims were unrepresented at the preliminary investigation stage, and notwithstanding the respondents state's assertion that it is not the responsibility of the state authorities to pay for such legal aid, it finds that it is axiomatic that legal assistance be available in capital cases, at all stages of the proceedings, especially when there were request from human rights lawyers to represent the victims. It should be understood by the respondent state that there a positive obligation on them to provide access to independent legal assistance under the Charter, inherent in the international prohibition of torture and ill-treatment. The African Commission has recognised the right to access to a lawyer as one of the 'basic procedural safeguards for those deprived of their liberty'[91] and as one of the necessary safeguards against abuse during the pre-trial process.[92]

180. The link between the prevention of torture and the right to prompt access to a lawyer has likewise been emphasised by other international human rights bodies. In its Resolution 61/153 of 2007, reaffirming the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, the General Assembly stressed that permitting prompt and regular access to legal counsel constitutes an 'effective measure … for the prevention of torture and other cruel, inhuman or degrading treatment and punishment.'[93] Similarly, the Human Rights Committee has stated that the protection of detainees from torture and ill-treatment 'requires that prompt and regular access be given to … lawyers'[94] and that the use of prolonged detention without any access to a lawyer violates a number of provisions of the Covenant, including article 7.[95]

91 See Robben Island Guidelines, para 20.
92 As above, para 27.
93 GA Res. 61/153, 14 February 2007, para 11.
94 Human Rights Committee, *General Comment No 20* (above, n 89), para 11.
95 Concluding Observations of the Human Rights Committee: Israel, 21 August 2003, UN doc CCPR/CO/78/ISR, para 13.

181. Human rights bodies have thus recognised that, for access to a lawyer to constitute an effective protection against torture and ill-treatment, such access has to be 'prompt' and regular.[96] For example the Human Rights Committee has recommended 'that no one is held for more than 48 hours without access to a lawyer',[97] whilst the UN Special Rapporteur on Torture has clarified that

> [l]egal provisions prescribing that a person shall be given access to a lawyer not later than 24 hours after he has been arrested usually function as an effective remedy against torture, provided compliance with such provisions is strictly monitored.[98]

182. Further, the right is to have access to a lawyer of one's choice, as recognised for instance in the UN Basic Principles on the Role of Lawyers.[99] For the right to counsel to be meaningful it must also comprise the right to timely, effective and confidentially communicate with counsel.

183. In the instant matter, the obligation to permit access to counsel or independent legal advice was breached, as detailed above. The African Commission is convinced that the victims were not given access during the critical early stage of detention, including interrogation sessions, when there is the greatest risk of torture and ill-treatment. The African Commission's view is that right of a detainee to have prompt recourse to a court is established as a matter of international law. It constitutes a vital aspect of the prevention and deterrence of torture and other ill-treatment.

184. In this regard it is worth mentioning that in the Robben Island Guidelines, the African Commission has recognised that the right to be brought promptly before a judicial authority constitutes an essential safeguard against torture and ill-treatment.[100] In its General Comment 2, the Committee Against Torture expressed the view that the obligation to take measures to ensure the effective prevention of torture implied a requirement that states should ensure

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96 See, eg, principle 17 of the UN Body of Principles: 'A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it.' See also principle 15 (excerpted in the Annex).

97 Concluding Observations of the Human Rights Committee: Israel (above, n 95), para 13.

98 'Question of the human rights of all persons subjected to any form of detention or imprisonment, in particular torture and other cruel, inhuman or degrading treatment or punishment. Report of the Special Rapporteur Mr P Kooijmans, pursuant to Commission on Human Rights resolution 1988/32', UN doc E/CN.4/ 1989/15, 50, para 241.

99 Principle 1, Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August - 7 September 1990, UN doc A/CONF.144/28/Rev.1 (1990) 118.

100 Robben Island Guidelines, para 27 (in relation to 'safeguards during the pre-trial process'); and see in general, as above, para 20.

> the availability to detainees and persons at risk of torture and ill-treatment of judicial and other remedies that will allow them to have their complaint promptly and impartially examined, to defend their rights, and to challenge the legality of their detention or treatment.[101]

185. This approach has been repeatedly endorsed by the General Assembly,[102] and finds further support in the jurisprudence of the Inter-American Court of Human Rights.[103]

186. As one of the inherent aspects of the protection of detainees from torture and ill-treatment, judicial oversight of detention applies at all times, including times of national emergency, as noted by the Inter-American Court:

> even in emergency situations, the writ of habeas corpus may not be suspended or rendered ineffective. … the immediate aim of this remedy is to bring the detainee before a judge, thus enabling the latter to verify whether the detainee is still alive and whether or not he or she has been subjected to torture or physical or psychological abuse. The importance of this remedy cannot be overstated, considering that the right to humane treatment recognized in Article 5 of the American Convention on Human Rights is one of the rights that may not be suspended under any circumstances.[104]

187. In this case the respondent states' obligation to bring the victims promptly to an independent judicial authority was breached. While they did appear before a prosecutor, the right guaranteed in law is to bring them before a judicial authority that is independent of the authorities detaining, interrogating and ultimately prosecuting them. They also had no meaningful opportunity to challenge the lawfulness of their detention, due to lack of access to a court and to lawyers. Article 3 of the Emergency Law 50/1982 as amended, stipulates that detainees or their representatives may appeal their arrest or detention orders within 30 days after the orders are issued. However, in practice detainees often have little access to the appeal provided for in law. The victims had no access to lawyers neither were they arraigned before a competent court during to properly remand them to custody

188. The respondent state, while arguing that the victims were allowed access to their families, failed to challenge in specific terms the allegations that they were refused access to medical care. The allegation of torture and more particularly the particulars of injuries sustained by the victims as contained in the Forensic Medical Reports were never challenged by the respondent state.

189. The respondent state has not refuted the allegations of torture or the harsh treatment to which the victims were subjected to. The

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101 Committee against Torture, General Comment 2 (above, n 24), para 13.

102 See, eg, principles 9 and 11(1) of the UN Body of Principles and GA Res. 61/153, 14 February 2007, para 11.

103 See, eg, *Habeas corpus* in emergency situations (arts 27(2) and 7(6) of the American Convention on Human Rights), advisory opinion *OC-8/87*, Inter-American Court of Human Rights, Series A, 8 (1987).

104 *Ibid*, para 12; see also above, para 35.

African Commission has in many of its decisions held that facts uncontested by the respondent state shall be considered as established.[105] The fact that the victims were subjected to repeated electric shocks, beatings, prolonged hanging, binding and blindfolding and denied access to medical care violates their physical and psychological integrity. There was also no evidence whatsoever pointing to violent action from the victims themselves nor has there been any reported escape attempt by the victims to warrant holding them in such degrading and inhuman manner.

190. Article 5 prohibits not only torture, but also cruel inhuman or degrading treatment. This includes not only actions which cause serious physical or psychological suffering, but which humiliate the individual or force him or her against his or her will or conscience. The African Commission therefore holds that the action of the respondent state constitutes a multiple violation of article 5 of the African Charter.

Alleged violations of articles 7 and 26

191. The complainants contend that the victims right to fair trial were violated in that; they were tried by a court that was not independent and impartial and whose decisions cannot be appealed; their right to a counsel was not fully respected; confessions made under torture or ill-treatment were used by the Court; and they were denied the right of appeal.

192. The essential question that must be asked here is whether the trial of the victims complied with the provisions of articles 7(1) and 26 of the African Charter.

193. Article 7 of the African Charter provides that:

> Every individual shall have the right to have his cause heard. This comprises:
>
> (a) The right to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by the conventions, laws, regulations, and customs in force;
>
> (b) The right to be presumed innocent until proven 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.

194. Article 26 on its part provides that:

> States parties to the present Charter shall have the duty to guarantee the independence of the courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.

[105] Communication 25/89, 47/90, 56/91, 100/93, *Free Legal Assistance Group and Others v Zaire* [(2000) AHRLR 74 (ACHPR 1995)].

195. A combined reading of articles 7 and 26 brings to the fore two core issues — having access to appropriate justice and the other relating to the independence of justice system. These two issues constitute the bedrock of a sound justice delivery system. The African Commission believes that the right to a fair trial is analogous with the concept of access to appropriate justice and requires that one's cause be heard by efficient and impartial courts.[106]

196. Article 7(1)(d) of the African Charter enshrines 'the right to be tried within a reasonable time by an impartial Court or tribunal.' The requirement of impartiality in article 7 is complemented by article 26 of the African Charter which imposes on states parties 'the duty to guarantee the independence of the Courts' in their respective territories.

197. These obligations are captured in the Commission's *Principles and Guidelines on Fair Trial* where the Commission has expounded on what should be required for an independent and impartial tribunal. Among other criteria, the *Principles and Guidelines on Fair Trial* state that:

- judicial bodies shall be established by law to have adjudicative functions to determine matters within their competence on the basis of the rule of law and in accordance with proceedings conducted in the prescribed manner;[107]
- there should not be any inappropriate or unwarranted interference with the judicial process nor shall decisions be subject to revision except through judicial review;[108]
- all judicial bodies shall be independent from the executive branch[109] and the government shall respect that independence;[110]
- the process of appointments to judicial bodies shall be transparent;[111]
- the judicial body shall decide matters before it without any restrictions, improper influence, inducements, pressure, threats or interference, direct or indirect, from any quarter or for any reason.[112]

198. Applying these fair trial principles to special tribunals, the African Commission has held that they violate article 7(1)(d) of the African Charter because their composition is at the discretion of the executive branch.

199. The victims were tried before the Supreme State Security Emergency Court, whose competence and procedures fall far short of the above standards. The Supreme State Security Emergency Court is

106 Communication 281/2003, *Wetsh'okonda Koso and Others v Democratic Republic of Congo* [(2008) AHRLR 93 (ACHPR 2008. See also communication 151/96, *Civil Liberties Organisation v Nigeria* [(2000) AHRLR 188 (ACHPR 1995)].

107 *Principles and Guidelines on Fair Trial,* sec A(4)(b).

108 As above, sec A(4)(f).

109 As above, sec A(4)(g).

110 As above, sec A(4)(a).

111 As above, sec A(4)(h).

112 As above, sec (A)(4)(e) and (g) and (A)(5)(a).

an exceptional court. It was established by the Emergency Law as a temporary court,[113] although, like the Emergency Law itself, it has been in force continually since 1981. The Emergency Law gives the Court the primary competence of ruling on crimes perpetrated in violation of decrees issued by the President of the Republic in application of the Emergency Law,[114] but the President of the Republic may also, at his discretion, refer any ordinary crime to the Supreme State Security Emergency Court.[115] According to Presidential Decree 1/1981 regarding the referral of some crimes to Emergency State Security Courts, all felonies and misdemeanours against the government's security or related to explosives shall be referred to the State Security Emergency Courts, established under the Emergency Law.

200. In view of the above, the African Commission is of the view that the degree of control which the President of the Republic exercises over the composition, conduct and outcome of proceedings before the State Security Court is antithetical to the notion of an independent and impartial judicial process. The law itself provides, for example, for the President to exercise the following powers:

> The President may suspend a case before it is submitted to Supreme State Security Emergency Court or order the temporary release of the accused person before referral of the case to the Supreme State Security Emergency Court.[116]
>
> Decisions of the Supreme State Security Emergency Court are final only when they're approved by the President of the Republic, and cannot thereafter be challenged before any other court in Egypt.[117]
>
> The President of the Republic may commute, change, suspend or cancel such decisions. He may also order the release of defendants[118] or order the retrial of the case before another court.[119]

201. It must be pointed out that Supreme State Security Emergence Court is not part of the regular criminal court structure in Egypt. Sentences passed by this Court can only be reviewed by the office responsible for ratifying its judgments, Office of the President of the Republic who is also the ratifying authority. The ratifying authority which is not a court of law, may mitigate the sentence or repeal it and, once the sentences are upheld the convicts may only petition the President for an amnesty or mitigation in accordance with the provisions of article 149 of the Constitution.

202. The respondent state, however, submitted that the State of Emergency Security Court which tried the accused persons is a prosecuting court with limited functions according to the law and the objective criteria. They further asserted that membership of this

[113] See art 3(b), Emergency Law.
[114] See above, art 7.
[115] See above, art 9.
[116] See above, art 13.
[117] See above, art 12.
[118] See above, art 14.
[119] See above, art 15.

Court comprises three experts judges who are members of the judiciary. They also state that the trials and procedures in this case and in stages and phases were carried out in public and in accordance with the law. It further argued that the criteria of fair trial adopted by the international agreements on human rights were observed, and therefore, it is obvious from the above and from the records of the proceedings of the court trials that two lawyers appeared during all the hearings together with the first and the second accused persons and four lawyers representing the third complainant.

203. From the submissions of the respondent state, the African Commission is of the view that the respondent state does not appreciate the importance of an independent tribunal, especially one that is responsible for trying victims charged with capital offences. The African Commission therefore reiterates that the essence of a higher tribunal is that, it affords the victims the opportunity to have their case re-examined on both law and facts by a judicial body. In this way the decision of the court below can be tested. The omission of the opportunity of such an appeal therefore greatly deprives the victims of due process.

204. In this regard the African Commission also wishes to make reference to the UN Basic Principle on the Independence of the Judiciary. Those principles provide that everyone shall have the right to be tried by the ordinary courts or tribunals using established procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals. Therefore, it is the view of the African Commission that a tribunal cannot be said to be independent when the implementation of its decision squarely vests on the executive branch of the government, in this case the head of state. This has completely defeated the criteria envisaged in a democratic state.

205. In *Civil Liberties Organisation and Others v Nigeria*,[120] the African Commission held that 'the foreclosure of any avenue of appeal to competent national organs in a criminal case attracting punishment as severe as the death penalty clearly violates article 7(1)(a)'. The African Commission agrees with the complainants that the fact that the decisions of the Supreme State Security Emergency Courts are not subject to appeal constitutes a *de jure* procedural irregularity and manifestly violates article 7(1)(a) of the African Charter.

206. Therefore, the African Commission notes that in all cases, the independence of a court must be judged in relation to the degree of independence of the judiciary *vis-à-vis* the executive. This implies

[120] Communication 218/98, *Civil Liberties Organisation and Others v Nigeria* [(2000) AHRLR 188 (ACHPR 1995)], para 33.

the consideration of the manner in which its members are appointed, the duration of their mandate, the existence of protection against external pressures and the issue of real or perceived independence: as the saying goes 'justice must not only be done: it must be seen to be done'.

207. The African Commission is of the view that the degree of control which the President exercises over the composition, conduct and outcome of proceedings before the State Security Court does not guarantee an independent and impartial judicial process. In its view that amounts to executive interference in the judicial process defeating the intent and purpose of article 7(1)(d). The African Commission is therefore of the view that the verdict of the Supreme State Security Emergency Court did not offer guarantees of independence, impartiality and equity and therefore constitutes a violation of the article 7 of the African Charter.[121]

208. In any event, it was the responsibility of the respondent state to adduce sufficient evidence to rebut the arguments that the court in its composition was independent and was capable of giving an impartial ruling, and this the respondent state has not done to the satisfaction of the African Commission. In the absence of such rebuttal or facts that could convince the African Commission of the opposite view, it cannot invalidate the submission by the complainants regarding the inexistence of a fair justice system.

209. The African Commission will look into the issue of the right to counsel of one's choice. This right as enshrined in article 7(1)(c) of the African Charter[122] is an important right which underpins several others, such as freedom from ill-treatment and the right to prepare a defence.[123] In the Principles and Guidelines on Fair Trial, the African Commission considered that in proceedings relating to criminal charges, legal representation is the 'best means of legal defence against infringements of human rights and fundamental freedoms'.[124] Such right to counsel applies during all stages of any criminal prosecution including preliminary investigations in which evidence is taken, periods of administrative detention, trial and appeal proceedings. Article 7 is explicit that the right is to counsel of the detainee or defendant's choice. It comprises the right to timely and

[121] Resolution ACHPR/Res. 41(XXVI) 99 on the Right to a Fair Trial and Legal Aid in Africa.

[122] Art 7(1) of the Charter guarantees 'the right to defence, including the right to be defended by counsel of his choice.'

[123] *Amnesty International and Others v Sudan*, para 64.

[124] *Principles and Guidelines on Fair Trial* sec N(2)(a).

confidential consultations with that counsel.[125] Where the accused either had no access, or only restricted or delayed access, to lawyers, the African Commission has found a violation of article 7(1)(c).[126]

210. In the instant case, none of the victims had lawyers present at the critical early interrogation stage. It is submitted by the complainants and not refuted by the respondent state that on 23 November 2004, a group of human rights lawyers submitted a specific request to the Public Prosecutor's Office (registered under number 16332) to legally represent a number of individuals, including the first victim, whose names had appeared in the local press as chief suspects in the Taba bombings' investigation. The lawyers received no response. The first victim was denied representation at interrogations for a period of five months until 24 March 2005. The second and third victims had no access to counsel until 26 March 2006, when they first appeared in court.

211. Moreover, even at the beginning of the trial, all three were denied the opportunity to consult with counsel privately, in order to prepare their defence. The lawyer client communication, as alleged by the complainants and not refuted by the respondents, took place through bars of the Courtroom, in the presence of and within earshot security officials. The African Commission therefore finds that the complete denial of access to counsel before their appearance in court and the restrictive access thereafter violated the right to counsel and the right to a defence (see below) under article 7(1)(c).[127]

212. Furthermore, in interpreting article 7 of the African Charter, the African Commission has stated that

> any confession or other evidence obtained by any form of coercion or force may not be admitted as evidence or considered as probative of any fact at trial or in sentencing.[128]

In *Malawi African Association v Mauritania,* this Commission has held that 'any confession or admission obtained during *incommunicado* detention shall be considered to have been obtained by coercion.'[129]

213. These principles correspond with other international human rights norms, addressed in relation to torture and ill-treatment,

[125] As noted by the Human Rights Committee in relation to the right to a lawyer under the ICCPR '[c]ounsel should be able to meet their clients in private and to communicate with the accused in conditions that fully respect the confidentiality of their communications. Furthermore, lawyers should be able to advise and to represent persons charged with a criminal offence in accordance with generally recognised professional ethics without restrictions, influence, pressure or undue interference from any quarter' (Human Rights Committee, General Comment 32 (above, n 60), para 34.

[126] See *Malawi African Association and Others v Mauritania*, [(2000) AHRLR 149 (ACHPR 2000)].

[127] *Malawi African Association v Mauritania* [(2000) AHRLR 149 (ACHPR 2000)](above, n 40), para 96.

[128] *Principles and Guidelines on Fair Trial, s*ec N(6)(d)(1).

[129] As above sec N(6)(d)(1)

under which evidence and confessions obtained through torture or cruel, inhuman and degrading treatment, cannot be used in judicial proceedings apart from for the purpose of prosecuting the act of torture or ill-treatment itself.[130]

214. The African Commission makes reference to article 15 of the Convention against Torture (CAT). It also notes that it has been accepted as inherent in international fair trial provisions comparable to article 7 of the African Charter. The European Court of Human Rights for example has held that

> the use of evidence obtained in violation of article 3 [prohibition against torture or ill-treatment] in criminal proceedings raises serious issues as to the fairness of such proceedings. Incriminating evidence – whether in the form of a confession or real evidence – obtained as a result of acts of violence or brutality or other forms of treatment which can be characterized as torture should never be relied on as proof of the victim's guilt, irrespective of its probative value.[131]

215. It notes that the principle can also be found in the Egyptian Constitution of 1971 which stipulates that 'if a confession is proved to have been made by a person under any … forms of duress or coercion, it shall be considered invalid and futile'[132]

216. Thus, where an individual alleges that a confession has been obtained by torture or ill-treatment, the burden of proof then lies in this case on the state to demonstrate that the confession in question was freely made. Although the Committee against Torture has affirmed in a number of cases that, 'it is for the author to demonstrate that her allegations are well founded',[133] it nevertheless stressed in *PE v France* that:

> In the light of the allegations that the statements at issue, which constituted, at least in part, the basis for the additional extradition request, were obtained as a result of torture, the State party had the obligation to ascertain the veracity of such allegations.[134]

217. In a similar vein, the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, reviewing two national decisions that adopted a somewhat different approach

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130 See above, note and accompanying text and, in general, sec III.A.2 (b)(iv).

131 *Harutyunyan v Armenia,* ECtHR para 63.

132 See art 42.

133 *PE v France* para 6(3); see also *GK v Switzerland,* communication 219/2002), Committee against Torture, decision of 7 May 2003, UN doc CAT/C/30/D/219/2002, para 6(11).

134 *PE v France* para 6(2); see also the slightly different formulation used by the Committee in *GK v Switzerland* para 6(10) 'the broad scope of the prohibition in article 15, proscribing the invocation of any statement which is established to have been made as a result of torture as evidence 'in any proceedings', is a function of the absolute nature of the prohibition of torture and implies, consequently, an obligation for each State party to ascertain whether or not statements admitted as evidence in any proceedings for which it has jurisdiction, including extradition proceedings, have been made as a result of torture.'

to the standard of proof question,[135] noted as follows:

> the applicant is only required to demonstrate that his or her allegations of torture are well founded. This means that the burden of proof to ascertain whether or not statements invoked as evidence in any proceedings, including extradition proceedings, have been made as a result of torture shifts to the state.[136]

218. Accordingly, once a victim raises doubt as to whether particular evidence has been procured by torture or ill-treatment, the evidence in question should not be admissible, unless the state is able to show that there is no risk of torture or ill-treatment. Moreover, where a confession is obtained in the absence of certain procedural guarantees against such abuse, for example during *incommunicado* detention, it should not be admitted as evidence.

219. The victims in this case all raised allegations of torture and ill-treatment. These allegations are at least consistent with the circumstances of their case, such as the *incommunicado* nature of their detention and the reports of the FMA which, at a minimum, indicate a risk of ill-treatment. Despite these concerns, the 'confessions' were admitted as evidence and appear to have formed at least part of the basis of their convictions and the imposition of the death penalty. The reliance on such evidence violates article 7 of the Charter.

220. The African Commission will now briefly address the matter of appeal. In this regard, the African Commission notes that article 12 of the Egyptian Emergency Law stipulates that 'It is not allowed in any form to appeal the decisions pronounced by State Security Courts.' This law, and its application in practice, violate article 7(1)(a) of the Charter, which provides for

> the right to an appeal to competent national organs against acts violating the fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force.

221. According to the Commission's Principles and Guidelines on Fair Trial, the right to appeal should be guaranteed in all states parties and should provide 'a genuine and timely review of the case, including the facts and the law'.[137] The Commission has noted that states parties should take steps to make appeals mandatory in death penalty cases, confirming the heightened importance of fair trial guarantees where life is at stake.[138]

222. The importance of appeal rights is also reflected in the Commission's jurisprudence. In *Law Office of Ghazi Suleiman v Sudan*, the Commission held that 'the fact that the decisions of the

[135] *Hanseatisches Oberlandesgericht (Hanseatic Court of Appeals, Criminal Division),* Hamburg; decision of 14 June 2005, NJW 2005, 2326 and *A and Others v Secretary of State for the Home Department* [2005] UKHL 71.

[136] Report of the Special Rapporteur on torture, and other cruel, inhuman or degrading treatment or punishment; UN doc A/61/259 (2006), Annex, para 63.

[137] See Principles and Guidelines on Fair Trial sec N(10)(a)(1).

[138] *Ibid.*

military Court [was] not subject to appeal … constitute[d] a *de jure* procedural irregularity.'[139] Concerning the right to appeal in death penalty cases, the Commission found that 'the foreclosure of any avenue of appeal to competent national organs in a criminal case attracting punishment as severe as the death penalty clearly violates [article 7(1)(a) of the Charter]'.[140]

223. By denying the victims the right to appeal the decision of the Supreme State Security Emergency Court, the Arab Republic of Egypt has violated article 7(1)(a) of the African Charter. It should be noted that the imposition of the death penalty is not *per se* unlawful under the Charter or broader international human rights law.

224. The African Commission therefore concludes that the victims' rights under article 7(a), (b and (c) of the African Charter including their right to appeal, were violated.

225. The African Commission will now analyse the submissions of the parties on article 4 of the Charter.

226. The complainants aver that the imposition of the death penalty on the victims by a court, whose composition is illegal and unconstitutional, such as the Supreme State Security Emergency Court, violates the victims' right to life and would amount to an arbitrary deprivation of life.

227. The respondent state argues that trial as well as procedures adopted in this case satisfied the requirement of fair trial as guaranteed by international norms and standard. They stated that the trials were carried out in public and in accordance with the assurances provided by the law. They also state that the victims were represented by lawyers of their choice during trial.

228. Article 4 of the African Charter provides that 'human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one shall be arbitrary deprived of this right'.

229. The victims were charged, *inter alia,* under article 86(b)(ii) and (iii) of the Egyptian Penal Code. This law provides that the punishment for the crimes specified in those provisions is death penalty where 'the action of the offender leads to the death of the victim of the crime'[141] or 'the crime which occurred was the object of the efforts or intelligence /contacts or involvement in committing it.'[142]

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[139] Communication 222/98 and 229/99, *Law Office of Ghazi Suleiman v Sudan*, [(2002) AHRLR 25 (ACHPR 2002)], para 53; see also para 65.

[140] Communication 218/98, *Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v Nigeria* [(2001) AHRLR 75 (ACHPR 2001)], para 33. See also *ibid*, para 34.

[141] Art 86 b(ii)(iii) of the Penal Code added by Law 97 of 1992 on counter-terrorism).

[142] As above.

230. The above law imposes a penalty on a particular crime in specified circumstances but did not provide an avenue for a competent judiciary to evaluate the appropriate penalty, in light of all of the circumstances of the case. The penalty is effectively mandated by law for certain categories of offences, with the President empowered to decide not to apply that sentence if he so decides. This is at odds with the requirements of right to life, as reflected in international legal practice.

231. The African Commission in the case of *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria*[143] took the view that the execution and implementation of a death sentence emanating from a trial which did not conform to article 7 of the African Charter will amount to an arbitrary deprivation of life. Having held that the trial of the applicants offended article 7 of the African Charter, it follows that any implementation of the death sentence imposed on the applicants by the Supreme State Security Emergency Courts will therefore amount to an arbitrary deprivation of life.

232. However after careful consideration of articles 7 and 26 and the wordings of article 4, the African Commission is of the view that article 4 of the Charter has not been violated. The victims are still under the custody of the respondent state, through a process that denied them due process and are not yet executed.

233. For these reasons, the African Commission holds as follows:

(a) That the respondent state — Republic of Egypt has violated the provisions of articles 5, 7(1)(a), (d) and 26 of the African Charter;

(b) that there has been no violation of article 4 of the African Charter;

The African Commission therefore calls on the respondent state;

(a) Not to implement the death sentences;

(b) Calls on the respondent state to adequately compensate the victims in line with international standard;

(c) Reform the composition of the State Security Emergency Courts and ensure their independence;

(d) Take measures to ensure that its law enforcement organs particularly the police respect the rights of suspects detained in line with article 5 of the Charter;

(e) Calls on the respondent state to harmonize the State Security Emergency Laws with a view to bringing it in conformity with the Charter and other international legislation and regional norms and standards;

(f) Calls on the respondent state to release the victims;

(g) Calls on the respondent state to submit the African Commission within 180 days from the date of receipt of this decision (in line with rule 112(2) of the African Commission's Rules of Procedure) on the measures taken to give effect to these recommendations.

[143] Communication 137/94, 139/94, 154/96 and 161/97 [(2000) AHRLR 212 (ACHPR 1998)], para 103.

Egyptian Initiative for Personal Rights and Interights v Egypt II

(2011) AHRLR 90 (ACHPR 2011)

Communication 323/06, *Egyptian Initiative for Personal Rights and Interights v Egypt*

Decided at the 10th Extraordinary Session, 12 - 16 December 2011

Gender-based violence against women attending demonstration

Admissibility (exhaustion of local remedies, decision not to prosecute, 65)
Equality, non-discrimination (discrimination against women, 137-139; verbal assault, 143; gender based violence, 144, 153, 154, 165;
State responsibility (duty to investigate, 155, 163, 164, 203, 206, 230, 231, 233-235; responsibility for non-state actors, 156, 166; equal protection of the law, 179)
Interpretation (international law, 192)
Cruel, inhuman or degrading treatment (physical and emotional trauma, 201, sexual molestation, 202)
Fair trial (appeal, 219-221)
Expression (journalists, 254)
Health (progressive realisation, 264)

Summary of the complaint

1. This communication is brought by the Egyptian Initiative for Personal Rights (EIPR) and Interights (the complainants) on behalf of Nawal 'Ali Mohamed Ahmed (the first victim), 'Abir Al-'Askari (the second victim), Shaimaa Abou Al-Kheir (the third victim) and Iman Taha Kamel (the fourth victim).

2. The respondent state is the Arab Republic of Egypt (Egypt); a state party to the African Charter on Human and Peoples' Rights (the African Charter).[1]

3. The complainants submit that on 25 May 2005, the Egyptian Movement for Change (*Kefaya*) organised a demonstration in front of *Saad Zaghloul* Mausoleum with respect to the referendum aimed at amending article 76 of the Egyptian Constitution, allowing multi-

[1] Egypt ratified the African Charter on Human and Peoples' Rights on 20 March 1984, and is therefore a state party.

candidate presidential elections. They submit that riot police surrounded the small number of protesters (around fifty) and several journalists reporting the events, and at about 12:00 noon, while public buses were transporting young supporters of President Mubarak and his party called the National Democratic Party (NDP), violence broke out as NDP supporters attacked the supporters of *Kefaya*. The complainants allege that riot police reportedly did not intervene.

4. According to the complainants, the protesters and the journalists covering the demonstration reconvened in front of the Press Syndicate at around 2:00 pm where they were met by a large group of riot police and NDP supporters. They allege that further incidents of insults, violence, intimidation and sexual harassment occurred in the presence of high ranking officers of the Ministry of Interior (MoI) and the riot police.

5. The complainants state that the first victim is a female journalist previously employed at *Al Gil* newspaper, in Cairo. They state that she was not reporting on the events in question or attending the protest action, but was rather proceeding to the Press Syndicate in order to attend an English course. The complainants allege that she was however, attacked by a group of youth supporters of President Mubarak and the NDP in response to an order from a police officer on the scene.

6. The complainants allege that, the first victim was pushed to the ground, her clothes torn, her private parts fondled, and her bag and documents seized from her. According to the complainants, she recognised members of the NDP as her assailants. They allege that the police officers on the scene failed to intervene, assist or prevent the assaults from taking place.

7. The complainants further state that, she was then ordered by the Chief of the MoI Greater Cairo Intelligence Unit, Ismai'l Al-Sha'ir, to leave the scene, and that she was unable to reclaim her alleged stolen belongings.

8. The complainants state that the first victim was attended to at the Monira Hospital on 25 May 2005, where a medical report indicated one large (10cm) scar, several smaller bruises on her chest, and visible scratches on her legs and feet. It is further submitted by the complainants that investigators refused to record the statements made by eyewitness when she reported the incident on the same day. They also state that the incident has left her emotionally traumatised as a result of the sexual violations and assaults she incurred.

9. The complainants also allege that the first victim received threats from the State Security Intelligence (SSI) officers to withdraw her complaint. They allege that her refusal to do so led to her

dismissal from her job at *Al Gil* newspaper and divorce from her husband.

10. The complainants state that the second victim, a female journalist at *Al Doustour* newspaper, in Cairo, was covering the events in her capacity as a journalist. They allege that she was hit in the face and stomach during the demonstration whilst attempting to take photographs on the scene.

11. The complainants allege that when the second victim tried to escape the scene, by getting into a taxi with the third victim, the Chief of the Intelligence Unit of the Boulaq Abou Al-'Ela police station stopped the taxi and an identified SSI officer forcefully dragged her out of the taxi, whilst hitting and kicking her. The second victim claims, according to the complainants, that the SSI officer ordered a group of female supporters of the NDP to tear off her clothes and hit her. She also alleges that she was later dragged to the main street (Ramsis Street) where security and police officers continued to hit, sexually assault, insult, and slap her face. According to the complainants, the second victim was also allegedly called abusive names such as 'whore' and 'slut'.

12. The complainants state that, as a result of the above mentioned assaults, the second victim was attended at the Hilal Hospital on 31 May 2005 and a medical report confirmed bruises on her left shoulder, left arm and back. They also submit that she is emotionally traumatised as a result of the sexual violations and assaults on her person.

13. The complainants allege that the second victim lodged a complaint with the Public Prosecution Office (PPO) but investigators refused to take statements from eyewitnesses. They allege that she received anonymous and indirect threats from neighbours and unidentified men to withdraw her complaint.

14. The complainants further submit that the third victim, a female journalist at *Al Doustour* newspaper, in Cairo, went to the Press Syndicate in both her capacity as a journalist covering the events and as a citizen exercising her right to protest. They allege that, she tried to escape the scene by getting into a taxi with the second victim when the Chief of the Intelligence Unit of the Boulaq Abou Al-'Ela police station assaulted her and ordered a group of female supporters of the NDP to physically attack and expose her body.

15. It is alleged by the complainants that the third victim was beaten, bitten, her hair pulled and her clothes torn, and was later rescued by people emerging from the Press Syndicate building who took her inside for protection. They add that she is emotionally traumatised and depressed from the assaults.

16. It is also alleged by the complainants that the third victim lodged a complaint where statements of eyewitnesses were ignored and that she received threatening calls at home and at work to withdraw the complaint.

17. The complainants allege that the fourth victim, a female journalist at *Nahdat Misr* newspaper, in Cairo, and a member of the *Kefaya* movement, was also attending the demonstration. They allege that she was attacked by a group of unidentified men who pushed her against the wall and hit her in her lower abdomen several times until she collapsed on the ground. They also allege that she was kicked on her pubic area by one of the men, while the others continued to beat, and tried to tear off her clothes.

18. It is alleged by the complainants that while the above mentioned assaults were taking place, law enforcement officers on the scene refused to come to her assistance, allow her seek medical assistance, or have access to the Press Syndicate building for protection.

19. The complainants allege that, the fourth victim stayed for two days in the Marg Hospital undergoing treatment for bruises on her right hip, right knee and upper pelvic area, and that a medical report was issued on 31 May 2005. They further allege that she is traumatised by the assaults that have had a detrimental effect on her mental health.

20. The complainants also submit that the fourth victim lodged a complaint on 5 June 2005 at the *Qasr Al-Nil* PPO and received threats from a group of unidentified men to withdraw the complaint.

21. According to the complainants, the victims' cases were classified as misdemeanors in violation of article 242 of the Penal Code. They submit that an investigation was instituted on 25 May 2005, and was completed on 27 December 2005 when the PPO announced that a decision not to prosecute had been taken due to the inability to identify the perpetrators.

22. The complainants submit that the victims appealed the decision of the PPO not to prosecute to the Appeal Misdemeanors Chamber of the First Instance Court of Southern Cairo (the Appeal Chamber). However, on 1 April 2006, the Appeal Chamber dismissed the case. They state that though the Appeal Chamber's decision found that the assaults had taken place on the victims, it was impossible to identify the perpetrators.

Articles alleged to have been violated

23. The complainants state that the aforementioned acts and omissions constitute a violation of articles 1, 2, 3, 5, 7(1)(a), 9(2), 16, 18(3) and 26 of the African Charter by the respondent state.

Prayers

24. The complainants state that, in requesting the African Commission on Human and Peoples' Rights (the African Commission) to examine their case, the victims seek:

(a) Recognition by the African Commission of violations of these articles of the African Charter;

(b) Renewed investigations and effective protection and punishment of the perpetrators of the violations;

(c) Paying compensation to the victims: In amount of EP57,000 for each victim;

(d) Enactment of legislation aimed at effecting the state's positive responsibility in defending and protecting human rights;

(e) Amendment of Police Law 109 of 1971 to impose penalties on law enforcement officers for violating human rights and for failing to prevent human rights violations occurring in their presence upon the establishment of malicious intent; and

(f) Amendment to article 268 of the Egyptian Penal Code to expressly exclude intention as a requirement of offence of assault on honour.

Procedure

25. The present communication was received by the Secretariat of the African Commission on Human and Peoples' Rights (the Secretariat) on 18 May 2006.

26. The Secretariat acknowledged receipt of the communication to the complainant by letter of 20 May 2006, and informed them that the communication has been registered as communication 323/2006 — *Egyptian Initiative for Personal Rights and Interights v Egypt*.

27. At its 39th ordinary session, held from 11 to 25 May 2006 in Banjul, The Gambia, the African Commission considered the communication and decided to be seized thereof.

28. On 14 August 2006, the Secretariat received the arguments on admissibility from both parties.

29. By *note verbale*, dated 16 August 2006, the Secretariat forwarded the complainants' submissions on admissibility to the respondent state and sent the latter's submissions in Arabic for translation.

30. At the African Commission's 40th ordinary session, held from 15 to 29 November 2006, in Banjul, The Gambia, both parties made oral submissions on admissibility.

31. At the 40th ordinary session of the African Commission, held from 15 to 29 November 2006, in Banjul, The Gambia, the African Commission declared the communication admissible, and both parties were informed accordingly.

32. By letter dated 15 February 2007, the complainants requested an extension of time to submit on the merits of the communication, and the request was granted.

33. By *note verbale* dated 15 March 2007, the Embassy of Egypt also requested an extension of time to submit on the merits of the communication. The request was granted by *note verbale* dated 19 March 2007.

34. On 16 March 2007, the complainants transmitted their submission on the merits of the communication to the Secretariat, and by letter dated 22 March 2007, the Secretariat acknowledged receipt.

35. By *note verbale*, dated 22 March 2007, the Secretariat forwarded the respondent state's submissions on the merits to the complainants.

36. By letter, dated 16 July 2007, a copy of the additional submissions on the merits of the respondent state was forwarded to the complainants.

37. During the African Commission's 42nd ordinary session, the respondent state submitted another version of their arguments on the merits, with the reason that the former had translation flaws. A copy of the revised submission was forwarded to the complainants.

38. During the African Commission's 44th ordinary session, the respondent state made additional submissions on the merits, and by *note verbale*, dated 11 December 2008, forwarded them to the complainants.

39. On 19 March 2009, the Secretariat received additional submissions from the complainants, and by letter, dated 25 March 2009, forwarded the submissions to the respondent state.

40. On 22 April 2009, the Secretariat received additional submissions from the respondent state in Arabic, and by *note verbale*, dated 27 April 2009, forwarded the submissions to the complainants.

41. The decision on the merits of the communication was deferred during the 45th, 46th, 47th, 48th, 49th, and 50th ordinary sessions of the African Commission respectively for various reasons, including time constraints.

42. During its 10th extra-ordinary session, the African Commission took a decision on the merits of the communication and the parties were accordingly notified.

The law on admissibility

The complainants' submissions on admissibility

43. The complainants submit that all the criteria of article 56 of the African Charter are satisfied and that the communication is admissible.

44. The complainants submit that they have complied with article 56(1) of the African Charter because the victims in the communication have been identified and their relevant details have been provided to the African Commission, along with the details of those individuals and organisations representing them.

45. The complainants also submit that they comply with article 56(2) of the African Charter because the communication is compatible with the Constitutive Act of the African Union (AU) and with the African Charter.

46. Concerning article 56(3) of the African Charter, the complainants submit that the communication is presented in polite and respectful language.

47. The complainants submit further that the communication complies with article 56(4) of the African Charter because it is based on information provided by the victims and not by media reports.

48. Concerning article 56(5) of the African Charter, the complainants submit that investigations were not properly undertaken by the police which led to a decision not to prosecute from the Cairo PPO on 17 December 2005. The complainants aver that the victims reported the alleged incidences to the police after the alleged assault on the 25 May 2005, but the police was unwilling to interview potential witnesses, take down statements, or assist them in any way.[2]

49. The complainants submit that three of the four victims appealed to the Cairo PPO to prosecute the perpetrators, but the Appeals Court rejected the appeals on 1 February 2006. They also submit that the fourth victim lost her right of appeal for failing to lodge it within 10 days due to pressure and threats that she allegedly received. They state that all the victims have been left with no further effective or available remedy.

50. The complainants submit that available remedies in Egyptian law are criminal or civil. They aver that none of the victims pursued solely civil remedies, and two of them asked for temporary civil compensation as part of their criminal proceedings. They also submit that pursuing separate civil action is not necessary and that criminal remedy is the most appropriate for sexual violations and physical assaults allegations.

51. The complainants refer to *Jawara v The Gambia*, (the *Jawara* case)[3] to sustain that the rationale behind article 56(5) of the African Charter is to provide the state concerned with an opportunity to remedy alleged violations through its domestic legal system, and that

2 Complainants submission on the admissibility brief, para 18.

3 Communications 147/95 and 149/96, *Sir Dawda K Jawara v The Gambia* [(2000) AHRLR 107 (ACHPR 2000)] (2000) ACHPR.

in the current case the respondent state has been given an opportunity to investigate, prosecute and remedy the alleged violations.

52. They also refer to *Amnesty International and Others v Sudan*[4] to argue that in cases where it is 'impractical or undesirable' for the complainants or victims to seize the domestic courts, the requirement of local remedies should not be applied literally, and that domestic remedies must be effective and not subordinated to the discretionary power of public authorities.

53. Furthermore, the complainants refer to similar requirements of exhaustion of local remedies in the context of the European Court of Human Rights (the European Court), where the exhaustion of all possible remedies within the criminal system does not require making another attempt to obtain redress by a civil action for damages.[5]

The respondent state's submissions on admissibility

54. In its submission, the respondent state argues that the communication is inadmissible before the African Commission for two reasons. Firstly, that the complainants have not exhausted local remedies, and secondly, that there has been no violation of the provisions of the African Charter.

55. With regards to the exhaustion of local remedies, the respondent state submits that the PPO issued a decision on 25 December 2005 ordering the police to stop the inquiry because there was no ground for criminal proceedings. It argues that this decision was justified by three reasons: firstly, the culprits had not been identified, secondly, the police officers accused of beating the alleged victims were not on the scene at the time, and thirdly the medical reports submitted by the victims were contradictory and could not lead to the identification of the culprits.

56. The respondent state argues that the decision by the PPO was temporary and that the case could be re-opened if new evidences emerge to the effect that the culprits have been identified and the police would be asked to continue with their inquiry. The respondent state submits that procedures could still be pursued and criminal proceedings could be initiated if new evidences arise.

57. The respondent state submits that:

- Investigations were carried following the complaints lodged on 25 May 2005;

4 Communication 48/90, 50/91, 89/93, *Amnesty International, Comité Loosli Bachelard, Lawyers' Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v Sudan* [(2000) AHRLR 297 (ACHPR 1999)](1999) ACHPR.

5 The complainants refer to the judgement of the European Court of Human Rights, *Assenov and Others v Bulgaria* (1998), para 86.

- Witnesses as well as police officers were interrogated;
- Videotapes and CDs submitted by the complainants were viewed; and
- Submitted medical reports were examined.

58. The respondent state submits that the investigations have not established an act of negligence, inaction or incitement from security officers in the present matter.

59. The respondent state explains that the PPO decided that, in reference to the alleged sexual assaults, there was no ground for the crime of violation of honour, but that evidence of severe beating, in accordance with the Penal Code, was established.

The African Commission's analysis on admissibility

60. The only legal issue at stake in the present case is the exhaustion of local remedies. With respect to the respondent states' submission that there was no violation of provisions of the African Charter, the African Commission notes that those arguments cannot be examined at the admissibility stage. Determination of violation(s) to the African Charter is made during the merits stage of a communication once that communication has been declared admissible by the African Commission.

61. The African Commission will therefore only examine article 56(5) in relation to the present communication.

62. Article 56(5) of the African Charter requires that communications should be sent to the African Commission after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged. A complaint pending before the local courts means remedies have not been exhausted. In the present case, the complainants argue that they have exhausted all the local courts and their case is not pending before them. However, according to the respondent state, police inquiries have been temporarily stopped and could be reopened when there is new information and evidences.

63. The African Commission has inferred that the initial *onus* to demonstrate that local remedies have been exhausted is on a complainant. Once a complainant shows that there are no local remedies available in the respondent state, the burden then falls on the respondent state to prove that an effective remedy is available and has not been exhausted.

64. In *Rencontre Africaine pour la Défense des Droits de l'Homme v Zambia*, the African Commission examined the respective obligation of the parties in terms of exhaustion of local remedies and declared: 'When the Zambian Government argues that the communication must be declared inadmissible because the local remedies have not been exhausted, the government then has the burden of demonstrating the

existence of such remedies.'[6] Therefore, in the present case, the respondent state must prove to the African Commission that judicial procedures to remedy the violations are still being pursued, otherwise its submission could be considered a mere statement.

65. The African Commission notes that, pursuing exhaustion of local remedy requires the availability of effective remedies. In the instant matter, the decision of the PPO not to prosecute, as well as the confirmation of that decision following the victims' appeal, is sufficient evidence that the conditions for the exhaustion of local remedies have been met. The victims were left with no other remedy because the inquiry procedures have been stopped.

66. It is the African Commission's view that the respondent state's submission on the temporary halt of inquiry procedures cannot justify the reason why victims should be left without any recourse until a potential reopening of a matter, following new evidence. The African Commission notes that 18 months have passed since the alleged violations occurred and probabilities for the inquiry to be re-opened are slim since evidence has already been gathered and examined. The respondent state, also did not supply the African Commission with any evidence that it has instituted actions to find 'the new evidence'.

67. In view of the above, the African Commission declares the communication admissible.

The merits

The complainants' submissions on the merits

68. The complainants state that the respondent state has violated the rights enshrined in the African Charter in several ways. They submit that the respondent state failed in its obligation to protect the victims from sexual violence.

Alleged violation of article 1

69. The complainants state that the positive obligations imposed under article 1 of the African Charter are manifested in two ways, including, the duty to prevent others from violating the rights protected, and the duty to protect. They argue that the duty to protect has been elaborated in detail by the European Court, which found that states must not only respect the rights and freedoms that the European Convention on Human Rights (the European Convention) embodies, but that 'In order to secure the enjoyment of those rights and freedoms, those authorities must prevent or remedy any breach

[6] Communication 71/92, *Rencontre Africaine pour la Défense des Droits de l'Homme v Zambia* [(2000) AHRLR 297 (ACHPR 1999)], para 13.

at subordinate levels.'[7]

70. The complainants submit that, in line with the consistent approach of other regional human rights bodies, the African Commission has found that positive obligations arise not only in respect of violations by state actors, but also by private individuals. They refer to *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (the *SERAC* case)[8] where it was held that governments have a duty to protect their citizens, not only through appropriate legislation and effective enforcement, but also by protecting them from damaging acts that may be perpetrated by private parties. This duty calls for positive action on the part of governments in fulfilling their obligations under international human rights instruments.

71. The complainants submit that the second positive duty is to investigate when a violation has occurred. They argue that the respondent state has an obligation to effectively investigate every situation involving the violation of rights. They refer to the Inter-American Court on Human Rights (the Inter-American Court) which held that if the state apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such right is not restored as soon as possible, the state has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction.

72. According to the complainants, the same is true when the state allows private persons or groups to act freely and with impunity to the detriment of the rights recognised by the African Charter. The complainants argue that where serious violations have taken place, it is the obligation of the state to ensure that criminal investigations are undertaken and effective prosecutions pursued. The complainants further note that the European Court in *MC v Bulgaria* held that the investigation must be independent, thorough and effective, and that access to a judicial remedy must be available and the state may be obliged to provide compensation.[9]

73. The complainants aver that, a state's compliance to its positive obligations towards its citizens is assessed by the due diligence test. They again make reference to the *SERAC* case where the African Commission recognised due diligence standard as a test for determining compliance by states in protecting the rights of citizens from being violated.

74. The complainants submit that the respondent state failed in its positive obligations to prevent and investigate the violations, which

7 HJ Steiner & P Alston (2000) *International human rights in context: Law, politics, morals* (2nd Edition Oxford University Press) at 797.

8 Communication 155/96, *Social and Economic Rights Action Centre and Another v Nigeria* (*SERAC* Case) [(2001) AHRLR 60 (ACHPR 2001)](2001) ACHPR.

9 *MC v Bulgaria* [2003] ECHR.

is a violation of article 1 of the African Charter. They cite the African Commission's decision in the *Legal Resource Foundation v Zambia*,[10] where it held that 'article 1 of the African Charter requires that the state not only recognise rights, but requires that they shall undertake … measures to give effect to them.'

Alleged violation of articles 2 and 3

75. The complainants argue that, according to the victims, they were discriminated against in the enjoyment of their rights in violation of the African Charter on the basis of their sex and political opinion. They note that the African Commission in *Legal Resource Foundation v Zambia* noted that, 'the right to equality' is very important.[11]

76. They submit further that, in *Association Mauritanienne des droits de l'homme v Mauritania*,[12] the African Commission emphasised that:

> Article 2 of the African Charter lays down principles that is essential to the spirit of this Convention, one of whose goals is the elimination of all forms of discrimination and to ensure equality among all human beings.[13]

77. The complainants further allege that, the main reason why the victims were assaulted by the authorities is due to the fact that they hold particular political views, are women and journalists. According to the complainants, this is evidenced by the sexual nature of the violations.

Alleged violation of article 5

78. The complainants state that the treatment received by the victims on 25 May 2005 amounted to a violation of their dignity and to inhuman and degrading treatment and that the assaults were severe and gravely humiliating in violation of article 5 of the African Charter. They cite the case of *Purohit and Moore v The Gambia*,[14] where the African Commission ascertained the test for violation of human dignity.

79. They also refer to a Canadian Supreme Court (CSC) judgement in *R v Ewanchuk*,[15] where a link was made between the right to dignity and the right to equality. The CSC established that violence against women is as much a matter of equality as it is an offence

[10] Communication 211/98, *Legal Resources Foundation v Zambia* [(2001) AHRLR 84 (ACHPR 2001)] (2001) ACHPR.

[11] As above, para 63.

[12] Communication 210/98, *Association Mauritanienne des droits de l'homme v Mauritania* [(2000) AHRLR 149 (ACHPR 2000)] (2000) ACHPR.

[13] As above, para 131.

[14] Communication 241/01, *Purohit and Moore v The Gambia* [(2003) AHRLR 96 (ACHPR 2003] (2003) ACHPR.

[15] *R v Ewanchuk* [1999] 1 SCR 330.

against human dignity and a violation of human rights. The CSC further stated that, sexual assault is an assault upon human dignity and constitutes a denial of any concept of equality for women.[16]

80. The complainants argue that the test for defining inhuman and degrading treatment in international, regional and national human rights instruments is whether the treatment complained of is very severe. They aver that inhuman and degrading treatment, as extensively elaborated by the European Court, involves treatment resulting in physical or psychological injuries. They submit that, degrading treatment more specifically is a treatment that grossly humiliates a person, and that, according to the European Court, a treatment of a sexual nature diminishes human dignity.

81. The complainants refer to the case of *Bekos and Koutropoulos v Greece*[17] where the European Court held that, in considering whether treatment is degrading, it had to consider whether the object of such treatment is to humiliate and debase the person concerned, and whether it adversely affected his or her personality.

82. The complainants also submit that the respondent state failed in its positive obligations to prevent and investigate the violations, which is a violation of article 1 of the African Charter. They cite the Commission's decision in *Legal Resource Foundation v Zambia*[18] where it held that '[a]rticle 1 of the African Charter requires that the state not only recognise rights, but requires that they shall undertake … measures to give effect to them.'[19]

83. The complainants further submit that the state authorities failed in their obligation to protect the victims from sexual harassment, assault, abuse and harm from NDP supporters and members of the riot police. In this regard, they submit that the respondent state failed in its positive obligation to prevent cruel, inhuman and degrading treatment and investigate the allegations impartially, in violation of article 5 of the African Charter.

Alleged violation of articles 7(1)(a) and 26

84. The complainants submit that while it is true that the victims have lodged their complaints and appealed to challenge the violations, the remedies available would not have been effective. They state that the victims did not have a right to an impartial and objective investigation and appeal process. It is the view of the complainants that this shows lack of independence of the PPO and the Appeal Court.

16 As above.
17 *Bekos and Koutropoulos v Greece* (ECHR).
18 n 10 above.
19 As above, para 62.

Alleged violation of article 9(2)

85. The complainants argue that the right of the victims' freedom of expression has been violated by the respondent state.[20] They argue that the second, third and fourth victims were attempting to assert their political opinions and to disseminate their views during the protest, and were prevented from doing so through assaults and sexual violence.

Alleged violation of article 16 and 18(3)

86. The complainants allege that the explicit targeting, intimidation and sexual harassment of the victims amount to a violation of their rights under article 18(3) of the African Charter. They submit that these acts have resulted in physical and emotional injury, and have detrimentally affected their physical and mental well-being, contrary to article 16 of the African Charter.

87. The complainants also allege a violation of article 18(3) of the African Charter in the failure of the state to protect the victims from discrimination against women. They submit that this case represents a critical opportunity for the African Commission to confirm that violence against women can amount to discrimination under the African Charter, and that states therefore have a legal obligation to prevent it, and take measures to thoroughly investigate, prosecute and punish in cases where it occurs. They also refer to article 1 of the Protocol to the African Charter on the Rights of Women in Africa (the Women's Protocol),[21] and argue that it strongly underscores violence against women, whether it is physical, sexual or psychological.

88. The complainants make reference to the United Nations (UN) Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), specifically its articles 6 and 7. They submit that the CEDAW Committee's General Recommendation (GR) 19 entitled 'Violence against Women,' provides a link between violence against women and equality. Furthermore, that paragraph 9 of the same GR specifies that in addition to applying to violence perpetrated by public authorities

> [u]nder general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence and for providing compensation.

[20] The Complainants cite communication 104/94, 141/94/145/95, *Constitutional Rights Project and Others v Nigeria* [(2000) AHRLR 227 (ACHPR 1999)] (1988) ACHPR, para 36, and communication 212/98, *Amnesty International v Zambia* [(2000) AHRLR 325 (ACHPR 1999)], para 79 to support their arguments.

[21] The Protocol to the African Charter on the Rights of Women in Africa was adopted on 13 September 2000, and came into force on 25 November 2005.

89. The complainants submit that, this was also confirmed by the CEDAW Committee's decision in *AT v Hungary*,[22] while the Committee was citing a report presented by the UN Special Rapporteur on violence against women, its causes and consequences on due diligence and the standards expected of state parties. In the report, the Special Rapporteur specified that 'the concept of due diligence provides a yardstick to determine whether a State has met or failed to meet its obligations in combating violence against women.'

90. According to the complainants, the sexual abuse endured by the victims is gender-specific and amounts to discrimination on the grounds of sex, which is a violation of article 18(3) of the African Charter.

The respondent state's submissions on the merits

91. The respondent state submits that the subject matter of the complaint does not satisfy the condition of exhaustion of local remedies stipulated in article 56 of the African Charter.

92. The respondent state argues that there has been no violation of any of the provisions of the African Charter. It states that the national measures undertaken and stated in the complaint are not in violation of the African Charter and the rights of the victims were neither prejudiced nor violated.

93. The respondent state further provides that investigations carried out by PPO concluded the existence of the crime of sexual molestation. They argue however, that the element of criminal intention was not established in this offence as the injuries sustained by the victims were as a result of battery and clashes.

94. The respondent state alleges that the documents containing a narration of the occurrences, incidents and statements submitted to the African Commission by the complainants are contrary to the statements made under oath before the PPO by the victims. It submits that new statements were made by the victims to support their complaint before the African Commission. It requests the latter to disregard unsubstantiated statements and not allow the assumptions of the correctness of the complaint to lead to findings contrary to those of the PPO.

95. The respondent state submits that the investigations of the PPO concluded that the perpetrators were unknown and that those who were accused by the victims in their testimonies were not present at the scene of the incident at the time of its occurrence.

[22] The United Nations Committee on the Elimination of Discrimination Against Women, communication 2/2003 (2005).

The respondent state's additional submissions on the merits

96. The respondent state submits in its additional submissions that there exist '[s]everal discrepancies between what the victims submitted in their testimonies before the PPO, and what they allege in their application before the African Commission.'

97. The respondent state outlines three instances of such discrepancies from the three victims which are summarised as follows:

> (i) The second victim, in her deposition to the African Commission, indicated that the wife of Mr Mohamed El Deeb, a member of the NDP supporter was leading the demonstrations against them; she did not mention this allegation to the PPO. Furthermore, the second victim said the PPO police officer, Nabil Selim, was the one who dragged her from the taxi with the third victim, meanwhile, the third victim later retracted her submissions to the African Commission, indicating that she discovered a year later that Nabil Selim was not the officer who dragged them from the taxi. The second victim also mentioned in her submissions to the African Commission that she had been sprayed in her face by an assailant, a matter which she never mentioned to the PPO;
>
> (ii) The third victim also retracted her accusations of Officer Nabil Selim after one year of the incident, and according to the respondent state, the PPO had established beyond any doubt that he could not have been at the scene at the time of the protest;
>
> (iii) The fourth victim alleged to the African Commission that she was beaten by Mr Mohammed El Deed from the NDP, and this was never mentioned to the PPO. She also alleged in her submissions before the African Commission that when she went to the hospital the following day, doctors insisted on calling the police, and the police refused to investigate based on jurisdictional reasons. This she never mentioned to the PPO.[23]

98. On the basis of the above, the respondent state declares that the victims' former accusations were unfounded and simply made to support their complaint. According to the respondent state, the statements of the victims are conflicting and show inaccuracy in identifying the persons who allegedly assaulted them.

99. The respondent state submits further that inconsistency also existed between the medical reports evidencing the injuries, but this is not substantiated.

100. The respondent state also refutes the allegations that there was discrimination because assaults were inflicted on the victims because of the 'mere fact of being women.' It argues that the assembly of the two parties in the riots included men and women other than the victims.

101. It submits further that the Egyptian Constitution affirms the principle of equality between men and women and the law provides many privileges for women to safeguard their effective participation in the community as a matter of affirmative action for the benefit of

[23] See *note verbale* from the respondent state of 31 October 2008 with attached discrepancies.

women. It states that Egyptian society rejects any form of degrading or inhuman treatment.

102. The respondent state also outlines the procedures taken by the PPO during investigation of the alleged violations. It explains that:

(i) The PPO heard in detail the testimony of all parties, victims, and witnesses concerning the incident;

(ii) The PPO referred the injured male and female victims to El-Hilal El-Ahmer Hospital, and attached twelve medical reports to the investigation reports, after confirming that the reports have been reviewed;

(iii) The PPO permitted each person who sustained injuries as a result of the crime to institute civil proceedings during investigations in application of article 199 *bis* of the Criminal Procedure Law;

(iv) On 13 June 2005, the PPO viewed the video tapes and CDs submitted by the complainants and it was revealed that none of the accused were present in front of the Press Syndicate or Saad Zaghloul Status, except Mohamed El Deeb;

(v) The PPO summoned all the accused whose names were included in the investigations and interrogated them in detail;

(vi) Investigations carried out by the PPO concluded the crime of sexual molestation (exposing private parts, sexual harassment and touching the genitals).

The complainants' additional submissions on the merits

103. In response to the respondent state's submissions about the 'Existence of several discrepancies between what the victims submitted in their testimonies before the PPO, and what they allege in their application before the African Commission,' the complainants argue that the respondent state only sets out three discrepancies, while inferring that there are more discrepancies which it does not substantiate. They submit that the instances set out by the respondent state refer to omissions rather than contradictions.

104. According to the complainants, the omissions mentioned above are due to the conditions under which the statements before the PPO were taken, and that not all the information that they provided was considered or written down. They further contend that the instances detailed in the respondent states' submission does not discharge it from its obligation to investigate human rights violations because the omission is not material enough to constitute a bar, by the victims, to an effective investigation.

105. The complainants submit further that, the respondent state placed too much reliance on the formal statements that the victims made to the PPO and failed to have any regard to the context and circumstances within which the statements were made. The complainants also attempt to clarify the discrepancies mentioned by

the respondent state in their additional submissions on the merits:[24]

> (i) On the discrepancy concerning the second victim's omission to mention to the PPO that the wife of Mr El Deeb led the demonstrations against them and that she was sprayed in the face by an assailant, the complainants submit that according to the second victim, the PPO did not record all the information provided. The complainants indicate further that, according to the second victim, she spent a lot of time waiting for her statement to be taken by the PPO and that when it was finally taken, they did not make any record of evidence that she submitted; including CDs containing pictures and her torn clothes;
>
> (ii) On the discrepancy concerning the third victim who retracted her accusations against officer Selim when she realised that she had been mistaken as to his identity, the complainants state that this retraction was done in good faith. They explain that the third victim's colleagues named one of her attackers as officer Selim, but did not know the name of her attacker, although she could recognise him. The complainants state that the third victim said 'I saw the same officer at another demonstration almost a year later and I recognised him. Another officer called out to him, and that is when I discovered that his name was not Nabil Selim;'
>
> (iii) On the discrepancy concerning the fourth victim who according to the respondent state, failed to mention to the PPO that she had been assaulted by Mr El-Deeb and also failed to mention the episode in the hospital and the police, the complainants explain that the victim mentioned in her affidavit that she was greatly distressed at the time she was reporting to the PPO. According to the complainants, the fourth victim indicated that she had difficulties recalling all the details and events at the time, and that she was only able to identify Mr El-Deeb later. Furthermore, according to the complainants, the fourth victim stated: 'I feel like I was having a nervous breakdown at the time, and could not focus.'[25]

106. The complainants aver that the respondent state uses the discrepancies as a basis that hampered its investigations of the alleged violations, meanwhile, according to them, the statements made by the victims had no discrepancies whatsoever, but rather omissions due to the particular circumstances of the case. They argue that the omissions have no material bearing on the present communication.

107. They reiterate that the respondent state failed in its obligations, in particular in its procedural obligation to investigate. This is because, according to the complainants, when the respondent state received the complaints, it failed to institute investigations that could have led to the identification of the perpetrators or established criminal wrongdoing. Rather, it expected the victims to provide them with the identities of the perpetrators.

108. The complainants submit that when the PPO provided reasons for its failure to prosecute, they stated that the crime of 'assault on

[24] See generally, the complainants' additional submissions on the merits, paras 12 to 16, and the affidavits in the merits submissions of the complainants of three of the victims contained in Annexure E: para 21, second victim, Abir Al-'Askari', paras 19-25, third victim, Shaimaa Abou Al-kheir's, & para 17-19, Iman Taha Kamel, fourth victim.

[25] Iman Taha Kamel, the fourth victim, the submissions of the complainants on the merits, Annexure E, para 19.

honour' could not be prosecuted because the perpetrators, whoever they are, lacked the requisite intent for committing the crime. In this regard, the complainants aver that the respondent state's submission that it failed to investigate, prosecute and punish the perpetrators because of the omitted information by the victims is incorrect. They argue that the victims submitted sufficient information to enable an investigation to take place.

The respondent state's additional submissions on the merits

109. In its additional submissions, the respondent state disputes the allegation that the investigation undertaken from the complaints filed by the victims, before the PPO as well as the decision by the Appeal Chamber upholding the decision of the PPO, lacked impartiality, objectivity or integrity.

110. The respondent state maintains that the PPO duly investigated the incident. It emphasises that the investigations carried out have all the specified safeguards for criminal investigation according to the Egyptian legal regime, particularly the impartiality and confidentiality of the investigations, the presence of all opposing parties and their respective defense counsels, who were also informed about the developments of the investigations.

111. It submits further that the security agencies have also taken all necessary security measures, whether in terms of securing the demonstrations, or disengaging the demonstrators in accordance with the specified rules and providing the victims with the necessary level of protection. It adds that the police also exercised their duties in receiving complaints from demonstrators, filing the necessary reports, and immediately referring the case to the PPO.

112. The respondent state argues that failure to supply the PPO with the information required coupled with the inconsistencies in the account given by the victims on the incidents that took place during the demonstrations, cannot be a reason for their inability to identify the perpetrators of the misdemeanor of beating them up. According to the respondent state, this only indicates that:

> The circumstances surrounding the incident characterized by a large crowd and the psychological and physical conditions of the female journalists did not permit them to precisely recollect the sequence of events, which in turn did not help the investigation authority to identify the perpetrators.

The respondent state submits that notwithstanding the above, the PPO and the police took necessary measures to investigate the incident.

113. Furthermore, according to the respondent state, the disparities make it evidently clear that the decision reached by the PPO, after its detailed and scrupulous investigations which showed that there were no grounds for initiating criminal proceedings

'temporarily' due to the inability to identify the perpetrators was logical and sound. More so, the perpetrators could not be identified and all those accused by the complainants, including the police and the others, were not present at the scene of the incident at the material time.

The African Commission's analysis on the merits

114. In this communication, the African Commission is called upon to determine whether the respondent state's failure to protect the victims from the alleged acts or omissions is a violation of their rights under the African Charter; specifically articles 1, 2, 3, 5, 7(1)(a), 9(2), 16, 18(3) and 26.

115. Articles 2 and 18(3) will be considered together, given that both have an element of discrimination.

116. Article 1 of the African Charter will be dealt with after all the other articles have been analysed, since a violation of article 1 can only be established if other articles in the Charter have been violated.

Alleged violation of article 2 — right against non-discrimination, and article 18(3) — right of non-discrimination against women

117. Article 2 of the African Charter provides that:

> Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national or social origin, fortune, birth or other status.

118. Article 18(3) of the African Charter provides that:

> The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.

119. The non-discrimination principle generally ensures equal treatment of an individual or group of persons irrespective of their particular characteristics, and the non-discrimination principle within the context of article 2 and 18(3) of the African Charter ensures the protection from discrimination against women by states parties to the African Charter.

120. Before the African Commission proceeds to determine whether articles 2 and 18(3) of the African Charter have been violated in this communication, it finds it imperative to define discrimination and its relationship with gender-based violence as alleged in this communication.

121. The Women's Protocol defines discrimination against women as:

> Any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women […] of human rights and fundamental freedoms in all spheres of life.'[26]

The same Protocol defines violence against women as:

> All acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life …[27]

122. Discrimination as defined by article 1 of CEDAW is:

> [A]ny distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.[28]

123. Furthermore, in its General Recommendation 19, the CEDAW Committee established the correlation between discrimination against women and gender-based violence by stating that:

> The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Gender-based violence may breach specific provisions of the Convention [CEDAW], regardless of whether those provisions expressly mention violence.[29]

124. The complainants argue that, in violation of article 2 of the African Charter, the victims were discriminated against in the enjoyment of their rights in violation of the African Charter on the basis of their sex and political opinion. They further allege that, there was differential treatment between men and women during the riot and that the main reason why the victims were assaulted by the authorities is basically because they are women and journalists. According to the complainants, this is evidenced by the sexual nature of the violations.

125. At this point, the African Commission would like to refer to the complainants initial submissions in this communication explaining the incident that took place on 25 May 2005.[30]

126. In response to the claims made by the complainants, the respondent state refutes the allegations submitting that, the assembly of the two parties in the riots included men and women other than the victims. It contends that there was no discrimination

26 n 21 above, article 1(f).
27 As above article 1(j).
28 CEDAW, article 1.
29 The United Nations Committee on the Elimination of Discrimination against Women, General Recommendation 19 (1992), para 6.
30 See para 3 of this communication.

and that assaults were not inflicted on the victims because they were women.

127. The respondent state submits further that the Egyptian Constitution affirms the principle of equality between men and women and that the law provides many privileges for women to safeguard their effective participation in the community as a matter of affirmative action for the benefit of women.

128. Since the respondent state is contesting the allegations of the complainants, the African Commission is called upon to analyse the arguments of both parties and establish whether the assaults endured by the victims as alleged, is discriminatory based on sex and political view in violation of article 2 of the African Charter.

129. At this point in time, the African Commission would like to pose the following questions: Whether the women and male protesters had similar treatment; and whether the treatment was 'fair and just', given that all women and men in the scene were under the same circumstances, that is, exercising their political rights.

130. In finding answers to these questions, paragraphs 3 to 20 of this communication under 'summary of facts' is crucial to the sexual nature of the violations as purported by the complainants.

131. The first victim alleges that she was threatened to be beaten if she insists to enter the Press Syndicate by a police officer. She alleges further that she was harassed by the NDP supporters, stating:

> Their hands were fondling my breasts and molesting all the sensitive areas in my body. They assaulted me with their hands and tore off my clothes and jewellery[31]… I ended up almost naked as a result.[32]

132. The second victim on her part alleges that, while she was taking pictures of the demonstrations she was attacked by an identified NDP supporter. She states; 'He slapped me across the face and called me abusive names, like "slut" and "whore".'[33] She further describes incidences which took place while she was trying to leave the Press Syndicate. She states:

> Someone dragged me by my hair and pulled me outside. … An identified police officer at the scene told me, 'I'll show you not to go down to the streets again.' He called me abusive names, like 'whore' and 'slut.' He also told me 'we'll take your picture and distribute it'.[34] … The officer who was holding me from the back then put his hand up my blouse from the back, as if he was trying to tear off my clothes. His other arm was around me and he fondled my breasts. I tried to stop him but couldn't. The two officers in front of me tried to pull off my jeans but they couldn't … The officer behind me started tearing my undershirt and bra.[35]

31 n 24 above, (Nawal's affidavit) para 5
32 As above, para 6.
33 As above, para 9.
34 As above, para 14.
35 As above. para 15 & 16.

133. The second victim also alleges that she was intimidated after filing the complaint at the PPO and pressured to withdraw the same. As a result, she suffered physical injuries, was emotionally traumatised, faced pressure from her family to quit her job and to cease political participation. She states:

> My feelings of personal security have deteriorated ... I change my clothes in the dark … scared to see myself naked. I felt like their fingerprints were marked on my body.[36]

She also allegedly lost her relationship with her partner after her refusal to withdraw the complaint which was perceived as a 'scandal' given the public and sexual nature of the violations she endured.

134. The third victim alleges that when she was trying to leave the Press Syndicate she was subject to several assaults. She states:

> One of the women pulled my hair and brought me to the ground. The next thing I knew I was being beaten … All of the clothes on the upper half of my body were torn off and I ended up with only a bra.[37]

According to the third victim, she also suffered from intimidation after filing the complaint at the PPO, to the extent that she was threatened and led to her being framed with prostitution accusations.

135. The fourth victim on her part alleges that, while she was participating in the demonstration, she was attacked by thugs who beat her up and tried to tear off her clothes. She alleges that she had men following her and also calling her names such as 'slut' and 'whore'. As a result of the incidents, the fourth victim alleges that she was severely traumatised to the extent that she had to be on anti-depressants, and suffered from physical injuries for three months.[38]

136. It is further alleged by the fourth victim that while the above mentioned assaults were taking place, law enforcement officers on the scene refused to come to her assistance.

137. Three clear conclusions are obvious from the submissions of the statements made by the victims;

(a) The victims were exclusively women;

(b) The victims were not protected from the perpetrators and other unidentified actors during the demonstrations; and

(c) The violations were perpetrated on the victims because of their gender.

138. Having said this, the *onus probandi* therefore shifts on the respondent state to prove that the victims were in effect protected by the law and that there was no differential treatment given to both male and female protesters on the scene. However, there is no evidence in the submissions of the respondent state showing that male protesters in the scene were also stripped naked and sexually harassed as the women were.

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36 As above (Abir's Affidavit) para 29.
37 As above (Shaimaa's Affidavit) para 13
38 As above (Iman's affidavit).

139. In the absence of any evidence to the contrary by the respondent state, the Commission finds a violation of article 2 of the African Charter.

140. In claiming a violation of article 18(3) of the African Charter, the complainants submit that the sexual abuse that the victims endured were gender-specific, amounting to discrimination on the grounds of sex.

141. The complainants further allege that the state failed to protect the victims from discrimination, by not taking any measures to thoroughly investigate, prosecute and punish the perpetrators in cases where it occurs.

142. In order for the African Commission to establish that article 18(3) has been violated by the respondent state, it is going to analyse 'some of the elements' of the testimonies provided by the complainants (discussed in paragraphs 131 to 136) above to establish whether the allegations were indeed gender-specific, and discriminatory on the primary basis of gender. This is because the characteristics of violence commonly committed against women and men differ, and it is only by analysing the nature of the violence that the African Commission can effectively draw its conclusions.

143. Firstly, when looking at the verbal assaults used against the victims, such as 'slut' and 'whore', it is the opinion of the African Commission that these words are not usually used against persons of the male gender, and are generally meant to degrade and rip off the integrity of women who refuse to abide by traditional religious, and even social norms.

144. Secondly, the physical assaults described above are gender-specific in the sense that the victims were subjected to acts of sexual harassment and physical violence that can only be directed to women. For instance, breasts fondling and touching or attempting to touch 'private and sensitive parts'. There is no doubt that the victims were targeted in this manner due to their gender.

145. Thirdly, the alleged threats against some of the victims who were accused of practicing prostitution when they refused to withdraw their complaints can also be classified as being gender-specific.

146. The standard for determining whether discrimination has taken place was canvassed by the Inter-American Court when it made its Advisory Opinion on the proposed Amendments to the Naturalisation Provisions of the Constitution of Costa Rica. The Court stated that:

> ... no discrimination exists if the difference in treatment has a legitimate purpose and if it does not lead to situations which are contrary to justice, to reason or to the nature of things ...[39]

This was also reflected by the UN Human Rights Committee when it held that:

> Not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.[40]

147. Can the differentiation of treatment of the victims in the present communication be classified as reasonable and legitimate as expressed by the UN Human Rights Committee?

148. It follows that, the principle of equality or non-discrimination does not mean that all differential treatments and distinctions are forbidden because some distinctions are necessary when they are legitimate and justifiable.

149. Looking at the arguments of the parties in this communication, the African Commission is of the opinion that the treatment was neither legitimate, nor justifiable because there is no reasonable cause behind the discrimination that was inflicted upon the victims.

150. Furthermore, in addition to the statements made by the victims, a statement made by a woman named Rabab al-Mahdy[41] in the complainants' submissions corroborated the sexual harassment inflicted on them. She stated:

> The thugs started beating and assaulting me. They put their hands up my clothes, and fondled all my sensitive areas under the eyes of the officers. [42]

151. The experience of another woman, Aida Seif el-Dawla,[43] who was also at scene, supports the arguments of the complainants about the gender-specific nature of the violations. Aida Seif el-Dawla alleges that when she was being assaulted, she tried to ask for help from the police officers, who instead hit her and retorted; 'This is so that you stop coming to the areas belonging to men!'[44]

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39 *Proposed Amendments to the Naturalisation Provisions of the Constitution of Costa Rica*, Advisory Opinion Oc-4/84, January 19, 1984, Inter-Am Ct HR (Ser A) 4 (1984) para 57.

40 Human Rights Committee, General Comment 18, Non-discrimination (Thirty-seventh session, 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN doc HRI/GEN/1/ Rev1 at 26 (1994), para 13.

41 Aida Seif el-Dawla was also participating in the demonstrations.

42 Annexure 'G', 'Translations of extracts of witnesses' statements made to the prosecutors and to Al-Nadim Center' — Statement of Rabab al-Mahdy to Al-Nadeem Cente.

43 Dr Aida Seif el-Dawla is an Egyptian psychiatrist and a prominent human rights activist.

44 n 42 above, statement of Aida Seif el-Dawla to Al-Nadeem Center.

152. It is clear that the incidents alleged took place in a form of a systematic sexual violence targeted at the women participating or present in the scene of the demonstration. Furthermore, perpetrators of the assaults seemed to be aware of the context of the Egyptian society; an Arab Muslim society where a woman's virtue is measured by keeping herself physically and sexually unexposed except to her husband. The perpetrators were aware of the consequences of such acts on the victims, both to themselves and their families, but still perpetrated the acts as a means of punishing and silencing them from expressing their political opinions.

153. In view of the fact that the respondent state did not refute the allegations made by the complainants in the framework of the actual acts of violence that were committed against the victims, and also following the analysis of the statements from the victims, the African Commission concurs with the complainants that the type of violence used during the demonstrations was perpetrated based solely on the sex of the persons present in the scene of the demonstration. In other words, the violence was gender-specific and discriminatory by extension.

154. Furthermore, if the respondent state failed to protect the victims from the violations that they incurred, and did not show any evidence of whether the differential treatment was legitimate, it goes without saying that the state has fallen short of its obligations under 18(3) of the African Charter.

155. The complainants also allege that the respondent state failed to investigate the sexual assaults that were perpetrated against the victims. This Commission notes that the concept of human rights is based on a typical recognition that every human being is equal and also recognises the inherent dignity and worth of every human being. Accordingly, when women are targeted due to their political opinion for the mere fact of being women, and are not assured the necessary level of protection by the state in the face of that violence, a range of their fundamental human rights are at stake, including their right to sexual equality. The state therefore has an obligation to investigate such acts of violence against women, whether committed by state or non-state actors.

156. The African Commission also notes that a state may be in violation of the African Charter, for acts of non-state actors, if it complicit in the violations alleged, has sufficient control over those actors, or fails to investigate those violations. The jurisprudence of the African Commission has reaffirmed this position in *Commission Nationale des Droits de l'Homme et des Libertés v Chad*.[45] In that communication, the African Commission stated that,

[45] Communication 74/92, *Commission Nationale des Droits de l'Homme et des Libertés v Chad* [(2000) AHRLR 66 (ACHPR 1995)] (ACHPR).

> If a state neglects to ensure the rights in the African Charter, this can constitute a violation, even if the State or its agents are not the immediate cause of the violation.[46]

157. Furthermore, in the *SERAC* case[47] the African Commission stated that:

> Governments have a duty to protect their citizens, not only through appropriate legislation and effective enforcement but also by protecting them from damaging acts that may be perpetrated by private parties.

158. The Inter-American Commission, in *Maria da Penha and Maia Fernandes v Brazil*, also warned from impunity concerning acts of violence and underlined that, failure to fulfil the obligation to prevent, protect, and prosecute creates a climate that is conducive to such acts.[48]

159. In the present communication, the victims allege that the perpetrators of the sexual assaults they were subject to were police officers, while other identified and unidentified persons were also acting upon orders from the police officers. According to the complainants, the state failed in its legal obligation to protect against discrimination and take measures to thoroughly investigate, prosecute and punish in cases where it occurs by leaving the perpetrators unpunished.

160. The complainants assert that when the respondent state received the complaints, it failed to institute investigations that could have led to the identification of the perpetrators or established criminal wrongdoing. Rather, it expected the victims to provide them with the identities of the perpetrators. The respondent however claims that there were discrepancies and contradictions between what the victims submitted in their testimonies before the PPO, and what they alleged in their application before the African Commission, which hampered the investigation of the violations.[49]

161. The complainants argue that the omissions made by the victims which the state describes as 'discrepancies' are due to the conditions under which the statements before the PPO were taken, and that not all the information that they provided was considered or written down. They further contend that the instances[50] detailed in the respondent state's submission does not discharge it from its obligation to investigate human rights violations because the omission is not material enough to constitute a bar, by the victims, to an effective investigation.

162. Even though the respondent state maintains that failure to supply the PPO with the information required, coupled with the

46 As above, para, 20.
47 n 8 above, para 57.
48 *Maria da Penha v Brazil* (2001) IACHR para 56.
49 See para 96 above outlining the discrepancies.
50 The complainants clarify these discrepancies in para 104 above.

inconsistencies in the account given by the victims on the incidents that took place during the demonstrations hampered the investigations, they seem to agree with the complainants that the victims made omissions due to the circumstances in which they found themselves. This is seen in the respondent state's submissions that,

> The circumstances surrounding the incident characterized by a large crowd and the psychological and physical conditions of the female journalists, did not permit them to precisely recollect the sequence of events, which in turn did not help the investigation authority to identify the perpetrators.

163. Based on the above, it is the African Commission's opinion that the respondent state failed to investigate and prosecute the perpetrators who committed gender-specific violations against the victims. Failure to investigate effectively, with an outcome that will bring the perpetrators to justice, shows lack of commitment to take appropriate action by the state, especially when this lack of commitment is buttressed by excuses such as lack of sufficient information to carry out a proper investigation. Furthermore, failure to investigate compromises an international responsibility on the part of the respondent state, both in the case of crimes committed by agents of the state and those committed by private individuals.

164. The effects of the violations perpetrated on the victims were palpable physically, and even from the medical records. The state did not therefore need further information to proceed with the necessary investigation that will bring the perpetrators to justice. As the Inter-American Commission said in *Maria da Penha and Maia Fernandes v Brazil*, and this Commission agrees, that:

> Ineffective judicial action, impunity, and the inability of victims to obtain compensation provide an example of the lack of commitment to take appropriate action …[51]

165. The African Commission also holds the same view with the CEDAW which held that, violence against women affects, compromises or destroys the enjoyment and exercise by women of their fundamental and human rights in different spheres of life.[52] In this regard, the African Commission considers violence against women as a form of discrimination against them.

166. To sum up, it is clear that the sexual assaults against the victims which occurred on 25 May 2005 were acts of gender-based violence, perpetrated by state actors, and non-state actors under the control of state actors, that went unpunished. The violations were designed to silence women who were participating in the demonstration and deter their activism in the political affairs of the respondent state which in turn, failed in its inescapable responsibility to take action against the perpetrators.

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51 n 49 above, para 57.

52 The United Nations Committee on Civil and Political Rights.

167. For these reasons, based on the above analysis, the African Commission finds the respondent state in violation of articles 2 and article 18(3) of the African Charter.

Article 3 — Right to equality before the law and equal protection of the law

168. Articles 3(1) and (2) of the African Charter on the other hand provide that, 'Every individual shall be equal before the law and that every individual shall be entitled to equal protection of the law.'

169. The complainants argue that the victims were subjected to all the violations alleged basically because the respondent state did not protect them from the perpetrators.

170. The respondent state contends that the security agencies have also taken all necessary security measures, whether in terms of securing the demonstrations, or disengaging the demonstrators in accordance with the specified rules, and providing the victims with the necessary level of protection.

171. The African Commission will at this point explain the principle of equality that underpin equality before the law and equal protection of the law according to its jurisprudence.

172. The African Commission has affirmed the principle of equality before the law and equal protection of the law by explaining the scope of these rights in *Zimbabwe Lawyers for Human Rights and the Institute for Human Rights and Development (on behalf of Meldrum) v Republic of Zimbabwe*.[53]

173. With respect to 'equality before the law' under article 3(1) of the African Charter, the African Commission stated in the aforesaid communication that:

> The most fundamental meaning of equality before the law under article 3(1) of the Charter is the right by all to equal treatment under similar conditions. The right to equality before the law means that individuals legally within the jurisdiction of a state should expect to be treated fairly and justly within the legal system and be assured of equal treatment before the law and equal enjoyment of the rights available to all other citizens ... The principle that all persons are equal before the law means that existing laws must be applied in the same manner to those subject to them.[54]

174. With regard to 'equal protection of the law' under article 3(2) of the African Charter, the African Commission also held in the same communication above that

> Equal protection of the law means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by

[53] Communication 294/2004, *Zimbabwe Lawyers for human Rights and the Institute for Human Rights and Development (on behalf of Andrew Barclay Meldrum) v Republic of Zimbabwe* (ACHPR)

[54] As above, para 96.

other persons or class of persons in like circumstances in their lives, liberty, property and in their pursuit of happiness.[55]

175. Equality and non-discrimination are core principles in international human rights law. Consequently, the premise under article 3 of the African Charter is that the law shall prohibit any form of discrimination and guarantee to all individuals equal and effective protection against discrimination on any ground, regardless of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. In this respect, the state has an affirmative duty to prohibit discrimination and ensure that all persons are protected by the law and are equal before the law.

176. The principle of 'equal protection' therefore places all men and women on an equal footing before the law. Furthermore, it indicates that all men and women are entitled to equal protection against any discrimination and against any incitement to such discrimination. The African Commission notes that, parties can only establish that they have not been treated equally by the law, if it is proved that the treatment received was discriminatory, or selective. If a party claims selective protection of the law, then the burden is on the party to show that the laws had discriminatory effects and purposes.

177. This Commission further asserts that equality before the law also entails equality in the administration of justice. In this regard, all individuals should be subject to the same criminal and investigative procedures in the same manner by law enforcement and the courts. On the other hand, for all individuals to have equal protection of the law, the dignity of every individual, whether male or female should be fair, equally safeguarded by the law and this should also be the case when applying or enforcing the law.

178. Although the respondent state submitted, that the security agencies have 'taken all necessary security measures ... providing the victims with the necessary level of protection,' the respondent state does not mention whether the 'necessary level of protection' was effective or satisfactory to the victims, or whether the level of protection was the same that was accorded to the men in the scene. It is not sufficient to say that necessary measures were taken when the results of those measures are not palpable.

179. It is the African Commission's view that no logical explanation can be derived from the fact that the victims were subjected to all the assaults-physical and emotional, they claim, if the state indeed protected them from the assaults. It is also the African Commission's view that inequality based on the ground of sex is an analogous ground for discrimination. Irrefutably therefore, this Commission underscores that freedom from discrimination is also an aspect of the

[55] As above, para 99.

principles of equality before the law and equal protection of the law under article 3 of the African Charter because both present a legal and material status of equality and non discrimination.

180. Based on the above, the African Commission concludes that there has been a violation of article 3 by the respondent state.

Alleged violation of article 5 (prohibition of torture and cruel, inhuman and degrading treatment)

181. Article 5 of the African Charter states that:

> Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel and inhuman or degrading punishment and treatment shall be prohibited.

182. The complainants argue that the treatment received by the victims on 25 May 2005 amounted to a violation of their dignity and to inhuman and degrading treatment. They sustain that the victims were physically and verbally assaulted, sexually assaulted and abused during the protest, adding that there was a violation of their dignity because the assaults were severe and gravely humiliating, in violation of article 5 of the African Charter.

183. The complainants further submit that since the state authorities failed in their obligation to protect the victims from sexual harassment, assault, abuse and harm from NDP supporters and members of the riot police, it failed in its positive obligation to prevent cruel, inhuman and degrading treatment and investigate the allegations impartially.

184. The respondent state does not provide any substantial arguments to contend the allegations of the complainants that the treatment subjected by the victims was inhuman and degrading. It only submits that 'The Egyptian society rejects any form of degrading or inhuman treatment.' Concerning failure to investigate, the respondent state argues that investigations were carried out by the PPO after the incident which concluded the existence of the crime of sexual molestation, which includes exposing private parts, sexual harassment and touching the genitals.

185. They argue that the element of criminal intention was not established in this offence as the injuries sustained by the victims were as a result of battery and clashes, adding that the PPO investigations concluded that the perpetrators were unknown.

186. Before the African Commission determines whether the acts inflicted on the victims amounted to inhuman and degrading treatment, and whether there was pain and suffering, it will first of all attempt to define the term 'inhuman and degrading treatment.'

187. The African Commission's jurisprudence has established the scope of inhuman and degrading treatment, which does not only include physical and psychological suffering. In *International Pen and Others v Nigeria*, for instance, the African Commission held that:

> Article 5 of the African Charter prohibits not only torture, but also cruel, inhuman or degrading treatment. This includes not only actions which cause serious physical or psychological suffering, but which humiliate the individual or force him or her to act against his will or conscience.[56]

188. The African Commission has also noted that violations under article 5 of the African Charter should also be established based on the circumstances of each case. In *Doebbler v Sudan*, the African Commission ruled that:

> While ultimately whether an act constitutes inhuman degrading treatment or punishment depends on the circumstances of the case. The African Commission has stated that the prohibition of torture, cruel, inhuman, or degrading treatment or punishment is to be interpreted as widely as possible to encompass the widest possible array of physical and mental abuses.[57]

189. Similarly, in *Media Rights Agenda v Nigeria*, the African Commission held that the term

> Cruel, inhuman or degrading punishment and treatment' is to be interpreted so as to extend to the widest possible protection against abuses, whether physical or mental.[58]

190. Furthermore, since inhuman and degrading treatment also impacts on the dignity of a person, the African Commission held in *Purohit and Moore v The Gambia* cited by the complainants that:

> Human dignity is an inherent basic right to which all human beings, regardless of their mental capabilities or disabilities as the case may be, are entitled to without discrimination. It is therefore an inherent right which every human being is obliged to respect by all means possible and on the other hand it confers a duty on every human being to respect this right.[59]

191. Further, article 16(1) of the UN Convention Against Torture, calls on states to:

> Undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity …

192. Article 16(2) of the same Convention adds that:

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56 Communications 137/94, 139/94, 154/96 & 161/97, *International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro-Wiwa Jr. and Civil Liberties Organisation v Nigeria* [(2000) AHRLR 212 (ACHPR 1998)] para 79.

57 Communication 236/2000, *Curtis Doebbler v Sudan* [(2000) AHRLR 248 (ACHPR 1999)], para 37. See also communication 225/98, *Huri-Laws v Nigeria* [(2000) AHRLR 273 (ACHPR 2000)] and UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

58 Communication 224/98, *Media Rights Agenda v Nigeria* (2000) ACHPR [(2000) AHRLR 262 (ACHPR 2000)], para 71.

59 n 14 above, para 57.

> The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment …

Accordingly, the spirit of the UN Convention Against Torture shall apply even in the context of the African Charter, as authorised by article 61 of the same.

193. Under the European Human Rights System, the European Court has also underscored the determining factor to qualify an act as 'ill-treatment', which is that; the act must 'attain a minimum level of severity'. On this ground, the Court has outlined four main criteria:

(i) The duration of the treatment;
(ii) The physical effects of the treatment;
(iii) The mental effects of the treatment; and
(iv) The sex, age and state of health of the victim.

194. This test was substantiated in *Ireland v UK*, where the Court held that:

> As was emphasised by the Commission, ill-treatment must attain a minimum level of severity if it is to fall within the scope of article 3. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc.[60]

195. Furthermore, in the combined cases of *Denmark v Greece*,[61] *Norway v Greece*,[62] *Sweden v Greece*,[63] and *Netherlands v Greece*,[64] popularly referred to as the *Greek* case, the European Commission held that …

> The notion of inhuman treatment covers at least such treatment as deliberately causes severe suffering, mental or physical which in the particular situation, is unjustifiable …[65]

In the same case, the European Commission also considered that, for an act to be degrading there must be some form of 'gross humiliation'.[66]

196. Having discussed the principle of inhuman and degrading treatment and indignity, the African Commission will rely on the criterion provided by its jurisprudence that:

> 'Acts of inhuman and degrading treatment Not only cause serious physical or psychological suffering, but also humiliate the individual …' and 'Can be interpreted to extend to the widest possible protection against abuses, whether physical or mental.'

60 *Ireland v UK* (1978) ECHR (series A) para 162.
61 *Denmark v Greece*.
62 *Norway v Greece*.
63 *Sweden v Greece*.
64 *Netherlands v Greece*.
65 The *Greek* case (1969) Yearbook: Eur Conv on HR 12, g 186.
66 As above.

197. In their submissions, the complainants give instances of inhuman and degrading treatment that the victims were subjected to, and which this Commission has analysed above.[67]

198. The respondent state has not denied the allegations presented by the complainants. It only states that 'the Egyptian society rejects any form of degrading or inhuman treatment.' In addition, it argues that the investigation carried out by the PPO concluded the existence of 'sexual molestation.' This raises the question whether sexual molestation is not 'inhuman and degrading' to qualify as a violation under article 5 of the African Charter. Is it not tantamount to sexual humiliation, especially with the use of degrading references such as whore and slut?

199. In *Modise v Botswana*, the African Commission held that the acts suffered by the victim

> Exposed him to personal suffering and indignity in violation of the right to freedom from cruel, inhuman or degrading treatment guaranteed under Article 5 of the Charter.[68]

Even though the acts in this communication cannot be compared to the acts in *Modise v Botswana* there is an aspect of indignity.

200. In *Campbell and Cosans v UK*, the European Court stated that,'treatment' itself will not be

> 'degrading' unless the person concerned has undergone — either in the eyes of others or in his own eyes — humiliation or debasement attaining a minimum level of severity. That level has to be assessed with regard to the circumstances of the case.'[69]

201. In the present communication, the African Commission finds that the treatment against the victims amount to physical and emotional trauma. The treatment also has physical and mental consequences obvious from the injuries sustained.

202. Furthermore, the level of suffering occasioned by the acts perpetrated on the victims which amount to inhuman and degrading treatment cannot be overlooked. It is the Commission's view that the acts were debasing and humiliating, sufficiently severe to fall within the ambit of the test provided by *Modise v Botswana* and the European Court to establish inhuman and degrading treatment, and consequently, the scope of article 5 of the African Charter. It is also the Commission's view that the respondent state has conceded that the victims were subject to inhuman and degrading treatment by admitting sexual molestation.

203. On the issue of investigation, the African Commission will like to make reference to its 'Guidelines and Measures for the Prohibition

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67 See generally, the commission's analysis under arts 2, 3, and 18(3) of the African Charter, and specifically paras 131 to 136 outlining the testimonies of the victims.

68 Communication 97/93, *John K Modise v Botswana* [(2000) AHRLR 25 (ACHPR 1997)] para 91.

69 *Campbell and Cosans v UK* (1982) ECHR, para 28.

of Torture, Inhuman and Degrading Treatment or Punishment in Africa (the Robben Island Guidelines)'.[70] Article 17 of the Robben Island Guidelines provides that states should

> Ensure the establishment of readily accessible and fully independent mechanisms to which all persons can bring their allegations of torture and ill-treatment,

while article 19 provides that:

> Investigations into all allegations of torture or ill-treatment, shall be conducted promptly, impartially and effectively, guided by the UN Manual on the Effective Investigation and Documentation of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (The Istanbul Protocol).

204. Furthermore, article 4(c) of the Declaration on the Elimination of Violence against Women, adopted by the General Assembly provides that states should,

> Exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons.[71]

205. The African Commission notes the Inter-American Court's decision in *Velasquez Rodriguez v Honduras*, which held that:

> An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention (…). What is decisive is … whether the State has allowed the act to take place without taking measures to prevent it or to punish those responsible …[72]

206. The acts in the present communication were illegal and unjustifiable. The African Commission will not belabour on analysing the responsibility of the state under this article since its reasoning will be the same as article 18(3) discussed above. Suffice to say that the respondent state has failed to conduct an effective investigation into the alleged acts of inhuman and degrading treatment and no diligent attempts have been made to hold anyone accountable.

207. The African Commission would also like to accentuate the fact that, being a party to the African Charter, the respondent state has an obligation to prohibit inhuman and degrading treatment under article 5 of the Charter. Furthermore, since the respondent state has acceded to the Convention against Torture,[73] it has formally accepted the Convention and is therefore bound by it. Even though article 13 of the Convention Against Torture does not specifically mention inhuman and degrading treatment, it provides that:

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70 Adopted by the African Commission during its 32nd ordinary session in 2002.

71 Declaration on the Elimination of Violence against Women, General Assembly resolution 48/104 of 20 December 1993, UN doc A/RES/48/104, 23 February 1994.

72 *Velasquez Rodriguez v Honduras* (1988) IACtHR, para 173

73 The respondent state acceded to the Convention on 25 June 1986.

> ... Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.

208. The African Commission notes that the respondent state is also a party to the ICCPR,[74] whose article 7 provides that, 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.' The victims in the present communication were not only subjected to ill-treatment, but intimidated to withdraw their complaints. The respondent state therefore owed an obligation to the victims to effectively investigate the acts of ill-treatment that impacted on their dignity and punish the perpetrators accordingly. Failing to do so only amounted to an infringement of the rights of the victims under article 5 of the Africa Charter and other international instruments that the respondent state is a party to.

209. From the foregoing, the African Commission concludes a violation of article 5 of the African Charter by the respondent state because the acts committed amounted to inhuman treatment and investigations were not conducted.

Alleged violation of article 7(1)(a) and 26 of the African Charter (right to fair trial and independence of the courts)

210. The complainants allege a violation of article 7(1)(a) and 26 of the African Charter respectively.

211. Article 7(1)(a) states that:

> Every individual has a right to have his cause heard which comprises the right to appeal to competent national organs against acts violating his fundamental rights.

212. Article 26 on its part provides that:

> State Parties to the present Charter shall have the duty to guarantee the independence of the courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.

213. With respect to the alleged violation of article 7(1)(a) of the African Charter, the complainants aver that the victims did not have a right to an impartial and objective investigation, as well as an appeal process, which in their view shows lack of independence of the PPO and the Appeal Chamber.

214. The complainants submit that the victims lodged their complaints to the PPO but the remedies available were not effective. The complainants submit that the victims appealed to the PPO to review their decision not to prosecute and their appeal was rejected. Subsequently, they appealed the decision of the PPO to the Appeal Chamber which dismissed their appeal on the basis that the assaults

[74] The respondent state Egypt ratified the ICCPR on 14 January 1982.

had taken place but that it was impossible to identify the perpetrators.

215. The respondent state agrees with the complainants' submissions that the PPO refused to prosecute the perpetrators and argues that the decision not to prosecute was based on three reasons.[75] According to the respondent state, the PPO and the Appeal Chamber were impartial and independent in their procedures as opposed to the complainants' submissions.

216. The right to fair trial, protected by article 7 of the African Charter and complemented by article 26 of the same Charter is a stronghold for the principle of judicial independence and appropriate justice in the African Human Rights System. In this regard, the African Commission provided an insight to article 7(1)(a) in *Good v Botswana* where it held that:

> The right to be heard requires that the complainant has unfettered access to a tribunal of competent jurisdiction to hear his case. It also requires that the matter be brought before a tribunal with the competent jurisdiction to hear the case.[76]

217. Similarly, the African Commission noted in *Zimbabwe Human Rights NGO Forum v Zimbabwe*,[77] that:

> The protection afforded by article 7 is not limited to the protection of the rights of arrested and detained persons but encompasses the right of every individual to access the relevant judicial bodies competent to have their causes heard and be granted adequate relief.

218. To strengthen the spirit of articles 7 and 26 of the African Charter, the African Commission adopted the Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa (the Principles and Guidelines on the Right to Fair Trial),[78] to assist states parties to the African Charter in their guarantee of the right to fair trial as enshrined in the African Charter. One of the essential elements of a fair hearing under the Principles include:

> 'An entitlement to an appeal to a higher judicial body'.[79] It also provides that, 'The right to appeal should provide a genuine and timely review of the case, including the facts and the law ...'[80]

75 See paras 55 to 56 above.

76 Communication 313/05, *Kenneth Good v Republic of Botswana* (ACHPR) para 169.

77 Communication 245/2002, *Zimbabwe Human Rights NGO Forum v Zimbabwe* [(2006) AHRLR 128 (ACHPR 2006)].

78 See also the Recommendation on the Respect and Strengthening of the Independence of the Judiciary adopted by the African Commission during its 19th Session, which took place in Ouagadougou, Burkina Faso in 1996. This Recommendation calls upon states parties to the African Charter, to meet certain minimum standards to guarantee the independence of judiciaries in the region, including *inter alia*; the recognition of universal principles of judicial independence; and urging governments to eliminate any legislation affecting judicial independence.

79 As above, sec 2(j).

80 As above, sec N(10)(a)(i).

219. The African Commission notes that the concerns, needs and interests of victims can only be addressed in judicial proceedings when these proceedings are impartial, taking into consideration facts and appropriate laws. The primary concern should therefore be to ensure that victims of human rights violations are redressed accordingly by given them an opportunity to appeal decisions from other judicial bodies.

220. Particularly, the appeal mechanism must be premised on the recognition that the right to appeal is a fundamental right under international law in which all victims are entitled to. Failing to allow victims appeal decisions in the opinion of the African Commission, is contrary to the guiding principles and spirit of the African Charter and other international and regional instruments.

221. In the present communication, after the victims appealed to the PPO and were not satisfied with the result, they appealed to the Appeal Chamber which dismissed their appeal and upheld the decision taken by the PPO not to prosecute the perpetrators. Thus, in effect, the victims had an opportunity to be heard by the Appeal Chamber, and therefore cannot claim that their right to appeal under article 7 of the African Charter was violated. Furthermore, their appeal was also entertained by the PPO even though the result was not satisfactory to them.

222. The issue of the appeal process being impartial or independent in itself, and as a result, showing the lack of impartiality and independence of the Appeal Chamber and the PPO does not fall within the ambit of articles 7 and 26 of the African Charter.

223. According to the Principles and Guidelines of the Right to Fair Trial, impartial and independent tribunals shall amongst other things: be established by law to have adjudicative functions to determine matters within their competence on the basis of the rule of law and in accordance with proceedings conducted in the prescribed manner;[81] not have any inappropriate or unwarranted interference with the judicial process nor shall decisions be subject to revision except through judicial review;[82] independent from the executive branch;[83] and the government shall respect that independence;[84] base its decision only on objective evidence, arguments and facts presented before it.

224. In the facts before the African Commission however, apart from alleging that the process of appeal in the Appeal Chamber and the PPO lacked impartiality and independence due to the reasons provided, the complainants have not substantiated the extent to

81 Principles and Guidelines on Fair Trial, sec A 4(b).
82 As above, sec A 4(f).
83 As above, sec A(4)(g).
84 As above, sec A(4)(a).

which it did so, or given enough reasons to support the allegations that both institutions were not impartial and independent according to the criteria provided by the Principles and Guidelines of the Right to Fair Trial. Thus in the absence of any information, substantiated by relevant evidences to 225. The complainants also allege that the victims did not have an impartial and objective investigation. They aver that the victims reported the alleged incidences to the police after the alleged assault, but the police was unwilling to interview potential witnesses, take down statements, or assist them in any way. They also submit that the PPO's decision to halt the investigations due to amongst other reasons, discrepancies in the victims' statements is immaterial because according to them, these discrepancies were mere omissions which have no material bearing on the present communication.

226. According to the respondent state, the investigations carried out by the PPO have all the specified safeguards for criminal investigation according to the Egyptian legal regime, particularly the impartiality and confidentiality of the investigations.[85] Furthermore, according to the respondent state, the decision reached by the PPO, after its detailed and scrupulous investigations which showed that there were no grounds for initiating criminal proceedings 'temporarily' due to the inability to identify the perpetrators was logical and sound.

227. The UN Human Rights Committee has shown that complaints must be investigated promptly and impartially so as to make the remedy effective. In its General Comment No 20, the Committee provides that:

> Complaints must be investigated promptly and impartially by competent authorities so as to make the remedy effective.[86]

228. The European Court has also expressed the importance of carrying out thorough investigations that are capable of leading to the identification and punishment of those responsible for any ill-treatment.[87] Moreover, when examining whether an investigation is effective, the European Court applied the following test in some of its cases: whether the authorities reacted effectively to the complaints at the relevant time;[88] the length of time it takes for the investigation to commence;[89] and whether there were delays in taking statements from the victims.[90]

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85 It explains the investigative procedures carried out by the PPO in para 101 of this communication.

86 Human Rights Committee, General Comment 20, Art 7 (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN doc HRI/GEN/1/Rev.1 at 30 (1994), para 14.

87 See *Ilhan v Turkey* (2000) ECHR, para 92.

88 *Labita v Italy* (2000) ECHR, para 131.

89 *Timurtas v Turkey* (2001) 33 EHRR 6 ECHR, para 89.

90 *Assenov & Others v Bulgaria* (1998) ECHR, para 105.

229. In *Assenov & Others v Bulgaria*, the European Court clearly addressed the notion of effective investigation that is not impartial and independent. In deciding on the alleged police misconduct against the complainant, the court noted that 'It was necessary to take evidence from independent witnesses,' adding that:

> … the examination of two further witnesses, one of whom had only a vague recollection of the incidents in question, was not sufficient to rectify the deficiencies in the investigation up to that point.[91]

The Court concluded that the lack of a thorough and effective investigation into the applicant's arguable claim that he had been beaten by police officers violates article 3 of the Convention.[92]

230. Accordingly, borrowing from the European Court, it follows that where victims raise arguable claims to have been ill-treated in breach of violations in the African Charter, the investigation carried out must be prompt and impartial to be effective. An impartial investigation should involve a thorough or scrupulous procedure which leads to results that identify the perpetrators and punishes those responsible for the ill-treatment and other violations alleged.

231. The African Commission has noted the arguments presented by the parties to this communication and concurs with the submissions made by the complainants that the investigation carried out by the PPO was not impartial, which jeopardised the victims' right to an effective remedy. Even though the respondent state describes the steps taken by the PPO during the investigation and concludes that the PPO did not prosecute due to lack of sufficient information from the victims, and discrepancies in their statements and medical reports, the African Commission finds that the PPO lacked sufficient evidence on which to decide whether or not the violations took place.

232. Additionally, apart from outlining the discrepancies which are described as omissions by the complainants, and which the Commission agrees do not have any material bearing on the investigation of the complaints put forward by the victims, this Commission notes that the respondent state failed to substantiate its arguments about the discrepancies in the medical reports.

233. In order to be impartial, it would have been of paramount relevance in the investigative processes for the PPO to obtain, if necessary *proprio motu* additional evidence from other sources by giving room for more witnesses in the scene to make illustrative statements that could corroborate the statements made by the victims. Instead, the PPO gave undue attention to the 'discrepancies' made by the victims which made it arrive at the tenuous conclusion that it could not proceed with the investigations because the perpetrators could not be identified, creating an appearance of an actual lack of impartiality.

91 As above, para 105.
92 As above, para 106.

234. According to this Commission, based on the evidence before it, there were procedural deficiencies that affected the final decision that was taken by the PPO in this communication. This obliges the Commission to conclude that the victims were indeed deprived of an effective and impartial investigation from the PPO. Having said this however, the African Commission is of the opinion that the impartiality of the investigative process should be separated from the allegations related to article 7(1)(a) and 26 of the African Charter. This is because even though lack of impartiality of the investigations amount to a violation of the victims' right to effective remedies, it cannot be classified as a violation of the victims' rights under articles 7(1)(a) and 26 of the African Charter which form the basis of this analysis.

235. The above notwithstanding, the second arm of article 26 of the African Charter also provides that, states should 'allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.'

It reads from this provision that 'The establishment of national institutions' translate to establishing courts to protect individuals from abuse from the state. However, it could also be interpreted to mean establishing institutions which also have the mandate to create mechanisms for protection. Essentially therefore, the respondent state has a duty to provide the structures and mechanisms necessary for the exercise of the right to fair trial.

236. This obligation is alluded to, by the Principles of the African Commission in its Principles.[93] The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power[94] also provides that 'judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress …'[95]

237. The complainants submit that sexual violations and physical assaults are most effectively dealt with by the criminal process and that the state has an obligation to ensure that there is an efficient criminal law remedy available for vulnerable individuals subjected to violations of a physical and sexual nature. The respondent state's submissions are only in respect of the reasons why the perpetrators could not be prosecuted, it does not provide any information about mechanisms that were put in place after the incidences to afford protection and redress to the victims, and even to prevent future occurrences of such violations.

93 Sec A(4)(u.)
94 Adopted by General Assembly resolution 40/34 of 29 November 1985.
95 Para 5.

238. Based on the above, the African Commission concludes that there is a violation of article 26 of the African Charter by the respondent state. However, there is no violation of article 7(1)(a) of the African Charter for the mere reason that the victims had an opportunity to appeal their claims in the Appeal Chamber.

Alleged violation of article 9(2) — Right to freedom of expression and opinion

239. The complainants submit that there is a violation of article 9(2) of the African Charter.

240. Article 9(2) of the African Charter provides that; 'Every individual shall have a right to express and disseminate his opinions within the law.'

241. The complainants argue that during the events on 25 May 2005, as journalists, the victims were only attempting to assert their political opinions and to disseminate these views within the country. They submit that the victims were prevented from exercising their profession and in the process, assaulted and sexually violated contrary to the protection afforded them under article 9(2) of the African Charter.

242. The respondent state did not dispute the complainants allegations under article 9(2) of the African Charter. This notwithstanding, based on the evidence before it, the African Commission will still proceed to determine whether this right has been violated by the respondent state.

243. Freedom of expression under article 9, read together with article 27(2),[96] of the African Charter is the cornerstone of a democratic country, and any violation of the right to freedom of expression impacts on the full realisation of other rights and freedoms enshrined in the African Charter and other international instruments.

244. The right to freedom of expression has also been recognised as a fundamental human right under other international human rights instruments, such as the UDHR,[97] and the ICCPR.[98] At the regional

[96] Art 27(2) provides that 'The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.'

[97] Art 19.

[98] Art 19 of the ICCPR provides that '[e]veryone shall have the right to hold opinions without interference' and 'everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.'

level, the African Charter on Democracy, Elections and Good Governance[99] provides in its article 27(8) that,

> In order to advance political, economic and social governance, state parties shall commit themselves to promoting freedom of expression, in particular freedom of the press and fostering a professional media.

245. The Declaration of Principles on Freedom of Expression in Africa (the Declaration)[100] which supplements the provisions of article 9 of the African Charter underscores respect for freedom of expression by providing that 'No one shall be subject to arbitrary interference with his or her freedom of expression,'[101] and 'Any restrictions on freedom of expression shall be provided by law, serve a legitimate interest and be necessary and in a democratic society.'[102]

246. The notion of freedom of expression and its link with political participation was expressed by the African Commission in *Amnesty International and Others v Sudan*, where it stated that freedom of expression is a fundamental human right, essential to an individual personal development, political consciousness and participation in the public affairs of a country.[103]

247. In view of the fact that political leaders are most often sensitive to expression of opinions that are related to the political affairs of the state, the African Commission stated in the *Good v Botswana* that:

> A higher degree of tolerance is expected when it is a political speech and an even higher threshold is required when it is directed towards the government and government officials.[104]

The Declaration also requires public figures 'to tolerate a greater degree of criticism,'[105] to promote transparency and accountability as tenets of good governance.

248. The African Commission noted in *Good v Botswana* that freedom of expression is not an absolute right, and can only be restricted for the reasons mentioned under principles I(1) and II of the Declaration. That is, if the restrictions serve a legitimate interest and necessary in a democratic society.[106]

249. Freedom of expression can also be limited by the clawback clause under article 9(2) in the context of the phrase 'within the law.'

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99 Adopted by the 8th ordinary session of the Assembly, held in Addis, Ethiopia, on 30 January 2007.

100 Declaration of Principles on Freedom of Expression in Africa, adopted by the African Commission during its 32nd ordinary session, 17 - 23 October, 2002, Banjul, The Gambia.

101 As above, Principle II(1).

102 As above, Principle II(2).

103 n 4 above, para 54

104 n 76 above, para 198

105 As above, Principle XII(1).

106 n 76 above, para 187.

In *Malawi African Association and Others v Mauritania*,[107] the African Commission stated that 'the expression' within the law 'must be interpreted in reference to international norms' 'which, among others, can also provide grounds of limitation on freedom of expression.'[108]

250. The African Commission also notes that the right to freedom of expression also carries with it the right to impart information to others, meaning that when an individual's freedom of expression is unlawfully restricted, it is not only the right of that individual that is being violated, but also the right of all others to 'receive' information and ideas.

251. The Inter-American Court upon referral from the Inter-American Commission confirmed and expanded on the Inter-American Commission's ruling in the case of *Claude Reyes et al v Chile*[109] holding that article 13 of the American Convention, which specifically establishes the rights to 'seek' and 'receive' information, protects the right of all persons to receive information held by the state. It further asserted that, the information should be provided without a need to demonstrate a direct interest in obtaining it, or personal harm, except where legitimate restrictions apply.

252. Thus, the right to freedom of expression and to receive information is broadly conceived to include information of all types of knowledge including in political terms as expressed in this communication, and the respondent state has an obligation to ensure that this information is accessible without impediment. Thus, limiting the right of the victims to freedom of expression also limits their right to receive information.

253. The above principle was expressed by the African Commission in the *Jawara* case, where it held that, the politically motivated harassment and intimidation of journalists not only deprived them 'of their rights to freely express and disseminate their opinions, but also the public, of the right to information.'[110]

254. In the present communication, the victims were all journalists, some of whom were allegedly reporting on the events of the demonstration and taking photographs and were allegedly assaulted and molested for their involvement in the protest to amend article 76 of the Egyptian Constitution. This restricts their right to freedom of expression and opinion.

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[107] Communication 54/91-61/91-96/93-98/93-164/97_196/97-210/98, *Malawi African Association and Others v Mauritania* [(2000) AHRLR 149 (ACHPR 2000)] (2000) ACHPR, para 106.

[108] As above, para 102.

[109] *Claude Reyes et al v Chile* (2003), IACHR.

[110] n 3 above, para 65.

255. It is not evident from the evidence presented in this communication that this restriction falls within the meaning provided by Principle II(2) of the Declaration, that is, 'provided by law', 'serve a legitimate interest', 'necessary', and in a 'democratic society.' Furthermore, the respondent state has not provided any information indicating that the victims, in exercising their right to freedom of expression, were threatening national security or public interest.[111]

256. On the bases of the above arguments, there is clearly a violation of article 9(2) of the African Charter by the respondent state.

Alleged violation of article 16 — The right to health

257. The complainants allege a violation of article 16 of the African Charter by the respondent state.

258. Article 16 has two facets to it: article 16(1) states, 'Every individual has a right to enjoy the best attainable state of physical and mental health;' and article 16(2) provides that:

> States parties to the present Charter shall take all necessary measures to protect the health of citizens and ensure that they receive medical attention when they are sick.

259. The complainants submit that the acts perpetrated against the victims included the infliction of physical, mental and sexual harm which has resulted in physical and emotional injury. According to the complainants, this has detrimentally affected their physical and mental well-being contrary to article 16 of the African Charter.

260. The respondent state does not address article 16 of the African Charter.

261. The right to health operates directly or indirectly as a prerequisite to all other human rights recognised by the African Charter. This principle was substantiated by the African Commission in *Purohit and Moore v The Gambia* where it stated that,

> The enjoyment of the right to health is crucial to the realization of other fundamental rights and freedoms and includes the right of all to health facilities, as well as access to goods and services, without discrimination of any kind.[112]

262. The right to health has also been recognised by article 25 of the UDHR which provides that 'Everyone has the right to a standard of living adequate for the health and wellbeing of himself and his family ...'[113]

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[111] The concept of National Security and Public interest was recognised as justifiable grounds to limit freedom of expression under the Charter in the *Good* case. para 189.

[112] n 14 above, para 80.

[113] See also article 12(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) which also provides that 'The States Parties to the present Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.'

263. In General Comment 14 on the right to health, the UN Committee on Economic, Social and Cultural Rights provides that

> the right to health contains four elements: availability, accessibility, acceptability and quality, and impose three types of obligations on states — to respect, fulfil and protect the right. In terms of the duty to protect, the state must ensure that third parties (non-state actors) do not infringe upon the enjoyment of the right to health.

264. This Commission therefore underscores the fact that the right to health is an entitlement which is derived from specific obligations claimed by individuals from states, and it is very fundamental to the exercise of other human rights enshrined in the African Charter. In this regard, states have a legal obligation to protect the right to health of its citizens, including *inter alia* taking concrete and targeted steps towards the full realisation of the right, and adopting legislation or other measures to ensure equal access to health-related services and health care.

265. In the present communication, the facts demonstrate that the victims were physically and emotionally traumatised as a result of sexual violence and assaults on their person. The trauma and injuries sustained has affected their physical, psychological and mental health clearly in violation of article 16(1) of the African Charter.

266. With respect to article 16(2), in the communication in question, it is reported that the victims all received medical attention after they were assaulted, meaning that the respondent state fulfilled its obligation under the sub-article to ensure that the victims received medical attention after the injuries sustained. As a matter of fact, it is through the medical reports that they were able to confirm the scars, bruises and scratches that were incurred by the victims.

267. In this regard, it is the view of the African Commission that there was no violation of article 16(2) of the African Charter.

Alleged violation of article 1 — obligations of member states

268. The complainants allege that the respondent state has violated article 1 of the African Charter.

269. 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.'

270. The complainants submit that the respondent state violated article 1 of the African Charter when it failed in its positive obligation to protect the victims from the violations they incurred. They also raise the issue of non-investigation by the respondent state as a violation of article 1 of the African Charter.

271. The respondent state did not make any submissions directly related to article 1 of the African Charter. Its submissions under the other articles however touch on the issues of protection and investigation which will not be replicated here.

272. The African Commission has held that article 1 of the African Charter gives the latter a legally binding character and that a violation of any provision of the Charter automatically means a violation of article 1.[114]

273. Following the analyses of the other articles alleged to have been violated by the respondent sate, it is the view of the African Commission that the violations that have been committed by the respondent state against the victims have been prompted by the latter's failure to protect, promote and fulfil these rights as required by the African Charter. In addition, the state's failure to thoroughly investigate the violations and institute mechanisms to protect the victims from further violations has also demonstrated the State's contravention of article 1 of the African Charter.

274. It is the opinion of the Commission that in the present communication, the respondent state had a responsibility to provide a police force to protect the victims against violations of their rights during the protest, and to put in place normative systems and institutions to maintain a system of justice that provides remedies for violations and imposes sanctions on violators. It is also the duty of the respondent state, to investigate when violations have occurred and ensure thorough investigations. Failure to do all the above, is a violation of article 1 of the African Charter.

Decision of the African Commission

275. From the above reasoning, the African Commission;

(i) Observes that the respondent state is in violation of articles 1, 2, 3, 5, 9(2), 16(1), 18(3) and 26 of the African Charter;

(ii) That there was no violation of articles 7(1)(a) and 16(2) of the African Charter by the respondent state;

(iii) Request an amendment of laws in the respondent state, to bring them in line with the African Charter;

(iv) Request compensation to each of the victims in the amount of EP 57,000, as requested by the complainant, for the physical and emotional damages/traumas they suffered;

(v) Urges the respondent state to investigate the violations, and bring the perpetrators to justice;

(vi) Urges the respondent state to ratify the Women's Protocol; and

[114] n 3 above, para 46.

(vii) Urges the respondent state to report on the steps it has taken to implement these decisions in accordance with rule 112(2) of its Rules of Procedure, within one-hundred and eighty (180) days.

MOZAMBIQUE

Zitha v Mozambique

(2011) AHRLR 138 (ACHPR 2011)

Communication 361/08, *JE Zitha & PJL Zitha (represented by Prof Dr Liesbeth Zegveld) v Mozambique*

Decided at the 9th extraordinary session, 23 February - 3 March 2011

Jurisdiction (continuing violation, 80-94)
Enforced disappearance (81)
Admissibility (exhaustion of local remedies, 105, 108; submission within reasonable time, 113)

Summary of complaint

1. The communication is submitted by Prof Dr Liesbeth Zegveld (attorney at law) (hereinafter called the complainant) on behalf of Mr Jose Eugency Zitha (herein after called first victim) and Prof Pacelli LJ Zitha (herein after called second victim). The respondent state is the Republic of Mozambique a state party to the African Charter on Human and Peoples' Rights (the African Charter or the Charter).[1]

2. Mr Jose Eugency Zitha was a citizen of Mozambique, born on 15 April 1939 in Magude, Mozambique and lived in Matola. Prior to his arrest and detention on 26 October 1974, he was a medical student at the University of Lourenco Marques in Mozambique, where he was enrolled in the Faculty of Medicine from 1968 and 1974.

3. The second victim, Prof Pacelli LJ Zitha, the son of the first victim, is a citizen of France, born on 19 October 1961 in Mozambique. He is currently living in The Netherlands and by profession, he is a Professor of Oil and Gas Production with the Delft University of Technology.

4. It is alleged that on 26 October 1974, the first victim was requested by the Minister of Home Affairs of the transition government of Mozambique,[2] Mr Armando Guebuza, to join a meeting of the members of the *grupos dinamisadores*. He was taken to the

1 Mozambique ratified the African Charter on 22 February 1989.
2 The transition government of Mozambique was formed after the Lusaka Agreement in 1974.

meeting in a military vehicle, accompanied by armed FRELIMO[3] soldiers. When he entered the meeting room, under the escort of heavily armed militia, he was humiliated and accused of being a betrayer.

5. It is alleged that Mr Guebuza ordered his arrest and detention at the headquarters of FRELIMO Armed Forces in Boane. He was not informed about the reasons for his arrest. His family, including his son, the second victim, were not informed nor notified of these events. After five days of thorough search by second victim and his family, they discovered that the first victim was detained at the prison of Boane.

6. A few weeks later, the first victim suddenly disappeared from the prison in Boane. After a few days the second victim found out that his father, the first victim, had been transferred to the former *Cadeia Judiciaria* in Maputo. Around the beginning of 1975, the second victim met the first victim for the last time at *Cadeia Judiciaria* in Maputo. After that visit, the first victim suddenly disappeared from the prison in Maputo.

7. The complainant alleges that an article from the Tanzania Daily News of 23 April 1975 indicated that the first victim was paraded in public on 21 April 1975 at the Nachinqwea Prison in southern Tanzania. Since then, there has been no trace of the first victim

Articles alleged to have been violated

8. The complainant submits that with respect to the first victim, the respondent state violated articles 2, 4, 5, 6 and 7(1)(d) of the African Charter and with respect to the second victim article 5 of the same Charter.

Procedure

9. The complaint was received at the Secretariat of the African Commission (herein after the Secretariat) on 9 June 2008.

10. On 15 July 2008, the Secretariat acknowledged receipt of the complaint and informed the complainant that it will be considered at the African Commission on Human and Peoples' Rights (herein after the African Commission) 44th ordinary session.

11. During its 44th ordinary session held from 10 to 24 November 2008, in Abuja, Nigeria, the African Commission decided to be seized of the communication and requested the complainant to submit its arguments on admissibility.

[3] The ruling party of Mozambique.

12. By letter, dated 11 December 2008, the Secretariat wrote to the complainant informing her of the decision of the African Commission.

13. By letter, dated 22 December 2008, the Secretariat of the African Commission wrote to the complainant requesting her to furnish the African Commission with the information on the missing documents in the complaint.

14. By letter, dated 7 January 2009, the Secretariat wrote to complainant reminding her to forward the information previously requested on the missing documents in the complaint.

15. On 18 February 2009, the complainant sent her submission on admissibility and adapted version of the original communication to the Secretariat. The Secretariat acknowledged receipt by letter dated 4 March 2009.

16. By *note verbale* dated 24 March 2009, the Secretariat informed the respondent state about the communication and requested it to submit its submissions on admissibility within three (3) months of notification.

17. On 21 April 2009, the complainant wrote to the Secretariat to enquire whether she could attend and make oral submissions on admissibility at the 45th ordinary session of the African Commission. The Secretariat acknowledged receipt by a letter dated 25 April 2009 and informed the complainant that the respondent state has not yet submitted its arguments on admissibility and as such it would not be necessary for the complainant to make oral submission.

18. By letter, dated 29 April 2009 and 28 May 2009 respectively, the complainant requested the Secretariat to consider the communication at its 45th ordinary session or provide explanations for the African Commissions position on the matter. The Secretariat acknowledged receipt by a letter dated 9 June 2009 and informed the complainant about the procedure for consideration of communications by the African Commission.

19. By *note verbale* dated 26 June 2009, the Secretariat informed the respondent state that it is yet to receive its arguments on admissibility and requested the state to send its arguments on admissibility by 23 July 2009.

20. By letter, dated 8 July 2009, the complainant requested the Secretariat to table the communication for considered at the 46th ordinary session of the African Commission. The Secretariat acknowledged receipt by letter dated 5 August 2009, and informed the complainant that when the communication is considered, the decision of the African Commission will be communicated to her. The complainant by letter, dated 17 August 2009, requested the Secretariat to clarify whether the Secretariat's letter of 5 August

2009, explains that it is not necessary for her to attend the session with her client.

21. By letter, of 29 September 2009, the Secretariat informed the complainant that the respondent state had still not yet submitted its arguments on admissibility and that if the respondent states does not forward its submissions before the 46th ordinary session, the African Commission will decide on the way forward and the decision will be communicated to her.

22. By letter, dated 21 October 2009, the complainant requested the Secretariat to confirm whether due to the fact that she and her client would not be allowed to make a statement during the 46th ordinary session of the African Commission, it would not be necessary for them to attend the session.

23. The Secretariat acknowledged receipt by letter, dated 26 October 2009 and informed her that it will not be necessary for them to attend the session.

24. By letter, dated 4 November 2009, the Secretariat received the submission of the respondent state on admissibility and forwarded it to the complainant by letter dated 30 November 2009 for her response.

25. On 19 February 2010, the Secretariat received the complainant's response to the respondent state's submission on admissibility and acknowledged receipt on 5 March 2010.

26. On 22 April 2010, the Secretariat received an email from the complainant indicating that, she will be attending the 47th ordinary session of the African Commission, together with the second victim to address the African Commission on the communication.

27. By *note verbale*, dated 23 April 2010, the Secretariat informed the respondent state about the complainants letter of 22 April 2010.

28. At the 47th ordinary session of the African Commission held from 12-26 May 2010, in Banjul, The Gambia, the complainant and the respondent state addressed the African Commission on the admissibility of the communication.

29. The African Commission decided to defer the communication to the 48th ordinary session for consideration on admissibility, to allow the Secretariat to take into consideration, the oral submissions of both parties in its draft decision.

30. By letter, and *note verbale*, dated 4 June 2010, the Secretariat informed the complainant and the respondent state of the decision of the African Commission.

31. The African Commission decided to defer the communication to the 49th ordinary session for consideration on admissibility due to lack of time.

32. By letter, and *note verbale*, dated 9 December 2010, the Secretariat informed the complainant and the respondent state of the decision of the African Commission.

The law on admissibility

Complainant's submission on admissibility

33. The complainant states that the criteria for admissibility stipulated in article 56 of the African Charter have been fulfilled and goes further to address each of these criteria.

34. The complainant states that in compliance with article 56(1) of the African Charter, the author has been indicated as Prof Dr Liesbeth Zegveld on behalf of Mr Jose Eugency Zitha and Prof Pacelli LJ Zitha.

35. The complainant submits that article 56(2) of the African Charter has been complied with, noting that the communication deals with violations of rights guaranteed under the African Charter, which the respondent state is a party to.

36. The complainant states that the communication is not written in disparaging or insulting language directed at the respondent state and as such it has complied with article 56(3) of the African Charter.

37. The complainant avers that the communication is not based exclusively on news disseminated through the mass media but is based on witness statements, a book and several reports of human rights organisations, and has thus fulfilled article 56(4) of the African Charter.

38. The complainant further states that in fulfilling article 56(5) of the African Charter, local remedies were not available or sufficient. The complainant submits with respect to the first victim that in *Forum of Conscience v Sierra Leone*[4] filed on behalf of people who were already executed, the African Commission held that 'there were no local remedies for complainants to exhaust and even if such possibility had existed, the execution of the victims had completely foreclosed such remedy'. The complainant argues that if there is a substantial chance that the first victim has been arbitrarily executed, exhaustion of local remedies is impossible and the requirement to exhaust local remedies is therefore not applicable in this case.

39. The complainant further argues that if the respondent state claims that the first victim is still alive, the respondent state is responsible to prove so. The complainant cites the African Commission's decision in *Institute for Human Rights and Development (on behalf of Jean Simbarakiye) v Democratic Republic*

4 Communication 223/98, *Forum of Conscience v Sierra Leone* (2000) [(2000) AHRLR 293 (ACHPR 2000)].

of Congo[5] in which it stated that: when a person is being held in detention and accused of committing a crime, it is the responsibility of the member state, through its appropriate judicial bodies, to bring this person promptly before a competent court of law in order to enable him/her to be tried in accordance with the rules guaranteeing the right to fair trial in accordance with national and international standards.

40. The complainant argues that with respect to the second victim, due to fear of persecution after the disappearance of the first victim, he was forced to flee his country in 1983 to France, after which his office in Mozambique was bombed. When gaining his political asylum status in France, he made a commitment by signing a form in France, stating that he would not undertake any action against Mozambique while living there. He lived in France from 1983 to1994 and in 1995 he moved to the Netherlands where he currently resides.

41. The complainant further argues that it was thus impossible for the second victim to pursue any domestic remedies following his flight from Mozambique to France for fear of his life. Because of this, he could not travel to Mozambique to undertake legal action himself. The complainant cites the African Commission's decision in *Jawara v The Gambia*,[6] where the African Commission held that

> the existence of remedy must be sufficiently certain, not only in theory but also in practice, failing which, it will lack the requisite accessibility and effectiveness. Therefore, if the applicant cannot turn to the judiciary of his country because of generalized fear for his life or even those of his relatives, local remedies would be considered to be unavailable to him.

42. The complainant further argues that, when the second victim moved to the Netherlands in 1995 and was able to work and obtain some resources to undertake legal research and action, he and his family contacted several competent lawyers in Mozambique but no counsel appeared available or willing to defend their interests because of fear for their lives. The complainant cites the African Commission's decision in *Doebbler v Sudan*[7] which states that 'in order to exhaust local remedies within the spirit of the article 56(5) of the African Charter, one needs to have access to those remedies but if the victims have no legal representation it would be difficult to access domestic remedies'.

43. According to the complainant, other reasons for the inability of the second victim to exhaust local remedies are that the fear remains that harm may be inflicted on his family living in

5 Communication 247/02 (2006) [(2003) AHRLR 65 (ACHPR 2003)].
6 Communication 147/95 and 149/96, *Sir Dawda K Jawara v The Gambia* (2000) [(2000) AHRLR 107 (ACHPR 2000)].
7 Communication 236/200, *Curtis Francis Doebbler v Sudan* [(2003) AHRLR 153 (ACHPR 2003)].

Mozambique, and because he is still hopeful that his father may be alive in the hands of the government, he opted for a careful approach to deal with the matter.

44. The complainant also argues that it was only after the second victim made his first trip to Mozambique in 1995, that he became aware that it was most likely that his father had been executed and he decided to undertake legal action because the respondent state did not react to any request for information and local undertakings proved unsuccessful.

45. The complainant submits that recently the second victim, still being actively seized of the matter to gain information from the respondent state, during President Guebuza's visit to the Netherlands on 27 February 2008, he personally presented a letter to the President and subsequent correspondences took place between the victims lawyers and the Human Rights Ambassador of the Dutch Ministry of Foreign Affairs.

46. The complainant submits that the second victim further went to Mozambique in August 2007, for an extensive inquiry to ensure progress in the case of the first victim. During this visit he managed to arrange two meetings with the son of Uria Simango (the former Vice-President of FRELIMO in the 1960's) and a meeting with Dr Simeao Cuamba (a high profile lawyer in Mozambique). Both meetings were unsuccessful. Several letters were also sent to Mr Armando Emilio Guebuza, the current President of Mozambique, requesting information of the whereabouts of the first victim. No reply was ever received.

47. The complainant cites the African Commission's decision in communication *Legal Assistance Group, Lawyers Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Temoins de Jehovah v Zaire*,[8] where the African Commission stated that

> one of the rationale for the exhaustion requirement is that the government should have notice of a human rights violation in order to have the opportunity to remedy such violation, before being called to account by an international tribunal.

48. The complainant finally submits that all the above mentioned instances prove the difficulty and impossibility of the second victim to exhaust local remedies in accordance with article 56(5) of the African Charter.

49. The complainant submits that the requirements of article 56(6) of the African Charter have been fulfilled. The complainant argues that it is a well-established principle of international law that a new government inherits the previous government's international

[8] Communication 25/89, 47/90, 56/91 and 100/93, *Legal Assistance Group, Lawyers Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Temoins de Jehovah v Zaire* [(2000) AHRLR 74 (ACHPR 1995)].

obligations including responsibility for the previous government's misdeeds and mismanagements.[9]

50. The complainant further submits that the African Commission is therefore, competent *ratione temporis* to consider events that happened after the coming into force of the African Charter, or if they happened before, constitutes a continuing violation after the coming into force of the African Charter.[10] The complainant, therefore, submits that forced disappearance of the first victim and the failure of the respondent state to investigate the case constitute a continuous violation of a human right and the communication was submitted as soon as it was possible to do so, as the second victim was unable to submit at an earlier time.

51. The complainant states that the communication has not been submitted to any other procedure of international investigation or settlement and as such has fulfilled the requirements under article 56(7) of the African Charter.

Respondent state's submission on admissibility

(a) Incompetent *ratione temporis*

52. The respondent state submits that the African Commission is incompetent *ratione temporis*, and therefore should not have even received the communication in question. The respondent state argues that article 65 of the African Charter provides that:

> For each of the states that will ratify or adhere to the present Charter after its coming into force, the Charter shall take effect three months after the date of the deposit by that state of the instrument of ratification or adherence.

53. The respondent state argues that the alleged incident happened in April 1977 before Mozambique became party to the African Charter.

54. The respondent state submits that the communication alleges that the first victim was transferred to Nachingwea, Tanzania, in April 1975 and has never been seen since. The respondent state states that the communication mentioned that most probably the first victim was executed there, noting that if that is true, it is obvious that the African Commission is being called upon to entertain a matter (the occurrence of which besides being prior to its own existence also preceded the coming into force of the Charter).

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9 Communication 64/92, 68/92 and 78/92, *Khrishna Achutan (on behalf of Aleke Banda), Amnesty International (on behalf of Orton and Vera Chirwa), Amnesty International (on behalf of Orton and Vera Chriwa) v Malawi* (1995) [(2000) AHRLR 144 (ACHPR 1995)].

10 Communication 251/02, *Lawyers for Human Rights v Swaziland* (2005) [(2005) AHRLR 66 (ACHPR 2005)].

The respondent state submits that the African Commission is only competent to entertain facts which occurred after the coming into force of the African Charter or, if they occurred before, they constitute a violation continuing after the coming into force of that same Charter.[11] The respondent state argues that that is not the case with the facts alleged in the present communication. The respondent state thus submits that, the African Commission is incompetent *ratione temporis*, since the facts which it is being asked to entertain in relation to both victims, preceded the coming into force of the African Charter, insofar as the respondent state is concerned, and such facts have not continued subsequently.

55. The respondent state submits further that if, however, the African Commission decides it is competent *ratione temporis* to entertain the subject matter of the communication, the African Commission should declare the communication inadmissible for failure to meet the fundamental requirement in article 56(5) of the African Charter.

(b) Incompatibility with article 56(5)

56. The respondent state argues that article 56(5) of the African Charter states that:

> Communications relating to human and peoples' rights referred to in Article 55 received by the Commission, shall of necessity, in order to be examined, meet the following conditions: […] Be subsequent to the exhaustion of local remedies, if any, unless it is obvious to the Commission that the procedure relating to these remedies is unduly prolonged.

57. The respondent state argues that with respect to the first victim, the communication was submitted on behalf of a citizen who, according to the same complainant had been detained on 26 October 1974 and executed in Nachingwea, Tanzania, in April 1975 or thereabout. The period in question, the respondent state argues, coincides to a large extent with the transitional period to an independent Mozambican state, during which an assortment of legislation was enacted, culminating in the adoption of the first Constitution of the Republic on 24 June 1975, which came into force with the proclamation of independence on 25 June 1975.

58. The respondent state further argues that there is no record at Mozambique's judicial institutions of any report, application for the right to appear before a judge, for *habeas corpus* or other appropriate judicial proceedings addressed by either the family members of the first victim or his legal representative. The respondent state cites the case of *Jawara v The Gambia*[12] where the

[11] Communication 59/91, *Emgba Louis Mekongo v Cameroon* (1995) [(2000) AHRLR 56 (ACHPR 1995)] para 28.

[12] Communication 147/95 and 149/96, *Sir Dawda K Jawara v The Gambia* (2000) [(2000) AHRLR 107 (ACHPR 2000)].

African Commission noted that the exhaustion of domestic remedies was one of the most important conditions for admissibility of communications, and held that 'before a case is brought before an international body, the state in question should have the opportunity to remedy the situation through its own system'. The respondent state argues that this has not happened.

59. The respondent state argues that the same observation applies with respect to the second victim. Although the complainant lists several attempts of which the second victim claimed to have tried to find answers of the whereabouts of the first victim, he did not grant the respondent state the opportunity to remedy the situation through its own system. The respondent state argues that none of the attempts were addressed to institutions of the judicial apparatus, which, besides being available since the time of the alleged detention of the first victim, were a reality, and effective and sufficient.

60. The respondent state argues that the 1975 Constitution established the political, economic and social organisation of the Mozambican state, and enshrines the separation of legislative, executive and judicial powers. It further argues that the Constitution guarantees the rights and freedoms of citizens, as well as, the principle of continuity of the preceding legislation, that is, from the colonial era, which did not contravene the Constitution. It argues that the Constitution also established the judicial organisation, enshrining among other aspects, the fundamental rules and principles of the judiciary. It states that, article 33 of the Constitution of the People's Republic of Mozambique provides that:

> The State guarantees the individual freedoms to every citizen of the People's Republic of Mozambique. These freedoms include the inviolability of dwelling and the secrecy of correspondence, and cannot be restricted save in cases specially foreseen in the law.

It states further that article 35 of the same Constitution states:

> In the People's Republic of Mozambique nobody may be arrested and subjected to trial except in terms of the law. The State guarantees the accused the right to defence.

61. The respondent state further argues that the periods of provisional detention are laid out in article 308 of the Criminal Procedure Code, and article 337 deals with the procedure for disregard of such periods. It argues that article 312 of the Criminal Procedure Code also provides for (application for appearance before a judge), the right of a detainee to appear before a judge, and article 315 provides for ('*habeas corpus*'). The respondent state, therefore, argues that the complainant could have had recourse to these rights before judicial instances already contemplated in article 62, chapter VI of the Constitution of the Republic (Judicial Organisation).

62. Furthermore, the respondent state argues that the Ministry of Justice provides legal assistance to citizens through the National Institute for Judicial Assistance (INAJ) established under Law 3/86 of

16 April 1986. The respondent state also argues Law 6/89 of 19 September 1989 created and institutionalised the Office of the Attorney-General of the Republic as the supreme body of the Public Prosecution Office and article 42 of Law 12/78 of 2 December 1978 provided that:

> The fundamental tasks of the Public Prosecution Office are as follows:
> (a) To watch over the observance of legality;
> (b) Oversee the enforcement of the law and other legal norms;
> (c) Control the legality of detentions and compliance with the respective periods;

63. The respondent state, therefore, submits that the complainant had opportunities for redress.

64. The respondent state further submits that the communication unfortunately presumed at the outset that it was useless to resort to the existing institutions, contrary to what the rest of Mozambique's citizens had been doing. The respondent state states that preference was given to unsuitable mechanisms, for instance, the handing of letters to bearers or members of the executive branch. It argues that disregard of the judiciary, which is the only institution competent to address concerns of the communication in hand, and the preference for political mechanisms (letters and meetings) have compromised the prime opportunity that the second victim, who, according to the communication, has visited Mozambique more than once, and his family who are even residents of Mozambique, had to put to the test the efficacy and sufficiency of the remedies available in the country.

65. The respondent state, therefore, submits that this communication should be declared inadmissible on two grounds:

> (1) Incompetence *ratione temporis* in light of article 65 of the African Charter.
> (2) Non-compliance with the requirement of article 56(5) of the African Charter.

Supplementary submission by the complainant

66. In response to the respondent state's submission, the complainant states that in general, the African Commission should consider carefully the political situation under which the violations were made.

67. The complainant therefore comments on two points made by the respondent state. Firstly, on the respondent state's argument that the African Commission is not a competent *ratione temporis*, the complainant states that the respondent state has neither disputed that it inherited the alleged acts and consequences of the previous government, nor has it offered any reasons or explanation why the alleged violations are continuing.

68. The complainant further submits that, the fact that the respondent state ratified the African Charter in 1988 does not mean

that it is exonerated from past violations of human rights and are therefore under obligation to undertake due diligence to remedy past violations that are still continuing and as such the African Commission should declare itself competent *ratione temporis*.

69. Secondly, on exhaustion of domestic remedies, the complainant argues that the first victim was a political prisoner unable to exhaust local remedies. As to the applicability of *habeas corpus*, the complainant states that according to article 6 of Decree-Law 21/75 (11 October 1975),

> persons implicated in the practice of crimes, the investigations and preparations of suits thereof having been or to be attributed to National Service for Public Security (SNASP), shall not benefit from the provisions of article 315 of the Criminal Procedure Code.

The complainant argues that since the SNASP was involved in the case of the first victim, he could not benefit from *habeas corpus*.

70. On exhaustion of local remedies by the second victim, the complainant refers the African Commission to a personal statement made by the second victim in which he reiterates personal facts that are of importance to this communication. The second victim in his personal statement stated that:

> Mozambique indicates the existing legal machinery that could have been used for this case. The fact that they exist does not guaranty that they have been, or would have been applied. In the political case the judiciary system has lacked and may still lack the capacity to apply the law because of the specific political situation where a single party governance hardly warranties independence of justice. It is misleading to state that domestic remedies have been and continued to be available uninterruptedly, especially when members of the executive branch are involved. There are many examples where injustice was rendered rather than justice, sometimes with deadly consequences. I have indeed visited Mozambique – my mother country for which I still have the deepest love – but certainly not calmly. It has always been after taking adequate security measures with appropriate warning systems to be able to flee the country at the first sign of danger. Perhaps the 1975 Constitution of Mozambique intended to enshrine the separation of the legislative, executive and judicial power and the guarantee of the fundamental rights of persons, but the reality has been totally different. On the contrary the executive has maintained strict control over the judicial power. Therefore, the judicial machine will be ineffective in any case.

Oral submissions at the 47th ordinary session

71. At the 47th ordinary session of the African Commission, held from 12 to 26 May 2010, in Banjul, The Gambia, the complainant, the respondent state and the second victim made oral submissions to the African Commission.

72. The oral submissions made by all the parties were the same as the written submissions submitted to the African Commission above.

Decision on the competence of the Commission

73. In the present communication, the complainant submits that the communication fulfils all the requirements of article 56 of the African Charter. The respondent state on the other hand submits that: firstly, the African Commission is incompetent *ratione temporis* in terms of article 65 of the African Charter, and secondly if the African Commission decides that it is competent *ratione temporis* to entertain the communication, the complainants have not fulfilled the requirements of article 56(5) of the African Charter and as such, the African Commission should declare the communication inadmissible.

74. The respondent state on the other hand argues that the African Charter came into force on 21 October 1986 and the Republic of Mozambique ratified the African Charter on 22 February 1988, and it came into force for Mozambique in February 1989.

75. The respondent state submits that the African Commission is only competent to entertain allegations which occurred after the coming into force of the African Charter, or where, they constitute a continuing violation after the coming into force of the African Charter. The respondent state further submits that since the facts which the African Commission is asked to consider in relation to both victims, preceded the coming into force of the African Charter, and as far as the respondent state is concerned such facts have not continued subsequently, the African Commission is therefore incompetent *ratione temporis*.

76. The complainant argues that the African Commission held in *Achutan and Others v Malawi*,[13] that

> it is a well established principle of international law that a new government inherits the previous government's international obligations, including responsibility of the previous government's misdeeds and mismanagements.

The complainant submits that even if the government in power did not commit the human rights abuses complained of, it is responsible for the reparation of these abuses. The complainant further argues that in order to consider whether the African Commission is competent to entertain allegations of human rights violations that took place before the coming into force of the African Charter, the African Commission has to differentiate between allegations of violations that are no longer perpetrated and violations that are ongoing.[14]

77. The complainant further argues that the African Commission needs to consider whether a disappearance is a continuous violation? The complainant states that though the African Commission has not explicitly decided whether a disappearance leads to a continuous

[13] *Krishna Achutan (on behalf of Aleke Banda) and Others v Malawi* [(2000) AHRLR 144 (ACHPR 1995)].

[14] *Lawyers for Human Rights v Swaziland* [(2005) AHRLR 66 (ACHPR 2005)].

violation, in *Commission Nationale des Droits de l'Hommes et des Libertes v Chad*,[15] the African Commission referred to the principle that conforms with the practice of other international human rights adjudicatory bodies. The complainant argues that the African Commission's duty to protect human rights indicates that it may take decisions from other international bodies into consideration, where it is accepted that forced disappearances amounts to a continuous violation.

78. The complainant submits that in the Inter-American Court on Human Rights, the court in numerous cases, held that

> forced disappearance of human beings is a multiple and continuous violations of many rights under the Convention that the State Parties are obliged to respect and guarantee.[16]

She also argues that the European Court of Human Rights have held that

> there has been a continuous violation of Article 2 on account of the failure of the authorities of the Respondent State to conduct an effective investigation aimed at clarifying the whereabouts and fate of the Greek-Cypriot missing persons, who disappeared in life threatening circumstances in respect of whom there is arguable claim that they were in custody at the time they disappeared.[17]

79. The complainant submits that it must be concluded that the forced disappearance of the first victim and the failure of the respondent state to investigate the case constitutes a continuous violation of human rights, and the African Commission is competent *ratione temporis*.

80. The African Commission holds that the fact that the events alleged occurred before the coming into force of the African Charter, is not sufficient to render the African Commission incompetent *ratione temporis*, because the African Commission is of the view that not only has the first victim been missing before the coming into force of the African Charter, he continues to be missing even after the coming into force of the Charter and to date, he is still missing.

81. In the view of the African Commission, every enforced disappearance violates a range of human rights including, the right to security and dignity of person, the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment, the right to humane conditions of detention, the right to a legal personality, the right to a fair trial, the right to a family life and when the disappeared person is killed, the right to life.

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15 Communication 74/92, *Commission Nationale des Droits de l'Homme et des Libertes v Chad* (1995) [(2000) AHRLR 66 (ACHPR 1995)].

16 Inter-American Court on Human Rights (IACHR), *Velasquez v Honduras*, 29 July 1988. Series C No.4, para 155.

17 *European Court of Human Rights (ECHR), Cyprus v Turkey*, Application no. 25781/94, Judgment d.d.10 mei 2001

82. It is worth mentioning that the respondent state does not refute that the first victim was ordered to be arrested by the then Minister of Interior. The respondent state does not deny that the first victim was in its custody at some point in time. In the present communication, the first victim did not just vanish.

83. According to the facts before the African Commission, the first victim was arrested on 26 October 1974 on the orders of the then Minister of Home Affairs of the Transition Government of Mozambique, Mr Armando Guebuza. It should be noted that on this date, the African Charter was not in existence. The African Charter was adopted in 1981 and came into force in 21 October 1986. The Republic of Mozambique ratified the said African Charter on February 1988, and it came into force for Mozambique on 22 February 1989 in terms of article 65 of the Charter. Is it possible therefore that a violation that occurred before the adoption, ratification and entry into force of an international instrument can be imputed on a state that was not a party to the treaty when the act was committed?

84. It is a well-established rule of international law that a state can be held responsible for its acts or omissions only if these acts and omissions are not in conformity with the obligations imposed on that state at the time that they were committed. However, in some cases, an act or an omission committed before the ratification of a human rights treaty may keep affecting the right(s) of a person protected under the treaty. A similar situation may be observed when an application is lodged with an international organ whose competence was recognised by the relevant state after the complained act or omission had been committed.[18] The effects of an event which occurred before the recognition might be continuing. Problems arising from these situations are generally resolved with reference to the doctrine of continuing violation under international law.

85. In the present communication, the alleged act is enforced disappearance and the alleged lack of investigation on the part of the respondent state. The question to ask at this juncture is can enforced disappearance, be considered a continuing violation?

86. The question whether or not a disappearance can be considered to be a continuing violation of the African Charter is relevant in this case for at least two reasons: the first is to determine the moment from when the time limit under article 56(6) of the African Charter starts to run, and the second is a determination of the admissibility of complaints concerning events which occurred before ratification of the African Charter by the respondent state.

[18] Altiparmak Kerem, The Application of the Concept of Continuing violation to the Duty to Investigate, Prosecute and Punish under International Human Rights Law' (1 January 2003). Available at SSRN: http://ssrn.com/abstract=926281.

87. To determine whether 'disappearance' is a continuing violation, the African Commission has to clarify what is a continuing violation or a continuing act?

88. A continuing violation happens when an act is committed in a certain moment, but continues due to the consequences of the original act.[19] The doctrine of continuing violation has been used by several international tribunals to hold states accountable for acts or human rights violations which occurred before the state became a party to a particular treaty or recognised the competence of the tribunal.

89. In the Inter-American Human Rights system, the Inter-American Commission on Human Rights has used the doctrine of continuing violation on several occasions to exert its authority over failure to investigate a past violation on grounds that an ongoing failure violates victims' Convention-protected right to judicial protection. In *Moiwana Village v Suriname*,[20] the Inter-American Court of Human Rights examined the violation which occurred before Suriname's acceptance of the Court's jurisdiction, but which continued after it. The Court argued that its jurisdiction is based on the state's failure to investigate the facts which occurred before the Convention's ratification.

90. In *Ovelario Tames v Brazil*,[21] the victim was allegedly beaten by military police officers and found dead in a prison in October, 1988. The Inter-American Commission accepted its own jurisdiction on facts which occurred before Brazil ratified the American Convention. It stated that:

> The fact that Brazil has ratified the Convention on 25 September, 1992, does not exempt its responsibility for violations of human rights that occurred prior to that ratification …

91. In *Blake v Guatemala*,[22] an American journalist was executed by Guatemalan authorities before the state accepted the tribunal's jurisdiction. In that case, Blake's forced disappearance lasted from 1985 until 1992, and in spite of the fact that his whereabouts were known by the government authorities, his next of kin were not informed. The Guatemalan government ratified the Convention in 1978 and accepted the jurisdiction of the Court in 1987, therefore, concerning the forced disappearance, the Court exerted its jurisdiction. According to the Court, the enforced disappearance was a continuous violation of the Convention rights.

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19 Lilian M Yamamoto, Inter-American Commission of Human Rights – Feasibility Study of Atomic Bombing Case. Japan Association of Lawyers Against Nuclear Arms.

20 Inter-Am. Ct. H.R. (ser. C) No. 124, at 1 (15 June, 2005)

21 IACHR Report No 19/98, Case No. 11.516, 21 February, 1998, Ann. Report. IACHR 1998.

22 Inter-Am. Ct. H.R. (ser. C) No. 36, at 1 (2 July 1996).

92. All the above mentioned cases refer to continuing violation of rights which happened after the establishment of either the Inter American Commission or the Court, even if the events occurred before the related countries had ratified the Inter-America Convention.

93. Another issue that must be taken into account is the doctrine of instantaneous act, which should be distinguished from continuous violations. In case of a continuing act, the violation occurs and continues over a period of time until the violation ceases. In case of an instantaneous act, the violation itself does not continue over time, although the completion of such an act might take some time. This definition of continuous violations can be applied to acts of disappearances, which can be qualified as a violation that occurs and continues over time, until it ceases, that is, until the missing person is no longer disappeared. Nigel Rodley, the United Nations Special Rapporteur on Torture at the time until 2001, pointed out that:

> the idea of 'disappearances' constituting a continuing offence is logical, since non-acknowledgement of the detention and nondisclosure of the fate or whereabouts of detained persons are key elements in the offence itself.[23]

94. In the present communication, the respondent state has not proved the whereabouts of first victim and neither has it demonstrated efforts made to investigate his whereabouts. The African Commission is of the view that the forced disappearance of the first victim constitutes a continuing violation of his human rights and for these reasons holds that it is competent *ratione temporis* to examine the matter.

The African Commission's analysis on admissibility

95. Having established that the African Commission is competent *ratione temporis* to entertain the communication before it, the African Commission will now proceed to analyse admissibility of the communication.

96. The admissibility of communications within the African Commission is governed by the requirements of article 56 of the African Charter. This article provides seven requirements that must be met before the African Commission can declare a communication admissible. If one of the conditions/requirements is not met, the African Commission will declare the communication Inadmissible, unless the complainant provides sufficient justifications why any of the requirements could not be met.

97. Article 56(1) of the African Charter states that:

[23] 'An Analysis of International Instruments on "Disappearance"', Nunca Más in *Human Rights Quarterly*, vol.19, 1997, p. 389.

> Communications relating to Human and Peoples' Rights ... received by the Commission shall be considered if they indicate their authors even if the latter request anonymity ...

The communication indicates the author as well as the victims of the alleged violations, and the African Commission therefore holds that the requirement under article 56(1) of the African Charter is fulfilled.

98. Article 56(2) of the African Charter states that

> Communications ... received by the Commission shall be considered if they are compatible with the Charter of the Organisation of African Unity or with the present Charter.

The communication is brought against the Republic of Mozambique which became a party to the African Charter on 22 February 1989 and the communication alleges violations of the rights contained in the African Charter, in particular, rights guaranteed under article 2, 4, 5, 6 and 7(1)(d) of the African Charter. The African Commission therefore holds that the requirements under article 56(2) of the African Charter have been fulfilled.

99. Articled 56(3) of the African Charter states that

> Communications ... received by the Commission shall be considered if they are not written in disparaging or insulting language directed against the State concerned and its institutions or to the Organisation of African Unity now African Union (AU).

The present communication is not written in disparaging or insulting language directed at the state, its institutions or the AU, and for these reasons the African Commission holds that the requirement of article 56(3) of the African Charter has been complied with.

100. Article 56(4) of the African Charter states that

> Communications relating to human and peoples' rights ... shall be considered if they are not based exclusively on news disseminated through the mass media.

The communication is not based exclusively on news disseminated through the mass media and there is evidence to show that the communication is based on witness statements, a book and several reports of human rights organisations. For these reasons, the African Commission holds that the requirement under article 56(4) of the African Charter has been fulfilled.

101. Article 56(5) of the African Charter states that

> Communications relating to human and peoples' rights ... shall be considered if they: are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged.

With regards to the first victim, the complainant submits that the respondent state has to prove that the first victim is still alive and bring him before a competent court of law in order to enable him to be tried in accordance with national and international fair trial standards.[24] The respondent state has not proved that the first victim

[24] Communication 250/02, *Liesbeth Zegveld & Mussie Epherm v Eritrea* (2003) [(2003) AHRLR 84 (ACHPR 2003].

is alive, and the complainant argues that there is substantial chance that the first victim has been executed and his execution has completely foreclosed such a remedy.

102. With respect to the second victim, the complainant submits that he has made several attempts to exhaust local remedies during visits to Mozambique to find out the whereabouts of his father. It is submitted that in his attempt to deal with the whereabouts of his father, the second victim took the following measures:

(a) Sent a letter to the former President of Mozambique Joaquim Chissano with no response;

(b) Sent several letters to the current President of Mozambique, Armando Emilio Guebuza on 15 August 2006, 12 September 2006 and 17 November 2006 respectively with no response;

(c) Sent a letter to Mr Bacre Waly Ndiaye: Special Rapporteur of Extrajudicial, Summary and Arbitrary Executions of the United Nations on 11 March 1996;

(d) Correspondence with Mrs Marise Castro of Amnesty International dated 5 January 1996 and 11 March 1996 respectively.

(e) Attempted to engage Mozambican lawyers to no avail, because, he alleges they were too afraid;

(f) Through his sister he tried to find another Mozambican lawyer whom he alleges was also not available for this case;

(g) Other family members of first victim undertook several actions such as seeking information from the police and prisons;

(h) Sister and mother contacted the former President of Mozambique, Samora Machel and even had an appointment with the President. He promised to support the case but later died in an air crash in 1986 and could not conclude the case.

103. The question to be asked at this juncture is 'what does exhaustion of local remedies entail'?

104. The African Commission in *Institute of Human Rights and Development in Africa and Interights v Mauritania*,[25] made it clear that:

> the generally accepted meaning of local remedies, which must be exhausted prior to any communication/complaint procedure before the African Commission, are the ordinary remedies of common law that exist in jurisdictions and normally accessible to people seeking justice.

105. The African Commission is of the view that the measures taken by the second victim in paragraph 102 above, do not only fall short of the judicial remedies required to be exhausted, but they also do not seem to be institutionalised administrative remedies. The second

[25] Communication 242/01, *Institute of Human Rights and Development in Africa and Interights v Mauritania* [(2004) AHRLR 87 (ACHPR 2004)].

victim seemed to have been exploring other possibilities other than judicial remedies. The complainant's argument that the second victim approached lawyers who refused to take up the matter for fear of their lives has not been adequately substantiated – no dates have been indicated and there is no adequate indication of why the lawyers would be afraid to take up the matter.

106. It is a general principle that the person who seizes the African Commission with a complaint is expected to demonstrate that he or she has complied with the requirements under article 56 of the African Charter especially article 56(5). The African Commission has developed in its jurisprudence that the person submitting the communication (author or complainant) need not be the victim. All the author/complainant needs to do is to comply with the requirements of article 56.

107. The African Commission has thus allowed many communications from authors acting on behalf of victims of human rights violations. Thus, having decided to act on behalf of the victims, it is incumbent on the author of a communication to take concrete steps to comply with the provisions of article 56 (5) or to show cause why it is impracticable to do so'. This was reiterated in *Article 19 v Eritrea*,[26] where the African Commission made it clear that:

> it is incumbent on the complainant to take all necessary steps to exhaust, or at least attempt the exhaustion of local remedies. It is not enough for the complainant to cast aspersion on the ability of the domestic remedies of the State due to isolated incidences.[27]

108. Therefore, local remedies could have been exhausted by the victim, the complainant or any other person. The African Commission is thus not convinced that the complainant or the victim in the present communication attempted, to exhaust local remedies, and was unable to exhaust those remedies because they were not available, effective or sufficient. The African Commission is of the view that the measures taken by the second victim as stated above in paragraph 102, to deal with the matter, do not fall within the purview of the African Commission's meaning of domestic remedies. The African Commission, therefore, is of the opinion that local remedies were not attempted.

109. For the above reasons, the African Commission holds that the requirement of article 56(5) of the African Charter has not been complied with.

110. Article 56(6) of the African Charter states that 'Communications relating to human and Peoples' Rights ... shall be considered if they: are submitted within a reasonable period from the time local remedies are exhausted, or from the date the Commission is seized with the matter'. The complainants argue that because of

[26] As above, para 63.
[27] As above, para 65.

fear of persecution, the second victim fled to France in 1983, and lived there until 1994. He later moved to the Netherlands in 1995, where he currently lives and works.

111. The African Commission notes the complainant's arguments that while applying for refugee status in France, the second victim made a commitment not to undertake any legal action against Mozambique while living in France and due to lack of resources it was impossible to undertake legal action from France. The complainant further states that when the second victim moved to the Netherlands in 1995, and obtained work, he was able to fund the resources in order to undertake legal action. He however made his first visit to Mozambique in 1995 and a second visit in 2007. This according to the complainant explains why the matter was submitted to the African Commission only in 2008.

112. While noting the difficulties encountered by the second victim, the African Commission is of the view that, the second victim or the complainant could have seized the African Commission as soon as the second victim or the complainant was convinced that local remedies could not be exhausted. The complainant submits that the second victim visited Mozambique in 1995 and again in 2007 to deal with the matter and that in 1995 when the second victim visited Mozambique, it became clear that his father, the first victim, had been executed, and he decided to pursue legal action.

113. In the second victim's personal statement Annex V and in his oral submission to the African Commission at the 47th ordinary session, he stated that he visited Mozambique on average every two years, and spends three to four weeks although, he indicates that he did so after taking adequate security measures. One wonders why it took the complainant over 13 years, from 1995 to 2008, to either bring a legal action in Mozambique or seize the African Commission. In *Darfur Relief and Documentation Centre v Sudan*,[28] the African Commission held that '29 months after the exhaustion of local remedies, the complainant submitting the complaint to the African Commission was unreasonable' and in *Southern Africa Human Rights NGO Network and Others v Tanzania*[29] the African Commission held that '11 years after the exhaustion of local remedies, the complainant submitting the complaint to the Commission was considered unreasonable'. It is therefore the African Commission's view that the complainant seizing the African Commission 13 years after which the complainant could have submitted the communication to the African Commission, is unreasonable.

[28] Communication 310/2005, *Darfur Relief and Documentation Centre v Republic of Sudan*.

[29] Communication 333/2006, *Southern Africa Human Rights NGO Network and Others v Tanzania*.

114. For the above reasons, the African Commission holds that the requirement of Article 56(6) of the African Charter has not been fulfilled.

115. Article 56(7) of the African Charter states that:

> Communications relating to human and Peoples' Rights ... shall be considered if they: do not deal with cases which have been settled by these states involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organisation of African Unity or the provisions of the present Charter.

The complainant submits that the communication has not been submitted to any international body and as such this requirement has been met. The state has no objections and there is no evidence before the Commission to show that the communication has been settled by another international body. The Commission therefore holds that this requirement has been fulfilled.

Decision of the African Commission

116. Based on the above analysis, the African Commission on Human and Peoples' Rights decides:

(i) To declare the communication inadmissible because it does not comply with the requirements under article 56(5) and (6) of the African Charter;

(ii) To give notice of this decision to the parties;

(iii) To publish this decision in its 30th Activity Report.

ZIMBABWE

Muzerengwa and Others v Zimbabwe

(2011) AHRLR 160 (ACHPR 2011)

Communication 306/05 – *Samuel T Muzerengwa and 110 Others (represented by Zimbabwe Lawyers for Human Rights) v Zimbabwe*

Decided at the 9th extraordinary session, 23 February - 3 March 2011

Admissibility (*prima facie* case, 56, 57; exhaustion of local remedies, all substantive issues to be addressed, 70-73)

Summary of alleged facts

1. The complaint is filed by the Zimbabwe Lawyers for Human Rights (the complainant) on behalf of one Samuel T Muzerengwa and 110 families (the victims), against the Republic of Zimbabwe (the respondent state).

2. The complainant alleges that on 16 December 1998, the Buhera Rural District Council at a council meeting decided that Samuel T Muzerengwa's village (hereinafter the 'Wakarambwa village') was situated in the lands of another village called Nyararai village headed by Mungofa Gotora. In its decision the Council resolved that the Wakarambwa's village should immediately move out of the land it occupied. No alternative land was provided even though the decision to evict was reached in terms of the Rural District Act (29:13) which allows the District Councils of each district to allocate land to individuals who are resident or originate from that district, if there is an unoccupied land.

3. The complainant avers that the dispute of ownership of the said land dates back to the colonial era, when the land had been declared a quarantine land, and was reserved for livestock grazing. Residents of Nyararai village hail from the family of the paramount chieftaincy of Nyashanu, which is the reigning family in the Buhera area. In 1975, the head of the Nyararai village applied to the District Administrator and the Ministry of Local Government to establish a sub chieftaincy. The request was granted and they proceeded to establish the Nyararai village. Furthermore, the complainant claims that during this period, families of the Wakarambwa village had already

settled in the area or as it were, they encroached on the land, which was reserved for Nyararai village.

4. With a view to decide on the dispute that ensued between the two families over the ownership of the land, the Buhera Rural District Council held three meetings. During the first meeting the members of the Council failed to reach a decision and decided to visit the area and analyze the maps of the same. When they went to inspect the land the Wakarambwa's refused to have the land inspected, and this was found to be in violation of the procedure of the Buhera District Council. Accordingly, at the next meeting the Council after taking into consideration a number of issues ruled that the Wakarambwa village headed by Samuel Muzerengwa had unlawfully occupied and encroached into the land of Nyararai village. The Council also resolved to evict the petitioners and instructed the complainant to seek court orders to the same.

5. The complainant submits that armed with the Council's resolution, the Gotora family approached the Magistrate's Court and obtained an eviction order. The Wakarambwa village decided to challenge the eviction order by seeking a review of the same in the High Court and Supreme Court. In both instances the case was dismissed on technicalities and the decision to evict the Wakarambwa family stood. The Courts did not order or direct the state through the Buhera District Council to make alternative arrangements for the Wakarambwa families who were now being considered as illegal settlers. This effectively rendered the petitioners homeless.

6. The complainant avers that the President of the Republic of Zimbabwe, under the Communal Lands Act 48,[1] is the guardian of the land and can intervene in land disputes, and can vary, set aside or reverse any decision or make such order he deems just. The complainant submits that on 6 March 2003 an appeal was made to the President but no formal acknowledgement of receipt of the appeal has been received.

7. As a result of the failure of the courts and the executive of the country to provide an effective remedy to the disputes surrounding ownership, the court orders were enforced, despite the fact that the Wakarambwa village had not been given alternative land to settle. The complainant alleges that the manner in which the evictions were carried was inhuman, unfair and disproportionate.

8. The complainant claims that the evictions did not meet international standards on forced evictions; that there was no compensation or restitution for destroyed properties; and no alternative land was provided for the affected families. The complainant submits that from 1999 to 2003 the Republic of Zimbabwe was engaged in a land reform and resettlement exercise,

1 Section 8(4) & (5) of the Communal Land Act Chapter 20:04.

but despite the fact that they were literally landless and homeless in their own country, they were not considered suitable candidates or beneficiaries during this programme.

Articles alleged to have been violated

9. The complainant alleges violations of articles 1, 2, 3, 5, 10(1), 13(1) and (3), 14, 16, 17, 18(1) and (4), 21 and 22 of the African Charter on Human and Peoples' Rights.

Procedure

10. The complaint dated 22 August 2005 was received at the Secretariat of the African Commission on 29 August 2005.

11. On 27 September 2005, the Secretariat received *amicus curiae* brief from the Centre on Housing Rights and Evictions in support of the complaint.

12. At its 38th ordinary session held from 21 November to 5 December 2005 in Banjul, The Gambia, the African Commission considered the communication and decided to be seized thereof.

13. On 15 December 2005, the Secretariat of the African Commission notified the respondent state of this decision and requested it to forward its written submissions on the admissibility of the matter. The Secretariat also enclosed a copy of the above mentioned *amicus curiae* brief from the Centre on Housing Rights and Evictions which was submitted in support of the present complaint.

14. On 30 January 2006, a similar notice was sent to the complainant requesting them to forward their written submission on admissibility.

15. On 1 May 2006, the Secretariat received the written submissions of the complainant on admissibility.

16. At its 39th ordinary session, the African Commission considered the communication and decided to defer it to its 40th ordinary session pending additional information from both parties. The parties were notified accordingly.

17. At its 40th ordinary session the African Commission considered this communication and deferred consideration of the matter to the 41st ordinary session.

18. On 24 November 2006, the respondent state submitted supplementary information on the admissibility of the communication.

19. At its 41st ordinary session, the Commission deferred consideration of the communication to its 42nd ordinary session. During this session the parties made their oral submissions before the Commission.

20. By *note verbale* and letter dated 8 July 2007 the Secretariat notified the respondent state and the complainant of the deferment of the communication and further invited the parties to forward additional submissions on admissibility, if any.

21. During its 42nd ordinary session held in Brazzaville, Republic of Congo, the Commission decided to defer the case to the 43rd ordinary session.

22. By *note verbale* of 19 December 2007 and letter of the same date, the Secretariat notified both parties of the Commission's decision.

23. During its 43rd ordinary session the Commission considered the communication and decided to defer the decision on admissibility to its 44th ordinary session which was scheduled to be held in Abuja, Nigeria from 10 – 24 November 2008.

24. By a *note verbale* and letter dated 22 October 2008, the Secretariat notified the parties of the decision of the Commission.

25. During its 44th, 45th and 46th ordinary sessions the Commission decided to defer its decision on admissibility and the parties were accordingly notified of the decisions.

26. During its 47th ordinary session held in Banjul, The Gambia from 12 to 26 May 2010, the African Commission decided to defer its decision on admissibility to its 48th ordinary session.

27. In *note verbale* and letter dated 16 June 2010 the respondent state and the complainants respectively were informed of the above decision of the African Commission.

28. During its 48th ordinary session, the African Commission considered and deferred its decision on admissibility of the communication to its 49th ordinary session to allow the Secretariat incorporate the comments made by the Commission.

29. By *note verbale* and letter dated 13 December 2010, the respondent state and the complainant were informed of the abovementioned decision of the Commission.

Law

Admissibility

Complainant's submission on admissibility

30. The complainant submits that the complaint fulfills the requirements of article 56 of the African Charter.

31. The complainant submits that articles 56(1) and (2) of the Charter are complied with as the authors of the communication are

identified and do not seek anonymity and as the complaint alleges infringement of provisions of the Charter by a state party thereto.

32. Regarding articles 56(3) and (4) of the Charter, the complainant avers that the complaint is not written in disparaging or insulting language and is not based on news disseminated in the mass media, as the information provided is based on court and council records.

33. The complainant also submits that the communication clearly lays down the processes through which the petitioners sought necessary remedies locally but failed to obtain them. After being served with the initial eviction order from the Magistrates Court the Wakarambwa village took the case on review to the High Court and on appeal to the Supreme Court, where they lost in both courts on technicalities, thereby the decision to evict was upheld.

34. The complainant further submits that the petitioners have tried to appeal to the President to reverse the decision under section 8(4) and (5) of the Communal Lands Act.

35. The complainant avers that the petitioners made the application to the President on 6 March 2003 but no formal acknowledgment of receipt or response thereto has ever been received. The complainant submits that since the President has chosen not to respond to the 'plea' by the petitioners, they have no option than to turn to regional institutions such as the Commission.

36. Accordingly, the complainant submits that local remedies have been exhausted as *per* article 56(5) of the African Charter.

37. Concerning article 56(6), the complainants are of the view that the complaint was filed within a reasonable time after exhaustion of local remedies.

38. On article 56(7) the complainant argues that the requirement has been satisfied as the matter has not been dealt with by, nor is it pending before any other international body.

39. Based on the above submission the complainant urges the Commission to declare the communication admissible.

Respondent state's submission on admissibility

40. The respondent state submits that the petitioners, in 1993, moved into the area in dispute without authority, effectively invading the said land. It further alleges that subsequent to the petitioning by the Nyararai village against the invasion, the Community Court, the District Court, and the High Court decided in favour of Nyararai village. The Supreme Court, on the other hand, made it clear that although the Buhera District Council had erred in proceeding to determine the dispute, 'it is common cause that the first respondent (Buhera District Council) has jurisdiction to determine land disputes

in terms of the Communal Lands Act.' It further held that if the petitioners had been aggrieved by the Council resolution, they could appeal against the decision to the President of Zimbabwe in terms of section 8(4) of the Act.

41. Although the complainant's letter of appeal to the President indicates that the appeal was also lodged at the Ministry of Local Government and National Housing, the Ministry contends that the appeal cannot be traced.

42. According to the respondent state the communication does not reveal any *prima facie* violation of the rights and freedoms other than general averments of violations of the African Charter.

43. The respondent state submits that the land dispute is entirely between two private persons or group of persons and that it suspects that the submission of the communication to the Commission is nothing more than a ploy to portray the petitioners as victims of the clean-up operation '*Murambatsvina*' undertaken by the government in June 2005, as nowhere in the complaint has it been shown that the government had a hand in the alleged 'impoverishment' of the complainants.

44. The respondent state holds that the evictions are not 'forced evictions' effected by the state but rather 'legal evictions' carried out after following due process of law.

45. According to the respondent state, the evictions were carried out in terms of the Communal Lands Acts read with the Regional, Town and Council Planning Act, and that the Buhera District Council is an autonomous body corporate with a distinct *locus standi* from the state of Zimbabwe and does not fall under the direction and control of the government. This according to the respondent state explains why in all the civil suits between the parties the complainant never cited any government minister or government organ.

46. The respondent state further argues that the complainants have not exhausted local remedies as they have appealed to the President in terms of section 8(4) of the Communal Lands Act, which is an administrative (not executive) procedure to be exercised by the President, and from which, if still aggrieved, they could approach the High Court for judicial review of the President's decision. The respondent state further avers that the Supreme Court could have been approached for relief on the basis of section 24(2) of the Constitution.

47. The respondent state further submits that the complainant portrays a picture of the President who is not bound by anything but his unfettered discretion in deciding the dispute, while the President like any other administrative body, would be bound to follow the rules of natural justice. If these rules were not followed, then the petitioners could always approach the courts for judicial review. The

state submits that the President's powers in this instance are not judicial but administrative and hence cannot undermine the powers of the judiciary.

48. The respondent state avers that at no point did the High Court and the Supreme Court made a final determination on the merits of the case other than being confined to the technical points that had been raised by either party. In this case, the High Court ruled that the Buhera District was the proper forum to deal with the dispute in terms of section 8 of the Communal Lands Act and that an appeal from the Council would lie with the President in terms of section 8(4) of the Act.

49. Although an appeal against the Council's decision is claimed to have been filed to the President, through the Ministry of Local Government, the respondent state submits that the said ministry does not have the appeal.

50. Based on the above submission, the respondent state avers that the communication is inadmissible.

The Commission's analysis on admissibility

51. Article 56 of the African Charter provides seven requirements based on which the African Commission assesses the admissibility or otherwise of communications submitted to it.

52. Even though the respondent state contests the admissibility of the communication on the basis of only three provisions of the Charter, namely; articles 56(2), (5) and (6), the Commission will proceed to analyse all the seven admissibility requirements provided under article 56 of the Charter.

53. Article 56(1) of the Charter states that communications received by the Commission should 'indicate their authors even if the latter requests anonymity'. In the present case the alleged victims are Samuel T Muserengwa and 110 families, and the author of the communication is Zimbabwe Lawyers for Human Rights whose address is disclosed in the communication. Neither the alleged victims nor the author of the communication has requested anonymity. The respondent state has not contested this fact. Thus, the Commission holds that the communication fulfils the requirement under article 56(1) of the Charter.

54. The second requirement under article 56(2) of the Charter requires communications to be compatible with the Constitutive Act of the African Union or with the African Charter. The complainant in the present communication catalogues a number of rights guaranteed in the Charter alleged to have been violated by the respondent state. The respondent state on the other hand argues that the complaint has failed to meet the requirement as it does not establish a *prima facie* violation of rights and freedoms, or the basic principles of the

Constitutive Act of AU such as 'freedom, equality, justice and dignity'. The respondent state submits that there is no *prima facie* case because the dispute in question is between two private parties and does not involve the state at all, and that the eviction was carried out by a non-state organ, in execution of a court order.

55. It is important to explain what *prima facie* violation of rights and freedoms entail. The term '*prima facie*' means 'on the face of it'; 'so far as can be judged from the first disclosure'; 'a fact presumed to be true unless disproved by some evidence to the contrary'.[2] So, *prima facie* is a decision or conclusion that could be reached from preliminary observation of an issue or a case without deeply scrutinizing or investigating into its validity or soundness.

56. Therefore, one is presumed to have presented a *prima facie* case or shown a *prima facie* violation of rights and freedoms under the Charter, when the facts presented in the complaint show that a human rights violation has likely occurred. The complaint should be one that compels the conclusion that a human rights violation has occurred if not contradicted or rebutted by the respondent state.

57. In the case at hand the complaint alleges a violation of articles 1, 2, 3, 5, 10(1), 13(1) and (3), 14, 16, 17, 18(1) and (4), 21 and 22 of the African Charter supported by court orders and other pertinent documents. The allegations in this communication are specific enough to establish a *prima facie* case. Therefore, the present communication is based on alleged violations of the Charter and hence fulfills the *ratione materiae* requirement.

58. The *ratione personae* and *ratio temporis* requirements have also been met. The complainants, as indicated above in paragraph 51, have the standing to bring the case before the Commission and hence meet the *ratione personae* requirement, and the alleged human rights violations occurred within the period of the Charter's application to the state, which is also a fact that is uncontested by the respondent state confirming that the *ratio temporis* requirement is also complied with. The last requirement under this provision is the *ratione loci*, which provides that states parties to the African Charter are responsible for violations that occur within their territory. While whether the alleged violations were committed by state actors directly or by private individuals is something that would be looked into at the merits stage, at this stage it suffice to proof that the alleged violation occurred within the territorial jurisdiction of the respondent state, which according to the Commission the complainant satisfactorily did.

59. The Commission thus holds that the communication establishes a *prima facie* violation of rights and freedoms in the Charter and thus complies with article 56(2) of the Charter.

2 HC Black *et al*, *Black's law dictionary*, 6th ed (1990) 1189.

60. Article 56(3) provides that communications should not be written in disparaging or insulting language directed against the state concerned and its institutions or to the African Union. The complainant claims that the communication is not written in disparaging or insulting language, which the respondent state has not challenged. So, the Commission holds that the communication fulfils the requirement under article 56(3) of the Charter.

61. Article 56(4) provides that communications should not be based exclusively on news disseminated through the mass media. The complainant submits that the communication is based on courts and council records, not on news disseminated by the mass media. The respondent state does not deny the complainant's assertion. Accordingly, the Commission is of the view that the communication complies with article 56(4) of the Charter.

62. Article 56(5) of the Charter stipulates that communications should be 'sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged'.

63. In human rights law it is important for a person whose rights have been violated to make use of domestic remedies to right the wrong, rather than address the issue to an international body.[3]

64. 'The rule is founded on the premise that the full and effective implementation of international obligations in the field of human rights is designed to enhance the enjoyment of human rights and fundamental freedoms at the national level' and this is supplemented by the fact that 'local remedies are normally quicker, cheaper, and more effective than international ones'.[4]

65. The rationale behind the exhaustion of local remedies is that states should be given the opportunity to address the issue before the matter is brought before international treaty bodies. In the African human rights system, the Commission has confirmed and reconfirmed this position in its decisions. In *Free Legal Assistance Group and Others v Zaire*[5] and *Rencontre Africaine pour la Défense des Droits de l'Homme v Zambia*[6] the Commission stated that the requirement of exhaustion of local remedies is founded on the principle that a government should have notice of human rights violation in order to have the opportunity to remedy such violations before being called before an international body.

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3 NJ Udombana 'So Far, So Fair: The Local Remedies Rule in the Jurisprudence of the African Commission on Human and Peoples' Rights' (2003) *American Journal of International Law*, 1-37.

4 n 3 above, 9.

5 Communications 25/89, 47/90, 56/91, 100/93, *Free Legal Assistance Group and Others v Zaire*[(2000) AHRLR 74 (ACHPR 1995)] (1995) para 36.

6 Communication 71/92, *Recontre Africaine pour la Defense des Droits de l'Homme v Zambia* [(2000) AHRLR 321 (ACHPR 1996)].

66. Accordingly, the submissions of the parties in this case would be assessed in light of the above.

67. The complainant submits that after the eviction order the petitioners appealed against the order in the High Court and then the Supreme Court, and both courts dismissed the appeal. They later appealed to the President of the Republic and received no response. The complainant further submits that even though they have appealed to the President, they were not required to, as executive remedies are discretionary and non-judicial in nature. The complainant accordingly submits that all local remedies have been exhausted.

68. The respondent state in response argues that the complainant has not exhausted local remedies as they have both administrative and judicial remedies left to pursue. According to the respondent state, the petitioners could appeal to the President in terms of section 8 of the Communal Land Act and could get administrative, not executive, remedy which can redress their claims. If they are not satisfied with the President's decision, the respondent state argues, they could always take their case before the High Court for review as per the Administrative Justice Act. The respondent state further avers that the Supreme Court could have been as well approached for relief on the basis of section 24(2) of the Constitution. The respondent state is also of the view that the High Court and Supreme Court never made a final determination of the matter on the basis of the merits of the case.

69. In the present communication after the eviction order from the Magistrate Court the petitioners' took their case to the High Court contending that the decision of the Council should be reviewed.[7] This was dismissed by Justice Ziyambi who did not find any conduct which was reviewable on the part of the Council. The petitioners appealed against the decision of the High Court to the Supreme Court and the latter also dismissed the appeal. The Supreme Court stated that the appeal was argued by the appellant (petitioners) on the wrong basis. The appeal was argued on the basis that the first respondent's (the Council's) decision of 19 August 1998 was made in terms of section 32 of the Regional, Town and Country Planning Act (Chapter 29:12) which according to the Supreme Court had nothing to do with what transpired in this case.

70. Based on the above, the Supreme Court adjudged that the appeal before the Court *a quo* to have the decision of the Buhera Rural District Council set aside on review on the basis of non-compliance with the provisions of the Regional, Town and County Planning Act was misconceived.[8] The judgment of the Supreme Court

[7] *Mungofa Gotora v Nditra Muzerengwa and 32 Others (Zimbabwean Magistrate Court for the Province of Manicaland)* Annexure C.

also indicates that even the counsel of the appellants conceded that the appeal has no merit, which is also obvious from the reading of the judgment.

71. The Commission agrees with the respondent state on the point that the domestic courts were not given the opportunity to remedy the merits or substance of the complaint. As indicated above the purpose of the rule of exhaustion of local remedies is to enable states address alleged violations of human rights before international bodies. In assessing whether states have been given this opportunity it is of prime importance to make sure that they have been addressed on all the substantive issues complained of and that the domestic procedures as provided by the laws of the country have been properly pursued, unless they are apparently unjust or prolonged.

72. In this communication the issue for determination before the Commission is the alleged unlawful eviction of the Muzerngwa's and the human rights violations they suffered as the result of such evictions. However, as the reading of the facts of the case clearly indicate the local courts of the respondent state were never approached to rule on the issue of eviction and other human rights violations that are allegedly caused by the evictions. The African Commission is convinced by the respondent state's argument, which is not contested by the complainant, that the latter could have approached the Supreme Court on the basis of section 24(2) of the Constitution to get redress for the alleged human rights violations.

73. It is true that the High Court and Supreme Court have been approached and both of them ruled against the petitioners. It should however, be noted that the courts did not rule on the merits of the case but on both instances dismissed the case on technicalities. The reason the courts were not able to deal with the merits is because the courts were approached to rule on procedural matters and thus failed to raise the substantive issues before the domestic courts.

74. The African Commission is in agreement with the complainant that appealing to the President is not a judicial remedy as it is discretionary in nature and therefore they are not expected to pursue it. Notwithstanding this fact the Commission is of the opinion that the issue before it, that is, the eviction of residents of the Wakarambwa village, has not been decided upon by the domestic courts of the respondent state. What the High Court and Supreme Court were called upon to do was to review the decision of the Buhera District Council and not to rule on the substance of the case.

75. For the aforementioned reasons the Commission finds that this communication does not comply with article 56(5) of the Charter.

[8] *Nditira Muzerengwa Chuma v Buhera Rural District Council & Mungofa Gotora* (Judgment No SC 75/2001 Civil Appeal No 325/2000) Annexure F.

76. From the above ruling it follows that the filing of the communication by the complainant is premature and has not observed the requirement under article 56(6) of the Charter.

77. Regarding the requirement that a communication must not be considered if it has already been settled before other international bodies, the complainant claims that the present communication has neither been dealt with nor is it pending before any other international body. The respondent has also not challenged this assertion. Consequently, the Commission holds that the complainants have satisfied the requirement under article 56(7).

78. *Obiter dictum*: in line with its well established jurisprudence the African Commission considered the *amicus curiae* brief submitted by the Centre on Housing Rights and Evictions[9] in support of the complainants submissions. However, the Commission notes that the *amicus curiae* brief submitted by the Centre on Housing Rights and Evictions does not address itself on admissibility.

Decision of the Commission on admissibility

79. In view of the above the African Commission on Human and Peoples' Rights decides:

(i) To declare the communication inadmissible because it does not comply with the requirements of article 56(5) and (6) of the African Charter;

(ii) To give notice of this decision to the parties in accordance with rule 107(3) of the new Rules of Procedure (RoPs)

(iii) To inform the complainants of their right to resubmit the communication before the Commission after exhausting local remedies in accordance with rule 107(4) of the RoPs;

(iv) To include this decision in its report on communications.

[9] See communication 276/03, *Centre for Minority Rights Development and Minority Rights Group International (on behalf of the Endorois Welfare Council) v Kenya* and communication 313/05, *Kenneth Good v Botswana* (2010) and also Rule 99 (16) of the New Rules of Procedure of the African Commission.

AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

LIBYA

African Commission on Human and Peoples' Rights v Libya

(2011) AHRLR 175 (ACtHPR 2011)

African Commission on Human and Peoples' Rights v Great Socialist People's Libyan Arab Jamahiriya,

Application 004/2011, ruling of 25 March 2011

Judges: Niyungeko, Akuffo, Mutsinzi, Ngoepe, Guindo, Ouguergouz, Mulenga, Ramadhani, Tambala, Thompson, Ore

Provisional measures in relation to massive violations of human rights in Libya

Provisional measures (without request from the Commission, 8, 9; without written pleadings or oral hearings, 13; where there is imminent risk of loss of human life, 13; relation to merits, 24)

After deliberations, having regard to the application dated 3 March 2011, received at the Registry of the Court on 16 March 2011, by the African Commission on Human and Peoples' Rights (hereinafter referred to as the Commission), instituting proceedings against the Great Socialist People's Libyan Arab Jamahiriya (hereinafter referred to as Libya), for serious and massive violations of human rights guaranteed under the African Charter on Human and Peoples' Rights (hereinafter referred to as the Charter);

Having regard to article 27(2) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (hereinafter referred to as the Protocol) and rule 51 of the Rules of Court; Makes the following order:

1. Whereas, in its application, the Commission submits that it received successive complaints against Libya, during its 91th extraordinary session held in Banjul (The Gambia) from 23 February to 3 March 2011:

2. Whereas, the Commission submits that the complaints allege:

- that following the detention of an opposition lawyer, peaceful demonstrations took place on 16 February 2011 in the eastern Libyan city of Benghazi;
- that on 19 February 2011, there were other demonstrations in Benghazi, Al Baida, Ajdabiya, Zayiwa and Derna, which were violently suppressed by security forces who opened fire at random on the demonstrators killing and injuring many people;
- that hospital sources reported that on 20 February 2011 they received individuals who had died or been injured with bullet wounds in the chest, neck and head;
- that Libyan security forces engaged in excessive use of heavy weapons and machine guns against the population, including targeted aerial bombardment and all types of attacks; and
- that these amount to serious violations of the right to life and to the integrity of persons, freedom of expression, demonstration and assembly.

3. Whereas, the Commission concludes that these actions amount to serious and widespread violations of the rights enshrined in articles 1, 2, 4, 5, 9, 11, 12, 13 and 23 of the Charter;

4. Whereas, on 21 March 2011, the Registry of the Court acknowledged receipt of the application, in accordance with rule 34(1) of the Rules of Court;

5. Whereas, on 22 March 2011, the Registry forwarded copies of the application to Libya, in accordance with rule 35(2)(a) of the Rules of Court, and invited Libya to indicate, within 30 days of receipt of the application, the names and addresses of its representatives, in accordance with rule 35(4)(a), whereas the Registry further invited Libya to respond to the application within 60 days, in accordance with rule 37 of the Rules;

6. Whereas, by letter dated the 22 March 2011, the Registry informed the Chairperson of the African Union Commission, and through him, the Executive Council of the African Union, and all the other states parties to the Protocol, of the filing of the application, in accordance with rule 35(3) of the Rules;

7. Whereas, by letter dated 23 March 2011, the Registry forwarded copies of the application to the complainants that seized the Commission, in accordance with rule 35(2)(e) of the Rules;

8. Whereas, by letter dated 23 March 2011, the Registry informed the parties to the application that, given the extreme gravity and urgency of the matter, the Court might, on its own accord, and in accordance with article 27(2) of the Protocol and rule 51(1) of its Rules, issue provisional measures;

9. Whereas in its application, the Commission did not request the Court to order provisional measures;

10. Whereas, however, under article 27(2) of the Protocol and rule 51(1) of the Rules, the Court is empowered to order provisional measures *proprio motu* 'in cases of extreme gravity and urgency and

when necessary to avoid irreparable harm to persons' and 'which it deems necessary to adopt in the interest of the parties or of justice';

11. Whereas, it is for the Court to decide in each situation if, in the light of the particular circumstances, it should make use of the power provided for by the aforementioned provisions;

12. Whereas, given the particular circumstances of the case, the Court has decided to invoke its powers under these provisions;

13. Whereas, in the present situation where there is an imminent risk of loss of human life and in view of the ongoing conflict in Libya that makes it difficult to serve the application timeously on the respondent and to arrange a hearing accordingly, the Court decided to make an order for provisional measures without written pleadings or oral hearings.;

14. Whereas, in dealing with an application, the Court has to ascertain that it has jurisdiction under articles 3 and 5 of the Protocol;

15. Whereas, however, before ordering provisional measures, the Court need not finally satisfy itself that it has jurisdiction on the merits of the case, but simply needs to satisfy itself, *prima facie*, that it has jurisdiction;

16. Whereas, article 3(1) of the Protocol provides that 'the jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation of the Charter, this Protocol and any other relevant human rights instrument ratified by the States concerned';

17. Whereas, Libya ratified the Charter on 19 July 1986 which came into force on the 21 October 1986; whereas, Libya ratified the Protocol on 19 November 2003 which came into force on 25 January 2004; and Libya is a party to both instruments;

18. Whereas, article 5(1)(a) of the Protocol lists the Commission as one of the entities entitled to submit cases to the Court;

19. Whereas, in the light of the foregoing, the Court has satisfied itself that, *prima facie*, it has jurisdiction to deal with the application;

20. Whereas, it appears from the application that there exists a situation of extreme gravity and urgency, as well as a risk of irreparable harm to persons who are the subject of the application;

21. Whereas, the application alleges that international organizations, mentioned below, both universal and regional, to which Libya is a member, have considered the situation prevailing in Libya:

- On 23 February 2011, the Peace and Security Council of the African Union 'express[ed] deep concern with the situation in the Great

Socialist People's Libyan Arab Jamahiriya and strongly condemn[ed] the indiscriminate and excessive use of force and lethal weapons against peaceful protestors, in violation of human rights and International Humanitarian Law which continues to contribute to the loss of human life and the destruction of property';

- On 21 February 2011, the Secretary General of the Arab League called for an end to violence, stating that the demands of Arab people for change are legitimate and the Arab League has suspended Libya;
- The United Nations Security Council in Resolution 1970 (2011) adopted on 26 February 2011, denounced 'the gross and systematic violations of human rights, including, the repression of peaceful demonstrators', noting further that 'the systematic attacks currently taking place in the Libyan Arab Jamahiriya against the civilian population may amount to crimes against humanity'; and decided to refer the situation in the Libyan Ara Jamahiriya since 15 February 2011 to the Prosecutor of the International Criminal Court;

22. Whereas, in the opinion of the Court, there is therefore a situation of extreme gravity and urgency, as well as a risk of irreparable harm to persons who are the subject of the application, in particular. in relation to the rights to life and to physical integrity of persons as guaranteed in the Charter;

23. Whereas, in the light of the foregoing, the Court finds that the circumstances require it to order, as a matter of great urgency and without any proceedings, provisional measures, in accordance with article 27(2) of the Protocol and rule 51 of its Rules;

24. Whereas, measures ordered by the Court would necessarily be provisional in nature and would not in any way prejudge the findings the Court might make on its jurisdiction, the admissibility of the application and the merits of the case;

25. For these reasons, the Court, unanimously orders the following provisional measures:

(1) The Great Socialist People's Libyan Arab Jamahiriya must immediately refrain from any action that would result in loss of life or violation of physical integrity of persons, which could be a breach of the provisions of the Charter or of other international human rights instruments to which it is a party.

(2) The Great Socialist People's Libyan Arab Jamahiriya must report to the Court within a period of fifteen (15) days from the date of receipt of the Order, on the measures taken to implement this Order.

AFRICAN COMMITTEE ON THE RIGHTS AND WELFARE OF THE CHILD

KENYA

IHRDA and Another v Kenya

(2011) AHRLR 181 (ACERWC 2011)

002/09: *IHRDA and Open Society Justice Initiative (OSJI) (on behalf of children of Nubian descent in Kenya) v Kenya*

Done in Addis Ababa, Ethiopia, 22 March 2011

Right of children of Nubian descent to nationality in Kenya

Interpretation (international law, 25)
Admissibility (exhaustion of local remedies, unduly prolonged, 26-34)
Children's rights (birth registration, 38, 40; nationality, 42, 44, 45, 48-53
Equality, non-discrimination (ethnic discrimination, 56; access to health services, 62; access to education, 65)
Health (vulnerable children, 61)

Summary of alleged facts

1. On 20 April 2009, the Secretariat of the African Committee of Experts on the Rights and Welfare of the Child (African Committee) received a communication brought by the Institute for Human Rights and Development in Africa based in The Gambia (an organisation with an observer status before the African Committee) and the Open Society Initiative based in New York (the complainants) on behalf of children of Nubian descent in Kenya.

2. The complainants allege that the Nubians in Kenya descended from the Nuba mountains found in what is current day central Sudan and were forcibly conscripted into the colonial British Army in the early 1900s when Sudan was under British rule. Upon demobilisation, allegedly, although they requested to be returned to Sudan, the colonial government at the time refused and forced them to remain in Kenya.

3. The complainants allege that the British colonial authorities allocated land for the Nubians, including in the settlement known as *Kibera*, but did not grant them British citizenship. At Kenyan

independence (1963), the complainants argue, the citizenship[1] status of the Nubians was not directly addressed, and for a long period of time they were consistently treated by the government of Kenya as 'aliens' since they, according to the government, did not have any ancestral homeland within Kenya, and as a result could not be granted Kenyan nationality. The complainants allege that the refusal by the Kenyan government to recognise the Nubians' claim to land is closely linked with the government's denial of Nubians to Kenyan citizenship.

4. A major difficulty in making the right to nationality effective for Nubian children is the fact that many Nubian descents in Kenya who are parents have difficulty in registering the birth of their children. For instance, the fact that many of these parents lack valid identity documents further complicates their efforts to register their children's births. It is further alleged birth registration certificate in Kenya explicitly indicates that it is not proof of citizenship, thereby leaving registered children in an ambiguous situation contrary to article 6 of the African Children's Charter.

5. In connection to this, the communication further alleges that while children in Kenya have no proof of their nationality, they have legitimate expectation that they will be recognised as nationals when they reach the age of 18. However, for children of Nubian descent in Kenya, since many persons of Nubian descent are not granted the ID cards that are essential to prove nationality, or only get them after a long delay, this uncertainty means that the future prospects of children of Nubian descent are severely limited and often leaves them stateless. The complainants further allege that a vetting process that is applicable to children of Nubian decent is extremely arduous, unreasonable, and *de facto* discriminatory.

6. The complainants allege and attempt to substantiate that the facts submitted by them are supported by reports from the United Nations bodies, non-governmental organisations, independent researchers, academicians, and adults and children of Nubian descent living in Kenya.

The complaint

7. The complainants allege violation of mainly article 6, in particular sub-articles (2), (3) and (4) (the right to have a birth registration, and to acquire a nationality at birth), article 3 (prohibition on unlawful/unfair discrimination) and as a result of these two alleged violations, a list of 'consequential violations' including article 11(3) (equal access to education) and article 14 (equal access to health care).

[1] Although technically speaking 'nationality' and 'citizenship' do not mean the same thing, the African Committee uses the two notions interchangeably in this decision as they are used in such a manner in the communication itself.

Procedure

8. The communication was received by the Secretariat of the African Committee on 20 April 2009. After some effort to follow up with the complainants, and the respondent state, during its 15th session, the Committee declared the communication admissible as *per* decision number 01/Com/002/2009 dated 16 March 2010.

9. A *note verbale* (reference DSA/ACE/64/1000.10 dated 13 July 2010) was addressed to the respondent state to present its written argument on the merits of the communication to allow the Committee consider the communication, but no response was received.

10. The Committee deferred the consideration of the communication for its next ordinary session.

11. Another *note verbale* (reference DSA/ACE/64/256.11 dated 22 February 2011) was again sent again to invite the respondent state to come and present its argument during the African Committee's 17th ordinary session, but again no response was received.

12. At its 17th ordinary session held in March 2011, the African Committee reasoned that children's best interests demanded that it consider the communication, and decided to be seized thereof and consider the communication on its merits. As a result, it heard oral arguments by the complainants, and scrutinized the validity, legality, and relevance of such arguments through a series of questions.

13. Para 13 omitted - eds.

14. Unfortunately, despite continued efforts by the Secretariat of the African Committee, this communication does not benefit from a response by the respondent state. This has inevitably forced the African Committee to rely on other information sources in determining and ascertaining questions of fact and law, that could possibly have been provided, raised, and/or invoked by the respondent state. It is important to mention at the outset that the Guidelines for the Consideration of Communications explicitly provide that the absence of a party shall not necessarily hinder the consideration of a communication.

Admissibility

Complainants' submission on admissibility

15. The current communication is submitted pursuant to article 44 of the African Charter on the Rights and Welfare of the Child which allows the African Committee to receive and consider communications from 'any person, group or nongovernmental organization …'. The Guidelines for the Consideration of Communications provides, under chapter II article 1, that the

admissibility of a communication submitted pursuant to article 44 is subject to around seven conditions relating to form and content.

16. The complainants submitted, in a submission dated 6 November 2009, that the authors of the communication have been identified and relevant details of the communication have been provided to the Committee, it is written and it is against a state party to the African Children's Charter. The complainants submitted that the communication is compatible with the provisions of the Constitutive Act of the African Union http://www.au.int/en/about/constitutiveACT_EN.pdf as well as with the African Children's Charter, that the communication is not exclusively based on information circulated by the media, and that the same issue has not been considered according to another international procedure. In addition, the complainants submitted that the communication is submitted within a reasonable period of time and that the communication is not written in an offensive language.

17. A more detailed explanation is provided by the complainants in relation to the requirement to 'exhaust all appeal channels at the national level'. In this regard, the complainants submitted that they have undertaken a number of efforts to exhaust local remedies for a period of seven years in order to resolve the issue of lack of citizenship of the Nubian community.

18. The complainants submit that in 2002 the Nubian community, through the Kenyan Nubian Council of Elders, instructed the Centre for Minority Rights Development (CEMIRIDE) to institute legal proceedings against the Kenyan government. On 17 March 2003 an action was commenced in the High Court of Kenya by way of an urgent application that led to a leave to file a class action suit on behalf of the Nubian community.

19. However, the complainants indicate that, even though CEMIRIDE filed the substantial constitutional application the same day in the High Court in Nairobi, numerous procedural obstacles have since been raised which have stalled the case. These obstacles reportedly include how on 8 July 2003 a certain Justice of the High Court declined to transmit the file to the Chief Justice on the ground that it was necessary to ascertain the identity of the 100,000 applicants; how another Justice of the High Court subsequently agreed that such a process to ascertain was unreasonable and fixed a date for a hearing of the merits of the case for 7 June 2004; but later on how, on 7 June 2004, again another Justice declined to hear the application and referred it back to the duty judge for directions on grounds that there were contradictory orders in the file.

20. Frustrated with the process, especially with the fact that within fifteen months of filing, the case had been brought before five different judges none of whom had proceeded with it, the

complainants indicate that a letter was sent to the Chief Justice of Kenya stating that there appeared to be a deliberate placement of administrative and procedural obstacles in the path of the determination of the application brought on behalf of the Nubian community. In this regard, the complainants indicate that no response to this letter, and other letters sent on 24 July 2004, 24 September 2004, and 24 January 2005 was received.

21. As a result, the complainants submitted that, more than six years after the CEMIRIDE instituted proceedings on behalf of the Nubian community, no bench has been constituted and no date has been fixed for a substantive hearing on the case. By invoking jurisprudence from the African Commission, and highlighting the provisions of the African Children's Charter and its Guidelines on the Consideration of Communications, the complainants submit that such a delay is excessive, and should be seen as an exception to the exhaustion of local remedies rule.

22. The complainants are of the view that the pursuit of local remedies by the Nubian community has been fraught with such impediments that it offers no prospect of success and children of Nubian descent living in Kenya cannot be reasonably expected to benefit from these local remedies. As a result of the above, the complainants argue that the communication should be declared admissible as it complies with all the requirements of the Guidelines for the Consideration of Communications.

The African Committee's analysis and decision on admissibility

23. The African Committee, after a detailed consideration of the communication, agrees with the submission of the complainants that the form of the communication is in compliance with the Guidelines of the African Committee ie it is not anonymous, it is written, and concerns a state party to the African Children's Charter. It also decides, after a thorough look at the communication, that the communication is compatible with the Constitutive Act of the African Union and with the African Children's Charter. The communication is presented in a professional, polite and respectful language, and is based on information provided, *inter alia*, by the alleged victims and on court documents, and not solely based on media reports. The Secretariat of the African Committee has also undertaken efforts to confirm that the same issue provided for the in the present communication has not been considered according to another international procedure.

24. However, to decide on the less straightforward and important issue whether local remedies have been exhausted (and in connection to that, whether the present communication has been brought within a reasonable period of time), which is an issue that probably would

have been challenged by the government of Kenya, the African Committee has scrutinised the written and oral submissions by the complainants in detail, and would offer below a more elaborate explanation.

25. At the outset, it should be mentioned that the African Children's Charter explicitly mandates the African Committee, in article 46 of the Charter, to:

> draw inspiration from international law on human rights, particularly from the provisions of the African Charter on Human and Peoples' Rights, the Charter of the Organisation of African Unity, the Universal Declaration on Human Rights, the International Convention on the Rights of the Child, and other instruments adopted by the United Nations and by African countries in the field of human rights, and from African values and traditions.

It is based on this explicit legislative mandate that the African Committee makes reference to laws, and jurisprudence from other countries or treaty bodies in Africa and elsewhere.

26. This as a backdrop, a local remedy has been defined as 'any domestic legal action that may lead to the resolution of the complaint at the local or national level'.[2] One of the main purposes of exhaustion of local remedies, which is also linked to the notion of state sovereignty, is to allow the respondent state be the first port of call to address alleged violations at the domestic level. In the words of the African Commission, exhaustion of local remedies is intended 'to give domestic courts an opportunity to decide upon cases before they are brought to an international forum, thus avoiding contradictory judgments of law at national and international levels'.[3] Furthermore, the primacy and greater immediacy of the domestic level is reinforced by the fact that local remedies are 'normally quicker, cheaper, and more effective'[4] and allow for better fact finding of alleged violations too. The African Committee understands and unreservedly supports these roles that the rule on the exhaustion of local remedies is supposed to play.

27. The lack of awareness of an alleged violation by the state deprives it the opportunity to address such a violation. However, in the context of the present communication, it would not be reasonably defensible to argue that the authorities in Kenya did not know about this ongoing allegation of violations of human rights in the presence of a number of related reports (including by the Human Rights Commission of Kenya) and more so, in the face of the pending case law before the High Court in Nairobi for such a long period of time.

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2 See *Constitutional Rights Project v Nigeria*, communication 60/91 [(2000) AHRLR 241 (ACHPR 1999)].

3 Communication 155/96, *SERAC v Nigeria* [(2001) AHRLR 60 (ACHPR 2001)], para 37.

4 F Viljoen *International human rights law in Africa*, (2007) 336.

28. This said, it is a well-established rule under international human rights law procedures that 'only domestic remedies that are available, effective, and adequate (sufficient) that need to be exhausted'.[5] In communication Nos 147/95 and 149/96, the African Commission held that a remedy is considered available if the complainant 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.[6] In other words, in terms of jurisprudence from the African Commission, and by interpreting the African Committee Guidelines for the Consideration of Communications, it follows therefore that the local remedies rule is not rigid.

29. In a clear distinction from other cases declared inadmissible by the African Commission,[7] the complainants did not operate on the basis of anticipating the effectiveness or otherwise of local remedies in theory and argued an exception to the rule. Rather, they in fact engaged the judicial system in Kenya, but with no success so far to have the case heard on its merits. Furthermore, there are unconfirmed indications that the case in the High Court is still pending as a result of some procedural technicalities that may need to be fulfilled under Kenyan law. Even then, it cannot be in these children's best interests (a principle domesticated by the Children's Act of 2001) to leave them in a legal limbo for such a long period of time in order to fulfil formalistic legal procedures. As an upper guardian of children, the state and its institutions should have proactively taken the necessary legislative, administrative and other appropriate measures in order to bring to an end the current situation children of Nubian descent in Kenya find themselves in.

30. Furthermore, with some stretch of imagination, it could also be argued that the complainants should have exhausted extra-judicial remedies such as administrative procedures within the relevant government offices or by lodging an official claim at the Kenya National Commission on Human Rights. However, what is envisaged under the Guidelines for the Consideration of Communications, and also supported by the jurisprudence from the African Commission, is that extraordinary remedies of a non-judicial nature do not fall within the notion of 'local remedies' and need not necessarily be exhausted for a communication to be declared admissible.

31. The African Committee is of the view that the complainants can be exempted from exhausting local remedies if such an attempt would be or is unduly prolonged, which is an explicitly mentioned

5 As above. See too citations there in pertaining to the jurisprudence of the African Commission in this regard and communication 147/95 and 149/96, *Jawara v The Gambia* [(2000) AHRLR 107 (ACHPR 2000)] para 32.

6 Paras 31 and 32.

7 See, for instance, communication 299/2005, *Anuak Justice Council v Ethiopia*, [(2006) AHRLR 97 (ACHPR 2006)], para 48.

exception under article 56(7) of the African Charter on Human and Peoples' Rights.

32. In fact, an unduly prolonged domestic remedy cannot be considered to fall within the ambit of 'available, effective, and sufficient' local remedy. Therefore, while the African Committee notes that in *Civil Liberties Organisation v Nigeria*,[8] the African Commission declined to consider a communication with respect to which a claim had been filed but not yet settled by the courts of the respondent state, it is our view that the unduly prolonged court process in the present communication is not in the best interests of the child principle (article 4 of the Charter), and warrants an exception to the rule on exhaustion of local remedies.

33. To conclude, a year in the life of a child is almost six percent of his or her childhood. It is in the spirit and purpose of the African Children's Charter, the Africa Call for Accelerated Action (Cairo Plus 5), the Millennium Development Goals http://www.undp.org/content/undp/en/home/mdgoverview.html and other similar commitments, that states need to adopt a 'children first' approach with some sense of urgency. This is one of the messages that the drafters of the African Children's Charter wanted to communicate in its Preamble when they recognised that 'the child occupies a unique and privileged position in the African society'. The implementation and realisation of children's rights in Africa is not a matter to be relegated for tomorrow, but an issue that is in need of proactive immediate attention and action.

34. As a result of the above, the African Committee decides that the six years that lapsed without a consideration of the merits of the case before the High Court in Nairobi is unduly and unreasonably prolonged, and qualifies for an exception to the requirement imposed on complainants to exhaust local remedies. In connection to this, the Committee is also of the view that this communication is brought within a reasonable period of time, after waiting for a sufficient period of time attempting to see if local remedies would offer any prospect of success and adequate remedies.

35. In view of the preceding reasoning, the communication is declared admissible.

Consideration of the merits

36. The communication alleges that the respondent state violated articles 6, in particular sub-articles (2), (3) and (4), article 3, and as a result of these two alleged violations, a list of 'consequential violations' including article 11(3) and article 14.

8 Communication 45/90 [(2000) AHRLR 188 (ACHPR 1995)].

Decision on the merits

Alleged violation of article 6

37. Article 6 of the African Children's Charter, titled 'Name and nationality', provides in full that:

> (1) Every child shall have the right from his birth to a name.
> (2) Every child shall be registered immediately after birth.
> (3) Every child has the right to acquire a nationality.
> (4) States parties to the present Charter shall undertake to ensure that their Constitutional legislation recognize the principles according to which a child shall acquire the nationality of the state in the territory of which he has been born if, at the time of the child's birth, he is not granted nationality by any other state in accordance with its laws.

38. It is rightly said that birth registration is the state's first official acknowledgment of a child's existence, and a child who is not registered at birth is in danger of being shut out of society — denied the right to an official identity, a recognized name and a nationality.[9] The complainants allege that the treatment of children of Nubian descent violates their right to be registered at the time of their birth, because some parents have difficulty having their children registered especially since many public hospital officials refuse to issue birth certificates to children of Nubian descent. Such a limitation is confirmed by the Kenya National Commission on Human Rights (KNHCR) that identified and recorded practices indicating discrimination against certain population groups, including persons of Nubian descent, in the grant of birth registration and identity documents.[10]

39. [sic]

40. Both the African Committee (2009) and the CRC Committee (2007) have already recommended through their concluding observations to the government of Kenya that there is some gap in the state party's birth registration practice, partly reflected in the number and categories (such as children born out of wedlock, children of minority groups, and children of refugee, asylum-seeking or migrant families) of births that go unregistered. Unregistered children are not issued birth certificates and thus rendered stateless, as they cannot prove their nationality, where they were born, or to whom. The African Committee is of the view that the obligation of the state party under the African Children's Charter in relation to making sure that all children are registered immediately after birth

[9] See UNICEF 'Birth registration: Right from the start' (March 2002) *Innocenti Digest* No 9, 1.

[10] See generally, KNCHR, 'An identity crisis? Study on the issuance of national identity cards in Kenya' (2007).

is not only limited to passing laws (and policies),[11] but also extends to addressing all *de facto* limitations and obstacles to birth registration.[12]

41. The complainants have further alleged that even when birth certificates are issued, they do not confer a nationality. They allege that children of Nubian descent are often left to wait until they turn 18 to apply to acquire a nationality.

42. In this respect, the African Committee is of the view that there is a strong and direct link between birth registration and nationality. This link is further reinforced by the fact that both rights are provided for in the same article under the African Children's Charter (as well as the UN Convention on the Rights of the Child). The African Committee notes that article 6(3) does not explicitly read, unlike the right to a name in article 6(1), that 'every child has the right *from his birth* to acquire a nationality'. It only says that 'every child has the right to acquire a nationality'. Nonetheless, a purposive reading and interpretation of the relevant provision strongly suggests that, as much as possible, children should have a nationality beginning from birth. This interpretation is also in tandem with article 4 of the African Children's Charter that requires that 'in all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration'. Moreover, this interpretation is further supported by the UN Human Rights Committee that indicated: 'States are required to adopt every appropriate measure, both internally and in cooperation with other states, *to ensure that every child has a nationality when he is born*' (African Committee's emphasis).[13] Moreover, by definition, a child is a person *below* the age of 18 (article 2 of the African Children's Charter), and the practice of making children wait until they turn 18 years of age to apply to acquire a nationality cannot be seen as an effort on the part of the state party to comply with its children's rights obligations. Therefore, the seemingly routine practice (which is applied more of as rule than in highly exceptional instances) of the state party that leaves children of Nubian descent without acquiring a nationality for a very long period of 18 years is neither in line with the spirit and purpose of article 6, nor promotes children's best

11 It remains to be seen in practice the extent to which the guarantee in the 2010 Constitution, particularly in article 12(1)(b) which states that '[e]very citizen is entitled to a Kenyan passport and to any document of registration and identification issued by the state to citizens' will improve this situation.

12 This can sometimes be achieved through a universal, well-managed registration that is based on the principle of non-discrimination and accessible to all (using e.g. mobile registration units for children living in remote areas) and free of charge. See JE Doek 'The CRC and the right to acquire and to preserve a nationality' (2006) 25(3) *Refugee Survey Quarterly* 26.

13 Human Rights Committee, General Comment 17, 'Article 24: Rights of the child' (1989) para 8.

interests, and therefore constitutes a violation of the African Children's Charter.

43. The complainants allege that birth registration certificate in Kenya explicitly indicates that it is not proof of nationality thereby leaving even registered children stateless. Furthermore, the communication further alleges that while children in Kenya have no proof of their nationality, they have legitimate expectation that they will be recognised as nationals when they reach the age of 18. However, for children of Nubian descent in Kenya, since many persons of Nubian descent are not granted the ID cards that are essential to prove nationality, or only get them after a long delay, this uncertainty means that the future prospects of children of Nubian descent are severely limited, and often leaves them stateless. The complainants further allege that a vetting process that is applicable to children of Nubian decent is extremely arduous, unreasonable, and *de facto* discriminatory.

44. Therefore, central to the present communication is the issue of statelessness. One of the main purposes of article 6, in particular article 6(4) of the African Children's Charter, is to prevent and/or reduce statelessness. A 'stateless person', according to the 1954 UN Convention relating to the Status of Stateless Persons http:// www2.ohchr.org/english/law/stateless.htm means 'a person who is not considered as a national by any state under the operation of its law'. There is evidence that this universal definition of a 'stateless person' is accepted as part of customary international law. Therefore, a 'stateless child' is a child who is not considered as a national by any state under the operation of its laws.

45. While complex issues of parentage, race, ethnicity, place of birth, and politics all play a role in determining an individual's nationality, the root causes of statelessness are complex and multifaceted including state succession, decolonization, conflicting laws between states, domestic changes to nationality laws, and discrimination.[14]

46. Whatever the root cause(s), the African Committee cannot overemphasise the overall negative impact of statelessness on children. While it is always no fault of their own, stateless children often inherits an uncertain future. For instance, they might fail to benefit from protections and constitutional rights granted by the state. These include difficulty to travel freely, difficulty in accessing justice procedures when necessary, as well as the challenge of finding oneself in a legal limbo vulnerable to expulsion from their home country. Statelessness is particularly devastating to children in the realisation of their socio-economic rights such as access to health

[14] See S Kosinski 'State of uncertainty: Citizenship, statelessness, and discrimination in the Dominican Republic' (2009) 32 *Boston College International and Comparative Law Review* 377.

care, and access to education. In sum, being stateless as a child is generally antithesis to the best interests of children.

47. At the global level, a range of instruments recognise the right to acquire a nationality, albeit with varying formulations.[15] Here, it is worth mentioning that, as Doek rightly explains, international human rights law has shifted from the position that 'the child shall be entitled from his birth ... to a nationality',[16] to one mandating that the child 'shall acquire a nationality' (article 7(1) of CRC, article 24(3) of ICCPR).[17] The same wording and position is transparent under article 6 of the African Children's Charter. The reason for such a shift is because it is felt that 'a state could not accept an unqualified obligation to accord its nationality to every child born on its territory regardless the circumstances'.[18]

48. Therefore, under general international law, states set the rules for acquisition, change and loss of nationality as part of their sovereign power. However, although states maintain the sovereign right to regulate nationality, in the African Committee's view, state discretion must be and is indeed limited by international human rights standards, in this particular case the African Children's Charter, as well as customary international law and general principles of law that protect individuals against arbitrary state actions. In particular, states are limited in their discretion to grant nationality by their obligations to guarantee equal protection and to prevent, avoid, and reduce statelessness.[19]

49. This as a backdrop, the government of Kenya has adopted its rules that provide for conditions by which a person can become a Kenyan citizen. Pursuant to Chapter IV of the former Constitution of Kenya and the Kenya Citizenship Act, Cap 170 of the Laws of Kenya, the four ways through which a person may acquire Kenyan citizenship are birth, descent, registration, and naturalisation. The African Committee has found sufficient evidence that indeed some persons (including children) of Nubian descent in Kenya have acquired Kenyan nationality through one of these four ways. Therefore, neither the

15 These instruments include the Universal Declaration of Human Rights (UDHR); International Covenant on Civil and Political Rights (ICCPR); International Convention on the Elimination of All Forms of Racial Discrimination (CERD); Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); Convention on the Rights of the Child (CRC); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW); and the Convention on the Rights of Persons with Disabilities (CRPD).

16 Principle 3 of the UN Declaration on the Rights of the Child of 1959.

17 Doek (note 12 above).

18 As above.

19 In this regard, the African Committee is of the view that African States, including Kenya, need to be encouraged and supported to ratify and implement fully the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness.

communication alleges nor the African Committee believes that all children of Nubian descent in Kenya have been left stateless. However, the crux and truth of the matter is that, even with the application of these (fairly restrictive) four ways through which a person can become a Kenyan national, a significant number of children of Nubian descent in Kenya have been left stateless.

50. As a result, the duty in article 6(4) of the African Children's Charter to ensure that a child 'acquire the nationality of the state in the territory of which he has been born if, at the time of the child's birth, he is not granted nationality by any other state in accordance with its laws' is squarely applicable to the present communication as an obligation of the government of Kenya. This, by no means, is an attempt by the African Committee to be prescriptive about the choice states make in providing for laws pertaining to the acquisition of nationality. Therefore, while the African Committee is not suggesting that states parties to the Charter should introduce the *jus soli* approach, in line with the best interests of the child principle, it is explaining the intent of article 6(4) of the African Children's Charter that if a child is born on the territory of a state party and is not granted nationality by another state, the state in whose territory the child is born, in this particular case Kenya, should allow the child to acquire its nationality.

51. It may have been further argued (by the government of Kenya), perhaps rather loosely, that the children of Nubian descent in Kenya may be entitled to the nationality of the Sudan, and, as a result, the government does not have to provide them with Kenyan nationality. However, such a line of argument would be remiss of the fact that, implied in article 6(4) is the obligation to implement the provision proactively in cooperation with other states, particularly when the child may be entitled to the nationality of another state. In the communication at hand, nothing has transpired that indicates that the government, if it holds such view, has undertaken any meaningful efforts to ensure that these children acquire the nationality of any other state.

52. In this regard, it is apposite to further highlight the nature of the state party obligation that article 6(4) of the Charter provides, which is 'undertake to ensure'. As such, the obligation that states parties including Kenya have under article 6(4) of the Charter is not an obligation of conduct but an obligation of result. States parties need to make sure that all necessary measures are taken to prevent the child from having no nationality.

53. The African Committee notes and commends the new constitutional dispensation introduced in 2010 in Kenya which ushers a number of advancements in promoting and protecting children's rights, including their right to acquire a nationality. In particular, article 14(4) of the 2010 Constitution entrenches that a child less than

eight years of age whose parents are not known is presumed to be a citizen by birth. While the African Committee lauds the effort of the state party in providing for this provision in its Constitution, it would like to draw the attention of the state party that this provision is still not a sufficient guarantee against statelessness, let alone address the crux of the present communication, namely, children born in Kenya of stateless parent(s) or who would otherwise be stateless, to acquire a nationality by birth. A child found in Kenya who is, or appears to be, less than eight years of age, and whose nationality and parents are not known, is presumed to be a citizen by birth.

54. As a result of the above, the African Committee finds violations of articles 6(2), 6(3) and 6(4) of the African Children's Charter buy [sic] the government of Kenya.

Alleged violation of article 3

55. The complainants allege that children of Nubian descent in Kenya are treated differently from other children in Kenya, for which there is no legitimate justification, amounting to unlawful discrimination and a violation of article 3 of the African Children's Charter. They further allege that the fact that children of Nubian descent are expected to go through a lengthy and arduous process of vetting (including requiring them to demonstrate the nationality of their grandparents, as well as the need to seek and gain the approval of Nubian elders and governmental officials, etc) is discriminatory, and depriving them of any legitimate expectation of nationality, and leaving them effectively stateless.

56. Racial and ethnic discrimination are prohibited as binding *jus cogens* norm of international law. The African Children's Charter is no exception. Article 3 provides in full that:

> [e]very child shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in this Charter irrespective of the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status.

The current facts in relation to children of Nubian descent in Kenya indicate a *prima facie* case of discrimination and violation of article 3 of the Charter. As a result, the burden shifts to the state to justify the difference in treatment indicating how such a treatment falls within the notion of fair discrimination. The failure of the state to be present for a consideration of this communication makes such an engagement impossible. However, the African Committee weighed whether the treatment of the children of Nubian descent in Kenya can be considered to be a fair discrimination, but found otherwise. For instance, in a very similar case involving children of Haitian descent in Dominican Republic, it was held that the refusal and placing of unfair obstacles by local officials to deny birth certificate and recognition of the nationality of Dominicans of Haitian descent as

part of a deliberate policy which effectively made the children stateless constituted racial discrimination.[20] Moreover, after a thorough investigation of the situation of children of Nubian descent in Kenya, the Kenya National Commission on Human Rights has concluded that 'the process of vetting … Nubians … is discriminatory and violates the principle of equal treatment. Such a practice has no place in a democratic and pluralistic society'.[21]

57. The current practice applied to children of Nubian descent in Kenya, and in particular its subsequent effects, is a violation of the recognition of the children's juridical personality, and is an affront to their dignity and best interests. For a discriminatory treatment to be justified, the African Commission has rightly warned that 'the reasons for possible limitations must be founded in a legitimate state interest and … limitations of rights must be strictly proportionate (sic) with and absolutely necessary for the advantages which are to be obtained'.[22] The African Committee is not convinced, especially in relation to a practice that has led children to be stateless for such a long period of time, that the current discriminatory treatment of the government of Kenya in relation to children of Nubian descent is 'strictly proportional with' and equally importantly 'absolutely necessary' for the legitimate state interest to be obtained. The Committee is of the view that measures should be taken to facilitate procedures for the acquisition of a nationality for children who would otherwise be stateless, and not the other way round. As a result of all the above, the African Committee finds a violation of article 3 of the African Children's Charter.

Consequential violations

58. The indivisibility of rights in the African Children's Charter is underscored by the consequential impact of the denial of nationality to children of Nubian descent by the government of Kenya. All Charter rights generate obligations to respect, protect, promote and fulfil. This is no less so in respect of the rights implicated when nationality and identity rights are violated. The complaint in the instant communication has primarily resulted in an infringement of article 3 which fundamentally proscribes discrimination against the child so as to limit the enjoyment by the child of the rights and freedoms recognised and guaranteed in the Charter. In the instant case, the discriminatory treatment of the children affected by the conduct of the government of Kenya based on their and their parents' and legal guardians' social origin has had long standing and far reaching effects on the enjoyment of other Charter rights. And, as the

[20] See, generally, *Yean and Bosico v Dominican Republic*, IACtHR judgment of 8 September 2005.

[21] KNCHR, (note 10 above), vi.

[22] *Legal Resources Foundation v Zambia*, communication 211/98 [(2001) AHRLR 84 (ACHPR 2001)], para 67.

African Commission on Human and Peoples' Rights has confirmed, in the African context, collective rights and economic and social rights are essential elements of human rights in Africa.[23]

Alleged violation of article 14

59. In the first place, a case had been made out that the affected children have suffered denial and unwarranted limitation of their rights to health. The Charter provides in article 14 for the children to enjoy the right to the highest attainable standard of health. Minimal access to health facilities, a lower level of contact with health promoting measures and medical assistance, and a lack of provision of primary and therapeutic health resources and programmes is inconsistent with respect for the child's right to the highest attainable standard of health. African jurisprudence places a premium on both the right to health care and the right to the underlying conditions of health. In the *Purohit c*ase, the African Commission held that the right to health in the African Charter on Human and Peoples' Rights includes the right to health facilities, access to goods and services to be guaranteed to all without discrimination of any kind.[24] It has been confirmed that the underlying conditions for achieving a healthy life are protected by the right to health. Thus lack of electricity, drinking water and medicines amount to a violation of the right to health. The *Zaire* case,[25] concerning article 16 of the African Charter on Human and Peoples' Rights, confirmed that the failure of the government of Zaire to provide the mentioned basic services amounted to an infringement of the right to health.

60. In the communication regarding the children affected by the denial of their nationality and Kenyan identity, a case was made out that the state party had violated in particular the right enshrined in article 14(2)(b) (the duty to ensure the provision of necessary medical assistance and heath care to all children with the emphasis on the development of primary health care) and article 14(2)(c) (the duty to ensure the provision of adequate nutrition and safe drinking water). These provisions being similar in content to the equivalent provisions in the African Charter on Human and Peoples' Rights, it can be deduced that the findings of the African Commission bear significant relevance.

61. It is incumbent upon states parties to the African Children's Charter to ensure that article 14(2)(g) is given full implementation, within available resources. Integrated health service programmes

[23] Communication 155/96, *SERAC v Nigeria* [(2001) AHRLR 60 (ACHPR 2001)], para 68.

[24] Communication 241/2001, *Purohit and Moore v The Gambia* [(2003) AHRLR 96 (ACHPR 2003)], para 80.

[25] Communication 25/89, 47/90, 56/91, 100/93, *Free Legal Assistance Group and Others v Zaire* [(2000) AHRLR 74 (ACHPR 1995)].

must be fully incorporated national development programmes, including those pertaining to the most vulnerable who lived in overcrowded and underserviced slum areas or camps. Where the underlying conditions, such as conditions in informal settlement and slum areas, present a heightened risk to the child's enjoyment of her right to health, the duty bearer must accept that there is a correspondingly more urgent responsibility to plan and provide for basic health service programmes under article 14(2)(g)). The states parties to the African Children's Charter are encouraged in giving effect to their article 14(2)(g) obligations, to ensure that national development plans reflect the need to prioritise health services and to intensify such planning for services to otherwise disadvantaged communities where child beneficiaries live.

62. The affected children had less access to health services than comparable communities who were not comprised of children of Nubian descent. There is *de facto* inequality in their access to available health care resources, and this can be attributed in practice to their lack of confirmed status as nationals of the Republic of Kenya. Their communities have been provided with fewer facilities and a disproportionately lower share of available resources as their claims to permanence in the country have resulted in health care services in the communities in which they live being systematically overlooked over an extended period of time.[26] Their health needs have not been effectively recognised and adequately provided for, even in the context of the resources available for the fulfilment of this right.

Alleged violation of article 11(3)

63. The Committee notes that the violation includes an infringement of the rights enshrined especially in article 11(3) of the African Children's Charter, which provides for the right to education. Ratifying states parties undertake to take all appropriate measures, with a view to achieving full realisation of this right. Article 11(3)(a) requires in particular the provision of free and compulsory basic education, which necessitate the provision of schools, qualified teachers, equipment and the well-recognised corollaries of the fulfilment of this right.

64. The African Commission on Human and Peoples' Rights has emphasised that the failure to provide access to institutions of

[26] This can also be said to affect their right to development under the African Charter on Humans and Peoples' Rights, to which the Republic of Kenya is also a state party. See, too the right to survival and development provided for in Article 6 of the UN Convention on the Rights of the Child, as well as article 24 dealing with the right to health.

learning would amount to a violation of the right to education under the African Charter on Human and Peoples' Rights.[27]

65. The affected children had less access to educational facilities for the fulfilment of their right to free and compulsory primary education than comparable communities who were not comprised of children of Nubian descent. There is *de facto* inequality in their access to available educational services and resources, and this can be attributed in practice to their lack of confirmed status as nationals of the Republic of Kenya. Their communities have been provided with fewer schools and a disproportionately lower share of available resources in the sphere of education, as the *de facto* discriminatory system of resource distribution in education has resulted in their educational needs being systematically overlooked over an extended period of time.[28] Their right to education has not been effectively recognised and adequately provided for, even in the context of the resources available for this fulfilment of this right.

66. At this juncture, while not directly in contention in this communication, the African Committee would also like to highlight the relevance of article 31 of the African Children's Charter to the issues at hand. Article 31 of the African Children's Charter requires that every child shall have responsibilities towards the family, society and the state, as well as other legally recognised communities, subject to his age and ability and to other limitations as may be contained in the Charter. Children of Nubian descent who have been born in Kenya are subject to the requirement of their serving their national community by placing their physical and intellectual abilities at the service of the nation, as well as preserving and strengthening social and national solidarity and the independence and integrity of his country. Although it cannot be suggested that the fulfilment of these duties is contingent upon the of their status as nationals and their identity as children of Kenya, the fulfilment of article 31 responsibilities highlights the reciprocal nature of rights and responsibilities, which reciprocity is not fulfilled when article 6 rights are not respected by the state concerned. The Committee wishes to emphasise that national solidarity and African unity are best achieved in an environment which eschews discrimination and denial of rights.

67. The African Committee regards the violations discussed in the preceding paragraphs as emblematic of the difficulties occasioned by the non-recognition of Kenyan nationality of children of Nubian descent in the instant case. Other Charter rights which, seen

27 Communication 25/89, 47/90, 56/91, 100/93, *Free Legal Assistance Group and Others v Zaire* [(2000) AHRLR 74 (ACHPR 1995)], para 11.

28 This can also be said to affect their right to development under the African Charter on Human and Peoples' Ri4ghts, to which the Republic of Kenya is also a state party. See, too the right to survival and development provided for on article 6 of the UN Convention on [sic] the Rights of the Child, as well as article 24 dealing with the right to health.

together, serve the child's best interests can be adduced on which the present violation have a bearing. The African Committee does not need to investigate these in further detail in the light of the findings above.

68. The Committee does not wish to fault governments that are labouring under difficult circumstance to improve the lives of their people. The government of Kenya has ratified the African Children's Charter earlier than many countries on the continent (25 July 2000), and more importantly, has made a number of significant progresses in implementing the provisions of the Charter. However, it is worthy of note that the violation complained of has persisted unchecked for more than half a century, thereby prejudicing not just the children in respect of whom the complaint has been brought under this African Children's Charter, but indeed generations preceding them. The implications of the multi-generational impact of the denial of right of nationality are manifest and of far wider effect than may at first blush appear in the case. Systemic under-development of an entire community has been alleged to be the result. Therefore, in addressing the consequences of the non-recognition of the nationality of children of Nubian descent, actions which address the long-term effects of the past practice must be formulated. As is clearly stated in the African Children's Charter (see article 11(2)(h); article 14(2)(h); article 20(2)), such measures must be formulated with the participation of the impacted community.

Decision of the African Committee

69. For the reasons given above, the African Committee finds multiple violations of articles 6(2), (3) and (4); article 3; article 14(2), (b), (c) and (g); and article 11(3) of the African Children's Charter by the government of Kenya, and:

(1) Recommends that the government of Kenya should take all necessary legislative, administrative, and other measures in order to ensure that children of Nubian descent in Kenya, that are otherwise stateless, can acquire a Kenyan nationality and the proof of such a nationality at birth.

(2) Recommends that the government of Kenya should take measures to ensure that existing children of Nubian descent whose Kenyan nationality is not recognised are systematically afforded the benefit of these new measures as a matter of priority.

(3) Recommends that the government of Kenya should implement its birth registration system in a non-discriminatory manner, and take all necessary legislative, administrative, and other measures to ensure that children of Nubian descent are registered immediately after birth.

(4) Recommends that the government of Kenya to adopt a short term, medium term and long term plan, including legislative, administrative, and other measures to ensure the fulfilment of the right to the highest attainable standard of health and of the right to education, preferably in consultation with the affected beneficiary communities.

(5) Recommends to the government of Kenya to report on the implementation of these recommendations within six months from the date of notification of this decision. In accordance with its Rules of Procedure, the Committee will appoint one of its members to follow up on the implementation of this decision.

SUB-REGIONAL COURTS

ECOWAS COMMUNITY COURT OF JUSTICE

Ameganvi and Others v Republic of Togo

(2011) AHRLR 203 (ECOWAS 2011)

Ameganvi and Others v Republic of Togo

Community Court of Justice of the Economic Community of West African States (ECOWAS), suit ECW/CCJ/APP/12/10, judgment, September 2011

Judges: Ramos, Benin, Potey

Exclusion from National Assembly

Political participation (political exclusion 49-50)
Admissibility (39)
Fair trial (expedited procedure, 41, 55)
Remedies (compensation, 61)

1. The application was submitted by Mrs Ameganvi and Others (claimants), who were members of the Togo National Assembly. They claimed to be excluded from the National Assembly by the Togolese government's (defendant).

2. The claimant has come to this Court seeking the following reliefs:

> [i] Declare and order that their exclusion from the Togolese National Assembly was in violation of human rights, in particular of articles 1, paragraph 2, and 33 of Protocol A/SP1/12/01 on Democracy and Good Governance and articles 7(1), 7(1)(c) and 10 of the African Charter on Human and Peoples' Rights;
>
> [ii] Order the Togolese Republic to allow them to take their seats once more as members of the National Assembly of the Togolese Republic;
>
> [iii] Order the Togolese Republic to pay each of them, in compensation for harm suffered, such sum as the court may consider sufficient by way of damages.

The facts according to the claimants

3. The claimants explain that they were all members of the Togolese National Assembly until 22 November 2010; that they were all active members of the political party called Union of the Forces of

Change (UFC) from which they resigned, some of them on 12 August 2010 and others on 12 October 2010.

4. The claimants affirm that, before the legislative elections organised in October 2007, the candidates chosen to represent the party in these elections were presented with three typewritten documents that they signed during an investiture ceremony for the candidates; that these documents entitled: *confidential contract of the UFC/agreement of adherence to the values of the UFC; contract of confidence in the UFC/Commitment of the candidate* and *Letter of resignation* (typewritten without indication of name or date, addressed to the Speaker of the National Assembly and including the title 'Deputy in the National Assembly') were kept by Mr Gilchrist Olympio, leader of the party.

5. The claimants explain that, as a result of the elections, the UFC obtained 27 seats for deputies in the National Assembly and that the latter constituted a parliamentary group with Mr Jean Pierre Fabre as leader and Mr Lawson Latevi Georges as deputy leader.

6. The claimants also state that, in reaction to their departure from the UFC, the Steering Committee of the UFC, in a declaration of 8 November 2010, announced that they had appointed, on 27 September 2010, Deputy Aholou Kokou as Leader of the UFC parliamentary group and Deputy Alexandre Akakpo as Deputy Leader.

7. The claimants explain that, according to a letter from the Speaker of the National Assembly addressed to the Constitutional Court, the new leader of the parliamentary group, Deputy Aholou Kokou, forwarded to him on 10 November 2010 letters of resignation supposedly coming from them and Mr Lawson Latevi, a non elected candidate in the legislative elections.

8. According to the claimants, these typewritten letters of resignation, forwarded by the Speaker of the National Assembly to the Head of the Constitutional Court and reading as follows: 'I wish to inform you that as from today, and for political reasons, I hereby resign from my position as Deputy in the National Assembly', are undated and bear the name of the author written by a third party. That these letters of resignation forwarded by the Head of the Constitutional Court do not imply a power of attorney given expressly by the deputies mentioned by name as being the signatories.

9. Likewise, seeing that the deputies mentioned by name in these letters had left the UFC and formed a new party (ANC), the new leader of the UFC parliamentary group could not still be acting in their name and that, for the record, the Speaker of the National Assembly himself had in fact been informed that they had left the UFC.

10. The claimants point out that a letter of resignation is a personal and voluntary deed, written, dated and signed by the person

who takes the decision to do so, and sent to the addressee by the person who is resigning; that, in the present case, none of the claimants gave authorisation to Deputy Aholou Kokou to send in his/her name and on his/her behalf, to the Speaker of the National Assembly, any deed of resignation whatsoever. That the presence of the deed of resignation attributed to Mr Lawson, who was not elected as a deputy, among the letters of the deputies supposedly resigning proves that these deeds were signed by candidates and not by deputies.

11. What is more, the Speaker of the National Assembly was officially informed of the exclusion of these deputies from the UFC on 12 August 2010. They add that the intention of Deputy Aholou to cause harm is quite clear and violates article 52 *in fine* of the Togolese Constitution which specifies: 'Every deputy is the representative of the whole nation; imperative mandates are null and void.'

12. That, according to the claimants, from the foregoing it must be understood that a deputy, once elected, is not legally accountable or responsible to his/her voters or the party under the banner of which he/she was elected, and that consequently he/she is not legally bound by commitments that might have been made before the election or by expressions of intent during his/her mandate.

13. That, likewise, one understands by 'imperative mandate' the deed that establishes a legal relationship between the deputy and the constituent(s) (voter and political party) so that the former would be in close dependence on the constituent; that this conception would result in the removal by the party or the voters of the mandate of an elected representative who did not comply with commitments contracted before his/her election.

14. The claimants affirm that the regulations of article 6 of the National Assembly's Rules of Procedure were not respected and that they did not sign any deed of resignation from their positions as deputies. The claimants conclude that the letters of resignation attributed to them are forged documents through the addition of the surname and first names of each of them by a third party.

15. They deduce from the foregoing that the Constitutional Court should have assessed the validity of these deeds, which had been notified to it in violation of article 52 of the Constitution of the Togolese Republic and article 6 of the National Assembly's Rules of Procedure, instead of taking cognisance of these deeds as it has done, recording that their seats as deputies were vacant and ordering that they be replaced.

The facts according to the defendant

16. The state of Togo, the defendant, points out in submissions dated 28 February 2011, that the facts of the case concern the conditions for replacing resigning deputies and that the Speaker of the National Assembly referred the claimants' letters of resignation from their positions as deputies to the Constitutional Court, which proceeded to replace these deputies in accordance with constitutional and legislative provisions.

17. The defendant, in another note dated 13 April 2011, points out that Mr Gilchrist Olympio, leader of the UFC political party, having being prevented from standing in the presidential elections of 4 March 2010, it was the Secretary General of the party, Mr Jean Pierre Fabre, who was appointed to represent the party in these elections; the defendant explains that after this election a crisis that arose within this political party led to the split of the party into two and the creation of the party called the National Alliance for Change (ANC) by the dissidents with Mr Jean Pierre Fabre as leader.

18. The defendant adds that subsequently the claimants, ex-dissidents of the UFC party, having voluntarily resigned from their positions as deputies by individual deeds, the Speaker of the National Assembly, in accordance with the provisions of article 6 of the Rules of Procedure of the National Assembly, informed the plenary session of the situation and then referred the matter to the Constitutional Court, which proceeded to replace the resigning deputies in application of article 192 of the electoral code.

Arguments invoked by the claimants

19. The claimants base the admissibility of their request on articles 9(4) and 10 of the Supplementary Protocol which stipulate: 'the Court has jurisdiction to determine cases of violation of human rights that occur in any member state'; 'may appeal to the Court … anyone who is a victim of human rights violation'.

20. On the substance, they affirm that human rights being inherent to human beings, these rights are inalienable, imprescriptible and sacred and may not be subjected to any limitation; they explain that their violated rights are sanctioned on the one hand by articles 1, 1(a) paragraph 2, and 33 of the Protocol on Democracy and Good Governance, and on the other by articles 7(1), 7(1)(c) and 10 paragraph 2 of the African Charter on Human and Peoples' Rights; that the Speaker of the National Assembly by forwarding to the Head of the Constitutional Court undated and doubtful letters of resignation (containing a typewritten part and words handwritten by a third party), which had not been sent to him by the deputies concerned, failed to contribute to respect for the principle of empowerment and strengthening of parliaments and thus

violated the provisions of article 1 of the abovementioned Protocol; they also point out that on receiving these letters of resignation from Deputy Aholou, who was in open conflict with the deputies whose resignations he was presenting, the Speaker of the National Assembly intentionally contravened the provisions of article 6 of the Rules of Procedure of the National Assembly.

21. The claimants maintain that the Constitutional Court, by declaring valid the notification of the deeds of resignation attributed to them, even though it knew that these had been forwarded by a third party in open conflict with them within the UFC, and that they had publicly disputed these letters, contravened the provisions of articles 32 and 33 of its rules of procedure and violated the principle of empowerment and strengthening of parliaments provided for by articles 1(a) paragraph 2, 33 paragraphs 1 and 2 of Protocol A/SPI/12/01 on Democracy and Good Governance. The claimants invoke on the other hand the violation of articles 7 and 10 of the African Charter on Human and Peoples' Rights.

22. They also maintain that the Constitutional Court did not ensure that it was respecting the provisions of this same article 7 by failing to give them a hearing or to invite them to obtain legal counsel.

23. The claimants also reproach the Speaker of the National Assembly for violating articles 7 and 10 of the African Charter on Human and Peoples' Rights for having forwarded to the Constitutional Court, while refusing to listen to them on this matter, letters of resignation attributed to deputies who he knew were no longer members of the political party to which he was linking them, but belonged to a new party called the ANC. They add that by acting thus the Speaker of the National Assembly ignored the provisions of article 52 of the Constitution of Togo, provisions according to which, during the 1995-2000 administration, the then Speaker of the National Assembly had authorised a deputy who left the party under the banner of which he had been elected to retain his seat.

24. In another note dated 5 May 2011, the claimants affirm that in constitutional law a written resignation with no indication of a date constitutes a blank resignation and that a letter of resignation tendered by an elected member to other persons should have no effect when it was addressed to the Speaker of the Assembly concerned and was legally connected to the imperative mandate forbidden by article 52 of the Constitution of the Togolese Republic; in this same note the claimants declare that they abandon the argument drawn from the provisions of the Protocol on Democracy and Good Governance invoked by them and request the Court to recognise this; they affirm that they are limiting the arguments supporting their request to articles 10 of the Universal Declaration of Human Rights of 10 December 1948 and 7(1), 7(1)(c), 10(1) and 10(2)

of the African Charter on Human and Peoples' Rights and conclude that the rights sanctioned by these instruments were violated to their detriment by the Togolese state.

Arguments of the defendant

25. The state of Togo, in a note dated 13 April 2011 and lodged with the Clerk of the Court on 18 April 2011, invokes the Court's legal incapacity to hear the present case, and explains that there was no violation of human rights because the Constitutional Court was merely respecting the provisions of articles 191 and 192 of the electoral code of the Togolese Republic; the defendant cites in support a case law of the Court, Decree no ECW/CCJ/APP/05/06 of 22 March 2007, and concludes that the request is inadmissible.

26. The defendant, in a note dated 14 February 2011, points out that there is no dispute that the claimants freely resigned from their positions as deputies by individual deeds, and maintains that it is also in accordance with common practice that on receipt of these letters of resignation by the Speaker of the National Assembly, these deputies no longer belonged to the National Assembly, and that even active regret demonstrated later could not revive mandates that no longer existed.

27. The defendant invokes in this regard article 6 of the Rules of Procedure of the National Assembly which states:

- Any lawfully elected deputy may resign from his/her seat
- Resignations are addressed to the speaker who makes them known to the National Assembly in the very next sitting and notifies the Constitutional Court about them.

28. The state of Togo explains that in this instance the minutes of the third plenary sitting of the second ordinary session of the year 2010 show that the Speaker of the National Assembly informed the plenary that nine deputies had sent him individual letters of resignation from their positions as deputies, that as the speaker had notified the Constitutional Court about these letters, the legal conditions had been strictly observed.

29. The defendant points out that, under these conditions, the procedure whereby the deputies were replaced respected the legal regulations and did not transgress any law that would justify an appeal to the Court of Justice of ECOWAS; that the exclusion of the jurisdiction of the Community Court is moreover in line with article 106 of the Togolese Constitution which states: 'The decisions of the Constitutional Court cannot be challenged. They apply to public authorities and all civil, military and jurisdictional authorities.' The defendant mentions a case law of the Community Court in the same vein, Decree ECW/CCJ/APP/02/05 of 7 October 2005, at the end of which the Court upheld that appeals against decisions of the jurisdictions of member states were not part of its remit.

30. In a note in reply dated 13 April 2011, the defendant also points out that the violation of the Protocol on Democracy and Good Governance reported by the claimants is without foundation, because the resigning deputies chose a political direction that differed from the one thanks to which they had been elected and therefore they did not have a choice other than to resign from their mandates as UFC deputies in view of the commitment they had made on 30 October 2007 at the ceremony of investiture of candidates of this political party.

31. Moreover, regarding the commitment of the claimants to 'invest themselves fully in the UFC party, respect its rules of procedure, its political directions and resign from their positions as deputies in the event of breaking the pact', the defendant affirms that seeing it was with full knowledge of the facts that they signed this agreement, it was also in full knowledge that they signed the letters of resignation that they were now disputing; in addition the defendant points out that these letters of resignation are not anonymous since the claimants are the authors, nor blank endorsements because they were written before signature and that their date does not matter in so far as their effect was projected in the future.

32. The defendant, invoking article 52 of the Constitution of Togo, points out that the resignations resulted from expressions of will in this instance; that the willingness of each of them to resign having being proved, the identity of the person who forwarded their letters of resignation to the Speaker of the National Assembly is of little importance, and that the speaker, who in turn referred the matter to the Constitutional Court, was just acting in accordance with the prescriptions of article 6 of the Rules of Procedure of the National Assembly.

33. The defendant, concerning the violation of article 33 of the Protocol on Democracy and Good Governance invoked by the claimants, maintains that appreciation of the authenticity of letters of resignation lies within the ambit of a discretionary power of the Constitutional Court, as does the hearing of resigning deputies.

34. The defendant questions the violation of articles 7(1) and 7(1)(c) of the African Charter on Human and Peoples' Rights invoked by the claimants and explains that these legal texts, which stipulate that anyone has the right to have his/her case heard; that anyone has the right to a defence, including the right to be assisted by a counsel for the defence of one's choice; apply to courts dealing with a lawsuit, and not as in this instance to the National Assembly which cannot be considered a court, and its speaker even less so, and therefore infers that there could not have been violation of these texts in the context of this institution.

35. The state of Togo maintains that neither did the Constitutional Court violate articles 7(1) and 7(1)(c) of the African Charter on Human and Peoples' Rights invoked by the claimants and explains its position by the fact that referral to this court in the context of the resignation letters of the claimants does not constitute a lawsuit.

36. The defendant also affirms, with regard to the alleged violation of article 10 of the African Charter on Human and Peoples' Rights, that it is by virtue of freedom of association advocated by this text that the claimants freely joined the UFC, just as subsequently they freely signed the impugned resignation letters, and concludes that, under these conditions and in application of the maxim *nemo auditur*, they cannot invoke their own turpitude.

37. In view of all the aforesaid, the state of Togo calls upon the Court to record:

- the free resignation of each of the claimants from his/her position as deputy as a consequence of political nomadism;
- the validity of the findings by the Constitutional Court concerning the resignation of each of the claimants from his/her position as deputy and their subsequent replacement in accordance with the legal provisions;
- dismissal of all the requests of the claimants and that they be ordered to pay costs.

Analysis of the Court

38. The examination of the Court will address successively the admissibility of the request and the submission to have it expedited, next its own competence and finally the substance.

Admissibility of the request

39. Mrs Manavi Isabelle and her co-claimants evoke, in terms of their request, the violation of their human rights by the Togolese state within the Togolese Republic. The Togolese Republic being a member state of the ECOWAS Community, this evocation made on the basis of articles 9(4) and 10 of Supplementary Protocol A/SP.1/01/05 relating to the Court, is fully sufficient to declare admissible the present request initiated by natural persons claiming the status of victims of a violation of human rights that might have been committed within a member state of the Community.

40. Consequently the Court declares admissible the request of Mrs Manavi Isabelle and her eight co-claimants.

Request for an expedited procedure

41. Through a separate request received by the Clerk of the Court on the same day as the main request, the claimants applied to benefit from the expedited procedure provided for in article 59 of Court rules; the Court notes that the claimants respected the form of lodging prescribed by article 59, however it points out that the

particular urgency prescribed by this legal text is not established by the mere indication by the claimants of the date of the elections for a new National Assembly scheduled for September 2012, which is not pertinent in so far as nothing prevents the claimants from standing as candidates in the elections in their personal capacity or within the context of their new political party; therefore the Court is of the opinion that this request to expedite the present case be dismissed.

Competence of the Court

42. Do the questions submitted for the Court's appreciation, namely the forwarding by the Speaker of the National Assembly to the Constitutional Court of letters of resignation attributed to the claimants and disputed by the latter, and Decision E018/10 of 23 November 2010 made by the Constitutional Court following the forwarding of these letters, fall under the cognisance of the Court as being liable to constitute violations of the human rights of the claimants as maintained by them?

43. The Court notes first of all that the mere reference to the abovementioned international instruments, which constitute the basic essentials of the Community's legal system in terms of human rights, infers the formal jurisdiction of the Court as determined by articles 9(4) regarding the content and 10(d) regarding referral to the Court; that its case law being consistent in this regard the Court must uphold its competence and give a ruling on the merits.

The substance

44. The Court must determine if the forwarding by the Speaker of the National Assembly of the letters of resignation, attributed to the claimants but disputed by the latter, and Decision no E018/10 of 23 November 2010, made by the Constitutional Court following the forwarding of these letters, constitute, as affirmed by the claimants, violations of human rights to their detriment.

45. Although it concerns an initiative of the Speaker of the National Assembly, followed by a decision of the Constitutional Court, the procedure which resulted in the claimants being deprived of their positions as deputies must be analysed as a whole, as being an act which is binding on the state of Togo with regard to its international commitments concerning human rights.

46. The Court is of the opinion therefore that if an alleged violation of the right to be heard is involved, only the examination of the procedure in its entirety will make it possible to affirm whether there has been respect or not of this right.

47. In this instance, the procedure which led to the declaration of loss of the claimants' mandates was initiated by the Speaker of the National Assembly, who decided to forward to the Constitutional

Court letters of resignation, attributed to certain deputies, that he had received from the UFC parliamentary group to which the claimants belonged.

48. It is true that article 6 of the Rules of Procedure of the Togolese National Assembly stipulates:

> (1) Any lawfully elected deputy may resign from his/her seat; (2) Resignations are addressed to the Speaker who makes them known to the National Assembly in the very next sitting and notifies the Constitutional Court about them.

49. This article reveals that nothing prevents a lawfully elected deputy from taking the initiative to present his/her resignation in writing by a letter addressed to the Speaker of the National Assembly. However, the deputies concerned deny having taken the initiative to renounce their mandates and to have addressed letters of resignation to the Speaker of the National Assembly.

50. The analysis of the facts of the case lead the Court to conclude that no letters of resignation were presented to the Speaker of the National Assembly by the claimants themselves in this matter.

51. What emerges is only that the Speaker of the National Assembly received from the new leader of the UFC parliamentary group, Deputy Aholou Kokou, documents that were signed by the claimants when they were still mere candidates for the position of deputies. The said documents read as follows: 'I wish to inform you that as from today, and for political reasons, I hereby resign from my position as Deputy in the National Assembly.'

52. However, these documents cannot be regarded as being letters of resignation in the sense of article 6 of the Rules of Procedure of the National Assembly. Indeed, according to this article, a letter of resignation must be signed by the lawfully elected deputy, a legal status that the signatories had not yet acquired when they signed the said letters; which is not disputed by the defendant.

53. Moreover, it follows from the facts of the case that the claimants never expressed their willingness to resign by handing in or sending letters to the Speaker of the National Assembly; indeed the contrary is true. They denied, in the plenary session of the National Assembly, having intended to resign, which is moreover confirmed by the creation of a new parliamentary group.

54. However, if the deputies concerned did not complete any deed of resignation, this means that the conditions as provided for in article 6 of the Rules of Procedure of the National Assembly were not observed, which is the reason why the said letters should not have been forwarded to the Constitutional Court without a prior hearing of the claimants.

55. Therefore the first reaction of the Head of the Constitutional Court to the letters of resignation he received was to send to the

Speaker of the National Assembly the letter dated 17 November denouncing the irregularities in the procedure and requesting that article 6 of the Rules of Procedure of the National Assembly be respected.

56. The illegality of this procedure by the Speaker of the National Assembly led the Constitutional Court to give the ruling it did, thus depriving the claimants of their mandates without their having been heard and this in violation of the relevant provisions of the Universal Declaration of Human Rights and the African Charter on Human and Peoples' Rights.

57. Indeed, article 10 of the Universal Declaration of Human Rights reads:

> Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

And article 7 of the African Charter on Human and Peoples' Rights reads:

> Every individual shall have the right to have his cause heard.' This right includes: 'the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force.

Article 1(h) of the Supplementary Protocol of ECOWAS on Democracy and Good Governance reads:

> The rights set out in the African Charter on Human and Peoples' Rights and other international instruments shall be guaranteed in each of the ECOWAS Member States; each individual or organisation shall be free to have recourse to the common or civil law courts, a court of special jurisdiction, or any other national institution established within the framework of an international instrument on Human Rights, to ensure the protection of his/her rights. In the absence of a court of special jurisdiction, the present Supplementary Protocol shall be regarded as giving the necessary powers to common or civil law judicial bodies.

58. The Court therefore concludes that there was violation by the state of Togo of the right of the claimants to be heard during the procedure which resulted in the loss of their mandates.

59. The claimants also allege the violation of their right of association provided for in article 10(2) of the African Charter on Human and Peoples' Rights. But the facts alleged in support of this violation not having been proved by the claimants, the Court dismisses this request.

60. The claimants requested that the state of Togo be ordered to pay them by way of damages such sum as the Court may consider sufficient in compensation for harm suffered.

61. But the claimants, even if they did not explain the constituent elements or the nature of their loss, nevertheless left it to the discretion of the Court to evaluate this loss. The Court rules that the claimants were deprived of a fundamental human right.

Consequently, it is appropriate that the claimants be compensated for the harm suffered by allocating to each of them a lump sum.

62. For the above reasons:

The Court, ruling publicly, in the presence of the parties involved, regarding human rights, in first instance and last instance:

Regarding the form:

Rejects the plea of lack of competence raised by the state of Togo;

Declares admissible the request of Mrs Ameganvi Manavi Isabelle and her eight co-claimants;

Declares itself competent to examine the allegations of violations of human rights brought by the claimants against the state of Togo;

Pronounces that the request for submission of the present matter to be expedited is rejected, the claimants not having been able to justify it with any legitimate reason;

Regarding the substance:

Pronounces that the state of Togo violated the fundamental right of the claimants to be heard as provided for in articles 10 of the Universal Declaration of Human Rights and 7 of the African Charter on Human and Peoples' Rights.

Consequently orders the state of Togo to compensate the violation of the human rights of the claimants and to pay each of them the amount of three million (3,000,000) CFA Francs.

Orders the state of Togo to pay the costs.

DOMESTIC DECISIONS

KENYA

Osman v Minister of State for Provincial Administration and Internal Security and Others

(2011) AHRLR 217 (KeHC 2011)

Ibrahim Sangor Osman (On his behalf and on behalf 1, 122 Evictees of Medina Location, Municipal Council of Garissa) v Minister of State for Provincial Administration and Internal Security & 3 Others (with Global Initiative for Economic, Social and Cultural Rights & 2 Others intervening as *Amici Curia*)

High Court of Kenya at Embu, Constitutional Petition 2 of 2011, 3 November 2011

Judge: Muchelule

Evictions and demolition of properties

Access to information (consultation, adequate and reasonable notice, and adequate information must precede eviction, 11)
Evidence (no response to depositions of affidavit will be deemed uncontroverted and admitted, 6)
Forced eviction (definition, 12)
Housing (alternative housing, resettlement or access to productive land must be available before eviction, 13)
Inherent human dignity and the security of the person (eviction must respect human dignity and security of persons affected, 11)
Interpretation (interdependency of rights, 8)
Life (eviction must respect right to life,11)
Remedies (proper remedy, 14, 15; award of damages,19)

[**1.**] This petition was filed on 23 February 2011 by the petitioner on his behalf and on behalf of 1 122 persons (all hereinafter referred to as 'the petitioners' who were evicted from Bularika, Bulamedina, Sagarui, Naima, Bulanagali and Gesto (commonly known as 'Medina location'*)* on 24, 30 and 31 December 2010 by the officers of 1st and 2nd respondents. Those evicted included children, women and the elderly. Some of the children were school-going. The petitioners were evicted from unalienated public land in respect of which title deeds have not been issued. The land is within the jurisdiction of the 2nd respondent. It had been occupied by the petitioners since 1940s,

initially as grazing land but in the 1980s they put up permanent and semi-permanent dwellings in which they were living prior to eviction.

[**2.**] Sometimes in December 2010 word started going round that the local provincial administration and the 2nd respondent were planning to evict the petitioners. On 3 December 2010 the District Commissioner, Garissa by name Samson Macharia came to the location in a GK Land-rover. He came along with a bulldozer and four saloon cars. In the vehicles were administration police officers and a group of unidentified youths. The District Commissioner informed the petitioners that he had come to prepare the ground for the construction of a ring-road and warned that any homestead that fell along the road would be deemed to be on government land and would be demolished. The team proceeded to mark the area where the purported road would pass, and left thereafter. There was no further communication. The petitioners made numerous attempts to have audience with the District Commissioner and the officers of the 2nd respondent but were not successful.

[**3.**] On 24 December 2010 a group of armed Administration Police Officers in riot gear and unidentified youths arrived under the command of the District Officer, Garissa Central and, without warning, begun to demolish the houses and structures of the petitioners which they claimed to be on government land. This left the petitioners homeless. On 30 and 31 December 2010 police officers came with the Deputy Mayor of the 2nd respondent by name Ismael Yusuf and continued with the exercise. On 31 December, 2010 the petitioners had become so agitated that they were now resisting the demolitions. The police officers used tear gas and physical violence to evict and eject them.

[**4.**] No written notice had been served on the petitioners. The respondents had no court order, and they did not engage the petitioners in any consultation or explanation. In all, 149 houses and structures were demolished. The petitioners were forced to live and sleep in the open or in make-shift temporary structures and were exposed to the elements and vagaries of nature, health risks, insecurity and lack of the basic human necessities such as food, water and sanitation. Several children had to drop out of school as their parents had to seek alternative accommodation elsewhere. Others had to move from the nearby Tumaini Primary School and go to other schools that included Yathrib Primary School. 26 of the petitioners were over 60 years in age and had to endure unbearable conditions in the open without basic human facilities.

[**5.**] On 12 January 2011 the petitioners wrote to the 3rd respondent about the evictions and the conditions under which they were living. He promised to investigate but nothing has been done since. On 11 February 2011 the District Commissioner Garissa came with a squad of Administration Officers and threatened to demolish

the temporary structures that the petitioners had put up. It is at that point that the petitioners filed this petition under articles 22(1), (2) and (3), 23(1) and (3), 165(1) and (3) and others, of the Constitution of Kenya 2010 and rules 20 and 21 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules 2006 and obtained an interim order of injunction to restrain the respondents, and all those acting under them, from evicting them or demolishing their houses and structures without a court order and provision of suitable alternative accommodation. They further obtained an interim mandatory injunction compelling the respondents to provide them with alternative housing, shelter/ accommodation, food, clean and safe drinking water, sanitary facilities and health care. They have since been allowed to return where their homes were demolished.

[**6.**] The petition was served on the respondents who did not file any response. It follows that the matters in the foregoing that were sworn to in the supporting affidavit of Ibrahim Sangor Osman were not controverted and should be accepted. The petition sought the following orders and declarations:

> (a) that the forcible, violent and brutal eviction through demolition of homes of the petitioners without according them alternative shelter and/or accommodation leaving them to live in the open exposed to the elements and vagaries of nature is a violation of their fundamental right to life guaranteed by article 26(1) and (3) of the Constitution of Kenya, 2010 and article 11 of the ICESCR;
>
> (b) that the forcible, violent and brutal eviction through demolition of homes of the petitioners without any warning, court orders, any or reasonable notice in writing or availing them information regarding the evictions and without according them alternative shelter and/or accommodation and leaving them to live in the open exposed to the elements and vagaries of nature is a violation of their fundamental rights to inherent human dignity and the security of the person guaranteed by articles 28 and 29(c),(d) and (f) of the Constitution of Kenya, 2010;
>
> (c) that the forcible, violent and brutal eviction through demolition of homes of the petitioners without warning, any or reasonable notice in writing or availing them information regarding the evictions is a violation of their fundamental right of access to information guaranteed by article 35(1) of the Constitution of Kenya, 2010;
>
> (d) that the forcible, violent and brutal eviction through demolition of homes of the petitioners and the destruction of the building materials and their household goods in the process, without court order/s and without according them an opportunity to salvage any of their belongings is a violation of their fundamental right to protection of property guaranteed by article 40(1), (3) and (4) as read with article 21(3) of the Constitution of Kenya;
>
> (e) that the forcible, violent and brutal eviction through demolition of homes of the petitioners without according them alternative shelter and or accommodation and leaving them to live in the open exposed to the elements and vagaries of nature is a violation of their fundamental rights to accessible and adequate housing, reasonable standards of sanitation, health care services, freedom from hunger and the right to clean and safe water in adequate quantities guaranteed by article 43(1)

read with articles 20(5) and 21 (1), (2) and (3) of the Constitution of Kenya 2010;

(f) that the violent and brutal eviction through demolition of homes of the petitioners without any court order/s, warning, any or reasonable notice in writing or availing them information and reasons regarding the demolitions and evictions is a violation of their fundamental right to fair administrative action guaranteed by article 47 of the Constitution of Kenya 2010;

(g) that the forcible, violent and brutal eviction through demolition of homes of the petitioners without according them alternative shelter and/or accommodation and leaving to live in the open exposed to the elements and vagaries of nature is a violation of their fundamental rights to physical and mental health, and the fundamental right to physical and moral health of the family under articles 16 and 18 of the ACHPR read with article 2(6) of the Constitution of Kenya 2010;

(h) that the forcible, violent and brutal eviction through demolition of homes of the petitioners without according their children alternative shelter and/or accommodation and leaving the children to live in the open exposed to the elements and vagaries of nature is a violation of the fundamental rights of children to basic nutrition, shelter and healthcare and protection from abuse, neglect and all forms of violence and inhuman treatment and to basic education guaranteed by article 53(1)(b), (c), (d) and (2) read together with article 21(3) of the Constitution of Kenya 2010 and article 28 of the ACHPR read with article 2(6) of the Constitution of Kenya 2010;

(i) that the forcible, violent and brutal eviction through demolition of homes of the elderly persons among the petitioners without according them alternative shelter and/or accommodation rendering them to live in the open exposed to the elements and vagaries of nature is a violation of the fundamental rights of the elderly persons to the pursuit or personal development, to live in dignity, respect and freedom from abuse and to receive reasonable care and assistance from the state guaranteed by article 57(b), (c) and (d) as read with article 21(3) of the Constitution of Kenya 2010;

(j) an order of permanent injunction restraining the respondents, their officers, agents and/or servants from evicting the petitioners appearing on annextures 'ISO1' and 'ISO2' and from carrying out any more demolitions of homes in the areas called Bularik, Bula Medina, Sagarai, Naima, Bulla Nasal and Gesto within the Municipal Council of Garissa without provision of alternative shelter/accommodation and/or housing mutually agreed upon with the petitioners;

(k) an order of mandatory injunction compelling the respondents to provide the petitioner and the 1,122 co-evictees appearing on annextures 'ISO1' and 'ISO2' with suitable and permanent alternative land, shelter and/or accommodation;

(l) that the petitioners are entitled to general, aggravated, exemplary and punitive damages against the respondents jointly and/or severally;

(m) such general, aggravated, exemplary and punitive damages as may be assessed by the honourable court; and

(n) costs of this petition.

[**7.**] The petitioners were represented by Mr Mbugua Mureithi. The *amici curia* were represented by Mr Odindo Opiata. Counsel filed written submissions which I found quiet relevant and useful. I am grateful to them for the authorities cited and the international instruments that they referred to. These international instruments are important because under article 2(5) and (6), the general rules of

international law and any treaty or convention ratified by Kenya form part of the laws of Kenya.

[**8.**] The Constitution of Kenya entrenches both civil and political rights and also social and economic rights, and makes both justiciable. It is an acknowledgment of the fundamental interdependence of these rights. The interdependence is out of the realization that people living without the basic necessities of life are deprived of human dignity, freedom and equality. Democracy itself is enhanced when citizens have access to the basic necessities of life. Article 19(2) indicates that the purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to build a society which is based on social justice and in which the potential of each person is freed.

[**9.**] Article 20 provides that the bill of rights of the Constitution applies to all law and binds all state organs and all persons, and by article 21(1), it is a fundamental duty of the state and every state organ to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the bill of rights. Under article 21(3), all state organs and all public officers have the duty to address the needs of vulnerable groups within the society. These groups include women, older members of society and children. Under article 28 every person has inherent dignity and to have that dignity respected and protected. Article 29 provides that every person has the right to freedom and security of a person, and that includes the right not to be subjected to any form of violence from either public or private sources.

[**10.**] The petitioners were evicted from unalienated public land which they had occupied since the 1940s and on which they had their residences. The eviction was violent and forceful as the police and the youths were using bulldozers, came in riot gear and used tear gas when the petitioners sought to resist these actions. The petitioners were left without any alternative place to reside. They were left in the open without any shelter, food, water, sanitary facilities or health care. The petitioners were not accorded any opportunity to salvage any of their property, building materials and household goods before and after the demolitions. The petitioners included women, children and the elderly. The education of the children was interrupted.

[**11.**] Under article 43, the petitioners were entitled to the fundamental rights to accessible and adequate housing, and to reasonable standards of sanitation, health care, clean and safe water in adequate quantities and education. Under article 47 the petitioners were entitled to be given written reasons regarding these evictions. What this means is that, prior to these evictions the petitioners had to be consulted and provided with adequate and reasonable notice. Adequate information on the reasons of the

proposed evictions and the alternative purposeful the land was to be used had to be indicated. This information was to be given in obedience of article 35 which guarantees the right to information. The evictions were then supposed to be carried out in the manner that respected human dignity, right to life and the security of the affected.

[**12.**] Kenya ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) on 3 January 1976 and consequently became bound to respect, protect and enforce the rights therein, including the right to adequate housing and the related prohibition of forced evictions as guaranteed by article 11 of the Covenant and the right to education as guaranteed under article 13. The UN Committee on Economic Social and Cultural Rights (CESCR), mandated with monitoring compliance with the ICESCR, provides a detailed analysis of the prohibition on forced eviction under international law. Forced eviction is defined by the Committee as:

> The permanent or temporary removal against their will of the individuals, families and/or communities from the home and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.

The ICESCR has gone on to clarify that:

> Notwithstanding the type of tenure, all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment or other threats. State parties should consequently take immediate measures aimed at conferring legal security of tenure upon those persons and households currently lacking such protection, in genuine consultation with affected persons and groups.

For the evictions to be justified under the ICESCR, they must be carried out in the most exceptional circumstances after all feasible alternatives to eviction are explored in consultation with the affected community and after due process protections are afforded to the individual, group or community. The ICESCR imposes an additional obligation upon governments that no form of discrimination is involved in any eviction nor should any eviction render persons homeless of vulnerable to other human rights violations where those affected are unable to provide for themselves. The state party must take all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access productive land, as the case may be, is available.

[**13.**] Kenya ratified the International Covenant on Civil and Political Rights (ICCPR) on 23 March 1976. By its article 17, forced evictions are prohibited. The Human Rights Committee, which monitors compliance of the Covenant, addressed forced evictions in Kenya in 2005 and found that forced evictions: 'arbitrarily interferes with the Covenant rights of the victims of such evictions, especially the rights under article 17 of the Covenant.' It went on to say that the government should:

> develop transparent policies and procedures for dealing with evictions and ensure that evictions from settlements do not occur unless those affected have been consulted and appropriate arrangements have been made.

[**14.**] Article 8 of the Universal Declaration of Human Rights and the 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 adopted by the United Nations General Assembly (resolution 60/147 of 21 March 2005) state that a proper remedy for forced evictions is to return the victims as close as possible to the *status quo ante*. They state that:

> restitution should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law … occurred.

[**15.**] The Supreme Court of the Republic of South Africa provides persuasive authority in this regard. In the case of *Tswelopele Non-Profit Organization & Others v City of Tshwane Metropolitan Municipality*, 2007 SCA 70 (RSA), the Court considered forced eviction as a violation of the right to have access to adequate housing as enshrined in article 26(1) of the Constitution of the Republic of South Africa. In doing so, the Court held that the proper remedy was the resolution of the *status quo ante* and ordered that the occupiers must get their shelters back and that the respondents should, jointly and severally, be ordered to reconstruct them.

[**16.**] I have considered the facts of this case against the provisions of the Constitution of Kenya 2010, the international instruments that Kenya has ratified and the persuasive authorities that counsel cited to me during this application. I find that the petitioners were not given a written notice to tell them that they were going to be evicted. The respondents came on 3 December 2010 to say that they wanted this land for a road and returned on 24 December 2010 to begin the evictions. 21 days notice for people who had lived on this land since the 1940s and had put up permanent and other dwellings thereon was both insufficient and unreasonable. In any case, this was not a written notice and they were not given adequate information about the need to develop the road in the area. There was no discussion with them about the usefulness of this road *vis-a- vis* their occupation of the land. There was no indication that they would be moved to some alternative settlement. (*Joe Slovo Community, Western Cape v Thubelisa and Others* [2009] ZACC 16.) No such settlement was eventually provided. The petitioners were merely thrown out, as it were, without care about where they were going. The eviction threw them into an open, hostile and shelter-less environment where there was no single basic necessity of life. Among the petitioners were children, women and the elderly. There was no special, or any, consideration for them. The education of the children was completely disrupted. When the petitioners sought to discuss what was awaiting

them with a view to finding a solution, the respondents were not available. The petitioners were entitled to information from their government regarding this whole exercise but were snubbed.

[**17.**] I consider that this forced eviction was a violation of the fundamental right of the petitioners to accessible and adequate housing as enshrined in article 43(1)(b) of the Constitution of Kenya 2010. More important, the eviction rendered the petitioners vulnerable to other human rights violations. They were rendered unable to provide for themselves. The eviction grossly undermined their right to be treated with dignity and respect. The petitioners were thrown into a crisis situation that threatened their very existence.

[**18.**] I find that the petitioners are entitled to the declarations in (a), (b), (c), (d), (e), (f), (g) and (i). Further, by order of mandatory injunction, the respondents are compelled to return the petitioners to the land from which they were evicted. The respondents are further commanded to reconstruct reasonable residences and/or alternative accommodation and/or housing for the petitioners. Such residences, accommodation and/or housing should have all the amenities, facilities and schools that were subsisting on the land at the time of the evictions and demolitions, or should be mutually agreed upon. There will be a permanent injunction to restrain the respondents from any such future evictions and/or demolitions unless and until the law is followed.

[**19.**] The petitioners asked for general, aggravated, exemplary and punitive damages against the respondents jointly and severally. I note that the orders above will to some extent restore the petitioners to their previous situation. I consider that the petitioners did not provide information regarding the value of what was lost in the evictions, or what they have spent so far in terms of seeking to survive under their present circumstances. These, however, should not minimize the gravity of the matter and the violations of the fundamental rights of the petitioners by the respondents. The petition was not defended. And yet, the Court cannot assume that the respondents have a limitless purse. It is in these circumstances that I have decided that each of the 1 123 petitioners shall get a global figure of Ksh 200 000 in damages from the respondents, jointly and severally. The respondents shall then pay the costs of the petition.

SEYCHELLES

Gill v Registrar of Political Parties

(2011) AHRLR 225 (SySC 2011)

Christopher Gill v Registrar of Political Parties

Supreme Court of Seychelles, Civil Appeal 1 of 2011, 30 March 2011

Judge: Karunakaran

Political participation

Constitution (amendment must retain identity and not destroy it, 44; political party must comply with basic structure of constitution, 43)
Political participation (importance and aim of political parties, 26; when registration of a political party is unconstitutional, 27)
Limitation of rights (enjoyment of rights is subject to law necessary in democratic society, 32, 36)

[**1.**] The last decade of the twentieth century will not be forgotten in the political history of Africa. This was the decade when the freedom struggle against the last vestiges of racial oppression in Africa, came to an end. Nelson Mandela wrote a eulogy to his long walk to freedom. The Rainbow Nation was in full blossom on the horizon of good hope. The people of Seychelles — after experiencing a cycle of different political systems — eventually attained political maturity and national stability. They embarked on their historic voyage from a single-party state towards a vibrant pluralist democracy. They ensured that the torch of liberty was passed on from one generation to another to burn forever as steady as a lighthouse on their shores.

[**2.**] In 1993, their voyage began with a dream — The Seychellois Dream — if I may call it that, a dream of a modern sovereign democratic republic, in which life was better, richer and fuller for every Seychellois without discrimination, whether based on race, colour, religion, creed, sex or political views; with equality of opportunity to enjoy freedom, justice, welfare, fraternity, peace and unity. Their dream was not based on an illusion but on a vision that sprouted from their ability to go beyond the obvious, to see the

invisible and touch the future. Their dream is not about problem-solving, but the pre-emption and prevention of problems. The people of Seychelles thus decided to rewrite their own political destiny and they did with a style of their own.

[**3.**] Differing political thoughts converged, were reconciled and conceived in consonance. The Constitution of Seychelles (The Third Republic) was born after much brainstorming, reflection, ideological debate and intellectual-labour and finally delivered through referendum.

[**4.**] 'The Seychellois Dream' has now taken shape with roots that give it a stronghold on ground realities and wings that give it the ability to reach new heights. It is beautifully animated in the preamble, which I am sure we all know, is a part of the Constitution (*vide SR Bommai v Union of India* AIR 1994 SC 1918). The preamble is a key to reaching into the minds of the makers of it. The people of Seychelles solemnly resolved to constitute Seychelles into a sovereign democratic Republic. The people, as descendants of different races had learnt to live together as one people and as one nation under God constituting a classless society. They wished to serve as an example for a harmonious multi-racial society. They proclaimed so in the Preamble. They recognised the inherent dignity, equality and inalienable rights of all members of the human family. They reaffirmed, in the Preamble, that these rights include the pursuit of happiness free from all types of discrimination. Pluralism flourished. People celebrated unity in diversity. The Constitution of Seychelles proclaimed a philosophy of its own founded on all these ideals, hopes, intentions, wishes and the aspirations of the people. This is the essence of 'The Seychellois Dream'.

[**5.**] Although this 'dream' is the perpetual pursuance of a unique goal that is close to the heart and sacred to every right-thinking Seychellois man and woman, some individuals, who have indeed, embraced the same democratic system, do not endorse the 'General Will' (*vide* Rousseau's Social Contract Theory 1762 Treatise) of the people of Seychelles. For reasons best known to them, they disown 'The Seychellois Dream'. They aspire to teardown that 'dream' and create a wonderland of their own based on 'Individual Will' (*vide* Rousseau *supra*). These individuals do not subscribe to the Seychellois philosophy of one people-one nation. They wish to fragment society and compartmentalise the people. They do not realise that for a state, the size and composition of Seychelles, unity is our greatest strength and means of survival amongst the many countries that dwarf us. They do not believe that men are born equal and all Seychellois are equal before law and equal in civil and political status. They do not believe in a classless society. For them, there are and ought to be two classes of citizens. They claim that one class or breed self-styled as '*Seselwa Rasin*' amongst the people of

Seychelles, is superior to the other class, whom they tag '*Seselwa Fabrike*'. They do not accept the existing constitutionalism nor have they had any respect for the equality and dignity of human beings. They want to do away with the Constitution of the Third Republic. They refuse to share or be part of 'The Seychellois Dream' enshrined in the Constitution. They want to have the exclusive right to politically control and govern Seychelles. They want to establish a government of the '*Rasin*' by the '*Rasin*' and for the '*Rasin*'. They believe and expressly state that the *Seselwa Rasin* have a duty and obligation to remove the 'PP Collaborators' (presumably, PP means Party in Power) from power, unless they renounce their collaboration. According to them, the removal of the PP collaborators from power must be accomplished, first, by exhausting all peaceful means available, and then, as an absolute last resort, by revolutionary direct action. Undoubtedly, what matters for them is the end, not the means. This is the essence of their political thoughts, beliefs, agenda and their ultimate dream, a dream obviously, based on an illusion.

[**6.**] These individuals want to rewrite the political philosophy and the destiny of every Seychellois and of the generations to come. In short, they want to establish a 'Fourth Republic' founded on a political philosophy of their choice. To achieve that, they need political power. To acquire that power, they obviously need a political organisation. Hence, they have now organised themselves as a 'Political Group'. According to them, since the present Constitution has given them freedom of thought, belief, expression and all civil and political rights, they have the fundamental right to express their political views and do away with the present Constitution. Moreover, since the Constitution has guaranteed and conferred on them the right to form a political party, they want to have their 'Political Group' registered as a political party in Seychelles.

[**7.**] Is this political group entitled to be registered in the eye of law, as a political party in Seychelles? This is the question that arose before the Registrar of Political Parties for determination. The Registrar answered in the negative. Now, the Court is invited to review his decision and pronounce on the correctness, accuracy, legality, constitutionality and propriety of his decision; hence this judgment.

[**8.**] This matter is before the Court by way of an appeal preferred by the appellant under section 8(1) of the Political Parties (Registration and Regulation) Act (Chapter 173) (hereinafter referred to as the 'Act') against the refusal of the Registrar of Political Parties (hereinafter referred to, as the 'Registrar') to register a political group called '*Mouvment Seselwa Rasin*' (hereinafter referred to, as the 'MSR'), as a 'Political Party' under the provisions of the Act.

[**9.**] One Mr Christopher Gill, a resident of Praslin, who claims to be the leader of MSR, - hereinafter called the 'appellant' - submitted an application to the Registrar on the 13 July 2010, in the prescribed form for the registration of MSR as a political party. The application was made in terms of section 5 of the Act, which reads thus:

> 5(1) A political party consisting of not less than 100 registered members may apply in the prescribed form to the Registrar for registration under this Act.
>
> (2) An application for registration shall be signed by the office bearers of the political party and shall be accompanied by
>
> (a) two copies of the constitution, rules and political programme or manifesto of the party duly certified by the leader of the party,
>
> (b) the particular of the registered office of the party;
>
> (c) a list giving the name, address and national identity number of not less than 100 registered members of the party;
>
> (d) a list giving the name, address and national identity number of the leader and other office bearers of the party;
>
> (e) such further information or document as the Registrar may require for the purpose of satisfying himself that the application complies with this Act or that the party is entitled to be registered under this Act.
>
> (3) A list referred to in paragraph (c) and paragraph (d) shall be signed by each of the persons named therein.
>
> (4) A person shall not be considered to be a member of a political party for the purposes of this Act unless
>
> (a) he has attained the age 18 years;
>
> (b) he is a Seychellois; and
>
> (c) he is resident in Seychelles.

[**10.**] The application was thus duly signed by the office bearers of MSR and accompanied by all documents required under section 5 (*supra*). The application was under consideration by the Registrar. During that time, one of the office bearers, Mr Francis Gill, whose name appeared in the original list submitted to the Registrar, was withdrawn by the applicant. Be that as it may, the Registrar meticulously scrutinised all the documents accompanied the application, including the Constitution of the MSR and the relevant provisions of law. Thus, after giving due consideration to the application, the Registrar rejected the application. He refused registration of MSR as a political party in terms of section 7 of the Act. This section is couched in the following terms:

> 7(1) The Registrar may refuse to register a political party if he is satisfied that
>
> (a) the application is not in conformity with this Act;
>
> (b) the name of the party
>
> (i) is identical to the name of a registered political party or a political party which has been cancelled under this Act or a political party whose application precedes the present application;
>
> (ii) so nearly resembles the name of a registered political party or a political party which has been cancelled under this Act or a political party whose application precedes the present application as to be likely to deceive the members of the party or the public; or

(iii) is provocative or offends against public decency or contrary to any other written law as to be undesirable;

(c) any purpose or object of the party is unlawful.

(2) A political party shall be deemed to have a purpose or object which is unlawful for the purposes of this Act if

(a) it seeks, directly or indirectly, to further ethnical, racial or religious discrimination or discrimination on the ground of colour;

(b) it advocates or seeks to effect political changes in the Republic through violence or unlawful means;

(c) it seeks to secede any part of the Republic from the Republic.

(3) For the purposes of determining whether a political party has an unlawful purpose or object the Registrar may consider any document (underline mine), statement or matter made by or on behalf of the political party or by an office bearer of the party.

(4) Where the Registrar refuses to register a political party, he shall forthwith serve upon the party a notice in writing to this effect and shall specify the ground for his refusal.

[**11.**] Having thus refused registration, the Registrar accordingly, served upon the appellant a notice in writing dated 12 October 2010 specifying the grounds for his refusal. The grounds specified by the Registrar in his notice *inter alia*, read (*in verbatim*) thus:

According to the Political Party (Registration and Regulation) Act, 1991 no party can be registered if its objects are unlawful. The objects of a political party are reflected in a political party's constitution.

I have scrutinized the applicant's constitution in the light of the provisions of the said Act and highlight some of the salient issues: Article IV provides that the applicant has the exclusive (*sic*) to political control and to govern Seychelles; Article VII provides that the applicant will create two categories of citizenship one for naturalized Seychellois and the other naturally born Seychellois. Upon assuming power the former that the applicant called '*fabrike*' is entitled to be to be (*sic*) deported; article XV and XIII promotes revolutionary changes of government. All the above provisions are contrary to article 1 of the Seychelles Constitution which creates Seyche1les as a democratic Republic, which is defined in article 47 of the Constitution (*sic*) as *inter alia*, where there exist the existence of human right and tolerance of the freedoms and right of others and where political changes occurs through the democratic process. The constitution of the applicant is unlawful. Under section 7 (of the said Act), I hereby reject your application for the registration of *Mouvman Selselwa Rasin* as a political party. However, if you are aggrieved by this decision you may appeal to the Supreme Court within 21 days of this notice.

H. Gappy (Sd)

Registrar of Political Parties

[**12.**] The appellant being aggrieved by the above decision wrote a letter dated 14 October 2010 to the Registrar, which *inter alia* reads thus:

Dear Mr Gappy,

I am writing further to your Letter dated 12 October, 2010 in which you rejected the application of *Mouvman Seselwa Rasin*. Reason being the constitution is unlawful ... Beliefs cannot be illegal in a democratic society. It is absurd. Beliefs of a party cannot be contrary to law or unlawful, if the belief is intended to change the law once given a mandate ... Revolution is a reality of all States and standard political dictum in any society ... Attorney Conrad Lablache has suggested to reword the Manifesto to placate your obvious nervousness in regards to

> MSR registration. The language can be interpreted in the wrong light especially when your office is dabbling in constitutional interpretation without any standards of interpretation in place. Standards of interpretation must be in place and known to the public, before an apparatus of the State can know how to rule on a fundamental right. In order to do this, our member will be consulted and they will be undertaking an exercise to review our manifesto. Their comments will be compiled and opinion noted we submit an alternative manifesto to you.
>
> Sincerely,
>
> Christopher Gill (Sd)
>
> Leader, MSR

[**13.**] Subsequently, on 21 October 2010, the Registrar received the 'Second Submission of the MSR Manifesto' — supposed to be in consonant with the Constitution and laws of Seychelles — from the appellant in respect of his application for registration. In fact, the second submission of the MSR manifesto was nothing but a replica of the first one that was originally submitted to the Registrar. The contents in respect articles iv, vii, xv, and xiii were the same except its jacket that carried a change of title from 'The Constitution of MSR' to read 'Manifesto of MSR'.

[**14.**] The Registrar again refused registration in his letter dated 4 November addressed to the appellant stating in *verbatim* thus:

> I acknowledge receipt of the second submission to this Office in respect to the application to register *Mouvman Selselwa Rasin* as a political party. In my opinion articles iv, xiii and xiv of your Manifesto are not in consonant with the provision of section 7 of Cap 173. You should revisit these articles. I regret to inform you that your application for the registration of *Mouvman Selselwa Rasin* as a political party is hereby rejected.
>
> (Sd) H. Gappy
>
> Registrar of Political Parties

[**15.**] In response to this letter, the appellant again submitted another manifesto of MSR entitled the 'Third submission' to the Registrar again insisting on the registration of MSR as a political party.

[**16.**] Obviously, the third submission is also nothing but the same old wine in a new bottle. The appellant had made some cosmetic changes to the previous one but in pith and substance both constituted the same political ideology. The changes were superficial. For instance:

> (1) Article ii was changed to read as follows:
>
> Day of Betrayal and Atonement: Henceforth, 5 June of every year shall continue as a national holiday to be remembered by all *Seselwa Rasin* as the Day of Betrayal and of Atonement. On this day, we will henceforth remember the betrayal of *Sesel pou Seselwa* and atone for the ways we individually may have personally betrayed *Sesel Pou Seselwa* in the prior year and resolve and define ways to improve our individual commitment and dedication *to Sesel Pou Seselwa* during the coming year
>
> (2) Article iv in the original Constitution of MSR read thus:
>
> *Seselwa Rasin* have the exclusive right to politically control and govern Seychelles. *Seselwa Rasin* have the exclusive right to be elected to, or

appointed to, any position in Seychelles that involved governing, or which has any powers to govern, any part of Seychelles.

This article was also completely deleted in the third submission and replaced by the following:

POLITICAL CONTROL OF SEYCHELLES

MSR shall pursue amendments to the Constitution to ensure that no '*Fabrike*' shall be permitted to seek any political office in the Republic and for all posts of high office to be reserved for *Seselwa Rasin*

(3) Article vii in the original Constitution of MSR that created two classes of citizens was kept intact in the third submission.

(4) Article xv in the original Constitution of MSR read thus:

If direct revolutionary action is needed, every *Seselwa Rasin* must do all that he or she can do to assist in the effort, even if that is simply providing those who are engaged, (underline mine) with a glass of water

This article too was completely deleted in the third submission and replaced as below:

Due Process of Law: No *Seselwa Rasin* shall be denied life, liberty, property, privacy, equality of opportunity and the pursuit of happiness without due process of law.

(5) Article xiii of the original Constitution of MSR read thus:

REMOVAL OF PP COLLABORATORS

We *Seselwa Rasin* have a duty and obligation to remove the PP Collaborators from power, unless they renounce their collaboration and implement *Sesel Pou Seselwa*. The removal of the PP Collaborators from power must be accomplished first by exhausting all peaceful means available, and then, as an absolute last resort, by Revolutionary Direct Action ... (Underline mine)

This article was completely deleted in the third submission and replaced to read as below:

SESELWA RASIN - SELF-EDUCATION - RECRUITMENT-DEFENSE

It is the duty of every *Seselwa Rasin* to politicize and educate himself or herself about The *Rasin-ist* Creed, and thereafter, to recruit, educate and politicize three other persons about *the Rasin-ist* Creed and to become a *Rasin-ist*, who in turn must do the same thing. It is the duty and obligation of every *Rasin-ist* to educate himself or herself according to each individual's highest abilities and capabilities so that *each Rasin-ist* may have the highest level of skill, abilities and capabilities to individually protect and *defend Sesel Pou Seselwa* and the principles contained in the *Rasin-ist* Creed.

[**17.**] The Registrar, having been again dissatisfied with the contents of the third submission again refused registration and served upon the appellant a notice in writing dated 13 November 2010 accordingly, specifying the grounds for his refusal. The said notice reads in *verbatim*, thus:

The third submission for the registration of '*Mouvman Seselwa Rasin*,' as a political party, is not substantially dissimilar to the previous ones. You are still insisting to discriminate between groups of Seychellois; ie between what you call the *Seselwa Rasin* and the non- *Seselwa Rasin*. This is a clear violation of the Constitution of the Republic of Seychelles and also the Political Party (Registration and Regulation) Act. Pursuant to section 7(4) of the Political Party (Registration and Regulation) Act, I hereby give you notice on the above stated grounds and I shall not register the '*Mouvman Seselwa Rasin*'.

H.P. Gappy (Sd)

REGISTRAR OF POLITICAL PARTIES

[**18.**] The appellant being aggrieved by the decision of the Registrar's refusal, to register MSR as a political party, has now appealed to this Court against the entire decision on the following grounds:

> (1) The reasons given by the respondent for refusing to register the political party is devoid of merit and contrary to section 7 of the Political Party (Registration and Regulation) Act, and is therefore illegal; and
>
> (2) By refusing to register the political party the respondent has violated the rights of the appellant's under article 21(1) 'freedom of thought', article 23 'to form or belong to a political party', article 24(a) and article 22(1) 'freedom of expression.'

[**19.**] Mrs Alexia Amesbury, learned counsel for the appellant submitted in essence that the original 'MSR Constitution' first submitted to the Registrar, was subsequently amended and replaced by the MSR manifesto (the third submission), which does not contain anything unlawful, illegal or unconstitutional. Seychelles is a democratic country and every Seychellois has a fundamental right to hold or subscribe to any political view or belief and to believe in any political ideology. The appellant as a Seychellois has every political and civil rights to hold and express any political belief and to form a political party and to have it registered under the Act. Accordingly, the appellant applied for registration of the MSR. He complied with all statutory requirements in terms of section 5 of the Act *(vide supra*). Hence, the appellant is entitled to have the MSR registered as a political party. That is a fundamental human right of the appellant or that of any other Seychellois for that matter. However, the Registrar unlawfully and illegally refused to register for no valid reason.

[**20.**] Moreover, it is the submission of Mrs Amesbury that (i) 'freedom of thought and expression' and (ii) right to form or belong to a political party are fundamental human rights. They are guaranteed not only by the Constitution of Seychelles under the Seychellois Charter of Fundamental Human Rights and Freedoms as sacrosanct, but also by the International Covenant on Civil and Political Rights (ICCPR) to which Seychelles is a party having signed and ratified it. According to counsel, the Registrar's decision in refusing registration is not only illegal but such decision is in gross violation of the appellant's fundamental human right guaranteed by the Seychelles' Constitution as well as by the international instrument. In support of her submission, counsel also cited the case of *Partridul Cmunistilor and Ungureanu v Romania* Application 46626/99 — the judgment of which was delivered by the European Court of Human Rights on 3 February 2005.

[**21.**] For these reasons, Mrs Amesbury urged the Court to allow the appeal and direct the Registrar to register '*Moument Seselwa Rasin*' as a 'Political Party' under the provisions of the Act.

[**22.**] On the other side, Honourable Attorney-General Mr Govinden submitted in essence that the decision of the Registrar to refuse registration is proper, lawful, legal and constitutional. The impugned decision is in consonant with the provisions of the Act and that of the Constitution of Seychelles. Indeed, Mr Govinden in his submission read out and drew the attention of the Court to a number articles found in the MSR manifesto, which are in violation of various provisions of the statutes and the Constitution of Seychelles. He clearly demonstrated to the Court how the appellant's attempt to register MSR as a political party would destroy every fabric of our society and the democratic system. The MSR's intended discrimination and the classification of people into 'Seychellois *Rasin*' and 'Seychellois *Fabrike*' not only violate various provisions of our Constitution but also violate 'International Human Right Norms'. He also drew an analogy between the MSR manifesto and the so-called Nuremberg Laws, which Hitler had decreed against the Jews in the Nazi Germany creating classification of its citizens and the resultant holocaust. Furthermore, Mr Govindan submitted that purpose and object of the MSR (*vide* article xv and xiii of the manifesto) is to bring about political changes including change of government through revolutionary means. This is unconstitutional and unlawful. Hence, according to Honourable AG, the decision of the Registrar is lawful. He rightly refused registration of MSR as a political party in terms of section 7(1)(c) of the Act (*vide supra*).

For these reasons, Honourable Attorney General urged the Court to uphold the decision of the Registrar refusing registration and dismiss this appeal accordingly.

[**23.**] I meticulously examined all the documents produced by the parties including all correspondence between the appellant and the Registrar of Political Parties in this matter. I diligently perused the relevant provisions of the Constitution of Seychelles and other related laws as well as the Romanian case law cited by learned counsel Mrs Amesbury. I gave careful thought to the arguments advanced by counsel on both sides, for and against this appeal.

[**24.**] At the outset, it is pertinent to note that section 7(3) of the Act (*vide supra*) clearly empowers the Registrar to consider any document, statement or matter made by or on behalf of the political party or by an office bearer of the party, for the purposes of determining whether a political party has an unlawful purpose or object. Evidently, the Act has given an unfettered discretion to the Registrar in so far as the consideration of all relevant documents in this respect. Hence, the Court holds that it was lawful, proper and reasonable for the Registrar to examine and consider all documents that emanated from the appellant including the first, second and third submissions for the purpose of determining on the registration

of MSR as a political party. To my mind, and in law he has rightly done so in this matter.

[**25.**] Moreover, I find that all certified copies of the documents produced by the Registrar as exhibits herein, are obviously, official documents, maintained in the course of his official duties and kept at his office as official record. They are indeed, public document. For all legal intents and purposes, they are presumed to be genuine and authenticated documents, in the absence of any evidence to the contrary *vide* Latin Maxim: *omnia praesumuntur legitime facta donec probetur in contrarium*.

[**26.**] Be that as it may, I will now move on to the merits of the case. Needless to say, political parties constitute the lifeblood of democracy. Without political parties, democracy loses its meaning. Although political parties in civilized democracies differ in their political beliefs and ideology, they all share certain characteristic features in common. Indeed, they all basically espouse an expressed ideology or vision bolstered by a written platform with specific goals aiming for the betterment of the nation and its people. The aims of political parties shall be based on respect for the nation's sovereignty, independence and territorial integrity and for democracy. They all recognise the citizens' equality before the law and equal protection of laws. They uphold the unity, security and dignity of the nation. They all believe in the ballots and in democracy, not in the bullets and in oligarchy or anarchy.

[**27.**] The primary objective of a political party is to influence government policy, usually by nominating their own candidates and trying to seat them in political office. They compete for political power to form their own government and implement their policy. Political parties participate in electoral campaigns, educational outreach or protest actions. When they are in power they try to ensure good governance through good people and good laws; preserve public accountability and transparency; they try to narrow down the gap between the rhetoric and the reality, although the gap has a perpetual tendency to reopen. Above all, the means employed to achieve the aims of political parties shall be in accordance with the existing constitutional framework and legal order of the nation. As I observe, these are the standard elements found as characteristic features of political parties that vie for political power in a democratic system. Bearing the above standards in mind, I carefully perused the political manifesto of MSR. On the face of it, it seems to me that MSR's aims, objects and its intended activities do not reflect those general characteristic features normally expected of any responsible political party in any pluralistic democratic society.

Unconstitutionality

[**28.**] From a meticulous examination of the documents on record I find that the MSR's constitution, in article xv and article xiii (*vide supra*) undoubtedly, promotes, advocates and incites change of government by revolution. They believe that if the ballots could not bring about the change they want, they will resort to the bullets as last resort. They say they will engage their cadets to achieve it by revolutionary direct action. Besides, they impose a legal obligation on all Seychellois men and women to assist those cadets in their engagement by providing them at least, a glass of water. Thus, the MSR strives to gain political power in order to establish their class rule undermining the 'Rule of Law' and 'Democracy'. This means that the constitutional and legal order in place since 1993 in Seychelles has been inhumane and unacceptable to them, to the so-called *Seselwa Rasin*. Is this not a glaring unconstitutional thinking, belief, attitude and unlawful object and approach?

[**29.**] According to MSR, the existing Constitution of Seychelles should be eliminated, whatever the means employed but it ought to be replaced by what they believe in. Is this not an abrogation of the existing Constitution of Seychelles? Is this not a threat to the sovereignty of the nation? Alas! Here, the image that comes to my mind is that of a man attempting to saw off the very branch he is sitting on.

Again, under article iv of the manifesto of MSR, they claim *Seselwa Rasin* have the exclusive right to politically control and govern Seychelles. Is this not a threat to our popular pluralist democracy and republicanism? In the same breath, they say that they shall have power 'to govern any part of Seychelles'. Is this not a threat to the territorial integrity of the nation?

Freedom of thought, belief and expression

[**30.**] The appellant Mr Gill also expressed his conviction in open court that mere belief cannot be illegal in a democratic society. He claimed that he has the constitutional right to believe in any political philosophy of his choice. I quite agree with him. He has a right to believe in any philosophy that predominates his mind, provided such belief is not wrong or erroneous and does not infringe the rights of other right-thinking people in society. In fact, human belief is an abstract entity, a synthesis — if I may use the dialectic term. It is based on the perception of reality by a human mind (see, Hegel's dialectic philosophy). As long as it remains as a belief — a thought unexpressed — within the mind of the believer, nobody will bother or read his mind to verify, whether it is a right belief or wrong belief. The believer may enjoy his freedom of belief within his mind, without any restriction imposed by anyone for any reason whatsoever. However, if the same belief is once expressed, relied and acted upon

either by the believer himself or by any other person for that matter, and if that act results in harm or likely to result in harm to his neighbour, then such belief whether political or otherwise, is liable to be scrutinised as this Court now does herein. And, if it is found to be wrong, then that belief is liable to be condemned as it adversely affects the interest of his neighbour. Incidentally, I should mention that I use the term 'neighbour' herein, in a broad sense as used in the 'golden rule' (thou shalt love thy neighbour as thyself — Leviticus 19:28) that sense was extended by Lord Atkin from the Sermon on the Mount to the law of negligence in *Donoghue v Stevenson* [1932] AC 562 (House of Lords), the most famous case in the common law. I prefer to extend it further to the law of human rights and freedoms.

[**31.**] Now, one might ask: Who, then in law, is my neighbour? The answer seems to be:

> persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions based on my beliefs, which are called in question.

Indeed, the active man, who acts on wrong beliefs, is more dangerous to society than the one who is blissfully ignorant of the subject matter and remains inactive. As Thomas Jefferson once mentioned 'Ignorance is preferable to error; and he is less remote from the truth who believes nothing, than he who believes what is wrong'. Obviously, the appellant in this matter is too remote from the truth as he believes in what is wrong in the eye of law.

[**32.**] In any event, the exercise of one's civil or political right is always subject to non-infringement of the rights of others. This reminds me of a story, that an Englishman walked along swinging his walking-stick and it struck the nose of another person. When the injured person objected, the wielder of the walking-stick said that England had ensured freedom to all people and that in swinging his walking-stick he was only exercising his right. The objector then replied 'Sir, your freedom ends where my nose begins'.

[**33.**] As rightly submitted by the appellant's counsel, it is true that our Constitution has ensured freedom and fundamental human rights including the 'Right to form political parties' to all people without discrimination. I endorse her proposition in this respect. For, freedom is an indivisible word. If we want to enjoy it and fight for it, we must be prepared to extend it to everyone; whether they are rich or poor; whether they agree with us or not; no matter; whatever be their race, religion, creed or colour of the skin; and whatever be the political belief or philosophy that predominates their mind; but we must be prepared to extent it to all. That is the bottom-line.

[**34.**] The appellant's understanding on the concept of 'free individuality' (the freedom of thought, speech, expression and action) appears to be biased against the state. His understanding is

obviously, based on the wrong belief that individualism is above the concept of state. As German philosophers Kant, Fichte and Hegel rightly propounded that the legal philosophy of free individuality, ought to be based on human mind that is, on the self-consciousness of a reasonable being. After all, man is a social animal (*per* Aristotle)! By nature, he lives in community and ought to interact with other fellow human beings for survival and civilisation. Freedom of action of one human being should respect the equal right of another. Firstly, individual freedom is of necessity mutual. Secondly, the sphere of legal relations is that part of mutual personal relations, which regulates the recognition and definition of the respective sphere of liberty, on the basis of free individuality. Thirdly, the state comes in to control and regulates the rights of the individuals.

[35.] The relationship between the individual and the state is based on three principles:

> (1) The individual becomes a member of the state by the due performance of civic duties and acquires his contractual status as a citizen.
>
> (2) The law guarantees and limits the rights of the individual; and
>
> (3) Outside the sphere of civic duties, the individual is free and responsible only to himself. In that mode he is a man, not a citizen.

Contrary to these principles, the appellant's political belief in effect, does not allow the individual to become a member of the state by the due performance of his civic duties. The appellant does not recognise the law that guarantees and limits the rights of individuals. He simply wants an individual to be free and be responsible only to himself as a man, but not to the state, as a citizen.

[36.] Besides, it must, however, be understood that fundamental rights are not absolute rights. They are subject to restrictions and 'rule of law'. Thus our Constitution tries to strike a balance between the individual rights and social interest. Although our Constitution guarantees the right to form political parties to all people, it also stipulates that such right is subject to restrictions as can be imposed under article 23(2) of the Constitution by a law and necessary in a democratic society. The required law, that is: the Political Parties (Registration and Regulation) Act is in place and in force that has, as contemplated by the Constitution, imposed such restriction as is 'necessary in a democratic society' to protect the rights and freedoms of others.

[37.] For the purpose of determining whether such a restriction is necessary in a democratic society, the adjective 'necessary', within the meaning of article 23(2), implies the existence of a 'pressing social need'.

The Court reiterates that its examination of whether the refusal to register MSR as a political party met a 'pressing social need' must concentrate on the following points:

(i) whether there is plausible evidence on record to show that MSR's objective is to jeopardize democracy and rule of law;

(ii) whether the intended class rule, revolutionary direct action, abrogation of the Constitution, classification of citizenry and all these factors taken together constitute the mission, vision and the objective of the political group, for which the appellant seeks registration as a political party.

(iii) whether the model of society conceived and advocated by MSR is compatible with the concept of a 'democratic society'; and

(iv) its overall examination of the above points must also take into account of the historical context in which the refusal to register the party concerned took place.

[**38.**] The task of Court herein is not to take the place of the Registrar of Political Parties and decide on the issue of registration: but rather to review under section 8 of the Act, the decisions he made in exercise of the power, conferred on him by section 7(1) of the Act. This does not mean that the Court's supervision is limited to ascertaining whether the Registrar exercised his discretion, lawfully, reasonably, carefully and in good faith. It must look at the refusal complained of in the light of the case as a whole, in order to determine whether it was 'proportionate to the legitimate aim if any, pursued' by MSR, and whether the reasons given by the Registrar to justify his refusal are 'relevant and sufficient'. In so doing, the Court has to satisfy itself that the Registrar applied standards which were in conformity with the principles embodied in the Constitution and the Act and, moreover, that he based his decisions on an acceptable assessment of the relevant facts (*vide*) *Romanian* case cited *supra* and see, *mutatis mutandis*, *Ahmed and Others v the United Kingdom*, judgment of 2 September 1998, Reports 1998-VI, 2377-78, § 55, and *Goodwin v the United Kingdom*, judgment of 27 March 1996, Reports 1996-II, 500-01, § 40).

[**39.**] It is truism that while in a dictatorship laws are enforced; in a democracy laws are voluntarily observed. The rule of law in a democracy must be maintained by inner-restraints and self-discipline. But, maintained, it must be. This applies not only to individuals, who believe and live in democracy; but also to the so-called political groups like MSR, who believe in oligarchy. At the same time, they also vie for political power, while operating within the same democratic system. This double thinking, as I see it, is clearly, unconstitutional and unlawful; to say the least, it is paradoxical to the core.

[**40.**] I perused the authority of *Romanian* case cited by counsel Mrs Amesbury in support of her argument. I find that the instant case of MSR is distinguishable from the *Romanian* case that differs in every aspect of law and facts. I carefully perused the judgment of that case in which, the appellants complained that the refusal of their application to register the PCN as a political party by Romanian government had infringed their right to freedom of association within the meaning of article 11 of the European Human Rights Convention.

Having regard to the grounds on which the Romanian authority had refused registration, they further submitted that they had been discriminated against on the basis of their political opinions, in breach of article 14 of the Convention. The European Court of Human Rights (ECHR) allowed the appeal stating that refusal for registration in that particular case, had been a violation of article 11 of the Convention.

[**41.**] Obviously, in the *Romanian* case, PCN's manifesto did not contravene or infringe any provision of the Constitution or the domestic laws of Romania. PCN did not advocate, promote or incite violence or revolution. Unlike MSR, they believed in democracy, national sovereignty, unity etc. In fact, the PCN manifesto *inter alia*, reads as follows:

> The PCN shall respect national sovereignty, the territorial integrity of the state, its legal order and the principles of democracy. None of its members shall defame the country and the nation, promote war and national, racial, class or religious hatred, encourage discrimination, territorial separatism or public violence, or engage in obscene and immoral activities

[**42.**] The PCN is a free association of citizens in Romania, which supports political pluralism, upholds the principles of a democratic law-based state and strives to defend their own interests without denying those of others unlike what MSR intends to do in Seychelles. That is why the ECHR held that the refusal by the Romanian government to register PCN as political party was in violation of article 11 of the Convention. Although MSR claims to be a political movement in Seychelles, by no stretch of the imagination, it can be equated or compared to the Romanian political party PCN. Hence, I hold that the authority cited by Mrs Amesbury is neither relevant to the point in issue nor supportive of her proposition. On the contrary, it rather strengthens the case of the respondent in this matter.

[**43.**] Before I conclude, it is pertinent to observe that the purpose or object of MSR is not only unlawful and inconsistent with the Constitution and other laws of Seychelles but also it is repugnant to the Universal Declaration of Human Rights 1948 and International Convention on the Elimination of All Forms of Racial Discrimination 1965. The Universal Declaration of Human Rights proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set out therein, without distinction of any kind, in particular as to race, colour or national origin. All human beings are equal before the law and are entitled to equal protection of the law against any discrimination and against any incitement to discrimination. Any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous, and that there is no justification for racial discrimination, in theory or in practice, anywhere; the discrimination between human beings on the grounds of race, colour or ethnic origin is an obstacle to friendly and peaceful

relations among nations and is capable of disturbing peace and security among peoples and the harmony of persons living side by side even within one and the same state; the existence of racial barriers is repugnant to the ideals of any human society and civilization. Any political parties or organizations which, through their aims or activities, campaign against the basic structure of the Constitution such as democracy, political pluralism, the principles of the rule of law, or the sovereignty, integrity or independence of the Republic of Seychelles, or attempt to disturb the multi-racial social harmony, unity and stability of Seychelles shall be unconstitutional. Besides, the means employed to achieve the aims of political parties shall be in accordance with Seychelles's constitutional and legal order. Hence, in the instant case the Registrar has rightly refused to register MSR as a political party on the ground that its object was unlawful.

[**44.**] It is also pertinent to observe that a political party may campaign for a change in the law or in the Constitution or in the legal and constitutional structures of the state, on three conditions:

> (1) Firstly, the means used to that end must in every respect be legal, constitutional and democratic; and end can never justify the means.
>
> (2) Secondly, the change proposed if any, must itself be compatible with fundamental democratic principles. It necessarily follows that a political party whose leaders incite or resort to violence or put forward a policy which does not comply with one or more of the rules of democracy or which is aimed at the destruction of democracy and the flouting of the rights and freedoms recognized in a democracy, cannot claim legitimacy to represent or stand or continue to stand as a political party that will truly preserve, protect and defend the Constitution of Seychelles. In any event, the Registrar in exercise of his power under section 9(1)(c) of the Act, may even cancel the registration of such irresponsible political parties, at any time, on proof to his satisfaction that those political parties have a purpose or object, which is unlawful; and
>
> (3) Thirdly, although there is no constitutional or implied limitation on the amending-power of the legislature to amend any part of the Constitution, that power to amend does not include the 'Power' to disfigure or abrogate the Constitution itself. The word 'amendment' used in the Constitution postulates that the old Constitution must survive without loss of identity and it must be retained though in the amended form. The Constitution is a living institution. It has a soul that represents the heirs of the past as well as the testators of the future. Obviously, it shall not opt to commit suicide simply by providing an inbuilt mechanism for amendments. Therefore, the power to amend does not include the 'Power' to destroy the soul of the Constitution or abrogate the basic structure or features of the Constitution. The basic structure of the Constitution of Seychelles includes (i) Supremacy of the Constitution, (ii) Republican and democratic form of government, (iii) Secular character of the Constitution, (iv) Separation of powers between the legislature, the executive and the judiciary, (v) Rule of law, (vi) Equality before law, and (vii) Free and fair election, which is a basic postulate of democracy. See, *Kesavanand v State of Kerala*, AIR 1973 Supreme Court of India 1461 (Decided by a Special Bench of 13 Judges) and *Indira Nehru Gandhi v Raj Narayan*, AIR 1975 Supreme Court of India 2299.

[**45.**] However, eschewing the said three conditions, MSR intend to cause or campaign for drastic structural changes in the supreme law

of the land as well as in the legal and constitutional structures of the state disregarding the 'Due Process of Law' and defeating the 'General Will' and the 'Sovereignty' of the People of Seychelles. Undoubtedly, it is an unlawful attempt by MSR to shatter 'The Seychellois Dream' enshrined in the Preamble of the Constitution of Seychelles.

In the light of all the above, this Court in its judgment, holds that:

(1) The reasons given by the Registrar of Political Parties for refusing to register the '*Moument Seselwa Rasin*' (MSR) as a political party are legally and constitutionally valid. His decision in this respect cannot be faulted for any reason whatsoever.

(2) The Registrar has exercised his discretion, lawfully, reasonably, carefully and in good faith and in accordance with section 7 of the Political Party (Registration and Regulation) Act and his decision is therefore, proper and legal; and

(3) By refusing to register MSR as a political party, the Registrar has not violated any of the appellant's fundamental human rights and freedoms guaranteed by the Constitution of Seychelles nor has the Registrar infringed any international human rights norms secured by international human rights instruments.

In the final analysis, I conclude that this appeal is devoid of merits and liable to be dismissed in its entirety. Hence, I decline to allow the appeal. I make no order as to costs.

Further order

[**46.**] I direct the Registrar of the Supreme Court to transmit the judgment delivered herein, to the Registrar of Political Parties by serving on him a certified copy of this judgment in conformity with rule 18 of the Political Parties (Registration and Regulations) (Appeal) Rules Cap 173.