

# COMMUNICATION 383/10 - MOHAMMED ABDULLAH SALEH AL-ASAD v. THE REPUBLIC OF DJIBOUTI

## SUMMARY OF COMPLAINT

### Summary of Facts

1. This Communication was received at the Secretariat of the African Commission on Human and Peoples' Rights ("the Secretariat," and "the Commission") on 10 December 2009. It is submitted by Mohammed Abdullah Saleh Al-Asad (the Complainant) through the Global Justice Clinic (previously the 'International Human Rights Clinic (IHRC)') of the Centre for Human Rights and Global Justice, Washington Square Legal Services Inc, New York University School of Law; and the International Centre for the Legal Protection of Human Rights (INTERIGHTS), (hereinafter jointly referred to as 'Representatives').
2. The Communication is submitted against the Republic of Djibouti, a Party to the African Charter on Human and Peoples' Rights ('the Charter') since 20 December, 1991<sup>1</sup> and bound by its provisions since 20 March 1992 in terms of Article 65 of the Charter.
3. The Complainant states that he is a citizen of Yemen. From 1985 until 2003 he lived in the Republic of Tanzania and established a family there. He also had a successful business. To facilitate his residence and business undertakings including acquisition of land in Tanzania, he obtained a forged Tanzanian birth certificate and a passport.
4. He states that on 26 December, 2003 around 9:00 pm while at his home in Dar es Salaam, two men who spoke the Swahili language and appeared to him to be Tanzanians apprehended and blindfolded him; bound his hands; and abruptly took him to an apartment where he was questioned for about five hours concerning his entry and residence in Tanzania and how he obtained a Tanzanian passport.
5. In the early hours of 27 December, 2003 he was once again handcuffed, blindfolded, and taken to the airport where he was put on a small aircraft and flown to an undisclosed destination. The Tanzanian authorities did not inform the

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<sup>1</sup> ACHPR "Ratification Table: African Charter on Human and Peoples' Rights" <http://www.achpr.org/instruments/achpr/ratification/> (accessed on 6 February, 2014)

Complainant or his family and friends about the reason for his apprehension or indeed his whereabouts. The flight took a few several hours. Upon landing, the Complainant was quickly pushed into a motor vehicle and driven for about half an hour to a detention facility where he was kept in isolation for two weeks.

6. During the second week he was interrogated about three times concerning terrorist-related activities. The interrogations centred on his relationship with certain terrorist suspects, and Al-Haramain, an Islamic Foundation to which had previously rented office premises in his property in Tanzania and of which he had been appointed as a co-trustee. The interrogations were carried out in English with the help of an Arabic language interpreter. He denied involvement in any terrorist-related activities.

7. Concerning the conditions of his detention, the Complainant states that he was first briefly kept in a small old dirty and unfurnished room, and then transferred to a bigger and cleaner room which only had an old sponge mattress, a toilet, a tap, and a plastic basin. After a few days he was provided with a pillow and a sheet. He was never allowed a change of clothes for the entire two weeks. High up the walls of the room were two small windows which opened to the outside. Another window was on the iron door. During the night, there were a lot of mosquitoes which prevented him from sleeping. From this cell, he could hear motor vehicles passing by, the call to prayer, and children playing, all which gave him the impression that he was in a residential area.

8. The Complainant states that at the end of the two weeks, he was once more bound, blindfolded, and driven from the secret detention facility to an airport 'by local personnel'. He further alleges that at the airport, he was pulled from the car, lifted off the ground and his blindfold was ripped off. He saw about five individuals clad in black with their faces concealed with balaclavas. The men tore off his clothing, shoved a finger into his rectum, photographed him naked, diapered him, and dressed him in a short sleeved shirt and a pair of trousers. Further, they plugged his ears with cotton, placed headphones and a hood over his head, tightly taped around his head, while his hands, waist, and feet were chained. He was then put on a waiting plane and flown out in turn to three detention facilities allegedly operated by the United States of America, two of which were in Afghanistan.

9. He states that in the subsequent secret detention facilities, he was still never allowed contact with the outside world including his own family and friends, organisations, and legal counsel. In addition he was subjected to continued isolate

detention, constant loud music, dietary manipulation, artificial light twenty-four hours a day, and exposed to cold weather.

10. Eventually on 5 May 2005, he was transferred by the United States Government to Yemen where he was subsequently tried for forging travel documents, convicted upon his own plea of guilt, sentenced to time served, and released on 14 March 2006. He was and has never been charged with any terrorism-related offences.

11. Whereas at first the Complainant had no knowledge of the first destination from Tanzania and the location of his detention, he believes that it was in the territory of the Republic of Djibouti. His belief is premised on a set of circumstantial evidence collated from his own experiences and observations whilst in his first secret detention facility outside Tanzania; documents filed with the High Court of Tanzania on a *habeas corpus* application filed by his father; expert testimony; and various reports of international organisations and the mass media documenting the United States of America's extraordinary rendition program undertaken as part of the counter-terrorism measures from the immediate aftermath of the terrorist attack of 11 September 2001 in the United States of America.

12. The Complainant further alleges that he believes the agents of the Government of Djibouti were involved from the moment of his arrival allegedly in Djibouti to the time he was handed over to the US agents who continued to detain and severally transfer him to the three subsequent secret detention facilities.

13. On 31 March 2009 his lawyers wrote the Attorney General of the Respondent State detailing the facts of his experiences during his secret detention by way of notice of violations of his rights as guaranteed under the African Charter.

14. The Complainant alleges that despite the notice, the Respondent State has not undertaken an effective investigation to discover additional information regarding his alleged detention and treatment in Djibouti. He further states that the Respondent State has neither identified and prosecuted those responsible, nor offered any other form of remedy to him.

#### **Alleged violations of the African Charter**

15. The Complainant avers that the treatment he suffered at the alleged instance of the Respondent State amount to violations of Articles 1, 2, 3, 4, 5, 6, 7(1), 12(4), 14, and 18 of the Charter.

## **Remedies sought**

16. Consequent upon the alleged violations the Complainant requests the Commission to:-

- (a) Recommend that the Republic of Djibouti should award him due compensation.
- (b) Recommend that the Republic of Djibouti should conduct a public inquiry into illegal apprehensions, renditions, and detentions in the context of counter-terrorism measures such as those exacted on him.
- (c) Require the Republic of Djibouti to report to the African Commission within six months on:-
  - (i) the steps taken to investigate and prosecute any person responsible for the violation of his rights.
  - (ii) the measures adopted to ensure appropriate oversight of foreign military and intelligence services on its territory as a guarantee for non-repetition of the type of violations he suffered.

## **PROCEDURE**

17. The Communication was received by the Secretariat on 10 December, 2009.

18. The African Commission decided to be seized of the Communication in terms of Article 55 of the African Charter at its 8<sup>th</sup> Extraordinary Session held from 22 February to 3 March, 2010. The Commission's decision was communicated to the parties with a request that they should submit written arguments on admissibility.

19. On 28 February 2011 the Secretariat received the Complainant's written **Arguments on Admissibility** together with a set of supporting documents comprising the Complainant's Declaration; Declaration of Zahra Ahmed Mohamed; Exhibits attached to the Arguments on Admissibility and the two declarations; a Factual Summary of publicly available information on the U.S. Government's extraordinary rendition, secret detention, and interrogation program and Djibouti's role in the program (the Factual Summary); and two volumes of attachments to the Factual Summary comprising Documents numbered A - T.

20. The Secretariat transmitted the Complainant's Arguments on Admissibility to the Respondent State with a request for the latter to submit written observations and arguments on admissibility.

21. The Commission considered the Communication at its 50<sup>th</sup> Ordinary Session held from 24 October to 5 November 2011 and decided to defer its decision on admissibility to the 51<sup>st</sup> Ordinary Session, pending the Respondent State's submission of observations on admissibility.

22. On 30 January 2012 by a Note Verbale referenced: ACHPR/LPROT/COMM/383/10/83.12 the Secretariat reminded the Respondent State to submit its arguments on admissibility.

23. By letter dated 19 March 2012 the Complainant requested an oral hearing on admissibility during the 51<sup>st</sup> Ordinary Session of the Commission.

24. On 10 April 2012 the Secretariat received the Respondent State's **Arguments on Admissibility** dated 3 April 2012 together with supporting evidence comprised of the Affidavit of Mr. Djama Souleiman Ali, the Chief Prosecutor of the Republic of Djibouti; and Exhibits to the Affidavit.

25. By letter dated 11 April 2012 and referenced ACHR/COMM/DJI/383/10/300/12 the Secretariat informed the Complainant that the consideration of the Communication on admissibility was deferred from the 51<sup>st</sup> Ordinary Session to the 52<sup>nd</sup> Ordinary Session in order to accommodate the request for oral hearing which had been submitted late for the 51<sup>st</sup> Ordinary Session.

26. By further letter dated 12 July 2012 and referenced ACHPR/COMM/383/10/597/12 the Secretariat requested the Complainant to submit two exhibits referred to in his initial written Arguments on Admissibility, to wit, a stamped copy of a Departure Declaration Card and a Ruling of the High Court of Tanzania on the *habeas corpus* proceedings, which had not been submitted together with the initial arguments.

27. On 16 July 2012 the Complainant submitted copies of the requested exhibits. These were transmitted to the Respondent State by Note Verbale dated 19 July 2012 and referenced: ACHPR/COMM/DJI/383/10/614/12, with a further request that the Respondent State should submit its observations thereon by 20 August 2012.

28. On 16 August 2012 the Secretariat received the Respondent State's **Supplemental Arguments on Admissibility** being observations on the Complainant's two exhibits and three expert declarations (see para. 27 above). The

Respondent State's Supplemental Arguments were duly transmitted to the Complainant.

29. On 23 August 2012 the Secretariat received from the Complainant a **Response to the States Arguments on Admissibility** together with three new declarations of Ms Cori Crider, Mr John Sifton and Ms Clara Gutteridge.

30. By Note Verbale of 30 August 2012 referenced ACHPR/COMM/DJI/383/10/814/12 to the Respondent State, the Secretariat acknowledged receipt of the former's Supplemental Arguments and also transmitted the Complainant's Response to the State's Arguments on Admissibility with a request that the Respondent State should submit its written observations thereon before 1 October 2012.

31. By letter dated 30 August 2012 and referenced ACHPR/COMM/383/10/DJI/813/12 the Secretariat also acknowledged receipt of the Complainants Response to the State's Arguments on Admissibility. By the same letter the Secretariat transmitted the Respondent State's Supplemental Arguments on Admissibility to the Complainant with a request that the latter should submit his observations thereon before 1 October 2012.

32. On 21 September 2012 the Secretariat received a letter dated 17 September 2012 from the Respondent State requesting for 30 days extension of time within which to submit its written observations on the Complainant's Response to the Respondent State's Arguments on Admissibility, citing the bulky extra declarations and attachments submitted in support of the Complainant's Response, the Response itself, and the fact that the Complainant had had approximately 5 months to submit its Response in excess of the requirement of Rule 105(3) of the Rules of Procedure.

33. In terms of Rule 113(2) of the Rules of Procedure, the Commission acceded to the request and granted the Respondent State a further 30 days ending 1 November 2012 for the submission of observations on the Complainant's Response. The Secretariat communicated this decision to the Respondent State by Note Verbale dated 26 September 2012 referenced: ACHPR/COMM/DJI/383/10/882/12.

34. On 30 September 2012 the Secretariat received the **Complainant's Response to the Supplemental Arguments on Admissibility submitted by the Republic of Djibouti**. The Response to Supplemental Arguments was duly transmitted to the Respondent State by Note Verbale dated 4 October 2012 and referenced: ACHPR/COMM/DJI/383/10/910/12.

35. During the 52<sup>nd</sup> Ordinary Session held from 9 to 22 October 2012 in Cote d'Ivoire, the Commission deferred the Communication to its 53<sup>rd</sup> Ordinary Session.

36. On 31 October 2012 the Secretariat received from the Respondent State a **Reply on Admissibility** being its observations on the Complainant's Response to the State's Arguments on Admissibility and the Response to the Supplemental Arguments. The Reply on Admissibility was submitted together with Annex A being a Satellite Image of Camp Lemonnier; a Second Affidavit of Mr Djama Souleiman Ali; and an additional Affidavit of Mr Hassan Said Khaireh.

37. On 21 November 2012 by a letter referenced: ACHPR/COMM/383/10/DJI/1143/12 the Secretariat transmitted the Respondent State's Reply on Admissibility to the Complainant with an indication that the Complainant was not obliged to file further observations.

38. On 5 February 2013, the Secretariat received a letter from the Complainant requesting an oral hearing during the Commission's next session in terms of Rules 88(6) and 105(4) of the Rules of Procedure. The Complainant also submitted what was intended to be the Final Response on admissibility.

39. In terms of Rule 99(4) of the Rules of Procedure the Complainant's request for an oral hearing was not granted for being late and the Secretariat informed the Complainant accordingly by letter dated 27 February 2013.

40. By a further letter of 29 April 2013 the Complainant renewed his request for an oral hearing during the African Commission's 54<sup>th</sup> Ordinary Session.

41. By letter of 26 June 2013 referenced ACHPR/COMM/383/10/DJI/777/13 the Secretariat informed the Complainant that the request for oral hearing had been granted for the 54<sup>th</sup> Ordinary Session scheduled to take place from 22 October to 2 November 2013. The Secretariat specifically noted to the Complainant that in terms of Rule 99(2) of the Rules of Procedure an oral hearing was expected to canvas new or additional facts on the Communication.

42. The Secretariat informed the Respondent State about the oral hearing scheduled during the 54<sup>th</sup> Ordinary Session by a Note Verbale of 26 June 2013 referenced ACHPR/COMM/DJI/383/10/776/13,.

43. On 20 September 2013 the Secretariat requested the Complainant through letter referenced ACHPR/COMM/383/10/DJI/1032/13, and the Respondent State through Note Verbale referenced ACHPR/COMM/DJI/383/10/1031/13 to send the names and state the functions of persons who would appear on their respective behalf at the oral hearing.

44. On 25 September 2013 the Complainant submitted a **Summary of New Facts**; a **Declaration of Mr Crofton Black** together with **Annexures**; Report of the Open Society Foundations titled *Globalising Torture: CIA Secret Detention and Extraordinary Rendition, February 2013*; and a link to the online Report of the Constitution Project titled *The Constitution Project's Task Force on Detainee Treatment, 2013*.

45. On 26 September 2013 the Secretariat received a request from the Complainant in accordance with Rule 100 of the Rules of Procedure that Mr. John Sifton be invited for examination as an expert witness on behalf of the Complainant during the oral hearing.

46. On 7 October 2013 the Secretariat wrote the named expert witness inviting him to attend at the oral hearing. The Respondent State was duly informed of Mr Sifton's attendance and role during the oral hearing by a Note Verbale dated 7 October 2013 referenced? ACHPR/COMM/DJI/383/10/1021/13.

47. The Secretariat subsequently received the full list of persons that would be appearing for the Respondent State and the Complainant by their respective letters of 11 and 16 October 2013 respectively.

48. On 25 October 2013 the Secretariat further received from the Respondent State **Observations of the Republic of Djibouti on Complainant's Final Response on Admissibility and New Facts**, attaching two exhibits being a Picture of Aircraft Registration No 5H-TZE from Tanzania Civil Aviation Authority, and the Republic of Djibouti's *Code de Procedure Penale*.

49. The oral hearing was eventually held on 2 November 2013 during the 54<sup>th</sup> Ordinary Session held from 22 October to 5 November 2013.

50. By a letter dated 4 November 2013 which was after the oral hearing but before the 54<sup>th</sup> Ordinary Session was concluded, the Complainant purported to file further observations on admissibility in response to the Respondent State's submissions during the oral hearing. The Complainant's post-hearing observations attached a further document being the Declaration of Mr. Sam Raphael with eight exhibits.

51. The Commission consider the propriety of the Complainant's post-hearing written observations and declined to have recourse to them for purposes of its decision on admissibility as this amounted to reopening arguments which had been closed upon the oral hearing. The Complainant was informed accordingly by letter dated 15 November 2013 referenced ACHPR/COMM/383/10/DJI/1274/13.

52. Lastly, on 20 November 2013 the Respondent State wrote the Commission objecting to the further submissions purported to be filed by the Complainant on 4 November 2013. The Respondent State went further to make its own observations on the Complainant's post-hearing submissions. The Commission declined to consider the Respondent State's post-hearing observations for the same reasons stated at paragraph 51 above.

### **Objections on procedure and the Commission's decision**

#### *Complainant's Objections to the Respondent State's additional written arguments*

53. In what was intended to be his last submissions on admissibility, the Complainant objects to the Respondent State's Reply on Admissibility. The Complainant contends that the Respondent State's Reply on Admissibility amounts to an abuse of process and is contrary to Rule 105 of Rules of Procedure. Accordingly he prays that the Reply and the supporting evidence must be disregarded by the Commission in arriving at its decision on admissibility.

#### *Respondent State's Submission on the Complainant's Objection*

54. For its part, the Respondent State addresses the Complainant's objection in its '*Observations on the Complainant's Final Response on Admissibility and New Facts*' which was yet another written submission. The Respondent State observes that its Reply on Admissibility was specifically allowed upon request by the Commission. Accordingly the Respondent State maintains that its Reply on Admissibility and the supporting affidavits should not and cannot be disregarded.

#### *The African Commission's Analysis and Decision on the Objections*

55. The African Commission would like to observe that the procedure adopted in this Communication with respect to parties' written arguments represents an extremely exceptional departure from its Rules of Procedure, in particular Rule 105.

56. Rule 105 (2) and (3) of the Rules of Procedure provides for the parties to submit a total of three written submissions starting with the Complainant's arguments on admissibility, followed by the Respondent State's arguments on

admissibility, and ending with the Complainant's comments on the Respondent State's written arguments. These are provided for with strict deadlines, subject to a single possible extension not exceeding one month in terms of Rule 113 of the Rules of Procedure.

57. In accordance with Rule 105 (4), any further observations may only be presented at an oral hearing as may be allowed by the African Commission under Rule 88(6) of the Rules of Procedure.

58. The African Commission would like to affirm that it does not espouse a relaxed approach in the application of its Rules of Procedure. Among the objects of its Rules of Procedure regarding Communications generally and submission of written arguments in particular is to ensure that parties are accorded equal, fair and adequate opportunity to present their respective positions, and that alleged violations or any matters that are in contention between the parties are clearly identified and determined expeditiously and conclusively.

59. Whereas the Rules of Procedure constitute a comprehensive code designed to achieve among others, the above objects, the Commission retains the prerogative to permit or require further written submissions outside the strict stipulations in the Rules of Procedure and in place of an oral hearing. However, the Commission would only do so in extremely exceptional circumstances in respect of which it does not even find it desirable to enunciate criteria. For all purposes, parties are well advised to strictly adhere to the provisions of its Rules of Procedure. The Commission will not hesitate to impose necessary procedural sanctions for default such as declining to consider a given submission that does not comply with the Rules of Procedure and acceptable practice.

60. In the present Communication, the Commission indeed allowed the Respondent State to file its Reply on Admissibility by way of observations on the Complainant's Response to the State's Arguments on Admissibility. The Commission considered, among others, that the Complainant's own second observations are more voluminous than his initial arguments on admissibility, in the process raising multiple new points, introducing three new expert declarations, and citing various new sources in support of the observations.

61. In addition, it is the Complainant's own manner of submitting arguments and supporting evidence that partly led to the escalation of written submissions for both parties. Among others, the Complainant omitted to attach some critical evidence to his initial arguments on admissibility and only provided the relevant evidence upon

being prompted by the Commission. By the time the Complainant submitted the omitted evidence, the Respondent State had already filed its Arguments on Admissibility. This led the Commission to transmit the Complainant's missing evidence to the Respondent State with a request to submit its observations thereon which ordinarily would have been canvassed in the Respondent State's initial arguments. The Respondent State's observations on the omitted documents are contained in its Supplemental Arguments.

62. Further, whereas close to a year elapsed between the time the Complainant's Arguments on Admissibility were received by the Secretariat and the time the Respondent State filed its arguments on admissibility, the Complainant subsequently also took about four months to submit his observations, contrary to the one month allowed under Rule 105(3) of the Rules of Procedure. As noted above, even when the Complainant eventually submitted, he then introduced substantial new points and supporting materials, a trend which continued for both parties until after the oral hearing.

63. Even more, subsequent to the contested Respondent State's Reply, both parties submitted further observations making the total number of written exchanges escalate to eleven with the very last two having been rejected by the Commission for being an abuse of process.

64. At all times the Commission endeavoured to avert the possibility of an oral hearing. As it turned out, however, an oral hearing was still held.

65. The Commission is satisfied that considering the intricacy and relevance of the matters contested in the present Communication, both parties were unprecedentedly and unusually accorded more than ample, equal and fair opportunity to present their respective positions culminating in the oral hearing held during the 54<sup>th</sup> Ordinary Session.

66. Accordingly, although the Complainant's objection is *prima facie* valid in terms of Rule 105 of the Rules of Procedure, the Commission confirms that it has, as a measure of exception, allowed the Respondent State's Reply. The Commission has thus considered all written arguments of both parties presented after the contested Respondent State's Reply. In its consideration, the Commission has however excluded both parties' written arguments and supporting evidence submitted after the oral hearing.

67. Thus in addition to the observations advanced during the oral hearing, the Commission has had regard to the following submissions as presented by the parties:-

- (a) Complainant's Arguments on Admissibility
- (b) Respondent State's Arguments on Admissibility
- (c) Respondent State's Supplemental Arguments on Admissibility
- (d) Complainant's Response to the State's Arguments on Admissibility
- (e) Complainant's Response to the State's Supplemental Arguments on Admissibility
- (f) Respondent State's Reply on Admissibility
- (g) Complainant's intended Final Response on Admissibility
- (h) Complainant's Summary of New Facts with supporting materials
- (i) Respondent State's Observations on Complainant's Final Response and New Facts

## THE LAW ON ADMISSIBILITY

### The Parties' Submissions

#### 1. *Complainant's Arguments on Admissibility*

68. Complainant submits that his Communication fully complies with conditions for admissibility stipulated under Article 56 of the Charter. In terms of Article 56(1) of the Charter, he states that he has identified himself as the Complainant and his Representatives have equally been identified with full contact addresses.

69. Pursuant to Article 56(2) of the African Charter, he submits that his Communication is compatible with the African Charter because it alleges serious *prima facie* violations of rights guaranteed under the Charter; and that the allegations are directed against the Republic of Djibouti, a Party to the Charter. He further submits in terms of Article 56(3) of the African Charter, that his Complaint is presented in a polite and respectful manner, without using disparaging or insulting language. Furthermore, the allegations are based on information based on a variety of sources, including his own testimony, and not exclusively on news disseminated through the mass media in compliance with Article 56(4) of the African Charter.

70. Regarding Article 56(6) of the Charter on exhaustion of local remedies, the Complainant submits *first* that local remedies to end his *incommunicado* detention were unavailable since he was not allowed contact with the outside world including his family, friends and lawyers, let alone the domestic legal system in the

Respondent State. *Secondly*, he submits that due to the practical barriers imposed by his *incommunicado* detention, and the lack of access to domestic courts in Djibouti, there was equally no remedy available to him to challenge and prevent his deportation from Djibouti at the end of his alleged two weeks detention there. *Thirdly*, and for the same reasons, local remedies to challenge and possibly prevent his *refoulement* into the U.S. Government's extraordinary rendition program were also unavailable to him in Djibouti.

71. The Complainant goes further to argue that even *post-facto* remedies to redress the violations he alleges are not available in Djibouti. In this regard he states that the principal *post-facto* remedy for the type of violations perpetrated against him whilst allegedly in Djibouti is the criminal prosecution of those responsible pursuant to the state's duty to carry out effective investigation of human rights violations of a criminal nature and prosecute and punish those responsible. The Complainant submits that the Respondent State has failed to discharge its obligation in this regard, even after he notified the latter about the acts perpetrated against him. Moreover, he argues, the Republic of Djibouti "as a guardian of law and order and protector of human rights in the country", must be presumed to be generally aware of the situation in its country; and having been involved through its agents in his detention and interrogation, it must equally be presumed to have been aware of the criminal activities taking place within its territory against him. He argues that the Respondent State having failed to institute an effective investigation, even upon notice through his letter of 31 March 2009 to the Respondent State's Chief Prosecutor, he was and is under no obligation to bring private prosecution as a domestic remedy.

72. Furthermore, the Complainant submits that *post-facto* civil remedies in particular are unavailable, ineffective and insufficient because, among others, "they are impossible to realise in the absence of a full criminal investigation by the Respondent State", and in any event civil remedies are not a sufficient remedy for cases of serious violations such as he allegedly suffered.

73. In the alternative, the Complainant submits that even if for argument's sake there are any effective civil remedies in Djibouti, the Communication falls within recognised exceptions to the exhaustion of domestic remedies. In this regard he argues *first* that exhaustion is not required where, as he maintains is his case, a Complainant has grounds to fear for his life should he return to the jurisdiction where his rights were violated. For this purpose, he states that the treatment he was subjected to in Djibouti has caused so much fear in him that he cannot safely return and pursue any remedies there. *Secondly*, he argues that exhaustion of domestic

remedies is not required where, as was his case, he was illegally removed from the Respondent State's jurisdiction. Additionally: he cannot pursue remedies from outside Djibouti; he is unable to return; and/or it would be impractical and unrealistic for him to seek any possible domestic remedy there. To demonstrate his inability to return to Djibouti, the Complainant states that he no longer has means to travel to Djibouti, a strange country for him, and to retain a lawyer to represent him in his quest for justice from the domestic courts.

74. With regard to Article 56(6) of the African Charter, the Complainant argues that since domestic remedies are not available, the requirement to present his Communication within reasonable time does not apply.

75. Alternatively, he argues that the Communication should be held to have been submitted within reasonable time from the date he became aware that domestic remedies were not available, to wit, any time after 31 March 2009 when he submitted a letter to the Djiboutian authorities, detailing the treatment he suffered. The Communication having been submitted within six months from 31 March 2009, it should be held to be within reasonable time, so he argues.

76. Further in the alternative, the Complainant argues that owing to the clandestine nature of the treatment he was subjected to and the repercussions of such treatment on his entire life, three years (from the date of his eventual release from prison) must be held to be reasonable time in terms of Article 56(6) of the African Charter.

77. Lastly, the Complainant states that the substance of his Communication has not been settled by any other procedure of international investigation or adjudication.

## 2. Respondent States Arguments on Admissibility

78. The Respondent State challenged the admissibility of this Communication on the basis of non-compliance with Article 56(2), (5), and (6) of the African Charter.

79. The Respondent State argues that the Communication is not compatible with the Charter as required under Article 56(2) thereof. In this regard it states *first* that compatibility *ratione materiae* requires that the Communication should indicate *prima facie* violations of the rights protected under the Charter. In this regard it argues that the evidence presented by the Complainant does not meet the standard of 'sufficient factual basis' to establish a *prima facie* case of violations of his rights.

80. *Secondly*, the Respondent State argues that compatibility *ratione personae* requires that the Communication should be directed against a state party to the Charter to which the alleged violations could *prima facie* be attributed. In this regard it argues that evidence presented by the Complainant indicates that the alleged violations of his rights are clearly directed against the United States of America, a state which is not and cannot be a Party to the African Charter. It argues that in finding possible violations, the Commission would as of necessity have to consider the acts of a third non-state party to the Charter and this would be contrary to trite principles of international customary law. Moreover, it so argues, the Complainant's evidence does not establish a *prima facie* case that the Complainant was ever in Djibouti altogether.

81. The Respondent State goes further to argue that even if for argument's sake the Complainant was ever in Djibouti and was mistreated there, he has presented no evidence that the Djiboutian Government had any knowledge that he was in Djibouti; that he was in the custody of Djiboutian authorities; that the alleged violations were perpetrated by Djiboutian state agents; or that Djibouti aided or assisted a third state in the commission of the alleged violations. It concludes by stating that the Complainant's claim 'falls far short of achieving the standard of proof required under international law.'

82. Accordingly, the Respondent State submits that contrary to the Complainant's submission, the present Communication does not meet the requirements of Article 56(2) of the Charter and must be declared inadmissible.

83. With regard to Article 56(5) of the African Charter requiring the exhaustion of local remedies, the Respondent State argues that the Complainant failed to even attempt to avail himself of local remedies in Djibouti. It argues further that if the Complainant's position is that a particular remedy did not need to be exhausted, he needs to show that such remedy does not fulfil the criteria of availability, effectiveness, and sufficiency in practice.

84. In this regard, the Respondent State argues that there is no evidence that the Complainant attempted, let alone apprised himself of the available local remedies. It states that the Djiboutian legal system provides for a right of detainees or their representatives to initiate the equivalent of *habeas corpus* proceedings, citing Articles 139, 140, and 141 of the *Djiboutian Procedural Code*. It also states that Article 74 of the Djiboutian Constitution contains procedural safeguards against arbitrary detention.

Furthermore, the Respondent State states that under its law, no one can be deported without first being given an opportunity to challenge his expulsion.

85. Concerning *post-facto* remedies, the Respondent State states that criminal local remedies are available including against state agents, referring to Articles 382 and 383 which criminalises detention or sequestration of another person by *any* person. In this regard, it states that after receiving this Communication it conducted an investigation, but the same could not even establish that the Complainant was ever in Djibouti let alone any evidence to warrant prosecution. It further states that the Complainant remains at liberty to furnish the Djiboutian authorities with further evidence that would establish his presence in Djibouti and the alleged mistreatment he suffered at the hands of Djiboutian state agents, in which case a criminal investigation would be reopened.

86. Similarly, it states that civil remedies are available both under its *Criminal Procedure Code* (Articles 6, 8 and 9 thereof) and under the *Code of Civil procedure*, including against state agents. It maintains that the Complainant is at liberty to pursue them even from outside as his physical presence is not a prerequisite under Djiboutian law.

87. The Respondent State thus maintains that the Complainant did not exhaust local remedies which are available, efficient and sufficient before he resorted to the Commission with this Communication.

88. Lastly, the Respondent State argues that the Communication was not submitted within reasonable time as more than three years elapsed from either the time he became aware in 2004 of his alleged detention and mistreatment in Djibouti or from the time he was eventually released from custody in 2006. It argues that the time taken before presenting this Communication is excessive and contrary to Article 56(6) of the African Charter. For the foregoing reasons the Respondent State prays that the Communication must be declared inadmissible entirely.

### 3. Respondent State's Supplemental Arguments on Admissibility

89. The Respondent State submitted further arguments being observations on two pieces of supporting evidence accidentally omitted by the Complainant when filing his initial arguments on admissibility. The documents were a stamped copy of the alleged Departure Declaration Card that had been tendered by the State in the *habeas corpus* proceedings before the High Court of the Republic of Tanzania, and the ruling on the *habeas corpus* application. These documents form part of the

circumstantial evidence the Complainant relies on to demonstrate that he was in Djibouti.

90. The gist of the Respondent State's observations is that the two documents confirm that there is no credible evidence to show that the Complainant was ever in Djibouti. In this regard the Respondent State argues that the Depart Declaration Card is a fake on the face of it, and as challenged by the Complainant's father in the *habeas corpus* proceedings in Tanzania.

91. Moreover, the Respondent State maintains, it could not find any evidence that any flight arrived in Djibouti from the Republic of Tanzania on 27 December 2003 as alleged by the Complainant. In fact, it so states, the alleged flight operated by *Tanzanair*, a private air Charter Company, is never known to fly to Djibouti, and there is no evidence that it flew to Djibouti on 27 December, 2003 as alleged by the Complainant or at any other time.

92. It further argues that the ruling by the High Court of the Republic of Tanzania on the *habeas corpus* application shows that the Court did not concern itself with where the Complainant had been deported. Rather the Court was concerned with whether he was still in the custody of Tanzanian immigration authorities, which the Court did not find as such. Accordingly, the Respondent State reiterates that there is no evidence that the Complainant was ever in Djibouti.

#### 4. *Complainant's Reply to the Respondent State's Arguments*

93. In response to the Respondent States challenge on compatibility in terms of Article 56(2) of the African Charter, the Complainant argues that the only question at this stage of the Communication is whether he has made out a *prima facie* case of violations, which entails allegations which if proven, would constitute violations of the right guaranteed under the Charter. He maintains that the evidence required for this purpose can only be of a preliminary nature, and the applicable standard of proof to be met by such evidence is lower than the standard employed at the merits stage.

94. In further support of the allegation that he was in Djibouti, the Complainant attached to his Reply; three further declaration of Cori Crider, John Sifton, and Clara Gutteridge being experts on the alleged U.S. rendition program. The purport of these declarations is to show that Djibouti including the US base in Djibouti called Camp Lamonnier was used as a conduit for transferring people captured under the US Government's extraordinary rendition program. The declarations are also meant to corroborate the Complainant's assertion that while in Djibouti he was held

*incommunicado* and subjected to torture, cruel, inhuman and degrading treatment before being further subjected to refoulement out of Djibouti into the hands of the U.S. Government's agents.

95. The Complainant states that given the clandestine design of the extraordinary rendition program to which the Complainant was subjected, information is kept so tightly secret that access is highly restricted. In this regard the Complainant invites the Commission to take this into account in adopting the appropriate standard of proof for assessing whether a *prima facie* case of violations has been made out.

96. Regarding exhaustion of domestic remedies, the Complainant reiterates his earlier arguments: that during his detention, domestic remedies were unavailable to him. In this regard the Complainant states that the violations he suffered were made possible because under the 'Agreement between the Government of the USA and the Government of Djibouti' (2003 Status of Forces Agreement, SOFA), the latter allowed the former unimpeded entry into Djiboutian territory through Camp Lamonnier. Further under the same Agreement, air crafts and motor vehicles were allowed to enter, move freely within the territory of Djibouti, and exit without any search or other form of oversight by Djiboutian authorities.

97. The Complainant argues that the immunity granted to the USA Government personnel at Camp Lamonnier under the SOFA Agreement, and the immunities generally available under international law for foreign states meant that Djibouti gave the USA Government personnel "*carte blanche*" (sic) to use its territory to illegally detain and interrogate individuals.

98. Regarding *post-facto* remedies, the Complainant also reiterates his earlier arguments concerning the unavailability, ineffectiveness and insufficiency, including in particular on the basis that the Respondent State has not undertaken an effective investigation to discover more facts on the basis of which criminal and civil remedies could be pursued before domestic courts in Djibouti.

99. In response to the Respondent State's arguments on the time taken before submitting this Communication, the Complainant again reiterates his earlier arguments, and adds that the facts that he had had to locate his family to Yemen and reconstruct his life altogether. He states that this occupied the three years that elapsed between his release from prison and the presentation of this Communication.

#### 5. *Complainant's Response to the Respondent State's Supplemental Arguments*

100. The Complainant submitted further written observations on the Respondent State's Supplemental Arguments. To the extent that these further observations raised anything new, the Complainant maintains that the testimonies of the Complainant's father and wife disputing the validity of the Departure Declaration Card tendered by the Tanzanian Authorities in the *habeas corpus* proceedings should not be accorded any weight as they were acting under extreme stress. Moreover the Complainant himself states in his testimony that he signed deportation documents. On the other hand the Complainant submits that in accordance with its jurisprudence, the Commission should not evaluate facts which have already by evaluated by domestic.

101. Furthermore, the Complainant stresses that the totality of evidence presented by the Complainant is more than sufficient to establish *prima facie* the allegation that he was detained in Djibouti. In this regard the Complainant refers to his own testimony that a guard told him that he was in Djibouti; that one guard admitted being Djiboutian; that the Complainant himself saw the picture of the Djiboutian President on the wall in the interrogation room; that Tanzanian immigration authorities made it clear in the *habeas corpus* proceedings that he had been deported to Djibouti.

102. Moreover, so argues the Complainant, the Respondent State has failed to demonstrate that it undertook an effective investigation which could have unearthed vital information.

#### 6. *Respondent States Reply to Complainant's Response on Admissibility*

103. Bearing in mind the additional evidence submitted by the Complainant in his Reply to the Respondent State's Arguments, the Respondent State submitted and the Commission allowed a Reply on Admissibility to allow for observations on the three additional declarations and others sources cited by the Complainant.

104. To the extent that the Respondent State presents any new submissions that are relevant at this stage of the Communication, it introduces a second affidavit of the Chief Prosecutor of Djibouti which is to the effect that the investigations entailed questioning airport personnel at the only Djiboutian Ambouli International Airport, immigration officers, officials in the armed forces, police and other security agencies. These investigations did not yield any information that the Complainant was ever in Djibouti. The Chief Prosecutor states that he went further to inquire from the U.S. Government if the Complainant had been detained at Camp Lamonnier, and the U.S.

Government provided verbal assurances that it never detained the Complainant in Djibouti.

**105.** With regard to statements made by Tanzanian officials during the *habeas corpus* proceedings, the Respondent State wonders how Tanzanian officials could have deported a Yemen citizen to its territory as an alleged destination of his choice without obtaining prior permission and when the Complainant himself had never been to Djibouti.

**106.** Commenting on the Complainant's set of circumstantial evidence indicating that that he was detained at Camp Lamonnier, the Respondent State observes first that the Complainant's testimony is inconsistent with the reality regarding the location of Camp Lamonnier. In particular, referring to a satellite image of the Ambouli International Airport (introduced with the Reply) where Camp Lamonnier is located, the Respondent State observes that driving from the airport to Camp Lamonnier cannot take up to twenty let alone thirty minutes as the Complainant alleges was the case on his arrival and depart from Djibouti. It stressed that the drive should take no more than a minute or two from the airstrip to anywhere else at the base of Camp Lamonnier.

**107.** Secondly, using the same satellite image, the Respondent State observes that the description by the Complainant that the place of his secret detention was likely in a residential area is inconsistent with geographic realities of Camp Lamonnier, which is located far from any residential areas. Even more strikingly, so observes the Respondent State, is the fact that the Complainant never stated that he heard any sounds of airplanes as one would expect in the immediate vicinity of a busy civilian and military airport such as Ambouli International Airport. It maintains, that the Complainant has not presented any reliable evidence that he was at Camp Lamonnier, let alone anywhere in Djibouti.

**108.** With respect to the reports by various organisations on which the Complainant relies to corroborate that he was detained in Djibouti as part of the U.S. Government's extraordinary rendition program, the Respondent State, observes that such reports are weak in that they cautiously do not conclusively establish Djibouti's involvement in the alleged U.S. Government's extraordinary rendition program. Similarly it argues that media reports are no more than a recycling of the Complainant's own interviews with media outlets and as submitted in the present Communication.

**109.** Lastly, the Respondent State introduces the affidavit of the Director General of National Security of Djibouti to underscore that its SOFA Agreement with the U.S. Government in respect of use of Camp Lamonnier is consistent with standard practice for such agreements between states and the United Nations and states *inter se*. Similarly the SOFA contains standard diplomatic immunities. In this connection it argues that even if the Complainant could for argument's sake be deemed to have been detained at Camp Lamonnier, such detention was without its knowledge or involvement as Camp Lamonnier was inviolate under the SOFA Agreement and international law on diplomatic relations. Accordingly, so it submits, there is no *prima facie* case that Djibouti was complicit in the alleged violations by a third state.

**110.** Moreover, it reiterates, the Commission must desist from considering this Communication on the merits because it would, contrary to international law, inescapably have to examine the propriety of the conduct of a third state which is and cannot be a party to this Communication. Accordingly the Respondent State reiterates that the present Communication must be declared inadmissible.

#### *7. Complainant's 'Final' Response on Admissibility*

**111.** The Complainant submitted further observations and the Commission allowed them taking into account that the Respondent State had introduced anew a second affidavit of its Chief Prosecutor, an affidavit of the Director General of National Security, and a satellite image of its Ambouli International Airport.

**112.** In his further submissions, the Complainant raised the objections determined above (see paragraphs 55 to 66).

**113.** Further, regarding the three sets of evidence introduced by the Respondent State in its Reply on Admissibility, the Complainant observes first that determination of whether there is sufficient evidence to show that the Complainant was in Djibouti is a matter for the merits stage. For the present purposes, he insists that the evidence presented ranging from his own testimony; the record of *habeas corpus* proceedings in Tanzania; reports of international organisations; the Affidavits of three experts on the alleged U.S. Government's rendition program all prove that Camp Lamonnier was routinely used for detention and a transit for rendition flights. He maintains that the said evidence also places him in Djibouti for approximately two weeks.

**114.** Other than the above, the Complainant also observes that the affidavit of the Director General of National Security establishes that even though Camp Lamonnier

is within Djiboutian jurisdiction and subject to Djiboutian law, yet in the same affidavit it is said that Djiboutian authorities has no power to enforce its laws on U.S. Government personnel on account of diplomatic immunities. In his view this means that there are no effective remedies in Djibouti against U.S. Government personnel stationed at Camp Lamonnier.

#### 8. *Complainant's Summary of New Facts*

**115.** The Complainant submitted a Summary of New Facts in response to the Commission's request pursuant to Rule 99(2) of the Rules of Procedure. As it turned out, the Summary of New Facts canvassed a new Declaration of Mr. Crofton Black with multiple annexures; and two voluminous reports by the Open Society Foundations<sup>2</sup> and The Constitution Project<sup>3</sup> both published in 2013 after the present Communication was submitted.

**116.** The purport of Mr Crofton Black's Declaration is to illustrate how the U.S. Government allegedly chartered aircrafts through intermediaries to fly detainees under the extraordinary rendition program; how Djibouti allegedly participated in the program tracing multiple flights allegedly associated with the program passing through Djibouti.

**117.** For its part, the purport of the report of the Open Society Foundations is to further illustrate that Djibouti is one of fifty-four Governments including Djibouti that allegedly knowingly participated in the U.S. Government rendition program by allowing Djiboutian law enforcement personnel to carry out arrests and secret detentions; and rendering individual to States where they faced torture and other abuses.

**118.** Lastly, the report of The Constitution Project is meant to save more less the same purpose as the report of the Open Society Foundation captured above.

#### 9. *Respondent State's Observations on Complainant's Final Response and New Facts*

**119.** In connection with the oral hearing, the Respondent State also presented written submissions comprising its observations on Complainant's final response on

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<sup>2</sup> Open Society Foundations, 'Globalising Torture: CIA Secret Detention and Extraordinary Rendition, February 2013, <http://www.opensocietyfoundations.org/sites/default/files/globalizing-torture-20120205.pdf> (as presented by the Complainant).

<sup>3</sup> The Constitution Project, 'The Report of The Constitution Project's Task Force on Detainee Treatment, 2013 <http://detainee-taskforce.org/read/> (as presented by the Complainant).

admissibility and the new facts; the *Criminal Procedure Code* of Djibouti; and a picture of aircraft alleged to have been used to transfer the Complainant from Tanzania.

120. The submissions advanced by both parties during the oral hearing will be canvassed in the Commission analysis.

### **The Commission's Analysis on Admissibility**

121. The present Communication is submitted under Article 55 of the Charter which allows the Commission to consider Communications other than those submitted by State Parties.

122. The admissibility of such Communications is governed by Article 56 of the Charter. Article 56 of the African Charter provides for seven conditions to be satisfied for a Communication to be admitted for consideration on the merits.

123. The Commission's jurisprudence is to the effect that the seven conditions under Article 56 of the Charter are cumulative and must each be adequately fulfilled for a Communication to be declared admissible. Consequently, if upon the Commission's assessment any one of the conditions is not satisfied, the Communication will be declared inadmissible entirely or to the extent of non-conformity as the case may be.<sup>4</sup>

124. Further, whereas the Complainant is required to address each condition with arguments and supporting evidence, the exchange of written arguments and supporting evidence by parties through the Secretariat serves the purpose of identifying and defining the real issues that are in contention between the parties, and which need to be focussed on regarding the admissibility of the Communication. This however does not mean that where an issue does not arise on any given condition the Commission will *ipso facto* consider such condition as satisfied. On the contrary, the requirement that each condition must be adequately fulfilled entails that the Commission will examine the Communication's compliance with each condition based on the material presented.

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<sup>4</sup> Communication 304/05 – *FIDH and others v Senegal* (2006) ACHPR para 38; Communication 338/07 - *Socio-Economic Rights and Accountability Project (SERAP) v Nigeria* (2010) ACHPR para 43; and Communication 284/03 - *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v Zimbabwe* (2009) ACHPR para 81.

**125.** To begin with, Article 56(1) of the African Charter provides that Communications received by the Commission under Article 55 of the Charter shall be considered if they indicate their authors even if the latter requests anonymity. There is no issue that arises upon this requirement as between the parties. The Commission does not also reckon any issue as the Complainant and his legal representatives are clearly indicated with full contact details. Article 56(1) of the Charter is accordingly satisfied.

**126.** Secondly, Article 56(2) of the Charter requires that the Communication must be compatible with the Constitutive Act of the African Union and with the Charter itself. As can be noted from the recount of the parties' arguments above, this is one of the conditions which have been profoundly contested by the Respondent State and in respect of which both parties have exchanged incessant arguments.

**127.** The Commission wishes to observe that its jurisprudence has kept evolving toward more clarity on what 'compatibility' with the Charter entails. In developing its jurisprudence generally and on compatibility in particular, the Commission as with other bodies, has always recognised that the Charter must so far as possible be interpreted in harmony with other relevant rules of international law which it forms part of.<sup>5</sup>

**128.** In this regard, the Commission wishes to note that 'compatibility' is not defined in the Charter or its Rules of Procedure. However the Commission has adopted the understanding that 'compatibility' generally denotes 'in compliance with' and 'in conformity with' or not contrary to' or 'against'".<sup>6</sup>

**129.** More importantly, the Commission recognises and is informed by principles of international law in assessing compatibility with the Charter. For example where, among other reasons, a Communication alleges violations which occurred at a time when the Respondent State was not yet a Party to the Charter, and such violations are not continuing after the Respondent State becomes a Party, the Communication is declared inadmissible.<sup>7</sup> This is in accordance with the principle of international law that

*Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any*

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<sup>5</sup> *Jones & Others v The United Kingdom* (2014) ECHR (Applications Nos. 34356/06 & 40528/06) para 189

<sup>6</sup> Communication 307/05 - *Obert Chinhamo v Zimbabwe* (2007) ACHPR para 48

<sup>7</sup> Communication 142/94 - *Muthuthurin Njoka v Kenya* (1995) ACHPR para 5;

*situation which ceased to exist before the date of the entry into force of the treaty with respect to that party*<sup>8</sup>

**130.** Notably, the reason is simple and well-articulated: “an act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.”<sup>9</sup> Put differently, “a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled.”<sup>10</sup>

**131.** Further, compatibility is also assessed in terms of whether the subject matter of a complaint related to violations of rights protected under a given instrument. Thus where a complaint does not raise violations of rights guaranteed expressly or by implication under the Charter, the Communication will be declared inadmissible.<sup>11</sup>

**132.** Furthermore, compatibility is also considered in terms of the parties to a Communication. This in common usage is termed compatibility *ratione personae*. The requirement in this regard is that a Communication must be submitted by a party who is legally permitted to submit a complaint, and against a State Party to the Charter.<sup>12</sup> By this rule, a Communication is deemed incompatible with the Charter if it is brought against a state which is not a party.

**133.** Similarly, subject to recognised exceptions, compatibility is considered with respect to the territorial location of the alleged violations, also termed compatibility *ratione loci*. This is closely linked to establishing compatibility *ratione personae* with regard to the respondent state. The fundamental principle of international customary law regarding treaties is that “unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory”.<sup>13</sup>

**134.** On this point, the Commission notes the difference between Article 1 of the International Covenant on Civil and Political Rights (ICCPR) and Article 1 of the African Charter: the former expressly limits the application of the ICCPR to within the territory and jurisdiction of a State Party. The latter by contrast does not expressly limit the application of the Charter within the territory and jurisdiction of

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<sup>8</sup> Vienna Convention on the Law of Treaties (VCLT) adopted 23 May 1969, Art. 28.

<sup>9</sup> Draft Articles on the Responsibility of State for International Wrongful Acts, adopted 2001, Art. 13

<sup>10</sup> *Island of Palmas* (Netherlands/United States of America), UNRIAA, vol. II (Sales No. 1949.V.1), p. 829, at p. 845 (1928).

<sup>11</sup> Communication 1/88 - *Frederick Korvoh v Liberia* (1994) ACHPR para 4

<sup>12</sup> Communication 266/03 - *Kevin Mgwanga Gunme et al v Cameroon* (2009) ACHPR para 71

<sup>13</sup> Vienna Convention on the Law of Treaties, n 8 above, Art 29

State Parties. But even in the case of the latter, the Commission holds the view that the Charter applies primarily within the territorial jurisdiction of States Parties. This is simply because the sovereignty of states with which they undertake international obligations is territorial, and the jurisdiction they exercise in discharge of those obligations is equally primarily territorial. However, as noted above, circumstances may obtain in which a state assumes obligations beyond its territorial jurisdiction such as when a state assumes effective control of part of a territory of another state (spatial model of jurisdiction)<sup>14</sup>, or where the state exercises control or authority over an individual (personal model of jurisdiction).<sup>15</sup> The Commission does not find it necessary to elaborate further on the circumstances under which a State Party may assume obligations extraterritorially.

**135.** It suffices to state however that a Complainant must establish a sufficient connection between the alleged violation and the Respondent State before the Commission can proceed to invoke the obligations of that state under the Charter with a view to assessing whether such obligations were breached.

**136.** For purposes of admissibility a Complainant can establish the sufficient connection by proving that he or she was under the territorial jurisdiction or effective control or authority of the Respondent State when the alleged violation occurred. A classic example of the latter is the case of a state occupying part of the territory of another state as was held by the International Court of Justice in the *Case concerning armed activities on the territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment of 19 December 2005) ICJ para 178.

**137.** In this regard, the Commission has held that whereas the question “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 [the admissibility stage] it suffices to prove that the alleged violation occurred within the territorial jurisdiction of the Respondent State”.<sup>16</sup>

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<sup>14</sup> General Comment 31 “Nature of the General Legal Obligation Imposed on States Parties to the Covenant” Human Rights Committee (2004) para 10; *Loizidou v. Turkey*, (preliminary objections), (1995) ECHR (App. No. 15318/89); *Loizidou v. Turkey*, (merits) (1996) ECHR (App. No. 15318/89); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion (9 July 2004) ICJ paras. 108-111; and *Armed Activities on the Territory of the Congo (Democratic Republic of Congo (DRC) v. Uganda)*, (19 December 2005) ICJ, both of them cited in *Al-Skeini & others v The United Kingdom* (2011) ECHR (Application No. 55721/07) paras. 90-91;

<sup>15</sup> Communication 52/79 - *Lopez Burgos v. Uruguay* (1981) HRC, General Comment 31, n 13 above para 10. On extraterritorial application of state’s human rights obligations, see further Marko Milanovic, *Al-Skeini and Al-Jedda in Strasbourg*, (2012) *The European Journal of International Law* Vol. 23 no. 1 p.121 at 122 < <http://ejil.oxfordjournals.org/content/23/1/121.full.pdf> > (accessed 21 January 2014)

<sup>16</sup> Communication 306/05 - *Samuel T. Muzerengwa & 110 Others v Zimbabwe* (2011) ACHPR para 58

**138.** In the present Communication, having carefully considered the submissions of both parties, the Commission reckons that one of the critical issues between the parties is whether at all the Complainant was ever at Camp Lamonnier or anywhere in Djibouti as alleged by the Complainant.

**139.** In line with the Commission's views in Communication 306/05 - *Samuel T. Muzerengwa & 110 Others v Zimbabwe*<sup>17</sup> the Commission wishes to state for purposes of the present Communication that even though the question whether the alleged violations were committed by Djiboutian state agents or those of the U.S. Government would have to be considered at the merit stage, it is necessary to establish at the admissibility stage that the Complainant was in the territorial jurisdiction or under the effective control of the Republic of Djibouti as he alleges.

**140.** Notably, the standard of proof required at this stage was subject of much contestation between the parties. The Complainant maintained that the standard of proof is lower at admissibility stage, and higher at the merits stage. The Respondent State on the other hand maintained that the standard is 'beyond reasonable doubt'.

**141.** The Commission wishes to observe first, that the term 'standard of proof' is used to 'mark a point somewhere along the line between a mere conjecture at one end, and the absolute certainty at the other' that an alleged fact is valid. Proof furnished in support of a given factual allegation must meet or surpass this point for the factual allegation to be found as proven.<sup>18</sup> At law such a point on the continuum between the two ends is denoted by different terminology such as 'on the balance of probabilities', 'on a preponderance of evidence', 'clear and convincing evidence', 'sufficiently substantiated', 'with the necessary degree of precision and certainty', 'with certainty', 'beyond reasonable doubt', and 'probable cause'.<sup>19</sup>

**142.** Pitching the appropriate standard of proof is germane to the validity of the conclusion to be derived. The above terminologies for standards of proof are adopted for various purposes and in respect of different subject matter and in a variety of circumstances.

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<sup>17</sup> *Ibid*

<sup>18</sup> K. Del Mar, 'The International Court of Justice and Standards of Proof', in: Bannelier, Chistakis, Heathcote (eds), *The ICJ and the Development of International law. The Lasting Impact of the Corfu Channel case* (Routledge, 2011), cited in Steven Wilkinson, 'Standards of Proof in International Humanitarian and Human Rights Fact-Finding and Inquiry Missions' (2013) Geneva Academy of International Humanitarian Law and Human Rights <<http://www.genevaacademy.ch/docs/reports/Standards%20of%20proof%20report.pdf>> p. 12-13 (accessed 5 February 2014)

<sup>19</sup> For an overview of standards applied by the International Court of Justice and the European Court of Human Rights see Steven Wilkinson, 'Standards of Proof in International Humanitarian and Human Rights Fact-Finding Inquiry Missions' n 18 above, pp. 19-20

**143.** The Commission wishes to note that even for purposes of Article 56 of the Charter, there cannot be adopted a single standard of proof that can be applied uniformly regardless of the admissibility condition and the circumstances of the case at hand. So for example, compatibility *ratione materiae* is made out by raising a *prima facie* case which only requires preliminary evidence indicative of a violation. A *prima facie* case is sufficient for admissibility purposes because the alleged violations would be substantively revisited with more rigour at the merit stage. The standard of proof for making out a *prima facie* case is accordingly lower than that which applies at the merit stage in assessing whether a violation actually occurred.

**144.** By contrast compatibility *ratione temporis* for example must be made out conclusively at admissibility stage as the very possibility of a case on the merits necessarily depends on whether the Respondent State had undertaken the necessary obligations when the alleged violations occurred. Whether a particular violation occurred after the critical date is an issue that goes to admissibility and not the merits of the alleged violations.

**145.** Similarly compatibility *ratione personae* with regard the Respondent State being a Party to the Charter must also be made out conclusively at the admissibility stage as this point too cannot be subject of reconsideration at the merit stage.

**146.** For the same reasons, the Commission holds the view that compatibility *ratione loci* must also be conclusively substantiated at the admissibility stage since at the latter stage, this would no longer be under consideration, unlike whether the state through its agents actually perpetrated or facilitated the alleged violations. In a case like the present where the very presence of the Complainant in the territorial jurisdiction of the Respondent State is squarely denied, it becomes particularly important to establish the location of the violation.

**147.** Clearly the standard of proof for matters which have to be conclusively established at admissibility stage cannot be the same as the standard of proof for matters on which only a preliminary finding suffices as such matters would be revisited later at the merit stage.

**148.** In the present Communication, to establish that he was deported to Djibouti and detained at a secret site there and therefore to establish that he was under the territorial jurisdiction or effective control of the Respondent State, the Complainant relies on a set of circumstantial evidence, including a record of *habeas corpus*

proceedings before the High Court of Tanzania instituted on the Complainant's behalf.

**149.** In this vein the Commission recalls that it adopts the approach

*that it is for the courts of State Parties and not for the Commission to evaluate the facts in a particular case and unless it is shown that the courts' evaluation of the facts were manifestly arbitrary or amounted to a denial of justice, the [African] Commission cannot substitute the decision of the courts with that of its own<sup>20</sup>*

**150.** However, the circumstances of this case do not permit the application of that approach. For the main, where facts are evaluated and established by courts of one State, such facts will not be taken as granted with regard to another State which was not a party in the proceedings before the courts of the first State, and particularly where such facts are contested by the second State in proceedings before the Commission. The Commission will therefore conduct its own evaluation of the facts alleged in the *habeas corpus* proceedings in Tanzania to the extent that they are contested by the Respondent State in the present Communication.

**151.** *Firstly*, the Complainant states that he believes he was in Djibouti because he was deported from the Republic of Tanzania to that country. To support this, he relies first on the record of the *habeas corpus* proceedings instituted on his behalf in Tanzania. The record included the *habeas corpus* application supported by 'affidavits' sworn by the Complainant's father and wife; an opposing affidavit of the Assistant Director of Immigration exhibiting a 'Departure Declaration Card' and a Notice to Prohibited Immigrant' purportedly signed by the Complainant on his deportation; and the ruling of the High Court of Tanzania on the *habeas corpus* application. The opposing affidavit and the exhibits thereto were meant to prove that he was no longer in the custody of Tanzanian officials and that he had been deported to Djibouti, a country of the Complainant's choice. To signify the Complainant's choice in this regard, the complainant is alleged to have signed the Departure Declaration Card and the Notice to Prohibited Immigrant.

**152.** Notably, the applicants in the *habeas corpus* proceedings disputed the signature, but the High Court of Tanzania opined that the validity of the signature was a question for a different consideration to the one it was called upon to decide on the *habeas corpus* application: whether he was still in the custody of the Tanzanian Immigration Authorities.

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<sup>20</sup> Communication 240/01 - *Interights et al. (on behalf of Mariette Sonjaleen Bosch) v Botswana* (2003) para. 29

**153.** In the present Communication the Respondent State also challenges the signature on the Departure Declaration Card as a forgery. It observes that the signature on the Departure Declaration Card and the one in the Complainant's declaration of facts in this Communication do not bear the slightest resemblance. Apparently, in the *habeas corpus* proceedings, the Complainant's father and wife similarly challenged the signature on the Departure Declaration Card as not the Complainant's.

**154.** Given the importance of the point under consideration, i.e. whether the Complainant was in Djibouti, the Commission has painstakingly examined the record of the *habeas corpus* proceedings. From that record, the Complainant seeks to rely on the affidavit of the Assistant Director of Immigration Services alleging that he had been deported to Djibouti; the Departure Declaration Card which purports to show that he was deported by air and to Djibouti, and the Notice to Prohibited Immigrant which also purports to show that he signed to being deported by air.

**155.** Regarding the signatures, the Commission notes, albeit without the assistance of a handwriting expert, that the signatures on the Departure Declaration Card and the Complainant's Declaration in support of the present Communication are manifestly different. In the Commission's view the Departure Declaration Card cannot have been signed by the Complainant. It is more probable than not that this document was made up and imputed to the Complainant. Accordingly the Commission does not regard the Departure Declaration Card as plausible evidence of the fact that the Complainant was deported to Djibouti.

**156.** Assuming the Departure Declaration Card is a valid document, there is a second issue arising on it. It is the identity and capacity of the aircraft that was indicated thereon as having been used to deport the Complainant. The Departure Card indicates the registration number of the aircraft as 5H-TZE belonging to Tanzanair, a private Charter Company. During the oral hearing a picture of the aircraft in question was produced by the Respondent State. It is relatively a small aircraft. The Respondent State submitted, and it was not controverted by the Complainant, that the capacity of the aircraft in question is such that it cannot fly non-stop the distance from Tanzania to the Republic of Djibouti. This is a crucial. It opens the possibility that if indeed he was flown out of Tanzania, he could have been taken to any of the other countries which are not as far as Djibouti. This is not mere conjecture. It is a real possibility when one considers that "*Globalising Torture: CIA Secret Detention and Extraordinary Rendition*"<sup>21</sup> among other reports produced by

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<sup>21</sup> See above, n2 pp.6, 75-76, 88, 106-107, and paras. 52, 60, 125

the Complainant, identifies 54 states as having participated in the alleged rendition program. Among the 54 states, are Ethiopia, Somalia and Kenya. These countries lie between Tanzania and Djibouti and the Complainant could have been flown to any one of those countries since they equally are reported to have participated in the alleged rendition program and other counter-terrorism measures.

**157.** Moreover, as will be shown below, the Complainant's own description of the identities of some of the people who kept guard over him (whom he repeatedly refers to as from the Horn of Africa) would perfectly suit persons from those countries. In the Commission's view, the impossibility of the alleged aircraft flying the distance between Dar es Salaam and Djibouti, and the possibility that he might have been flown to any of the other countries cast considerable doubt on the possibility that the Complainant could have landed in Djibouti as opposed to those other countries identified above. This underscores the need for more reliable evidence pointing to the only reasonable conclusion that he was flown to Djibouti other than any of those countries.

**158.** Reverting to the issue of signatures, the Commission notes that it is the signature on the Notice to Prohibited Immigrant that appears roughly similar to the Complainant's signature in his Declaration. The Commission supposes it is the 'Notice to Prohibited Immigrant' that the Complainant alleges was read to him and he was made to sign at the Tanzanian immigration offices without vetting its contents. This document indicates that he was to be deported by air. It does not mention the destination. Thus whereas the Notice to Prohibited Immigrant may be evidence that the Complainant was to be deported by air, it cannot be evidence that he departed by air to Djibouti.

**159.** Regarding the deposition of the Assistant Director of Immigration Services to the effect that the Complainant was deported and escorted to Djibouti as a destination of his choice, the Commission is not convinced that this is more probable than not in light of the fact that the Complainant has fervently insisted in his submissions that Djibouti was a perfectly strange country to him as he had never had any connection with it in his life. It is difficult for the Commission to rely on the deposition of the Assistant Director of Immigration Services in this regard when the Complainant himself suggests that Djibouti could not possibly have been his destination of choice. Moreover, given the clandestine nature of the rendition program characterised by concealment to the victim of his whereabouts, the Commission has difficulty believing that the Complainant could have been told the truth about his whereabouts. The Commission does not find the depositions by the Assistant Director of Immigration Services to be reliable.

**160.** The last piece of evidence from the record of the *habeas corpus* proceedings is the ruling of the High Court of Tanzania. As observed by the Respondent State, and as it appears to the Commission from the ruling, the High Court of Tanzania was not so concerned with where the Complainant had been deported to. Thus, the High Court was content to simply state that there was before it *prima facie* evidence that he had been deported to Djibouti, without ultimate definite finding that he had been deported to Djibouti. Dealing with the applicants' challenge of the signature on the Departure Declaration Card, the High Court observed that the defects in the documents produced by the Assistant Director of Immigration Services would only fall for consideration if the Court were dealing with the legality of the Complainant's deportation. In this regard to the extent that it may suggest that the Complainant was deported to Djibouti, the ruling of the High Court of Tanzania does not constitute conclusive evidence of that allegation.

**161.** Having considered the entire record of the *habeas corpus* proceedings, the Commission is not convinced that the record constitute reliable and conclusive evidence that the Complainant was deported to Djibouti.

**162.** *Secondly*, the Complainant narrated his own experiences at the place of his secret detention from which he draws the conclusion that he was in Djibouti. In this connection he states that upon arrival he was driven for about twenty to thirty minutes. On this point, the state produced a satellite map of Camp Lamonnier where the Complainant believes he was detained. From the satellite map which was not disputed by the Complainant, the Commission observed that Camp Lamonnier is indeed located within the precincts of Ambouli International Airport and a drive between the airstrip and anywhere at Camp Lamonnier cannot possibly last 20 - 30 minutes. Again the Commission has considerable difficulty to conclude from these circumstances that the Complainant was indeed at Camp Lamonnier as he fervently alleges.

**163.** Further, the Complainant states that during his interrogation at the secret detention facility, there was an Arabic interpreter who looked Syrian or Lebanese, and a third man who looked like from the Horn of Africa. Notably, the Complainant hesitantly states that *he* (complainant) *believes* this third man told him that he was Djiboutian. The Complainant goes further to state that the guards who kept watched on him all the time looked like they were from the Horn of Africa and were dressed in civilian clothing. He alleges that these guards told him that he was in Djibouti. He also states that on the wall of the interrogation room he saw a picture of a man who looked like from the horn of Africa with name "Ismail" written in English below the

picture. He lastly states that one day he experienced an earthquake which was confirmed by a nodding gesture by one of his guards, and subsequently by data from the International Seismological Centre which reports that on 4 January 2004 there was an earthquake of magnitude 5.0 centred on Djibouti.

**164.** On its part the Respondent State observes that the Complainant does not describe the impact he felt. It observes further that an earthquake of the stated magnitude could have reverberated in the neighbouring countries including Yemen which is just across the Red Sea, or indeed other countries around Djibouti. In that regard the Respondent State argues that the earthquake cannot prove that he was in Djibouti as he might have been in any of the countries surrounding Djibouti. In the same vein, the Respondent State observes that the Complainant is not firm about what he was told regarding being in Djibouti. It also maintains that the general description of his guards as being from the Horn of Africa cannot be relied upon to conclusively prove that he was in Djibouti.

**165.** Having carefully reviewed all the material put before it by both parties, the Commission is equally not satisfied that the Complainant's version of his experiences at the place of his secret detention conclusively establishes that he was in Djibouti to the exclusion of the other alleged participating countries. For one thing, save for the alleged picture of the president, the rest of the description of what he observed could fit in Somalia and Ethiopia, among the countries reported to have participated in the rendition.

**166.** Regarding the earthquake, it is interesting to note as observed by the Respondent State that the Complainant does not describe the magnitude of the impact he felt. Indeed, on his word, he had to confirm with the guard whether what he had felt was an earthquake. The Commission is unable to make a definite finding that the Complainant was in Djibouti from his alleged experience of an earthquake, especially when the very means by which he alleges he was transported to Djibouti are of considerably doubtful veracity.

**167.** Regarding the alleged picture of the president in the interrogation room, it is important to observe that the Complainant has gone to great lengths stating that he believes he was detained at Camp Lamonnier. According to both parties, Camp Lamonnier is run by the US Government under a Status of Forces Agreement between the USA and Djibouti. The Camp enjoys the same diplomatic status as an embassy of a country. The Commission wonders whether such premises could then bear the picture of the president of Djibouti. Further, assuming he was indeed at

Camp Lamonnier which is under US control, this would mean that the Complainant was under US effective control immediately upon his arrival, if not prior thereto.

168. Taken together with the fact that the alleged means for transporting the Complainant to Djibouti are of doubtful practicality, the Commission is unable to draw a definite conclusion that these inconsistent pieces of circumstantial evidence point to his alleged presence in Djibouti as the only reasonable fact other than his presence in other alternative locations..

169. *Thirdly*, the Complainant refers to various reports and several expert declarations which the Commission does not find necessary to enumerate. It suffices to state that the sum total of all the reports with supporting documents indicate overwhelmingly that the U.S. Government ran an extraordinary rendition program with the assistance of fifty-four participating states which included Djibouti. To the extent that these reports document that the Complainant was in Djibouti, they cite the Complainant's own testimony either to the media or as filed in this Communication as sources. In this regard they are of limited value since they simply reproduce the Complainant's own testimony..

170. Strikingly, all the extensive evidence presented in this regard does not establish but one critical point: whether among the many states participating in the U.S. Government extraordinary rendition program, the Complainant was in fact in Djibouti as he alleges. In this regard, the Commission notes for example that none of the flights which travelled through Djibouti as captured in the Declaration of Mr Crofton Black coincide with the dates that the Complainant alleges he entered or left Djibouti.

171. The Commission fully notes the Complainant's observation that some flight data is missing, allegedly because rendition flights into and out of Djibouti were allowed without filing data with the local aviation authorities. This however contradicted by the fact that data for several flights which passed through Djibouti have been identified and retrieved. Of all the flights associated with the extraordinary rendition program passing through Djibouti, it is surprisingly only the data for the flight which allegedly transported the Complainant that is missing. The absence of data for the relevant flight does not help the hypothesis that he was in Djibouti other than the other possible countries.

172. The Commission is also mindful of the fact that the clandestine nature of the extraordinary rendition program entails that direct evidence may be hard to come

by, and a victim can only resort to circumstantial evidence for purposes of establishing a sufficient connection between the alleged violations and the Respondent State by way of establishing compatibility *ratione loci* and *ratione personae*. The Commission is well prepared to draw inferences of fact from such evidence. However, the Commission holds the view that where circumstantial evidence is sought to be relied on, as is the case in the present Communication, such evidence must not be open to multiple inconsistent inferences creating considerable doubt about a given inference preferred by a Party..

**173.** Further, the Commission has considered the case of *El-Masri v. The Former Yugoslav Republic of Macedonia* (2012) ECHR (Application no. 39630/09) on which the present Communication appears to have been modelled and on which the Complainant considerably relies. Mr. El-Masri was subjected to the same alleged US Government extraordinary rendition program as alleged in the present Communication. He was rendered from the territory of the Former Yugoslav Republic of Macedonia, the Respondent in that case. There was overwhelming evidence placing the applicant both in the territory and under the jurisdiction of the Former Yugoslav Republic of Macedonia. Among others, the European Court relied on the testimony of a former Minister of Interior of the Respondent State who confirmed that

*Macedonian law-enforcement authorities, acting upon a valid international arrest warrant issued by the US authorities, had detained the applicant, kept him incommunicado and under the constant supervision of UBK (State Intelligence Service) agents in a location in Skopje. He had later been handed over to the custody of a CIA "rendition team" at Skopje Airport and had been flown out of the respondent State on a CIA-operated aircraft.*<sup>22</sup>

**174.** In this regard the Court found that "his statement [was] a confirmation of the facts established in the course of the other investigations and of the applicant's consistent and coherent description of events."<sup>23</sup> Such other established facts included aviation and flight logs which coincided with the dates of the applicant's movements as narrated by him.<sup>24</sup>

**175.** By contrast with the present Communication, whereas the barrage of evidence produced by the Complainant make a strong case of the existence of the U.S. Government's extraordinary rendition program and that the Republic of Djibouti participated in the program, there are multiple factual lacunae and

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<sup>22</sup> *El-Masri v The Former Yugoslav Republic of Macedonia* (2012) ECHR (Application no. 39630/09) para 161

<sup>23</sup> *Ibid.*

<sup>24</sup> *Id*, para 157

inconsistencies which renders the evidence inconclusive on one critical issue: whether the Complainant was indeed in Djibouti. This is a critical point in the present Communication given the Respondent State's denial of the Complainant's presence in its territory, and the reasonable probability that the Complainant might have been in any of the other states in the Horn of Africa and its proximity which allegedly participated in the US Government's rendition program.

176. Proof of the Complainant's presence in Djibouti is a critical for the finding that he was within the territorial jurisdiction or indeed under the effective control or authority of the Republic of Djibouti. It is on such a finding that the Communication's compatibility with the Charter *ratione loci* would be founded..

177. On the available material, to the extent that the Complainant has not conclusively established his presence in the Respondent State's territory or that he was otherwise under its effective control or authority, the Commission is not convinced that Article 56(2) of the Charter is satisfied.

178. There is a further point regarding the Commission's competence to consider the present Communication. The Respondent State argues that the Commission cannot adjudicate upon the present Communication because in doing so it would have to determine the propriety of the conduct of the United States of America which is not and cannot be a Party to the African Charter and to the present Communication. The Respondent State relies on the *Case of the Monetary Gold removed from Rome in 1943 (Italy v. France, United Kingdom of the Great Britain and Northern Ireland and United States of America)* (Preliminary Question) (1954) ICJ.

179. The Commission observes that the Complainant alleges that he was tortured, among other violations of his rights. The prohibition of torture is a *jus cogens* rule of international law. One of the obligations of states concomitant to the prohibition of torture in this regard is that a state is prohibited to deport, extradite, or expel a person to another state where he *will* or is *likely to be* subjected to torture.<sup>25</sup> The mere fact that the receiving state which would execute the torture is not party to the Charter or indeed in the relevant proceedings does not absolve the sending state from accounting for its own act of sending the victim to the third state under the Charter.

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<sup>25</sup> ACHPR/ Res. 61(XXXII) 02 (2002): Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines)

**180.** In short, whereas the Commission recognises the rule of international law enunciated in the *Monetary Gold Case*, it however holds the view that so far as it relates to violations of human rights and of such gravity as torture in particular, the mere fact that the conduct of a third state would as of necessity have to be examined will not absolve a State Party from accounting for its obligations duly undertaken under the Charter.

**181.** Thus, the mere fact that the conduct of the United States of America would as of necessity have been examined in the present Communication would not have absolved the Republic of Djibouti from accounting for its obligations under the Charter, had the Complainant established his presence in Djibouti, a fact the Commission has not so found.

**182.** In terms of its jurisprudence, since the conditions under Article 56 of the Charter are cumulative, where a communication fails to satisfy one condition, it is inadmissible. The Complainant has not satisfactorily made out the Communication's compatibility with the Charter *ratione loci*. This being a threshold requirement which has to be made out conclusively at the admissibility stage, the Commission does not find it necessary to consider the remaining conditions.

#### **The African Commission's Decision on Admissibility**

**183.** In view of the foregoing, the African Commission on Human and Peoples' Rights declares this Communication Inadmissible for incompatibility with the Charter in terms of Article 56(2) of the Charter.

**Done in Luanda, Angola during the 55<sup>th</sup> Ordinary Session of the African Commission on Human and Peoples Rights, 28 April to 12 May 2014**