

**Communication 339/2007: Patrick Okiring and Agupio Samson (represented by  
Human Rights Network and ISIS-WICCE) v. Republic of Uganda**

**Summary of the Communication**

1. The Communication was submitted by Human Rights Network - Uganda, HURINET-U, and Women's International Cross Cultural Exchange - ISIS-WICCE (the Complainants), on behalf of Mr. Patrick Okiring and Mr. Agupio Samson (the Victims), on 29 March 2007. The Complaint is brought against the Republic of Uganda (the Respondent State).<sup>1</sup>
2. The Complainants allege that, on 23 November 2004, the Victims were arrested in Yumbe district in Uganda on allegations of membership in an armed group whose aim was to forcefully overthrow the Government of President Museveni; however they were neither charged nor brought before a court of law at the time of their arrest.
3. The Complainants aver that on 15 November 2005, the Victims, along with 20 other accused including Kiiza Besige (a former Presidential candidate), were charged with treason and concealment of treason, and committed to stand trial in the High Court of Uganda, in Criminal Case No. 955 of 2005.
4. Further, the Complainants allege that on 16 November 2005, fourteen (14) of the accused, including "the two (Peoples Redemption Army [PRA]) suspects," were granted bail by the High Court; however they were not released in spite of the release orders. The Complainants further allege that, before commencement of the court proceedings, "armed police/military personnel" cordoned off the court premises, stormed the High Court and forcefully returned the bailed suspects back to Luzira Maximum Prison.
5. The Complainants state that on 17 November 2005, the accused were charged with the offence of terrorism, and in the alternative with being in unlawful possession of firearms, before the General Court Martial, in UPDF/GEN/075 of 2005. The Complainants contend that these offences arose from the same facts as the treason and concealment of treason charges, which were earlier preferred against the suspects in the High Court on 15 November 2005.
6. The Complainants aver that the Uganda Law Society filed a petition against the Attorney General, Constitutional Petition No. 18 of 2005 - *Uganda Law Society versus the Attorney General*, seeking the Court's interpretation of the concurrent proceedings in the High Court and the Court Martial, in respect of the same charges and in respect of inconsistencies with the Constitution.
7. The Complainants aver that the suspects filed another Constitutional petition, Constitutional Petition No.12 of 2006, seeking the court's pronouncements and

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<sup>1</sup> Uganda ratified the African Charter on Human and Peoples' Rights on 10 May 1986

declaration in respect of the earlier petition No. 18 of 2005, the continued detention of the bailed 14 suspects and their trial before the General Court Martial. The Complainants state that the Constitutional Court ruled that the continued detention and trial of the suspects before the General Court Martial was illegal, thus the suspects should be released forthwith. However, the Complainants note that the Government still did not comply with the ruling.

8. The Complainants assert that following the Constitutional Court's ruling, four production warrants were issued by the High Court Registrar requiring the Commissioner of Prisons to produce the suspects in Court to have their bail processed; however the warrants were ignored and the Commissioner of Prisons did not appear before the Court on all four occasions.
9. The Complainants state that on 24 January 2007, the Attorney General and Director for Public Prosecutions filed an application in the High Court seeking to review and/or set aside the bail order issued in November 2005. On 1 March 2007, the Complainants state that the Court declined to grant the Government's application for review of the bail orders and ordered the immediate release of the suspects. Further, the Complainants aver that armed security personnel cordoned off the Court premises and, following the Court's ruling, entered the courtroom and forcefully re-arrested the suspects, vandalized Court equipment, beat up the suspects and deployed dogs to clear the courtroom of people.
10. The Complainants state that on 02 March 2007, the Judiciary announced a sit down strike for one week in protest of Government's interference in Court activities and disrespect for Court rulings. The Complainants further note that the Uganda Law Society, and the East African Law Society, supported the strike by the Judiciary and resolved to hold their own strike from 12 to 14 March 2007.
11. The Complainants note that the Victims were subsequently charged with other offences separate from the charges brought against them in Criminal Case No. 955 of 2005 and UDPF/GEN/075 of 2005, and were granted bail on these other charges. The Complainants note that Mr. Patrick Okiring, having satisfied the requirements set by the High Court, was out of detention on bail.
12. Further, the Complainants state that records at the High Court at Arua and Criminal Division at Kampala indicate that Mr. Samson Agupio was released from internment at the government prison after a *nolle prosequi* was entered by the Director of Prosecutions. However, the Complainants contend that the Amnesty Commission, which was seized of the matter, has no record that Mr. Samson Agupio applied for and was granted amnesty. Thus, the Complainants note that there is no information on Mr. Samson Agupio's whereabouts.

### **Articles alleged to have been violated**

13. The Complainants allege that Articles 5, 6 and 7 of the African Charter on Human and Peoples' Rights (the Charter) have been violated.

### **Prayers**

14. The Complainants seek the following:
  - (a) Recognition of the violations of human rights committed by the Respondent State;
  - (b) An order of compensation for the Victims; and
  - (c) An order upon the Respondent State to in future desist from violating the provisions of the Charter and respecting the individual rights of its citizens as protected under the Charter.

### **Procedure**

15. The present Communication was received at the Secretariat on 11 April 2007, and subsequently seized at the Commission's 41<sup>st</sup> Ordinary Session, which was held from 16 to 30 May 2007, in Accra, Ghana. The parties were informed on 20 June 2007 and requested to submit their arguments on Admissibility.
16. On 28 August 2007, the Secretariat wrote to the Parties, reminding them to submit their arguments on Admissibility by the end of October 2007.
17. In a letter dated 13 September 2007, the Complainants wrote to inform the Commission that Mr. Patrick Okiring, having satisfied the requirements set by the High Court, was out of detention on bail. However, Mr. Samson Agupio had not yet satisfied the bail requirements and remained in custody.
18. In a separate letter, dated 13 September 2007, the Complainants transmitted submissions on Admissibility to the Secretariat.
19. On 30 October 2007, the Respondent State wrote to request the deadline for its submissions on Admissibility be extended to 14 November 2007, and on 5 November 2007 sent a Note Verbale to the Commission addressing the Admissibility of the Communication. Further, on 16 November 2007, the Respondent State sent a Note Verbale informing the Commission that the matters raised in the Communication had been considered and duly ruled on by the East African Court of Justice, and attached the said decision to the letter.
20. At its 43<sup>rd</sup> Ordinary Session, held in Ezulwini, the Kingdom of Swaziland from 07 to 22 May 2008, the Commission granted audience to the parties to complement their respective written submissions orally.
21. In a letter dated 13 August 2012, the Complainants informed the Commission that Mr. Samson Agupio was released from internment at the government prison after a

*nolle prosequi* was entered by the Director of Prosecutions. Attached to this letter, the Complainants submitted copies of decisions and sources of information referenced in their submissions on Admissibility, in response to a request from the Secretariat.

22. The Communication was subsequently deferred to, considered and declared admissible at the 13<sup>th</sup> Extra-Ordinary Session. The Respondent State was informed of the decision of the Commission by way of a Note Verbale dated 27 February 2013. On the same day, a letter was sent to the Complainants informing them of the decision and requesting that they make their submissions on the Merits within sixty days.
23. In a letter dated 14 November 2015, as no submission had yet been received, the Commission informed the Complainants that if no submissions were received as soon as possible, the Commission would proceed to strike out the Communication for want of diligent prosecution. The Complainants' submission on merits was subsequently forwarded to the Commission through a letter dated 08 February 2014.
24. The Complainants' submission on the merits were forwarded to the Respondent State through a Note Verbale on 24 September 2014. The Respondent State was requested to forward its submissions on the merits of the Communication, within sixty (60) days of this notification.
25. Through Note Verbale dated 11 March 2015, the Commission granted the Respondent State 30 working days, from the date of notification, to file written submissions on the merits, if any. The Commission informed the Respondent State that it would proceed on the determination of the merits on the basis of the available information if the said submissions were not received within the stated period.
26. Through a diplomatic note dated 05 May 2015, the Respondent State forwarded its submission on the merits to the Commission. The submission was forwarded to the Complainants on the 20 May 2015, granting the Complainants thirty (30) days to submit any additional written observation or information; no additional submissions were received.

### **The Law on Admissibility**

### **The Complainant's Submissions on Admissibility**

27. The Complainants submit that they have satisfied all the criteria on admissibility, as set out in Article 56 of the African Charter. The Complainants submit that: the authors of the Communication are indicated; the Communication is plainly compatible with the Constitutive Act of the African Union and the Charter; the Communication is presented in polite and respectful language; and is based on information provided by the Complainants and Court documents, not on media reports, in accordance with clauses (1), (2), (3) and (4) of Article 56.

28. Regarding the requirement of exhaustion of local remedies, the Complainants contend that the Complaint was brought before the Commission after the Victims exhausted the local domestic remedies, however they did not obtain relief. The Complainants aver that Article 56(5) is one of the most important conditions for the admissibility of Communications, as it gives the State concerned the opportunity to remedy the alleged violation through its domestic legal system. In support of this, the Complainants cite the Commission's decision in *Dawda Jawara v. The Gambia*.<sup>2</sup>
29. The Complainants submit that domestic remedies exist in the Respondent State, noting that the Article 129(1) of the Constitution of the Republic of Uganda (the Constitution) makes provisions for judicial power to be exercised by the Supreme Court, the Court of Appeal, the High Court and other subordinate Courts thereto.
30. The Complainants aver that the Victims have engaged these judicial institutions, noting that the Victims, along with the other suspects, applied for bail, and bail orders were made by the High Court.
31. Further, the Complainants note that the Victims petitioned the Constitutional Court for the following declarations and orders: that the Victims are entitled to a fair and impartial trial; their continued detention after the Constitutional Court in Petition No. 18 of 2005 declared the concurrent trial in the High Court and Court Martial in violation of their right to personal liberty; and lastly that, the General Court Martial, in ignoring the decision of the Constitutional Court and the continued detention of the 14 bailed petitioners, acts in an inconsistent manner with Article 128(3) of the Constitution, and therefore is in contravention of the principle of the independence of the Judiciary.
32. The Complainants submit that the Victims have exhausted these local remedies, and further submit that the national Courts resolved the issues in the applicants favour. However the Complainants contend that the court orders have not been respected by the Executive arm of Government, which has employed the police and military to deny the Victims of their right to liberty, fair and impartial trial, and to frustrate the various court orders.
33. The Complainants submit that, in consecutive order, the following release and declaratory orders have been pronounced; however submit that none has been implemented:
  - (a) Bail application No. 201 of 2005, pronounced on 16 November 2005;
  - (b) Constitutional Court Petition No. 18 of 2005, pronounced on 31 January 2006;
  - (c) Constitutional Court Petition No. 12 of 2006, pronounced on 12 January 2007;
  - (d) Review of Bail application No. 20 of 2007.

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<sup>2</sup> Communication 147/95,149/96: *Dawda K. Jawara v. The Gambia* (2000) ACHPR para 30-31

34. The Complainants contend that the Respondent State has been given numerous opportunities to remedy the violations of the Charter, as required by the Commission in *Amnesty International and Others v. Sudan*,<sup>3</sup> and claim that the State has chosen to ignore the decisions of the constitutional judicial authorities by implementing the decisions of the Executive.
35. The Complainants further contend that the Respondent State's appeal against the decision of the Constitutional Court over the declarations and orders affecting the Victims and the other accused, does not affect the bail release orders since the State has not complied with them. In support of this, the Complainants cite *Assanidze v. Georgia*, a case from the European Court of Human Rights, which concerned the detention of a person whose final release had been ordered by a competent court. The Complainants aver that the European Court, in finding that domestic remedies had been exhausted, noted that where a final release order was made, the principle of legal certainty (one of the fundamental aspects of the rule of law) preclude any attempt by a non-judicial authority to call that judgment into question, or to prevent its execution.<sup>4</sup>
36. The Complainants submit that in the instant case, the Executive working with other institutions of the State, such as the military and the police, blatantly ignored the pronouncements and orders of the Court, and even questioned the said pronouncements.
37. The Complainants conclude by noting that in spite of all the efforts of the Victims and their counsel, the Respondent State has not obliged or respected the Court's release orders.
38. For the above reasons, the Complainants submit that this Communication satisfies the admissibility requirements of Article 56 of the Charter.

### **The Respondent State's Submissions on Admissibility**

39. The Respondent State contends that the Communication is inadmissible under the African Charter, submitting that the Communication was filed with the Commission before the exhaustion of local remedies, and therefore offends the provisions of Article 56(5).
40. The Respondent State avers that promotion and upholding human rights is one of the national objectives and directive principles of state policy, thus the Constitution enjoins the State to guarantee and respect institutions charged with the responsibility for protecting and promoting human rights. The Respondent State submits that one

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<sup>3</sup> Communication 48/90, 50/91, 52/91, 89/93: Amnesty International, Comité Loosli Bachelard, Lawyers' Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v. Sudan (1999) ACHPR para 32

<sup>4</sup> *Assanidze v. Georgia* (2004) ECHR (Application No.71503/01) para 131

of these institutions is the Uganda Human Rights Commission (hereafter UHRC), established under Article 51 of the Constitution.

41. The Respondent State submits that Article 52 mandates the UHRC to, *inter alia*, investigate, at its own initiative or on a complaint made by any person or group of persons against the violation of any human right. Further, under Article 53(1), the Respondent State submits that the UHRC has the powers of a Court to issue summons or other orders requiring attendance of any person before it, and if satisfied that there has been an infringement of a human right or freedom, the UHRC is empowered to order the release of a detained or restricted person, payment of compensation, or any other legal remedy or redress.
42. The Respondent State argues that the UHRC is the proper framework within which the Complainants could and should have had their case properly addressed. In addition, the Respondent State avers that the Constitution guarantees the UHRC's independence; specifically that the performance of its duties shall not be subject to the direction of any person or authority. The Respondent State notes that in instances where wayward agents were found guilty of violating a human right, the Government of Uganda dutifully complied with the UHRC's directives, including the compensation of victims.
43. The Respondent State notes that the Complainants have not utilised this forum for addressing human rights grievances in Uganda. The Respondent State further notes that, if the Victims are ultimately found innocent, they would be at liberty to seek remedies and redress from the High Court, which are being sought in the present Communication.
44. The Respondent State concludes that the Government does not object to the decision of the Court, and notes that the Victims were granted bail by the High Court, and will be released when they meet the bail terms imposed by the Court. As such, the Respondent State requests the Commission to decline to entertain the Communication because it violates Article 56(5) of the Charter.
45. Additionally, the Respondent State asserts that the matters raised in the present Communication were considered and definitively ruled on by the East African Court of Justice, in *Reference No.1 of 2007 Between James Katabazi and 21 Others (Applicants) vs. Secretary General of the East African Community (1<sup>st</sup> Respondent) and the Attorney General of the Republic of Uganda (2<sup>nd</sup> Respondent)* [hereafter the Katabazi case]. The Respondent State notes that the case was filed on behalf of Mr. Katabazi and 21 others, including Mr. Patrick Okiring and Mr. Agupio Samson. The Respondent State, therefore, submits that the matters raised in the Communication are *res judicata*, and therefore cannot be heard and determined by the Commission again.
46. For the above reasons, the Respondent State requests the Commission to declare the Communication inadmissible.

## **The Complainant's Supplementary Submissions on Admissibility**

47. Regarding the Katabazi case which was before the East African Court of Justice, the Complainants aver that this Reference initially bore the names of all the 22 Peoples Redemption Army (PRA) suspects; however for personal reasons both Mr. Samson Agupio and Mr. Patrick Okiring withdrew instructions and their participation before the East African Court, and opted to give their consent to the Complainants to bring their complaint before the African Commission. The Complainants note that, as testament and evidence of this fact, the consent and authorization forms of the Victims were submitted to the Commission.
48. Additionally, the Complainants contend that, notwithstanding the title naming all 22 suspects, the Court's Judgment explicitly states that the reference was brought by sixteen persons, of which Mr. Samson Agupio and Mr. Patrick Okiring were not party. Accordingly, the Complainants submit that the arguments by the Respondent State alleging that the Victims were parties to the Reference before the East African Court of Justice were erroneous and misleading.
49. The Complainants further aver that the Complaint before the Commission was in relation to the actions of state actors which constitute violations of the African Charter and the Constitutive Act of the African Union, which is different from the reference brought before the East African Court of Justice, as this Court would not have jurisdiction to hear complaints against violations of the Charter and Constitutive Act by a Member State.

## **Oral Submissions**

### **The Complainants' Oral Submissions**

50. In oral submissions, the Complainants reiterated their written submissions, stating that the Communication was submitted in accordance with the requirements of the Charter: specifically the Complaint was submitted in a respectful manner and non-abusive language; the complaint related to violations of the Charter and the Constitutive Act of the African Union. The Complainants averred that all available local remedies had been exhausted, however the Respondent State had not heeded the orders issued by the Constitutional and High Court in various decisions handed down. The Complainants reiterated that the Communication was thus admissible before the Commission.

### **The Respondent State's Oral Submissions**

51. The Respondent State, in turn, reiterated its assertion on the exhaustion of local remedies. It was observed that, under Article 23(6) of the Constitution, a person arrested in respect of a criminal case is entitled to apply to court to be released on bail. The Respondent State made reference to the UHRC, noting its powers and functions, as established under Article 52 and 53 of the Constitution, and noting that

that there is a right of appeal from the UHRC to the High Court. The Respondent State further noted while that the UHRC does not investigate any matter pending before a court or judicial tribunal, and with regard to the order for compensation, this remedy was not sought from the UHRC or High Court. The Respondent State concluded that the Complainants had not exhausted the local remedies available to them.

52. Additionally, the Respondent State noted that the accused were charged before the High Court, released on bail, and further charged before the General Court Martial, which rendered the application for bail difficult to implement at the time, given that the accused had been charged before another competent court for different offences. The Respondent State noted that the condition for bail, not the right to bail under the General Court Martial was still a subject of appeal before the Supreme Court, since the Constitutional Court's position was not clear, and concluded that the Complainants had not exhausted local remedies given that the Supreme Court had not pronounced itself in finality in the matter.
53. The Respondent State also reiterated the assertion that the Complainants lodged a petition before the East African Court of Justice, which was finally decided.
54. In conclusion, the Respondent State averred that the Victims could still get remedies locally.

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

55. Article 56 of the African Charter provides seven requirements, which must all be met before a Communication can be declared Admissible by the Commission.
56. From the submissions of the parties, the Admissibility of this Communication is contested on two grounds; non-exhaustion of local remedies as stipulated in Article 56(5) of the African Charter, and on the grounds that the Communication deals with a case which has been settled by the State involved, as stipulated in Article 56(7). Given that the Respondent State has not contested sub-sections (1), (2), (3), (4) and (6) of Article 56, and in the absence of any information to the contrary, the Commission holds that the aforementioned sub-Articles of Article 56 of the Charter have been met. The Commission will proceed to determine whether the requirements under the contested sub-sections of Article 56 have been met.
57. Article 56(5) of the African Charter states that Communications relating to human and peoples' rights shall be considered if they: "are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged." The Complainants submit that they have exhausted all local domestic remedies, in accordance with Article 56(5) but have not obtained relief. In support of this, the Complainants referred to release and declaratory orders the Victims applied for, which were pronounced in favour of the applicants. The Respondent State, on other hand, contends that because the Victims did not apply to have their case addressed

by the UHRC, the Communication does not meet the requirement for the exhaustion of local remedies, stated in Article 56(5) of the Charter.

58. The Commission observes that through the local remedies rule, States are given the possibility of redressing the alleged wrong within their own domestic legal systems before their responsibility is brought to the international level.<sup>5</sup> Additionally, it is a generally accepted principle in international law that before an international body is approached all available legal domestic remedies must be exhausted by the applicant. As stated in the Commission's Information sheet No. 3, "he or she must have taken the case to the highest court of the land."<sup>6</sup>
59. The Commission notes that in the present case, the Victims filed a petition in the Court of Appeal, sitting as the Constitutional Court; that is Constitutional Petition No. 12 of 2006. In its ruling, the Court held that the continuation of the High Court trial while the 14 bailed petitioners were in unlawful custody contravened the Constitution, and their continued detention in contravention of the Constitutional Court's declaration was unlawful. As redress, the Court held that "[T]he 14 bailed petitioners are to be released forthwith, under the terms of their bail granted by the High Court, unless they are being held on some other lawful ground."<sup>7</sup>
60. The Commission notes that in the present communication, the Victims obtained the remedies they sought from the Court of Appeal, which was sitting as the Constitutional Court, therefore they did not appeal to the Supreme Court for redress. The Commission further notes that while the Supreme Court is the highest appellate Court in Uganda, the jurisdiction of the Supreme Court is limited to appeals on decisions of the Court of Appeal where "the party is aggrieved by the decision of the Court of Appeal."<sup>8</sup> As such, the Victims fulfilled the requirement by exhausting the legal domestic remedies available to them, irrespective of the fact that they did not take their case to the highest court of the land.
61. Regarding the Respondent State's assertion that the Victims did not exhaust all available local remedies because they did not seek to have their case addressed by the UHRC, the Commission notes from its jurisprudence that it has previously held that human rights commissions do not fall under the category of judicial remedies which should be sought by the Victims. This can be seen in *Alfred Cudjoe v. Ghana*, and reaffirmed in *Kenneth Good v. Botswana*, where the Commission held that:

*"the internal remedy to which Article 56(5) refers entails remedy sought from courts of a judicial nature, which the Ghanaian Human Rights Commission is clearly not. From the African Commission's point of view, seizing the said Commission can [be] taken as preliminary amicable*

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<sup>5</sup> Silvia D'Ascoli & Katherine Maria Scherr, *The Rule of Prior Exhaustion of Local Remedies in the International Law Doctrine and its Application in the Specific Context of Human Rights Protection*, (2007) 15

<sup>6</sup> The African Commission on Human and Peoples' Rights Information Sheet No. 3

<sup>7</sup> *Col (Rtd.) Kizza Besigye and 22 Others vs. The Attorney General* - Constitutional Petition No. 12 of 2006 – 12 January 2007, p.31

<sup>8</sup> Article 132(1) and (2), Constitution of the Republic of Uganda (1995)

settlement and should, in principle, considering the employer's failure to react, be followed by an action before the law courts."<sup>9</sup>

Therefore local remedies that are essentially *non-judicial* or *discretionary* are not the kind envisaged by the rule.<sup>10</sup>

62. However, the Commission notes that, unlike the Ghanaian Human Rights Commission referred to in *Cudjoe v. Ghana*, the UHRC has the powers of a Court to issue summons or other orders requiring attendance of any person before it, and if satisfied that there has been an infringement of a human right or freedom, the UHRC is empowered to order the release of a detained or restricted person, payment of compensation or any other legal remedy or redress.<sup>11</sup>
63. Whereas to date the Commission has not deliberated on whether a quasi-judicial remedy is to be regarded as a remedy for the purposes of the rule under Article 56(5) of the Charter, as is the case of the UHRC which is a human rights commission vested with judicial powers comparable with those of traditional courts, the Commission finds that in the present case where the Victims have exhausted the available legal remedies to the highest level and obtained redress, it would be unreasonable to hold that all available legal remedies were not exhausted because the Victims did not seek to have their case heard by the UHRC.
64. Accordingly, the Commission finds that the Victims exhausted all domestic legal remedies, and as such holds that the requirement of Article 56(5) has been met.
65. Article 56(7) of the African Charter states that Communications relating to human and peoples' rights shall be considered if they: "do not deal with cases which have been settled by the states involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organization of African Unity or the provisions of the present Charter." In essence, Article 56(7) bars the Commission from entertaining cases that have been settled by another international settlement procedure.<sup>12</sup> This provision embodies the principle of *res judicata* to the extent that it excludes a matter which has been settled by the state involved.<sup>13</sup>
66. The Commission has, in its jurisprudence, adopted the following definition; "Res judicata is the principle that a final judgement of a competent court/tribunal is conclusive upon the parties in any subsequent litigation involving the same cause of

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<sup>9</sup> Communication 221/98: Alfred B. Cudjoe v. Ghana (1999) ACHPR para 14. See also Communication 313/05-Kenneth Good v Republic of Botswana (2010) ACHPR para 88

<sup>10</sup> Henry Onoria, The African Commission on Human and Peoples' Rights and the exhaustion of local remedies under the African Charter (2013) 3 *African Human Rights Law Journal* 19

<sup>11</sup> Article 52 and 53, Constitution of the Republic of Uganda

<sup>12</sup> Communication 266/03: Kevin Mgwanga Gunme et al v Cameroon (2009) ACHPR para 84

<sup>13</sup> Lucyline Nkatha Murungi, Jacqui Gallinetti, The Role of Sub-Regional Courts in the African Human Rights System (2010) 7 *International Journal on Human Rights* 126

action.”<sup>14</sup> The Commission further expounded on this by noting that the principle behind the requirement under this provision of the African Charter is to desist from faulting member states twice for the same alleged violations of human rights.<sup>15</sup>

67. In the present Communication, the Respondent State avers that by virtue of the fact that the matters raised in the Communication were definitively ruled on by the East African Court of Justice in the Katabazi case, the issues raised in the Communication are *res judicata*. The Complainants, on the other hand, contend that the Victims withdrew instructions and their participation before the East African Court.
68. In determining whether the present Communication meets the requirement of Article 56(7), the Commission is guided by its jurisprudence in *Kevin Mgwanga Gunme et al v. Cameroon*, in which it held that “the African Commission states that for a matter to fall within the scope of Article 56(7) of the African Charter it should have involved the same parties, the same issues raised by the complaint before the African Commission, and must have been settled by an international or regional mechanism.”<sup>16</sup> Further, in *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions v. Sudan*, the Commission held that “the mechanisms envisaged under Article 56(7) of the Charter must be capable of granting declaratory or compensatory relief to victims, not mere political resolutions and declarations.”<sup>17</sup>
69. The initial issue to be determined by the Commission is whether the East African Court of Justice (*hereafter* the East African Court) is one of the mechanisms envisaged under Article 56(7) of the Charter. To this end, the Commission notes that the East African Court, one of the organs of the East African Community established under Article 9 of the Treaty for the Establishment of the East African Community,<sup>18</sup> is “[...] a judicial body which shall ensure the adherence to law in the interpretation and application of and compliance with this Treaty.”<sup>19</sup> Further, the Commission notes that, following consideration of a reference,<sup>20</sup> the Court shall deliver a reasoned judgment in public session,<sup>21</sup> and that “execution of a judgment of the Court which imposes a pecuniary obligation on a person shall be governed by the rules of civil procedure in force in the Partner State in which execution is to take place,”<sup>22</sup> which indicates that the East African Court is capable of granting both declaratory and compensatory relief to victims. From the above, the Commission is of the view that

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<sup>14</sup> Communication No. 260/02: Bakweri Land Claims Committee v. Cameroon (2004) ACHPR para 52. See also, August Reinisch, *The Use And Limits of Res Judicata and Lis Pendens as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes*, *The Law and Practice of International Courts and Tribunals*, 2004, 50- 51.

<sup>15</sup> *Id.*, para 52

<sup>16</sup> Communication 266/03: para 86

<sup>17</sup> Communication 279/03, 296/05: *Sudan Human Rights Organization & Centre on Housing Rights and Evictions (COHRE) v. Sudan* (2009) ACHPR para 105

<sup>18</sup> <http://www.eacj.org/establishment.php>

<sup>19</sup> Article 23, Treaty for the Establishment of the East African Community

<sup>20</sup> “A reference by a Partner State, the Secretary General or any person under Articles 28, 29, 30 respectively of the Treaty shall be instituted by presenting to the Court an application;” Rule 24, *The East African Court of Justice Rules of Procedure*, 2010

<sup>21</sup> Article 35, Treaty for the Establishment of the East African Community

<sup>22</sup> Article 44, Treaty for the Establishment of the East African Community

the East African Court, a regional judicial mechanism which is capable of granting declaratory or compensatory relief, is one of the mechanisms envisaged under Article 56(7) of the Charter.

70. The Commission also notes that the Judgment of the Katabazi case was delivered on 01 November 2007, essentially rendering the matter *settled*.
71. Having established that the Katabazi case has been settled by a regional mechanism which falls within the scope of Article 56(7), the Commission will proceed to determine whether the present Communication involves the same parties and the same issues as the case before East African Court.
72. Regarding the question of whether the same parties were before the East African Court and the African Commission, the Commission notes that the case before the East African Court was brought against the Republic of Uganda by twenty two (22) applicants, only one of whom is named; that is James Katabazi. However, in the letter dated 13 August 2012, the Complainants conceded that the Victims were indeed party to this case before the East African Court of Justice.
73. The Commission further notes that while the Complainants have asserted that the Victims “withdrew instructions and their participation before the East African Court and opted to give their consent to Human Rights Network (HURINET) and ISIS-WICCE to bring their complaint before the African Commission,”<sup>23</sup> the Complainants have not adduced evidence to support the assertion that the Victims withdrew from the Katabazi case. The Commission further notes that the Respondent State averred that the Victims were applicants in the Katabazi case,<sup>24</sup> however did not adduce any additional evidence in support of this claim.
74. In light of the dearth of evidence to support or rebut this claim, the Commission requested confirmation from the Registrar of the East African Court that the Victims withdrew from the Katabazi case before the judgment was delivered. To this end, the Commission has established that “Mr. Patrick Okiring and Mr. Samson Agupio who were the 19<sup>th</sup> and 21<sup>st</sup> Applicants in the Reference, discontinued their reference against all the Respondents by a notice lodged in this Court on 11<sup>th</sup> July 2007.”<sup>25</sup> As a result, the Commission is of the view that the matter has not been settled with respect to the Victims, because they were not party to the suit when the judgment was rendered by the East African Court on 01 November 2007.
75. In light of the above, the Commission finds that the requirement of Article 56(7) has been met.
76. Accordingly, the Commission declares this Communication admissible.

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<sup>23</sup> Letter from the Complainants, Reference: HUR/95/10, 13 August 2012

<sup>24</sup> Note Verbale from the Ministry of Foreign Affairs of the Republic of Uganda, Reference: AOG70/153/01, 01 October 2012

<sup>25</sup> Letter from the East African Court, Reference: EACJ/C-4/VOL.1/23/13, 13 February 2013

## **Consideration on the Merits**

### **The Complainants' Submissions on Merits**

#### **Alleged violation of Article 5**

77. In the merits submission, the Complainants claim a violation of Article 5 of the Charter. The Complainants submit that while in detention at the Luzira Government Prison and other government security detentions, the Victims were beaten, taunted and flogged in a bid to induce them to confess the crimes for which they were arrested. The Complainants aver that those acts were done by the Respondent State's servants in the course of their employment.
78. The Complainants further submit that the state has done nothing to apprehend the perpetrators of the violence.

#### **Alleged violation of Article 6**

79. The Complainants aver a violation of Article 6 of the Charter. The Complainants submit that although the victims were granted bail by the High Court on 16 November 2005, they were kept in detention and charged before the General Court Martial. The situation continued in disregard of the Constitutional Court declaration in petition No.18 of 2005 that the continued detention of the victims and others contravened the right to personal liberty and the principle of independence of the judiciary.
80. The Complainants submit that the acts of the servants or agents of the Respondent State through the continued detention of the Victims, denied the Victims their right to personal liberty and violated the provisions of Article 6 of the Charter.
81. The Complainants aver that the actions of the Respondent State in which its servants or agents disregarded the orders of the Constitutional Court directing the release of the Victims militate against the judiciary and the spirit and provisions of Article 6 of the Charter.

#### **Alleged violation of Article 7**

82. The Complainants submit that the actions of the armed men at the premises of the High Court violated the principle of judicial independence and is therefore a violation of the right to a fair trial as provided in Article 7 of the Charter.
83. The Complainants aver that the storming of armed men and security agents at the High Court and their interference with the activities of the Court interfered with the independence of the judiciary in so far as their actions were calculated to instil fear in the judge and other judicial officers. In support of their claim, the Complainants

point out to the withdrawal of the trial judge. The Complainants submit that these actions contravene the right of an accused person to be afforded a fair and impartial trial.

84. The Complainants submit that the Victims have been denied access to their lawyers on several occasions and that their lawyers were violently beaten while at the High Court.
85. The Complainants submit that the trial of the Victims before both the High Court of Uganda and the General Court Martial on different charges but based on the same facts contravenes Article 7 of the Charter. The Complainants refer to articles 28(1) and 44(c) of the Ugandan Constitution.
86. In the same manner, the Complainants further aver that the Court Martial had no jurisdiction over the offences of terrorism and the unlawful possession of fire-arms and that the trial of the Victims under such charges before the Court Martial violates the right to a fair trial.

### **The Respondent State's Submission on the Merits**

#### **Alleged violation of Article 5**

87. In its submission, the Respondent State argues that it cannot be found to have violated Article 5 as the Complainants have failed to adduce medical evidence or any other evidence to prove the allegation of torture.

#### **Alleged violation of Article 6**

88. In refuting the argument of the violation of Article 6, the Respondent State submits that the right to personal liberty is not absolute and may be derogated from.
89. The Respondent State alleges that the Victims were arrested and taken to court to answer the amended charges preferred against them.
90. The Respondent State argues that its actions are within the confine of the domestic law. The Respondent State submits that arresting an individual suspect for an offence provided for under the law does not violate the Charter.
91. The Respondent State alleges that the arrest of the Victims were linked to the subversive activities that the Victims were involved in. The State argues that its actions are in line with its duty to ensure that its independence, sovereignty and territorial integrity are not compromised by the Victims.

#### **Alleged violation of Article 7**

92. The Respondent State submits that the siege of the High Court did not affect the independence of the judiciary. In support of this claim, the Respondent State points out to the grant of bail to the Victims and the declarations made by the Constitutional Court in Constitutional Petitions No. 18 of 2005 and No.12 of 2006. The Respondent State submits that the declarations by the Constitutional Court in those two cases in favour of the Victims show how independent the judiciary is.
93. The Respondent State avers that security was deployed at the High Court following intelligence information that the Victims were to be rescued to escape the course of justice and join an armed rebellion. The Respondent State therefore submits that its actions were necessitated by security reasons.
94. The Respondent State submits that trials by military courts do not per se constitute a violation of the right to be tried by a competent organ. In support of this allegation, the Respondent State refers the decision of the Commission in *Civil Liberties Organisation v Nigeria*: The military tribunals are not negated by the mere fact of being presided over by military officers. The critical factor is whether the process is fair, just and impartial. The Respondent submits that the trial of the complainants in the military courts is not a violation of the right to a fair trial since this is provided for in the Ugandan law.

### **The Commission's Analysis on the Merits**

#### **(i) Violation of Article 5**

95. The Complainants aver that the Victims were beaten, taunted and flogged to induce confession in violation of Article 5 of the Charter. This averment is contested by the Respondent State which avers that the Complainants have not produce any evidence of torture, including medical evidence.
96. Article 5 of the Charter provides that: "Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited."
97. The Respondent State points out to the lack of evidence by the Complainants to prove the allegation of torture. The Commission notes that specific rules govern the burden of proof in torture cases. When a person is injured in detention or while under the control of security forces, there is a strong presumption that the person was subjected to torture or ill-treatment. The burden then shifts to the Respondent State to convince the Commission that the allegations of torture raised by the Complainants are unfounded.<sup>26</sup>

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<sup>26</sup> Communication 334/06: Egyptian Initiative for Personal Rights and Interrights v. Egypt (2011) para 168-169

98. Furthermore, the State is obliged to investigate allegations of torture, independently of the origin of the complaint. The formal lodging of a complaint of torture or an express statement of intent to sue is not necessary and it is enough for the Victim to bring the facts related to the allegation of torture to the attention of the authorities.<sup>27</sup>
99. In the present case, the Complainants do not allege that the Victims have sustained injuries as a result of the alleged beatings and floggings. The Complainants neither allege nor does the evidence reveal that allegations of torture were in fact brought to the attention of the State. The Commission has perused the evidence before it and has not found any evidence that such allegations were made before either the domestic courts or any other body.
100. In *Ouko v. Kenya*, the Commission held that “although the Complainant has claimed a violation of his right to freedom from torture, he has not substantiated this claim. In the absence of such information, the Commission cannot find a violation as alleged.”<sup>28</sup> In *Aminu v. Nigeria*, on allegations of torture and inhuman treatment on several occasions by the Nigerian security operatives, the Commission held that “In the absence of specific information on the nature of the acts complained of, the Commission is unable to find a violation as alleged.”<sup>29</sup>
101. The Commission notes that there is no allegation that injuries occurred while in detention. The facts do not reveal a failure by the Respondent State to undertake an effective investigation into allegations of ill-treatment. In light of the absence of information substantiating the allegations, the Commission declines to find a violation of Article 5 of the Charter.

**(ii) Violation of Article 6**

102. The issue before the Commission is whether the continued detention of the Victims in defiance of the bail order issued by the High Court on 16 November 2005 and of the declarations of unconstitutionality issued by the Constitutional Court in Constitutional Petitions No.15 of 2005 and No.18 of 2005, contravene the right to personal liberty enshrined at Article 6 of the Charter. Article 6 of the Charter states: “Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.”
103. The Commission notes the fundamental importance of the guarantees under Article 6 for securing the personal liberty of every individual and the protection from arbitrary arrests and detention. For this reason, the Commission in its jurisprudence has highlighted the need for any deprivation of liberty to conform strictly to the limitations under Article 6. In *Gunme v Cameroon*, the Commission stated that “a state

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<sup>27</sup> Communication No. 187/2001: Dhaou Belgacem Thabti v. Tunisia (14 November 2003) Committee against Torture CAT/C/31/D/187/2001; [http://www.bayefsky.com/html/tunisia\\_t5\\_cat\\_187\\_2001.php](http://www.bayefsky.com/html/tunisia_t5_cat_187_2001.php)

<sup>28</sup> Communication 232/99: John D. Ouko v. Kenya (2000) ACHPR, para 26

<sup>29</sup> Communication 205/97: Kazeem Aminu v. Nigeria (2000) ACHPR para 16.

party cannot justify violations of the African Charter by relying on the limitation under article 6 of the Charter. The respondent state is required to convince the Commission that the measures or conditions it had put in place were in compliance with article 6 of the Charter.”<sup>30</sup> In *Amnesty International and Others v. Sudan*, the Commission stated “Article 6 must be interpreted in such a way as to permit arrests and detention only in the exercise of powers normally granted to the security forces in a democratic society.”<sup>31</sup> Competent authorities should not enact provisions which limit the exercise of rights and freedoms.

104. The most appropriate manner to ensure the respect of Article 6 is to allow for a judicial review of any arrest and detention by independent and impartial courts. **Principle 35 of the Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial detention in Africa**, adopted by the Commission during its 55<sup>th</sup> Ordinary Session in Luanda, Angola, from 28 April to 12 May 2014, provides that:

*“All persons in police custody and pre-trial detention shall have the right, either personally or through their representative, to take proceedings before a judicial authority, without delay, in order to have the legality of their detention reviewed.”*

105. Such a right would be ineffective if the decision of the judicial authority was not binding on the executive, and for this reason, Principle 35 of the Guidelines further states: *“If the judicial authority decides that the detention is unlawful, individuals have the right to release without delay.”*

106. The Commission would also like to recall **Principle 4(a) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa**, adopted by the Commission at the 33<sup>rd</sup> Ordinary Session, held in Niamey, Niger, from 15 to 29 May 2003:<sup>32</sup> *“The independence of judicial bodies and judicial officers shall be guaranteed by the constitution and laws of the country and respected by the government, its agencies and authorities.”* The Executive and the Legislature must respect and abide by the judgements and decisions of the Judiciary, even when they do not agree with them. *“Such respect for the judicial authority is indispensable for the maintenance of the rule of law, including respect for human rights standards, and all branches of Government and all State institutions have a duty to prevent any erosion of this independent decision-making authority of the Judiciary.”*<sup>33</sup>

107. The Commission agrees with the Respondent State that the right to personal liberty does not grant complete freedom from arrest or detention. Deprivation of liberty is a legitimate form of state control over persons within its jurisdiction. Instead, the right to personal liberty acts as a substantive guarantee that any arrest or detention will not be unlawful or arbitrary. In *Rafael Marques de Morais (represented by the Open*

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<sup>30</sup> Communication 266/03: *Gunme v Cameroon* (2009) ACHPR para 118

<sup>31</sup> *Supra* note 3, para 59

<sup>32</sup> [http://www.achpr.org/files/activity-reports/17/achpr34and35\\_actrep17\\_20032004\\_eng.pdf](http://www.achpr.org/files/activity-reports/17/achpr34and35_actrep17_20032004_eng.pdf)

<sup>33</sup> Office of the High Commissioner for Human Rights & International Bar Association, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* (2003) 121

*Society Institute and Interights) v. Angola*, the Human Rights Committee defined arbitrariness in the context of arrest and detention as more than an action that goes against the law. The Human Rights Committee noted that arbitrariness also includes “elements of inappropriateness, injustice, lack of predictability and due process of law.”<sup>34</sup>

108. The Respondent State argues that its actions were permissible under Article 6 of the Charter as the purpose of the arrest of the Victims was to bring them before a court of law to answer an offence provided by law. The Commission has consistently held in its jurisprudence that the clause ‘laid down by law’ does not provide a blanket approval of any domestic law regardless of its effect. If so, States Parties to the Charter would be able to negate the rights conferred upon individuals by the Charter. The clause constitutes a reference to international law, meaning that only restrictions on rights which are consistent with the Charter and with States Parties’ international obligations should be enacted by the relevant national authorities.<sup>35</sup>
109. The Respondent State further argues that the arrest was in line with the duty of the State to ensure its independence, sovereignty and territorial integrity. While accepting that the State has a right and duty to guarantee its security, the Commission must emphasise that the State remains subject to the provisions of the Charter. The exigencies of fighting terrorism cannot invalidate the protection afforded under Article 6.<sup>36</sup> In the present case, the risk posed by the Victims to society and the risk of flight must have been taken into consideration by the High Court before the issue of the Bail Order, it is not for the Executive of the Respondent State to usurp the role of the Court.
110. Where a suspect is released on bail contrary to the wishes of the State, the State should not be allowed to deny bail and detain the individual by again arresting the suspect and bringing the latter under different charges before a different court. To allow the State to do so defeats the powers of the Court to grant bail and removes any judicial oversight over arrests and detentions. It is inappropriate, blatantly unjust and removes any element of predictability. A detainee having recourse to the Courts has a legitimate expectation that the order of the Court will be abided to by the State.
111. For these reasons, the Commission finds that the subsequent arrest and detention of the Victims after they had been granted bail was arbitrary and unlawful and therefore outside the permissible limitations to the right to personal liberty. The Commission finds the Respondent State in violation of Article 6 of the Charter.

### **(iii) Violation of Article 7**

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<sup>34</sup> Communication 1128/2002: Rafael Marques de Morais (represented by the Open Society Institute and Interights) v Angola (2005) Human Rights Council, para 6.1

<sup>35</sup> Communication 275/03 : *Article 19 v Eritrea* (2007) ACHPR paras 91,92.

<sup>36</sup> African Commission on Human and Peoples’ Rights, Principles and Guidelines on Human and Peoples’ Rights while Countering Terrorism in Africa, Part 1(I), adopted during the 56<sup>th</sup> Ordinary Session in Banjul, The Gambia, from 21 April to 7 May 2015

➤ **Article 7(1)**

112. The Complainants aver a violation of the right to a fair trial protected under Article 7 of the Charter through various actions of the Respondent State. Article 7(1) of the Charter states:

*Every individual shall have the right to have his cause heard. This comprises:*

- a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;*
- b) the right to be presumed innocent until proved guilty by a competent court or tribunal;*
- c) the right to defence, including the right to be defended by counsel of his choice;*
- d) the right to be tried within a reasonable time by an impartial court or tribunal.*

113. The Complainants aver that the presence and actions of the armed men within the premises of the High Court were calculated to instil fear and are in violation of the right of an accused person to be accorded a fair and impartial trial.

114. The Commission notes that the impartiality and independence of the Judiciary concern not only those standing before the Courts, but affect the broader issues of separation of powers, democracy and the rule of law.

115. Taking this into consideration, the Commission has at various times reiterated the need by States to respect the independence and impartiality of the Courts. **Principle 4(f)** of the **Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa** states: *“There shall not be any inappropriate or unwarranted interference with the judicial process nor shall decisions by judicial bodies be subject to revision except through judicial review, or the mitigation or commutation of sentence by competent authorities, in accordance with the law.”* **Principle 5** of the same Principles further states that *“Judicial officers shall decide matters before them without any restrictions, improper influence, inducements, pressure, threats or interference, direct or indirect, from any quarter or for any reason.”* In its **Resolution on the Respect and the Strengthening of the Independence of the Judiciary**, the Commission called upon African countries to *“refrain from taking any action which may threaten directly or indirectly the independence and the security of judges and magistrates.”*<sup>37</sup>

116. The Respondent State argues that the presence of the Security Agencies was necessitated by information that upon their release on bail, the Victims were to escape the course of justice and join an armed rebellion. The Respondent State is no doubt aware that on an application for bail, the correct approach is to adduce such evidence before the Court to ensure an informed determination as opposed to cordoning off the Court prior to the start of the proceedings.

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<sup>37</sup> ACHPR/Res.21 (XXI) 96: Resolution on the Respect and the Strengthening of the Independence of the Judiciary

117. The Respondent State further avers that the grant of bail by the High Court to the Victims is proof that the siege did not affect the independence of the judiciary. The fact that the Judiciary refused to be intimidated cannot be used as a defence by the State. What is of concern here to the Commission is the intention of the Respondent State through the deployment of security forces, as opposed to the result achieved by such actions.
118. The Commission notes the information contained in Constitutional Petition No.18 of 2005 referred to in the Complainants' submission that the security forces entered the criminal registry and cells and interrupted the processing of the bail order of the Victims. The Commission further notes that the head of the Judiciary was not consulted prior to the deployment. While the State has the duty and right to ensure national security, the current circumstances do not point to a *bona fide* security concern.
119. The Commission finds that the actions of the security forces are not reflective of their avowed aim of protecting national security, but rather the aim was to ensure the continued detention of the Victims through the intimidation of the judiciary. The manner in which the security forces behaved constituted a threat to the independence of the Judiciary and was calculated to induce fear in the judicial personnel, by reminding them of the reach and might of the State.
120. The Commission notes that under the principle of separation of powers, the assessment of the security situation in the Courtroom falls under the responsibility of the presiding Judge. Accordingly, if there were security concerns on the possibility of the Victims escaping from the Courtroom, the presiding Judge would be the one to request additional security, or at the very least should have been consulted before the deployment of the security forces. In the absence of this, the actions of the security forces amount to intimidation of the Judiciary.
121. For these reasons, the Commission finds that the deployment of the armed men in the premises of the Court aimed at interfering with the independence and impartiality of the Court, thereby violating the right of the Victims' to a fair trial under Article 7(1) of the Charter.

➤ **Article 7(1)(b) and (d)**

122. The Complainants further submit that charging the Victims with two different set of offences before both the High Court and the General Court Martial on the same sets of facts contravenes the right to a fair trial and to a fair hearing. The Complainants refer to Articles 28(1) and 44(c) of the Ugandan Constitution. Article 28(1) of the Ugandan Constitution states: "In the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law." Article 44(c) of the Ugandan Constitution states: "Notwithstanding anything in this Constitution, there shall be no derogation from the enjoyment of the following rights

and freedoms - the right to fair hearing.” This argument is rejected by the Respondent State who submits that trials by military courts do not per se constitute a violation of the right to be tried by a competent organ. To support this affirmation, the Respondent State refers to *Civil Liberties Organisation and Others v. Nigeria* where the Commission held that that a military tribunal per se is not offensive to the rights in the Charter, nor does it imply an unfair or unjust process.<sup>38</sup> The Respondent State further contends that the trial of the Complainants by the military courts is not in violation of their right to fair trial, as it is provided for under Ugandan law.

123. The question before the Commission is thus whether the trial of the Victims before the military courts was in violation of the fair trial rights under Article 7(1)(b) of the Charter?
124. The Commission first finds it necessary to distinguish the Communication referred to by the Respondent State, *Civil Liberties Organisation and Others v. Nigeria*,<sup>39</sup> with the present one. In this Communication the civilian was part of a common conspiracy together with members of the military to overthrow the Nigerian Military Government. Five of those brought before the military court were part of the military, with only one civilian. The Commission found it was reasonable that he be charged with his military co-accused in the same judicial process.<sup>40</sup> It is important to note the circumstances present in this particular Communication. The Commission was here dealing with events occurring under a military regime where the authority of the executive and the legislature had been subsumed under military rule. The Commission was, in other words, limited by the circumstances in the state. What the Commission attempted to achieve is the durability and application of the norms prescribed by the Charter, even under a military system.<sup>41</sup> The situation in this case recalls the affirmation of the Human Rights Committee that military tribunals may only try civilians in extraordinary, objectively determined and narrowly defined circumstances such as cases where fair, independent and impartial civilian courts are unavailable.<sup>42</sup>
125. The current case has stronger similarities to *Marcel Wetsh'okonda Koso and Others v Democratic Republic of Congo* and *Law Office of Ghazi Suleiman v. Sudan*, where the Commission found that the fact that civilians and soldiers accused of a civilian offence in this instance the theft of drums of diesel were tried by a military court presided over by military officers was a flagrant violation of the above-mentioned requirements of good justice.<sup>43</sup> In *Law Office of Ghazi Suleiman v. Sudan*, the

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<sup>38</sup> Communication 218/98: Civil Liberties Organisation, Legal Defence Centre and Assistance Project v Nigeria (2001) ACHPR para 44

<sup>39</sup> *Ibid*

<sup>40</sup> *Id*, para 25

<sup>41</sup> *Id*, para 26

<sup>42</sup> General Comment 13: “Article 14 (Administration of Justice) Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law,” Human Rights Committee (1984) para 4

<sup>43</sup> Communication 281/2003: Marcel Wetsh'okonda Koso and Others v Democratic Republic of Congo (2008) ACHPR para 86

Commission recalled the general stand of the African Commission on the question of civilians being tried by military courts:

*“In its Resolution on the right to a fair trial and legal aid in Africa, during the adoption of the Dakar Declaration and Recommendations, the African Commission noted that: ‘In many African countries, military courts or specialised criminal courts exist side by side with ordinary courts to hear and determine offences of a purely military nature committed by military staff. In carrying out this responsibility, military courts should respect the norms of a fair trial. They should in no case try civilians. Likewise, military courts should not deal with offences which are under the purview of ordinary courts.’<sup>44</sup>*

126. The Commission would also like to recall **Principle G(c)** of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa: *“Military courts should not in any circumstances whatsoever have jurisdiction over civilians.”* Civilians having neither military duties nor functions cannot be tried before military courts. The trial of civilians by a military tribunal violates due process and fair trial rights, in particular the individual’s right to a hearing by a competent, independent and impartial tribunal.<sup>45</sup>
127. The Respondent State further argues that such trial is not in violation of Article 7 of the Charter, as it is provided for in Ugandan law. The Commission would like to recall its arguments made in relation to Article 6 in this Communication: the mere fact that a law has been voted by the competent organ in the State does not provide a blanket approval of the law regardless of its effect. Domestic laws must be consistent with the Charter and with States Parties’ international obligations.<sup>46</sup>
128. In the current case, both Victims are civilians in a State where the remedy of civilian courts are available. Among the twenty (20) others arrested with the Victims, all were civilians, bar one retired Colonel who should therefore be considered as a civilian and a Captain. The Commission therefore fails to see any compelling reason for their trial before the General Court Martial.
129. The Commission finds that the trial of the Victims before the General Court Martial infringed their right to be heard by a competent, independent and impartial court under Article 7(1)(b) and (d).

➤ **Article 7(1)(c)**

130. The Complainants further aver that the General Court Martial lacked the required jurisdiction to try the Victims for the offence of terrorism and the unlawful possession of firearms. The Commission finds that the lack of *ratione personae* jurisdiction noted above with regards to the trial of the Victims is a fatal mistake to the prosecution of the case before the General Court Martial. It is immaterial whether

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<sup>44</sup> Communication 222/98, 229/99: Law Office of Ghazi Suleiman v. Sudan (2003) ACHPR para 65

<sup>45</sup> Cantoral Benavides v. Peru (2000) IACtHR (Series C No. 69), para. 112

<sup>46</sup> Communication 275/03: Article 19 v Eritrea (2007) ACHPR paras 91,92.

the charges could have validly been brought before the General Court Martial with respect to military staff, the General Court Martial is incompetent to try the Victims, independently of the charges.

131. The Complainants further aver that the Victims were on several occasions denied access to their lawyers to prepare their defence. The African Commission in several previous decisions has set out the principle that where allegations of human rights violations go uncontested by the Government concerned, the Commission must decide on the facts provided by the Complainant and treat those facts as given.<sup>47</sup>
132. Legal representation is regarded as the best means of legal defence against infringements of human rights and fundamental freedoms. This is recognised in various instruments adopted by the Commission. **Principle N(1)** of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa provides that, “The accused has the right to communicate with counsel.” **Principle 14(c)** of the Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa provides that: “Pre-trial detainees shall have regular and confidential access to lawyers or other legal service providers.”
133. The denial of access to counsel by the Respondent State is a serious violation of the right to defence, opening the door to procedural irregularities and prejudicing the defence of the Victims. The Commission holds that there has been a violation of Article 7(1)(c) of the Charter, the right to be defended by counsel.
134. The Complainants further aver that the lawyers of the Victims were violently beaten while at the High Court and this fact being undisputed is accepted as true by the Commission. The Commission notes that States have the obligation to ensure that lawyers are able to carry out their profession freely, independently and without fear of bodily or mental harm.<sup>48</sup> Where lawyers are intimidated, this has a chilling effect on their ability to defend their clients. This in turn violates the right to defence of the Victim. In view of the foregoing, the Commission finds a violation of the right to defence under Article 7(1)(c) of the Charter.
135. More than a violation of the right to defence, the Commission finds that the beating of a lawyer in court while he is undertaking professional duties, is a severe threat to the rule of law. It is now widely accepted that for the rule of law to flourish, judicial independence is necessary. Not only must judges be allowed to decide cases without interference, every judicial actor should be allowed to freely fulfil his role. An independent lawyer allows an impartial judge to reach a reasoned and fair decision in view of the law and facts. The physical assault of a lawyer in the premises of the court is an impermissible attack on the independence of the judiciary and the rule of law in the State.

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<sup>47</sup> Communication No. 206/97: Centre For Free Speech v. Nigeria, (1999) ACHPR, para 17. *See also*, Communications Nos. 59/91, 60/91, 64/91, 87/93 and 101/93

<sup>48</sup> Principle I(b) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa

**(iv) Violation of Article 26**

136. The Complainants mention in their Merits Submission a violation of Article 26 of the Charter, in conjunction with Article 7. Article 26 of the Charter states: “States Parties to the present Charter shall have the duty to guarantee the independence of the Courts.” Article 26 of the Charter provides for the independence and impartiality of courts necessary to give effect to Article 7 of the Charter.

137. In *Zimbabwe Lawyers for Human Rights and Institute for Human Rights and Development in Africa (on behalf of Andrew Barclay Meldrum) v. Zimbabwe*, the Commission held as follows:

*“It is impossible to ensure the rule of law, upon which human rights depend, without guaranteeing that Courts and tribunals resolve disputes both of a criminal and civil character free of any form of pressure or interference. The alternative to the rule of law is the rule of power, which is typically arbitrary, self-interested and subject to influences which may have nothing to do with the applicable law or the factual merits of the dispute. (...) It is a vital requirement in a State governed by law that court decisions be respected by the State, as well as individuals. The Courts need the trust of the people in order to maintain their authority and legitimacy. The credibility of the Courts must not be weakened by the perception that courts can be influenced by any external pressure.”<sup>49</sup>*

138. By refusing to comply with the Bail Order and the Constitutional Declarations issued by the Courts and by invading the High Court to prevent the release of the Victims, the Respondent State undermined the independence of the Courts. This is a violation of Article 26 of the African Charter.

**139. In view of the above, the Commission:**

- i. Does not find violation of Article 5 of the African Charter;
- ii. Finds violations of Article 6, Article 7(1)(b), (c), (d) and Article 26 of the Charter;
- iii. Hereby orders the Government of Uganda to pay adequate compensation to the Victims for the violations of Article 6, Article 7(1)(b), (c), (d) and Article 26 of the Charter. In assessing the manner and mode of payment of compensation, the Government of Uganda shall be guided by international norms and practices relating to payment of compensatory damages. The Commission avails its good offices to facilitate the implementation of this ruling;
- iv. Further directs to the Government of Uganda to determine the whereabouts of Mr. Samson Agupio, confirm that Mr. Agupio was released from detention

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<sup>49</sup> Communication 294/04: *Zimbabwe Lawyers for Human Rights and Institute for Human Rights and Development in Africa (on behalf of Andrew Barclay Meldrum) v. Zimbabwe* (2009) ACHPR para 118-119.

following the *nolle prosequi* entered by the Director of Prosecutions and inform the Commission accordingly;

- v. Directs the Government of Uganda to ensure that the provisions of the Uganda Peoples' Defence Forces Act No. 7 of 2005, through which the Victims who are civilians were charged in the General Court Martial, is revised to prohibit the trial of civilians before military courts;
- vi. Calls on the Government of Uganda to train its military personnel and law enforcement officials on human rights principles, including the African Charter, the Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial detention in Africa, the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, the Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa, among others;
- vii. Requests the Government of Uganda to inform the Commission within one hundred and eighty (180) days of being notified of this decision, the measures taken to implement the present decision in accordance with Rule 112(2) of the Rules of Procedure of the Commission.

**Done in Dakar, Senegal, at the 22<sup>nd</sup> Extra-Ordinary Session of the African Commission on Human and Peoples' Rights held from 29 July to 07 August 2017**