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Communication 704/18

**Berhane Abrehe Kidane (Represented
by Solomon Weldekirstos and Eritrean
Law Society)**

v

The State of Eritrea

*Adopted by the
African Commission on Human and Peoples' Rights
During the 78th Ordinary Session done virtually from 23 February to 08 March 2024.*


.....
Hon. Commissioner Rémy Ngoy Lumbu
Chairperson to the African Commission
on Human and Peoples' Rights


.....
Ms. Abiola Idowu-Ojo
Executive Secretary to the African
Commission on Human and Peoples' Rights

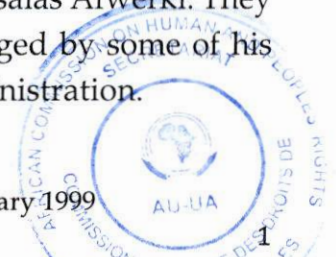


Communication 704/18 – Berhane Abrehe Kidane (Represented by Solomon Weldekirstos and Eritrean Law Society) v The State of Eritrea

Summary of Complaint:

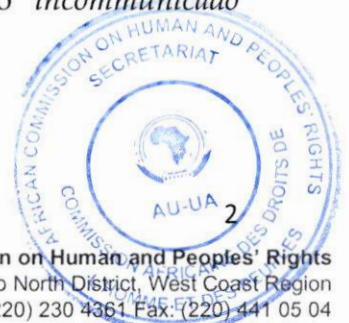
1. The Secretariat of the African Commission on Human and Peoples' Rights (the Secretariat) received a complaint on 12 October 2018 from Solomon H. Welsdekirstos (the First Complainant) and the Eritrean Law Society (the Second Complainant) jointly submitted on behalf of Berhane Abrehe Kidane (the Victim). The First Complainant is the nephew of the Victim and both Complainants are based in the United States of America.
2. The Complaint is submitted against the State of Eritrea (Eritrea/ the Respondent State), a State Party to the African Charter on Human and Peoples' Rights (the African Charter).¹
3. The Complainants aver that the Victim is a 73-year-old citizen of the Respondent State and the former Minister of International Development and Finance of the same State. They note that he had a long history of involvement in the struggle for the liberation of Eritrea from 1963 and 1975 when he joined the Eritrean Liberation Front (ELF) and the Eritrean People's Liberation Front (EPLF) respectively, and following the liberation of Eritrea in 1991 up to 2012 served in various senior government positions.
4. The Complainants aver that since independence the Respondent State has been ruled by the Peoples' Front for Democracy and Justice (PFDJ), the successor to the EPLF, under the dominant leadership of incumbent President Isaias Afwerki. They claim that the President has, from time to time, been challenged by some of his colleagues and senior government officials regarding his administration.

¹ Eritrea ratified the African Charter on Human and Peoples' Rights on 14 January 1999





5. In that vein, they claim that the Victim in March 2012, in his capacity as Minister of International Development and Finance, made a formal proposal, to a meeting of the Cabinet of Ministers chaired by the President, highlighting the urgency and need to conduct a comprehensive evaluation on the workings of government as well future policy and governance frameworks. According to the Complainants, the proposal was a clear call for overhauling the political system in Eritrea, introducing a constitutional order based on the **adopted** but unimplemented Constitution of Eritrea, 1997 and the election of new political leadership.
6. The Complainants additionally aver that the Victim in his proposal indicated that the ministry which he headed was being deliberately undermined, in an effort, he believed, was orchestrated by the President. The Complainants aver that the President responded by summarily dismissing the Victim from his ministerial position in August 2012. They claim that since then, the Victim had been living as a civilian.
7. The Complainants aver that following his dismissal, the Victim wrote a book entitled *Eritrea Hageray (Eritrea My Country)*, published in the United States of America, which is critical of the President. The Complainants allege that the publication of this book, which *inter alia* blames the President for the political crisis in the Respondent State and calls on Eritreans to struggle peacefully for democratic change in Eritrea, is one of two major reasons for the Victim's illegal detention. The second being a pre-recorded internet audio message, released before the inauguration of the book, in which the Victim repeated the core themes of the book and invited the President for a televised debate.
8. They claim that on 17 September 2018, a few days after the book was published, the Victim was approached by security agents of the Respondent State and taken to an undisclosed location. They assert that the Victim's whereabouts remain unknown and that no official account has been given of his predicament. They claim that he has not been brought before a court of law, nor allowed to contact his family, a doctor, or lawyer of his choice. The Complainants submit, therefore, that the Victim has been unlawfully detained and subjected to *incommunicado* detention.





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9. The Complainants claim that the Victim has a poor medical history. They aver that the Victim underwent a liver transplant in 2010 and that he has to travel abroad regularly to receive specialised treatment related to the surgery. They claim that since 2014, he has experienced repeated and hostile obstacles in this respect, and by 2017 had been prohibited from international travel. They claim that he had been importing supplementary medicine at an exorbitant price, which had done little to improve his health.
10. The Complainants assert that the illegal detention took place amidst this precarious health situation and submit that his health must have deteriorated, presenting the danger of irreparable harm.
11. The Complainants submit that the Complaint complies with the requirements under Rule 93(2) of the Rules of Procedure of the African Commission, in that the name, nationality, full address and signature of the person or persons filing the Complaint are provided. The Complainants do not request anonymity and confirm that the Complaint has not been submitted to another international settlement proceeding.
12. The Complainants also submit that domestic remedies do not have to be exhausted in this case, as they do not exist, and are neither available, effective nor sufficient due to the political situation in the Respondent State.
13. The Complainants claim that the Victim's wife, referred to as Ms. Almaz Habtemariam, has also been detained *incommunicado* since January 2018. However, the Complainants do not include a full account of the alleged plight of the wife and accept that her case may be addressed in a separate Complaint.

Articles alleged to have been violated

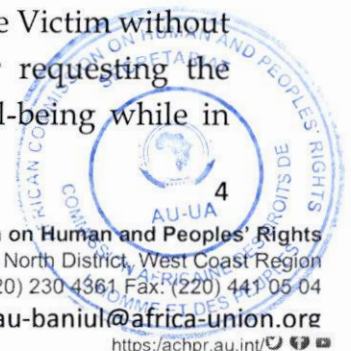
14. The Complainants submit that the Respondent State has violated Articles 1, 4, 5, 6, 7, 9(1), 12(1)(2), 13(1) and 16(1) of the African Charter on Human and Peoples' Rights.

Prayers



15. The Complainants request the African Commission on Human and Peoples' Rights (the African Commission) to:

- a. Be seized of this Complaint and find the Respondent State in violation of the Charter provisions above;
- b. Issue Provisional Measures pursuant to Rule 98 of the Rules of Procedure in order to prevent irreparable harm to the Victim on account of the possibility of imposition of extra-judicial execution or the risk of death due to deplorable health conditions or abysmal conditions of the prison, continued *incommunicado* detention, ongoing risk of torture and mistreatment or the lack of legal recourse faced by the Victim, as follows:
 - i. Immediate and continuing disclosure of the Victim's location and status;
 - ii. A guarantee of the Victim's safety and well-being while in custody;
 - iii. Regular and unhindered communication with and access to his family;
 - iv. Regular and unhindered access to medical treatment of the Victim's choice; and
 - v. Regular and unhindered access to legal representation of the Victim's choice.
- c. Urge the Respondent State to immediately release the Victim, which is critical since the specialised medical treatment which he needs is not readily available in the Respondent State, which can be administered through a bail bond, or provide compensation for the harm he has sustained as a result of the unlawful detention without trial.
- d. If the Respondent State opts to take further legal action against the Victim, instruct the Respondent State to do so in accordance with obligations of the latter emanating from the African Charter, including the duty to ensure the right of the Victim to a fair trial, the right to be represented by a lawyer of his choice and his right to bail, among others.
- e. If the Commission believes it cannot order the release of the Victim without prejudicing the merits of the Communication, consider requesting the Respondent State guarantee the Victim's safety and well-being while in





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custody, allow immediate, unhindered communication with and access to his family, a doctor and a lawyer of his choice.

Procedure

16. The Secretariat received the Complaint on 12 October 2018.
17. During its 63rd Ordinary Session held from 24 October to 13 November 2018, the Commission decided to be seized of the matter and issued provisional measures. Both parties were informed of its decision on 29 October 2018. By note verbale of same date, the Commission informed His Excellency Mr. Issais Afwerki, the President of the State of Eritrea, of the issuance of provisional measures.
18. On 27 December 2018, the Complainants' submissions on Admissibility were received at the Secretariat and subsequently transmitted by Note Verbale Ref: ACHPR/COMM/704/18/ERI/232/19 to the Respondent State on 8 March 2019 for its observations.
19. On 6 June 2019, following the 64th Ordinary Session of the Commission, the Secretariat informed both parties that the Respondent State had been granted an extension of 30 calendar days within which to file its late submissions on Admissibility, failing which the Commission would proceed to a default decision.
20. On 19 November 2019, following the 65th Ordinary Session of the Commission, the Secretariat informed both parties that the extended deadline for the Respondent State's submissions on Admissibility had expired and thus the Commission would proceed to a default decision.
21. Consideration of the Admissibility of the Communication was subsequently deferred until the 67th Ordinary Session.
22. The Commission considered on the Admissibility of the Communication during its 67th Ordinary session held from 13 November to 3 December 2020, and parties were informed on 20 January 2021.



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23. By email dated 19 March 2021, the Secretariat received the Complainants' submissions on Merit, receipt of which was acknowledged in correspondence dated 19 April 2021.
24. On 19 April 2021, the Commission transmitted the Complainant's submissions on Merit, to the Respondent State, notifying the State of the sixty (60) days it had, within which they were to make submissions on Merit.
25. The period of sixty (60) days lapsed on 18 June 2021. The Respondent State has neither made submissions on Merits, nor requested an extension to allow them to make the submissions, in accordance with the Rules of Procedure. The Commission therefore proceeds to decide on merit in light of the Respondent State's default.

Admissibility

The Complainants' submissions on Admissibility

26. The Complainants submit that the instant Communication satisfies all the requirements for Admissibility as outlined in Article 56 of the African Charter and present arguments in support of this submission.
27. The Complainants do not provide standalone arguments addressing sub-Articles 56(1), (2), (3), (4), (6) and (7) of the African Charter. However, the Complainants make several claims throughout their submissions, which speak to these sub-Articles and suggest that the Communication satisfies their requirements. Accordingly, the majority of the Complainants' submissions focus on sub-Article 56(5) of the African Charter.
28. In that regard, the Complainants admit that they have not exhausted or even attempted to exhaust domestic remedies but plead that the African Commission waive such requirement based on the doctrine of constructive exhaustion of domestic remedies. Specifically, the Complainants submit that domestic remedies do not exist, and are neither available, effective nor sufficient due to a climate of fear and impunity for human rights violations in Eritrea.



29. The Complainants claim that *incommunicado* detention, including that of the Victim, is among some of the most widespread human rights violations in Eritrea which are perpetrated by state agents without any guarantees for accountability. They claim that Eritrea is the only country in Africa without a working constitution and a functioning parliament thereby exacerbating the said climate. The Complainants refer to two reports by the United Nations (UN) Commission of Inquiry on Human Rights in Eritrea (COI) which they argue found that "...systemic, widespread and gross human rights violations have been and are being committed in Eritrea under the authority of the Government"². The Complainants argue that indeed, the African Commission was the first intergovernmental human rights monitoring body to spotlight the "worrying" situation of human rights in the Respondent State. Essentially, the Complainants submit that the Respondent State suffers from a complete breakdown of the rule of law and a climate of impunity.
30. From that assertion, the Complainants argue that this climate of fear and impunity makes it impossible to exhaust domestic remedies. The Complainants refer once again to the COI Reports which they claim found that "...without substantial institutional and legal reform ... there is no genuine prospect of the domestic judicial system [in Eritrea] holding perpetrators to account in a fair and transparent manner"³. They note that the African Commission has found functional and structural shortcomings as regards the operation of domestic remedies in three Communications against Eritrea, namely, *Liesbeth Zegveld and Mussie Ephrem v. Eritrea*⁴, *Article 19 v. Eritrea*⁵ and *Dawit Isaak v. Eritrea*⁶.
31. Additionally, the Complainants submit that the Supreme Court of British Columbia in *Araya v. Nevsun Resources Ltd*⁷ confirmed that domestic remedies in Eritrea are ineffective. The Complainants state that the case involved a lawsuit initiated by Eritreans who alleged that they suffered from human rights violations in Eritrea involving a Canadian mining company (Nevsun). The Complainants state further that the applicants, in that case, claimed that they were unable to go

² Complaint Addendum, para 13 citing COI, First Report, A/HRC/29/42 (2015) para 23 & COI, Second Report Summary, A/HRC/32/47 (2016), paras 59-95.

³ Complaint Addendum, para 25 citing Second COI Report, *supra* note 2, para 107.

⁴ **Communication 250/02** (2003) ACHPR.

⁵ **Communication 275/03** (2007) ACHPR.

⁶ **Communication 428/12** (2016) ACHPR.

⁷ 2016 BCSC 1856.





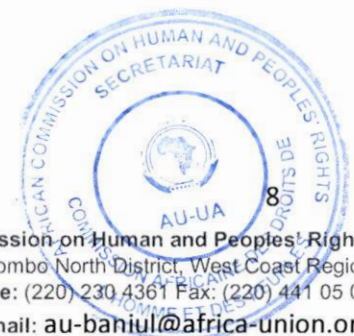
back to Eritrea to seek justice from the national courts due to the overall political situation in the country as well their fear of persecution.

32. The Complainants argue that the Court decided in the applicants' favour finding that there was sufficient evidence to conclude that the applicants would not receive a fair trial in Eritrea as any domestic judge deciding in their favour would place his or her career and personal safety in jeopardy⁸. The Complainants note that the above ruling was confirmed on appeal by the Court of Appeal for British Columbia in *Araya v. Nevsun Resources Ltd*⁹. The Complainants also note that the said rulings were mostly based on expert testimonies provided by two former senior judges in Eritrea, both of whom are also members of the Eritrean Law Society, the Second Complainant in this case.
33. The Complainants refer to the findings of the European Court of Human Rights in *Akdivar and Others v. Turkey*¹⁰, and submit that the rule of exhaustion of local remedies is deemed inapplicable for a State whose authorities have remained passive in the face of widespread and systematic human rights violations. The Complainant concludes that in such cases, it is neither practical nor advisable to pursue domestic remedies.
34. The Complainants claim that ordinarily the victim or any other person based in Eritrea could have filed for a writ of *habeas corpus* in the High Court of Asmara, this being the place from which they allege the Victim was taken. They note that Articles 177 to 179 of the Transitional Civil Procedure Code of Eritrea allows for the filing of the said writ by any person in Eritrea. They argue, however, that due to the climate of fear and impunity, alleged above, no one would venture to file such an application due to safety concerns.
35. The Complainants claim that alternatively, as entities based abroad, they could have filed for a writ of *habeas corpus* in the High Court of Asmara by mailing the application via courier services, such as DHL. They note, however, that procedurally and as a matter of general practice, submission of any application to Eritrean Courts by an entity not based in Eritrea is not possible except such entity has legal representation in Eritrea. They argue again that due to the climate of fear

⁸ Id, para 284.

⁹ 2017 BCCA 401, paras 47 & 48.

¹⁰ (1996) ECHR (Application Nos. 99/1995/605/693) para 67.





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and impunity, appointing a legal representative in Eritrea, for the sole purpose of filing for the said writ places the safety of such person at risk.

36. The Complainants refer the Commission to the facts of *Dawit Isaak v. Eritrea* arguing that in the given case, the Complainants, entities based abroad, attempted to file for a writ of *habeas corpus* in the High Court of Asmara via DHL but that the application was ignored. To corroborate this claim, the Complainants attach to their Admissibility submission, the affidavit of Björn Tunbäck, a Swedish Journalist who claims to have assisted in the *Dawit Isaak* case. In his affidavit, the affiant also testifies that due to the climate of fear and impunity aforementioned "...there are no available domestic remedies for cases related to grave human rights abuses, such as the crime of *incommunicado* detention".

ANALYSIS OF THE COMMISSION ON ADMISSIBILITY

37. This Communication is submitted pursuant to Article 55 of the African Charter, and as such must fulfil the seven cumulative requirements prescribed under Article 56 of the African Charter. Whereas the Complainants claimed to have fulfilled all the said requirements, the Respondent State does not contest any submission despite the opportunity afforded it. Nevertheless, the Commission shall proceed to a decision on Admissibility based on the submissions of the Complainants and information at its disposal¹¹. The Commission will give due weight to the Complainants' allegations insofar as these have been adequately substantiated.

a. Identification of authors (Article 56(1) of the African Charter)

38. To begin, Article 56(1) of the African Charter requires Communications to 'indicate their authors'. In the instant case, Mr. Solomon H. Weldekirstos and the Eritrean Law Society, referenced earlier as the First and Second Complainants respectively, are duly identified as the authors with full name and contact details. Accordingly, the present Communication complies with Article 56(1) of the African Charter.

¹¹ **Communication 292/04** – *Institute for Human Rights and Development in Africa v. Republic of Angola* (2008) ACHPR, para 34.





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b. Compatibility with the African Charter and AU Constitutive Act (Article 56(2))

39. Article 56(2) of the African Charter provides that a 'Communication should be compatible with the African Charter and the Constitutive Act of the African Union'. Compatibility requires that the alleged violations must be submitted by a person competent to do so against a State Party to the African Charter (*ratione personae*); relating to rights guaranteed by the African Charter (*ratione materiae*); that occurred at a time when the African Charter was operational in the State Party (*ratione temporis*); and within the territory of the said State (*ratio loci*)¹².

40. From its reading, the Commission considers that the present Complaint reveals *prima facie* violations of specific adumbrated provisions of the African Charter occurring within the territorial sphere of the State of Eritrea, a State Party to the Charter, at a time when the African Charter was operational in the State. Accordingly, the Commission considers that the present Communication complies with Article 56(2) of the African Charter.

c. Disparaging or insulting language (Article 56 (3) of the African Charter

41. In accordance with Article 56(3) of the African Charter, the Commission considers that this Communication is not written in a disparaging nor insulting language.

d. News disseminated through mass media (Article 56(4)) of the African Charter

42. On Article 56(4) of the African Charter, the Commission considers that the allegations proffered herein are based on an affidavit from the First Complainant, a nephew of the Victim, as well various reports and case judgments. Accordingly, the Complainants have not relied exclusively on media sources and are thus in compliance with Article 56(4) of the African Charter.

e. Exhaustion of domestic remedies (Article 56(5)) of the African Charter

¹² **Communication 335/06 – Dabaloriohuwa Patriotic Front v. the Republic of South Africa (2013) ACHPR.**



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43. Article 56(5) of the African Charter requires that Communications be submitted after exhausting local remedies if any unless it is obvious that this procedure is unduly prolonged. In this regard, the Commission has expounded extensively on the exhaustion of domestic remedies rule, most prominently in the case of *Jawara v Gambia*, where the Commission held that domestic remedies must be available, effective and sufficient, establishing further that a domestic remedy is considered *available* if the Complainant can pursue it without impediment, *effective* if it offers a prospect of success, and *sufficient* if it is capable of redressing the complaint.¹³
44. In the present case, the Complainants have acknowledged that they have not exhausted or even attempted to exhaust local remedies but plead the African Commission waive such requirement based on the doctrine of constructive exhaustion of local remedies. Mostly, the Complainants have submitted that due to the widespread and systematic violations of human rights which occur with impunity in Eritrea, firstly, local remedies do not or cannot be said to exist and secondly, even if they exist, their exhaustion would be impractical and undesirable.
45. As earlier indicated, the Respondent State does not contest these submissions by the Complainants. Nevertheless, the Complainants, by invoking the exceptions to the exhaustion rule, must initially present a *prima facie* case that they have constructively exhausted domestic remedies in order to shift the onus onto the Respondent State.
46. As regards their first submission, the Commission is of the view that the Complainants fail to show how the alleged widespread and systematic violations in Eritrea affect the existence of domestic remedies. Considering that the existence or otherwise of domestic remedies is a legal and material fact that is readily observable, a general claim on this matter without substantiation cannot suffice. Notwithstanding the Complainants' doubts as to the functioning of the Eritrean Constitution, it provides for a tiered ordinary judicial system, consisting of the Supreme Court and Lower Courts, all of which, to the best of this Commission's knowledge, were operational at the time of the alleged *incommunicado* detention of the Victim. Indeed, by acknowledging that there was an option to file for a writ of *habeas corpus* in the High Court of Asmara, the Complainants effectively concede that domestic remedies exist in Eritrea. The Commission does not venture to claim

¹³ Communication 147/95 and 149/96, (2000) ACHPR, para 31.



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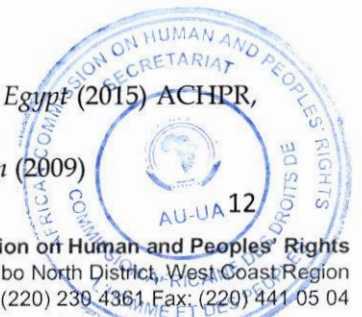
that these remedies would have resulted in the release of the Victim as contested by the Complainants and the findings of the COI Reports and the *Nevsun* case, paragraphs 26 to 27 *supra*. However, such claims speak more so to the accessibility and effectiveness of domestic remedies rather than their existence.

47. Regarding their second submission, this Commission is uncertain about the legal value of the claim that widespread and systematic violations of human rights render exhaustion of domestic remedies impractical or undesirable. This uncertainty stems from the dearth of legal meaning or value ascribed to the terms "widespread" and "systematic" for purposes of judicial adjudication. The Commission, for the most part, has not determined the nature of "widespread" and "systematic" violations and their particular implications for the exhaustion of domestic remedies.
48. The Complainants, however, elaborate on this submission by arguing that "the exhaustion rule is deemed inapplicable when there is practice consisting of a repetition of human rights violations and official tolerance by State authorities towards such practice"¹⁴. From that line of reasoning, the Commission gathers that the Complainants are attempting to argue that the present Complaint reveals "massive" and "serious" violations of human rights. While these terms have not been used explicitly, they are nevertheless the most prominent expressions in the Commission's lexicon that speak to the dispersal and periodicity of rights violations in a State. Indeed, whenever Complainants allege widespread and systematic violations, the Commission conducts an analysis to determine the scale and gravity of the said violations towards ascertaining whether they are "massive" and "serious" for purposes of waiving or invoking the exhaustion rule¹⁵.
49. As indicated above, towards determining whether violations are serious and massive, the Commission considers both the scale and nature or gravity of the alleged violations¹⁶. In terms of scale, a violation is massive, where a significant number of people are targeted within a specific area or entirety of a State Party. In terms of nature, a violation is serious, where it is the product of a consistent and

¹⁴ Complaint Addendum, para 30.

¹⁵ **Communication 467/14** – *Ahmed Ismael and 528 Others v. the Arab Republic of Egypt* (2015) ACHPR, para 170.

¹⁶ **Communication 279/03** – *Sudan Human Rights Organisation & Another v. Sudan* (2009)





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predetermined action or omission that impacts on a right or a combination of rights guaranteed under the African Charter.

50. In this respect, notwithstanding the reference to the systematic and widespread violations of the rights of so-called political dissenters and Eritrean citizens in general, the Complainants are representing only a single Victim and not all political dissenters or citizens of Eritrea. As such, the Commission is called to determine whether the *incommunicado* detention of Berhane Abrehe Kidane, alone, violates the African Charter. The broader context serves as evidentiary material for that purpose but is itself not up for adjudication. At this stage, therefore, the question is whether the alleged violations stemming from the *incommunicado* detention of the Victim meet the requisite gravity and scale threshold for exempting the Complainants from exhausting domestic remedies.

51. To that end, while the alleged ongoing *incommunicado* detention of the Victim may reveal grave or serious violations of human rights¹⁷ the Commission is not convinced that the scale of the violations amounts to that which renders the exhaustion of domestic remedies impractical or undesirable. In all cases where the Commission has found an exception to the exhaustion rule in this respect, the alleged violations affected a large number of victims. Indeed, in *Ahmed Ismael and 528 Others v. the Arab Republic of Egypt*, the Commission found that the alleged violations of the rights of over 500 Victims failed to meet the threshold for "massive" violations as the victims were all identifiable and their convictions could be individually appealed¹⁸. Accordingly, in the instant case, there is nothing to suggest that exhausting domestic would be impractical or undesirable. As such, this Commission considers that the instant Communication does not reveal "serious" and "massive" violations of human rights which would permit waiver of the exhaustion requirement.

52. Having found that the alleged violations in this case do not meet the requisite scale threshold for permitting an exemption to the exhaustion requirement, the next consideration is whether there are other factors which nevertheless impede access to domestic remedies and or render them ineffective. In this respect, the Commission notes that the Complainants' second submission can also be understood as invoking the principle of futility. This principle applies where a

¹⁷ See *Liesbeth Zegveld and Mussie Ephrem v. Eritrea*, *supra* note 4, para. 55.

¹⁸ *Supra* note 15, para. 173.



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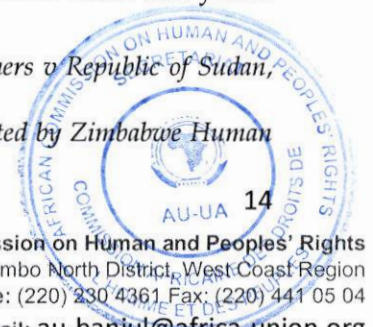
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complainant firmly establishes that the domestic court or authority will inevitably dismiss a claim or when a positive result is impossible due to past court rulings, state inaction, or danger in seeking out the remedy. Indeed, the Commission has previously found that complainants are not required to exhaust domestic remedies that objectively have no chance of success¹⁹. This principle speaks to the effectiveness or otherwise of a domestic remedy.

53. In this respect, the Complainants have argued that they could not file for a writ of *habeas corpus* on behalf of the Victim as doing so would require employing a legal representative based in Eritrea, an untenable option considering the risk to the personal safety and career of such person. In this same vein, they argue that the courts in Eritrea would ignore any *habeas corpus* application filed before them as doing otherwise would jeopardise the career and personal safety of the responsible judges.
54. On this claim, the Commission is reluctant to admit blanket proclamations that absolve Complainants from even attempting to exhaust domestic remedies. While this Commission takes note of the findings of the COI concerning the alleged climate of fear and impunity in Eritrea, the Commission is mindful that political instability though regrettable is not uncommon. Indeed, the Commission has declared numerous Communications inadmissible for failure to exhaust domestic remedies notwithstanding the political upheavals described therein²⁰. In this case, the Complainants are based outside Eritrea and could have sought the assistance of any number of legal representatives towards filing their writ. They have not firmly established that all the available legal representatives in Eritrea are reluctant to file such applications due to fear of persecution or that the Courts will always ignore such applications.
55. The Complainants referred the Commission to the three Communications against Eritrea, mentioned in paragraph 26 *supra*, as evidence of impediments created by the climate of fear and impunity. In those Communications, they argue that legal representatives in Eritrea refused to assist in filing for a writ of *habeas corpus* and that applications filed by the complainants were nevertheless ignored. Notably, two of the three Communications referenced were decided more than ten years

¹⁹ See for example Communication 368/09 (2013), *Abdel Hadi, Ali Radi & Others v Republic of Sudan*, particularly paras 46-49.

²⁰ *Supra* note 15; see also **Communication 340/07 - Nixon Nyikadzino (represented by Zimbabwe Human Rights NGO Forum) v Zimbabwe** (2014) ACHPR.





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ago, and the third Communication decided in 2016, was dismissed for re-litigating the legal and factual issues advanced in one of the two earlier Communications. Indeed, in *Article 19 v. Eritrea*, the Commission held that the Eritrean Constitution provides ample safeguards against persons who are arrested and detained without charge or trial including the right to petition the court for a writ of *Habeas Corpus*. Accordingly, the Commission held that it was incumbent on those Complainants to at least attempt to exhaust domestic remedies notwithstanding their claims that doing so would be futile²¹.

56. The above notwithstanding, the Commission still declared the above Communications admissible. The Commission reasoned that even though the arguments adduced by the Complainants were not sufficient, it could nevertheless infer from the circumstances surrounding the case that domestic remedies were ineffective²². The Commission held that cases alleging ongoing *incommunicado* detention engender the Respondent State's positive obligation to afford due process of law. Accordingly, the Commission declared that when a person is being held in detention and accused of committing a crime, it is the responsibility of the Member State, through its appropriate judicial bodies, to bring the person promptly before a competent court of law to enable him or her to be tried²³. Further, if it is shown that the State had ample notice, even if not within the context of domestic remedies, the State may still be said to have been properly informed and is expected to take appropriate steps to remedy the alleged violation²⁴.

57. This positive obligation arises because *incommunicado* detention 'constitutes a gross human rights violation that can lead to other violations such as torture or ill-treatment or interrogation without due process safeguards'. Additionally, by itself, 'prolonged *incommunicado* detention and/or solitary confinement could be held to be a form of cruel, inhuman or degrading punishment and treatment'²⁵. Accordingly, in *Article 19 v. Eritrea* specifically, the Commission found that holding victims *incommunicado* for over three years demonstrates a *prima facie* violation of due process of the law and in particular, Article 7 of the African Charter. It held further that, by not taking any action to remedy the situation more than twelve months after the Commission had been seized of the matter, the State had failed to

²¹ See *Article 19 v. Eritrea*, *supra* note 5, para 67.

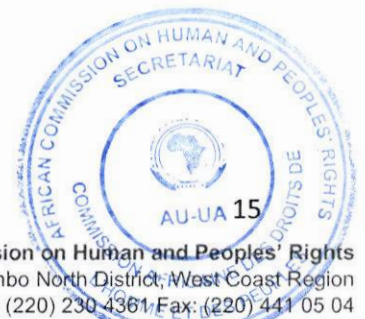
²² *Article 19 v. Eritrea*, *supra* note 5, para 74.

²³ *Id*, *supra* note 4, para 35.

²⁴ *Article 19 v. Eritrea*, *supra* note 5, para 77.

²⁵ See *Liesbeth Zegveld and Mussie Ephrem v. Eritrea*, *supra* note 4, para 55.

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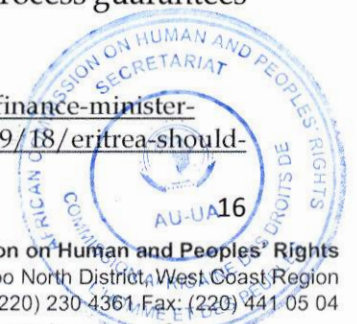
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demonstrate that domestic remedies were available and effective and thus the Complainants were discharged from the obligation to exhaust them.

58. Indeed, in those cases, the State of Eritrea admitted that it had detained the mentioned victims and that it had failed to bring them before a court of law due to various shortcomings in its criminal justice system. It admitted that the High Court of Asmara had only one chamber responsible for handling criminal matters and that the Court's calendar was highly congested as a result leading to significant delays in bringing detainees before a court of law. The admissions, therefore, aligned with the Commission's presumption that domestic remedies were not effective.
59. In the present Communication, at the time of submission of the Complaint, the victim had been allegedly detained *incommunicado* for two months notwithstanding the need for urgent medical attention. In this Commission's considered opinion, the State has had ample time and notice to at least charge the Victim or grant him access to legal representation, considering that he is a **high-profile** individual whose release and whereabouts have been requested by numerous internationally reputable organisations²⁶. Indeed, over a year has passed since the Commission seized this Communication and engaged the State, but the latter has not been forthcoming and has not complied with requests for assurances that the Victim's health needs would be managed while in custody.
60. Admittedly, the Respondent State in the present Communication, unlike previous Communications, has not acknowledged detaining the victim nor any shortcomings in its criminal justice system. While the Commission cannot conclusively find that the State has detained the Victim, the Complainants adduce reliable evidence establishing a *prima facie* case that state agents detained the Victim *incommunicado*. Nevertheless, this Commission is convinced that Eritrea's admissions in the previous Communications did not affect their outcome. The State's admissions merely confirmed the presumption that domestic remedies were ineffective, a presumption established by the failure to afford due process guarantees for alleged victims of *incommunicado* detention. Indeed, where a party raises non-exhaustion of local remedies because of a lack of due process guarantees

²⁶ <https://www.amnesty.org/en/latest/news/2018/09/eritrea-release-former-finance-minister-immediately-and-unconditionally/> ; <https://www.hrw.org/news/2019/09/18/eritrea-should-end-18-years-darkness>





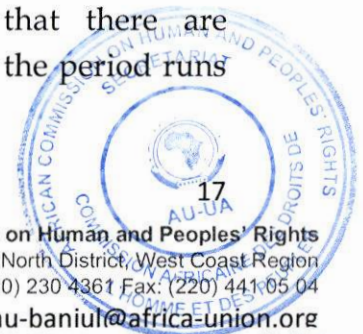
in the State, the burden of proof will shift to 'the State claiming non-exhaustion and it has an obligation to prove that domestic remedies remain to be exhausted and that they are effective'²⁷. By failing to engage the Commission on the allegations made by the Complainants, the Respondent State fails to discharge this onus. It would be an affront to justice to reward the State for its silence in this case while penalising it for its admissions in previous Communications.

61. As such, in the absence of any concrete steps on the part of the State to bring the victim to court, or to allow him access to his legal representatives two years after his arrest and detention, and more than one year after being seized of the matter, the African Commission is persuaded to conclude that domestic remedies, even if available, are not effective nor sufficient.
62. Accordingly, the Commission considers that the Complainants have constructively exhausted domestic remedies and are thus in compliance with Article 56(5) of the African Charter.

f. Submission within a reasonable period (Article 56(6) of the African Charter

63. Article 56(6) of the African Charter requires that a Communication must be submitted '...within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized of the matter'. The Commission recalls that the African Charter does not provide a fixed period for reasonableness and instead determines this on a case-by-case basis. In practice, the Commission adopts the international standard of a six-month delimitation within which a Communication may be reasonably submitted from the domestic level. The reasonableness of submission beyond this period is dependent on the circumstances of the case.
64. Ordinarily, the reasonableness period runs from the moment local remedies are exhausted. However, where remedies are unavailable, the period runs from the date on which the alleged violation(s) occurred or when the applicant became aware of the act or its effects. If the Complainant attempts to exhaust an apparently available remedy and only subsequently becomes aware that there are circumstances that render the remedy ineffective or insufficient, the period runs

²⁷ See *Liesbeth Zegveld and Mussie Ephrem v. Eritrea*, *supra* note 3, para 36.





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from the date the Complainant became aware or ought to have become aware of the said circumstances.

65. The Commission observes that the present case raises claims of ongoing *incommunicado* detention and thus concerns a “continuing situation”. This being “... a state of affairs which operates by continuous activities by or on the part of the State to render the applicants victims”²⁸. This term has often been used by the African Commission when considering the *ratione temporis* compatibility of an application. However, sister bodies such as the European Court have also considered it under their timeliness provisions. The case law concerning the scope of acts constituting continuing situations is by no means settled. However, there is consensus in international law regarding ongoing enforced disappearances or *incommunicado* detention as continuing violations²⁹.
66. As indicated in the preceding paragraphs, if domestic remedies are deemed ineffective, as in the present case, the reasonableness period starts to run the moment the Complainant became or ought to have become aware of these circumstances. Notably, if the act complained of is “instantaneous”, “does not extend in time”, the above rule applies. However, if the alleged act is “continuous”, “continues in time”, different rules apply. The European Court in this respect has held that if an alleged act “constitutes a continuing situation against which no domestic remedy is available, it is only when the situation ends that the six-month period starts to run”³⁰ but if the alleged act continues, the six-month rule is not applicable³¹.
67. The Commission recalls that principally, the timeliness provision is anchored upon the need for legal certainty since over time a fair examination of issues raised becomes problematic. However, with continuing situations, this problem does not arise since the act(s) complained of is ongoing. Essentially, “if there is a situation of ongoing breach, the time limit ... starts afresh each day and it is only once the situation ceases that the final period of six months will run to its end”³². This rule, therefore, serves the purpose of preventing perpetrators of ongoing violations from enjoying impunity for these acts.

²⁸ *Kevin Mcdaid and Others v. United Kingdom* (1996) ECHR (Application No. 25681/94).

²⁹ Inter-Am. Ct. H.R. (ser. C) No. 36, *Blake v Guatemala* at 1 (2 July 1996)

³⁰ *Sabri Güneş v. Turkey* (2012) ECHR (Application No. 27396/06) para 54.

³¹ *Oliari and Others v. Italy* (2015) ECHR (Application Nos. 18766/11 & 36030/11) paras 96-97.

³² *Varnava and Others v. Turkey* (2009) ECHR (Application Nos. 16064/90 et al) para 159.



68. In *Octavio Ruben Gonzalez Acosta v Paraguay*³³, despite a lapse of 24 years, the Inter-American Commission on Human Rights (IACHR) employed the doctrine of continuing violations and held that "...taking into account the date of the alleged violations, the possible existence of a situation of continuing violation of human rights, and the status of the various domestic remedies in Paraguay, the Commission finds that the petition under analysis was submitted within a reasonable period of time"³⁴.
69. Accordingly, considering that this case complains of a continuing situation – being the continued *incommunicado* detention of the Victim – the Commission holds that the present Communication was submitted within a reasonable period of time.
70. Indeed, even if the Commission disregarded the principle of continuing violations, the Complaint would still have been submitted within a reasonable period. The Complaint was submitted on 19 October 2018, two months after the alleged *incommunicado* detention of the Victim, which occurred on 17 September 2018. Clearly, submission within two months is well within the international standard of a six-month delimitation period. As such, the present Communication complies with Article 56(6) of the African Charter.

g. Other procedure of international settlement (Article 56(7) of the African Charter)

71. In accordance with Article 56(7) of the African Charter, the Communication, as duly indicated by the Complainants, has not been submitted to, or settled by another regional or international complaints mechanism.

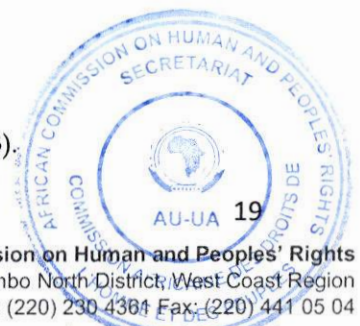
Decision of the Commission on Admissibility

72. In view of the above, the African declared this Communication Admissible in accordance with Article 56 of the African Charter;

CONSIDERATION OF THE MERITS

³³ Petition 12.358: *Octavio Ruben Gonzalez Acosta v Paraguay* (7 – 24 October 2003).

³⁴ *Id*, para 30.





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Complainant's submission on the Merits

Alleged violation of Articles 4 and 16(1) of the African Charter

73. The Complainants submitted that the Victim has been denied access to medical treatment. They submit that in 2010 the Victim underwent a liver transplant, which necessitates periodic specialized medical treatment. The victim can only access the treatment by traveling abroad. Without such medical treatment, the Victim's health can deteriorate quickly, leading to irreparable harm.
74. The Complainants further argue that the prison condition in Eritrea are abysmal, to the extent of making the right to enjoy the best attainable state of physical and mental health, more problematic.
75. Additionally, the complainants aver that the Victim's extended detention places him at risk of a deliberate act of extra-judicial execution. The basis for this submission, is that it is a common problem in the Respondent State.
76. The Complainants submit therefore, that the Respondent State has exposed the Victim to a great danger that can be a cause to a violation of his right to life, provided for in Article 4; and the highest attainable standard of physical health, as provided for in Article 16(1). They request a broad reading of the right to life as provided by the Commission in *Kazeem Aminu v Nigeria*³⁵ to include the state's obligation to protect against real or imminent death.

Alleged violation of Article 6 of the African Charter

77. The Complainants aver that the acts of 17 September 2018, of the Respondent State's security agents taking the Victim, and thereafter holding him in *incommunicado detention*, were in violation of the Victim's right to liberty.
78. Citing *Article 19 v The State of Eritrea*³⁶ wherein the Commission indicated that where a person is in continuous detention, without access to effective legal representation, or is unable to avail themselves of assistance, or is unable to

³⁵ *Kazeem Aminu v Nigeria*, Communication 205/97

³⁶ *Article 19 v The State of Eritrea*, Communication 275/03, para 81, 93, and 99, referring to the UN Human Rights Committee's decision in *Albert Womah Mukong v Cameroon*, Communication 458/1991, UN Doc. CCPR/C/51/458/1991 of 10 August 1994, para.



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challenge their detention, then their detention will be considered arbitrary, unlawful and therefore constitutes a breach of their right to liberty, the Complainants submit that the Complainant's detention, is in violation of his right to liberty as provided for in article 6 of the Charter.

Alleged violation of Article 7 of the African Charter

79. The Complainants submit that since the Victim's arrest on 17 September 2018, he has never been brought to Court. This, they submit is a violation of his right to receive a fair hearing, trial process, including the appropriate procedures to ensure equality before the Courts, as provided for in Article 7 of the African Charter.

Alleged violation of Article 9 of the African Charter

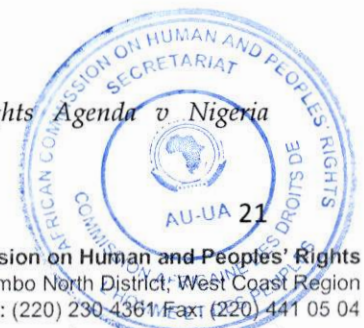
80. The Complainants allege that the Victim's illegal detention took place after the publication of his two-volume book, and the release of his pre-recorded message. The Respondent State's action, in detaining the Victim, the Complainants aver, is therefore intended to silence the Victim.

81. Citing *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria*³⁷ the Complainants submit that the Commission recognizes the right to freedom of expression both as a basic human right and as an element necessary for political consciousness, including participation in the public affairs of a given country. In this sense, the right is framed as a two-pronged concept, as it "comprises the right to receive information and to express one's opinion."³⁸

82. The Complainants aver further that, for the Victim, who is a former high-ranking government official, unlike ordinary citizens, this right is most critical. They premise this submission on the fact that the Victim's previous position in government gave him insider's knowledge about how the government of the Respondent State functions, which knowledge, they submit, is most vital in the formation of public opinion. In exercising such right, they aver, the Victim would be contributing to the political life of his country.

³⁷ *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria* Communications 105/93, 128/94, 130/94, 152/96 (1998)

³⁸ *Ibid.*





83. The Complainants submit therefore that the detention, due to the publication of his two-volume book, and the audio recorded message, is a violation of Article 9 of the African Charter.

Alleged violation of Article 13 of the African Charter

84. The Complainants submit that the political situation analysis of the government of the State of Eritrea, and the peaceful and non-violent call to all Eritrean citizens to take part in the conduct of public affairs, was an exercise of his right to participate in the government of his country, provided for in Article 13 of the African Charter.

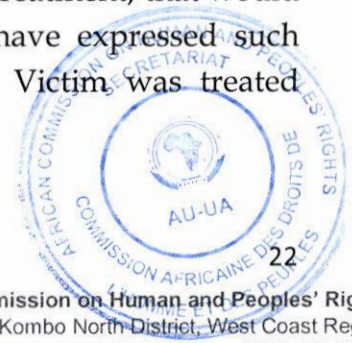
85. They submit that the Respondent State's reaction in detaining the Victim is therefore a violation of this right.

86. The Complainants aver that in a democratic order, there would be nothing wrong with openly calling for a resignation of a head of state, and encouraging the general population to organize themselves in a peaceful and non-violent way, to advance this cause.

87. The above, they aver, is what the Victim did. They aver that these acts are part and parcel of the exercise of fundamental rights and freedoms. They therefore submit that the Respondent State's detention of the Victim is in violation of his rights that allow him to participate freely in the government of his country, such as the right to freedom of expression, the right to freedom of peaceful assembly, and the right to participate in the public affairs of one's own country, provided for in Articles 9, 11 and 13 of the African Charter.

Alleged violation of Articles 2 and 3 of the African Charter

88. The Complainants submit that the Respondent State committed the other violations outlines above in response to the Victim's expression of his political opinion critical to the President of the Respondent State. The expression of his rights, the Complainants aver, made him susceptible to mistreatment, that would otherwise not be meted against others who would not have expressed such opinions. To this end, the Complainants allege that the Victim was treated differentially.





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89. The Complainants submit therefore that the above differential treatment was in violation of the Victim's right to not be discriminated against, as provided for in Article 2 of the African Charter, including his right to be treated equally under the law, provided for in Article 3 of the African Charter.

Alleged violation of Article 12 of the African Charter

90. The Complainants submit that the Victim has been precluded from traveling abroad.

91. They submit therefore, that the Respondent State in so doing, violated the Victim's right to travel abroad, which right is guaranteed in Article 12 of the African Charter

Alleged violation of Article 5 of the African Charter

92. The Complainants submit that the cumulative effect of the rights violations detailed above is anti-thesis to the idea of dignity inherent in the human person, and provided for in the African Charter. They further indicate that, for example, deprivation of access to the family members is degrading both to the Victim and his family members.

93. Citing the Commission's decision in *Liesbeth Zegveld and Mussie Ephrem v Eritrea*³⁹ the Complainants submit that the longer the Victim remains under *incommunicado detention*, the greater the risks are for him to be exposed to additional torturous acts of the Respondent State.

Alleged violation of Article 1 of the African Charter

94. Citing the Commission's decision in *Dawda Jawara v The Gambia* the Complainants submit further that a violation of any of the provisions contained in the African Charter is an automatic violation of Article 1 of the African Charter.

³⁹ *Liesbeth Zegveld and Mussie Ephrem v Eritrea*, Communication 250/02, para 55



95. The Complainants submit therefore that in violating the above detailed rights and freedoms, the Respondent state violated Article 1 of the African Charter.

Respondent State's submissions

96. As indicated above, the Respondent State did not submit its observations on the merits, despite **having been invited to do so, followed by reminders about the deadline and the extensions of time granted to the Respondent State. The Commission will therefore proceed to consider this Communication in absentia, in accordance with Article 108(1) of the 2010 Rules of Procedure.**

The Commission's decision on Merit

On the violation of the right to equality before the law and the right to not be discriminated against

97. Article 2 of the African Charter **provides that:**

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

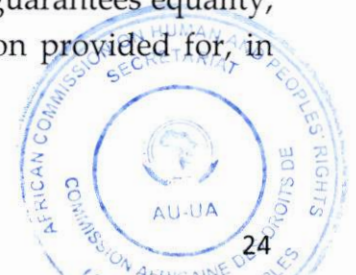
98. Article 3 of the African Charter **provides that:**

1. *Every individual shall be equal before the law.*
2. *Every individual shall be entitled to equal the law protection of the law.*

99. The non-discrimination principle generally ensures equal treatment of an individual or group of persons irrespective of their particular characteristics. **Equal protection of the law, on the other hand, requires that the law itself treats people equally, without discrimination, while the right to equality before the law implies equal treatment of all people by the courts and tribunals, without discrimination.**⁴⁰ Therefore, article 3 of the African Charter guarantees equality, which supplements the general **prohibition** on discrimination provided for, in Article 2.⁴¹

⁴⁰ *Isiaga v Tanzania (merits)* (2018) 2 AfCLR 218 233, paras. 84 e 85.

⁴¹ *Antonie Bissangou v Congo*, Communication 253/02, para 70.





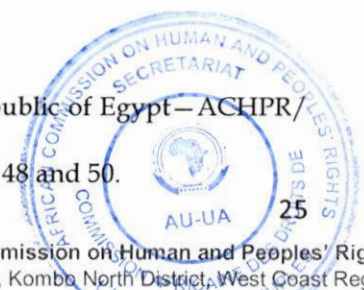
100. The Commission notes that there is no evidence that the law itself provides for differentiated protection between opponents or critics of the government and opponents or non-critics of the government, so the question of equal protection by the law does not arise here. In the case of equality before the law, i.e. before the courts, the Commission is of the opinion that the failure to address the alleged opponents' rights, amounts to discriminatory treatment, which constitutes a violation of the right to equality before the courts and tribunals.
101. With regard to discrimination, the Commission recalls the doctrine in *Equality Now*⁴², according to which the victim must always provide a comparator. If there is a plausible element of comparison, the Respondent State must provide credible grounds to justify the discrimination. The Commission also notes that when it comes to opponents, it has been its understanding that the element of comparison arises from the simple fact that there are people from the regime or supporters of the government who are free to express themselves without being victims of repression that is reserved for opponents.
102. The Commission recalls that it has referred to Article 2 in the broader context of the human rights situation in Africa, when it urged the Egyptian government to "put an end to the harassment, arbitrary arrest, detention and sentencing of journalists, human rights defendants, and individuals who express dissenting views regarding the Government's actions."⁴³
103. The Commission has established jurisprudence, in which political belief and opinion **have been** raised as a ground for protection against discrimination. Specifically, in *Sir Dawda Jawara v The Gambia*, the Commission held that by **suspending** the Constitutional Bill of Rights:

*the government therefore restricted the enjoyment of the rights guaranteed therein, and, by implication, the rights enshrined in the Charter.... The suspension of the Bill of Rights and consequently the application of the Charter was not only a violation of Article 1 but also a restriction on the enjoyment of the rights and freedoms enshrined in the Charter, thus violating Article 2 of the Charter as well.*⁴⁴

⁴²

⁴³ Resolution on the Deteriorating Human Rights Situation in the Arab Republic of Egypt – ACHPR/Res.297 (EXT.OS/XVII) 20, 28 February 2015, para 3.

⁴⁴ *Sir Dawda K. Jawara v Gambia (The)*, Communication 147/95-149/96, paras 48 and 50.





104. The Commission found, in this case therefore that banning political parties, as well as banning ministers of the former civilian government from taking part in political activity, was discriminatory.
105. Similarly, in *Liesbeth Zegoeld and Mussie Ephrem v Eritrea*, where a number of former government officials were openly critical of the Eritrean government, resulting in their arrest and detention, the Commission found that they had been '*detained on account of their political beliefs*' and found a violation of Article 2 of the **African Charter**.
106. In the present Communication, **the Commission observes that** the Complainants have illustrated that the Victim has been treated differentially, on the basis of his political opinion, and his critique of the country's leadership. **However**, criticisms of opposition parties by members of the ruling party, have never resulted in arrest, *incommunicado detention*, or being held for extended periods of time, without fair trial, and an opportunity to apply for **bail**.
107. **The Commission notes that, although the victim is from the ruling party, his criticisms constitute opposition to the way in which his party and its leadership have managed the country. In terms of form, the victim is not an opponent, but in material terms he is an internal opponent and therefore deserves the same protection as any other opponent. It should be noted that had the victim not criticised the government, he would not have been the subject of repression.**
108. To this extent, the Commission therefore finds that there has been violation of Articles 2 and 3 of the African Charter.

On the violations of the right to life and to physical and mental health

109. The complainants allege the violation of Articles 4 and 16(1) of the African Charter. Indeed, Article 4 of the African **Charter provides that** "*Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.*" **On the other hand**, Article 16 (1) of the African Charter provides that "*Every individual shall have the right to enjoy the best attainable state of physical and mental health.*"





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110. The Complainants claim that the Victim suffered restrictions in accessing healthcare even before he was detained. Further, they aver that the conditions of prisons in the Respondent state, are abysmal, exposing detainees to tremendous health risks, which are often life threatening.
111. The Commission considers the right to life the supreme right of every human being, and the foundation of all other human rights.⁴⁵ Without this right, the Commission has observed, all other rights lack meaning.⁴⁶ **This right** is violated when the Respondent State exposes individuals to “personal suffering and ...deprive him of his dignity.”⁴⁷
112. To ensure that other rights are meaningful, the Commission advances a broad interpretation of the right to life, that includes dignity, health, livelihood and to live in peace.⁴⁸ The UN Human Right Committee has similarly emphasized that “*the right to life includes the right of persons to be free from acts and omission or expected to cause their unnatural or premature death and to live in dignity.*”⁴⁹
113. The Commission recognizes that a violation of Article 4 can occur without resulting in death. The African Court on Human and Peoples’ Rights, in *African Commission on Human and Peoples’ Rights v Kenya* held that “*contrary to other human rights instruments, the Charter established the link between the right to life and the inviolable nature and integrity of the human being.*”⁵⁰ **Consequently, the** denial of essential necessities therefore, such as medical attention can constitute a violation of the right to life, as the state has the obligation to ensure ‘respect to life’.⁵¹

⁴⁵ Noah Kazingachire, John Chitsenga, Elias Chemvoura and Batanai Hadzisi (represented by Zimbabwe Human Rights NGO Forum) v Zimbabwe Communication 295/04,

⁴⁶ Sudan Human Rights Organisation and Centre for Housing Rights and Evictions (COHRE) v Sudan, Communications 279/03-296/05, para 146

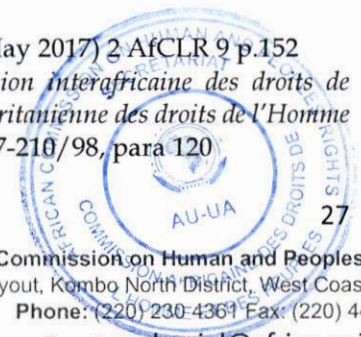
⁴⁷ John K Modise v Botswana, Communication 97/93, Decision on the Merits: Amicable settlement

⁴⁸ General Comment No. 3 on the Right to Life, Adopted During the 57th Ordinary Session of the African Commission on Human and Peoples’ Rights held from 4 to 18 November 2015 in Banjul, The Gambia, paras 6 and 41. **In the same vein, see Léon Mugesera c. Rwanda, ACtHPR, Case No. 012/2017, Judgment of 27 November 2020 (merits and reparations), §§ 100 - 107.**

⁴⁹ General Comment no 36 of the United Nations Human Rights Committee sur l’article 6 du Pacte international relatif aux droits civils et politiques”, para 3

⁵⁰ *African Commission on Human and Peoples’ Rights v Kenya* (merits) (26 May 2017) 2 AfCLR 9 p.152

⁵¹ *Malawi African Association, Amnesty International, Ms Sarr Diop, Union interafricaine des droits de l’Homme and RADDHO, Collectif des veuves et ayants-Droit, Association mauritanienne des droits de l’Homme v Mauritania*, Communications 54/91-61/91-96/93-98/93-164/97_196/97-210/98, para 120





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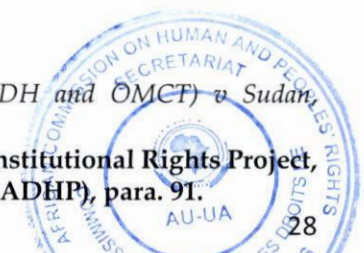
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114. The Commission acknowledges that the state's responsibility to protect individuals who are in custody is heightened. It includes a positive obligation to protect detained persons from emergencies that threaten their life. **This obligation extends to the provision of necessary conditions of a dignified life, namely the provision of adequate healthcare.**
115. **The Commission recalls that in *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v Sudan* it has affirmed that States have the obligation to "refrain from denying or limiting equal access for all persons, including detainees, to health services".** As noted earlier in the present decision, and in relation to Article 5 of the African Charter, the state's responsibility to protect health is heightened where individuals are detained.
116. In *Monim v Sudan*, where the detainee had high blood pressure, the Commission found that the medication he was provided with, in detention, was 'not adequate to guarantee his health,' and instead resulted in this being both life threatening and jeopardized his health.⁵² The Commission considered that the **Respondent State** in this circumstance violated **the victim's** right to health by failing to take the necessary measures to protect **his** health, especially given that he was in the custody of the State authorities.
117. Similarly, the Commission has found in *Media Rights Agenda, Constitutional Rights Project, Media Rights Agenda and Constitutional Rights Project v Nigeria*⁵³, that denying a detainee access to doctors while their health is deteriorating, is a violation of Article 16 of **the African Charter**.
118. In the present Communication, the Complainants have raised concerns regarding the victim's lack of access to medical treatment, particularly due to the Respondent state's restrictions on the Victim's travel abroad. The Complainants have demonstrated that the Respondent state has obstructed the Victim's ability to travel abroad since 2014, and that he has been completely precluded such travel since 2017, a year before the Victim was taken by security agents of the Respondent State.

⁵² *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v Sudan*, Communication 379/09, para 137.

⁵³ *Communication 105/93, 128/94, 130/94, 152/96 Media Rights Agenda, Constitutional Rights Project, Media Rights Agenda and Constitutional Rights Project/ Nigeria (198) (CADHP)*, para. 91.





119. The Complainants have also adequately demonstrated that the Victim's health, given his medical history and *incommunicado* detention, is a risk of rapid deterioration, if he does not receive adequate medical attention from qualified doctors. The medical attention required by the Victim, is specialized and in scarce supply, in the Respondent State.

120. **The Commission notes that the Complainants' allegations about the victim condition of detention are confirmed by the First Report of the UN Commission of Inquiry on Human Rights in Eritrea which describes the conditions of detention in the Respondent State prison as**

*extremely harsh, and the lack of access to sufficient food, water and medical care while in detention is found to debilitate prisoners and to lead to short- and long- term health complications, and sometimes death. The practice of keeping detainees in incommunicado detention and/or in isolation with total disregard for international standards is widespread. The mental and physical health of prisoners is thus unduly and unnecessarily affected.*⁵⁴

121. **The Commission considers that the conditions of the victim's detention, as described by the complainants and confirmed by the UN above-mentioned report, and the impossibility of pursuing appropriate treatment abroad, are likely to lead to a serious deterioration of the victim's state of health and, therefore, jeopardise his life.**

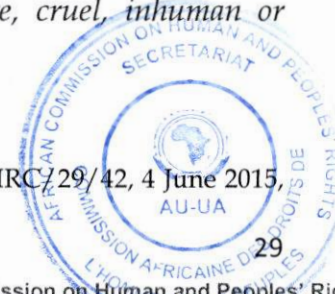
122. The Commission therefore finds based on the above, that there is a violation of Articles 4 and 16(1) of the African Charter.

On the allegation of torture, cruel, degrading and inhuman treatment

123. Article 5 of the African 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.

⁵⁴ First Report of the UN Commission of Inquiry on Human Rights in Eritrea, A/HRC/29/42, 4 June 2015, para. 73.





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124. The Commission notes from the onset that the present Communication does not raise any issues related to slavery and slave trade, and will therefore confine its analysis of Article 5 to torture, cruel, inhuman or degrading treatment or punishment.

On the alleged torture

125. The Commission has repeatedly held, is one of the most egregious and morally reprehensible human rights abuses.⁵⁵ Its absolute prohibition is therefore one of the most fundamental values of a democratic state.

126. **Adopting the definition of torture as provided for in Article 1 of the Convention of Torture, the Commission has acknowledged that:**

Torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.⁵⁶

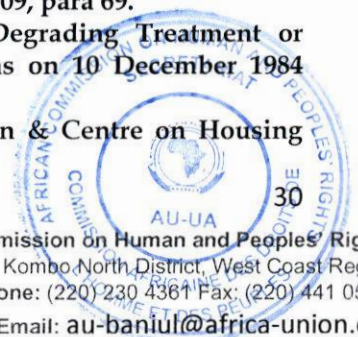
127. **In *Sudan Human Rights Organisation and Center for Housing Rights and Evictions v. Sudan*⁵⁷, the Commission defined torture as (i) severe physical or psychological pain or suffering inflicted at the instigation of or with the consent or acquiescence of state authorities; (ii) with a specific aim of obtaining information, punishing or intimidating the victim, or for any reason based on discrimination.**

128. The Commission recalls that the alleged violations must be analysed in the light of the time at which the complaint was submitted. In the present case, the Commission notes that the victim was detained on 17 September 2018 and the

⁵⁵ *Abdel Hadi, Ali Radi & Others v Republic of Sudan*, Communication 368/09, para 69.

⁵⁶ The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Adopted by the General Assembly of the United Nations on 10 December 1984 (resolution 39/46)

⁵⁷ Communication No. 279/03-296/05: *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan* (2009) CADHP, paras. 155 -157.





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complaint was submitted on 12 October 2018. In other words, the victim had been in detention for twenty-five (25) days at the time of seizure of the Commission. The analysis could be restricted to the twenty-five (25) days if the Respondent State had complied with the Provisional Measures ordered by the Commission. Therefore, the Commission considers that the detention lasted until the beginning of this 78th Ordinary Session, making it a total of five (5) years, five (5) months and eight (8) days.

129. The Commission notes that the Complainants have not presented any facts demonstrating that (i) severe physical or psychological pain or suffering was inflicted at the instigation of or with the consent or acquiescence of the state authorities. Nevertheless, the Commission considers that the detention for (5) years, five (5) months and eight (8) days in the conditions referred to above, naturally implies a high level of suffering for which the Respondent State is responsible.
130. The Commission considers that the duration of the detention referred to above, without communication with the outside world, without contact with the family and the lawyer, and without any judicial control, and considering the state of health and age of the victim, creates a framework of psychological pressure such that it is reasonable to consider that this may have caused severe psychological suffering to the victim. The first requirement of torture is therefore met.
131. With regard to the second requirement, the Commission considers that detention is normally aimed at ensuring that the victim is brought to justice to answer for the acts of which he is accused. In the CPP of the Requested State itself, even when detention is ordered by the judge, it is aimed at ensuring the detainee's presence in court; or for the protection and safety of any person or the public or the risk of continuing criminal activity or interfering with the investigation.⁵⁸
132. The Commission observes that, in the absence of any plausible motivation, it is natural to consider that the detention of the victim for a more than five (5) years by itself constitutes a kind of punishment, which implies fulfilment of the second requirement of torture. It is therefore concluded that the victim was subjected to torture in violation of Article 5 of the African Charter.

⁵⁸ Article 68 of the CCP.



On the alleged of cruel, inhuman or degrading treatment

133. **The Commission notes that torture, by its very nature, is inhuman treatment, due to the severity of the suffering and the objective pursued.** ⁵⁹ In *Civil Liberties Organisation v Nigeria*, the Commission stated that, '[w]hile being held in a military detention camp is not necessarily inhuman, there is the obvious danger that normal safeguards on the treatment of prisoners will be lacking.⁶⁰ In the same case, the Commission emphasized that "[b]eing deprived of the right to see one's family is a psychological trauma difficult to justify, and may constitute inhuman treatment. Deprivation of light, insufficient food and lack of access to medicine or medical care also constitute violations of Article 5."

134. Further, to the above, in *Abdel Hadi, Ali Radi & Others v Republic of Sudan*, the Commission states that

*Regarding the incommunicado detention, death threats, denial of access to medical care and adequate toilet facilities, the Commission observes that holding a person in detention under conditions that are not in keeping with his dignity and pose a threat to his health amounts to cruel, inhuman and degrading treatment or punishment."*⁶¹

135. In the present Communication, the Commission found above that the Victim has been held in *incommunicado detention* with no access to a lawyer, or appropriate health practitioners, despite his very serious health condition **and his age advanced age of 73. The Commission** therefore considers that this amounts to inhuman and degrading treatment.

136. **For these reasons, the Commission** therefore finds that Article 5 of the African Charter has been violated.

On the violation of the right to liberty

137. Article 6 of the African Charter provides that:

⁵⁹ *Curtis Francis Doebbler contra o Sudão*, Queixa 236/00, parágrafo 37.

⁶⁰ *Civil Liberties Organisation v Nigeria*, Communication 151/96, paras 26 and 27.

⁶¹ *Abdel Hadi, Ali Radi & Others v Republic of Sudan*, Communication 368/09, para 74.





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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 arbitrarily arrested or detained.

138. In accordance with the Commission Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa, both arrest and any subsequent detention that are not in accordance with the African Charter **are deemed to be arbitrary**⁶².
139. The Commission recognizes that the deprivation of the right to liberty and security often adversely and directly affects the enjoyment of other African Charter rights. In *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan*, the Commission specifically pointed to rights ranging from the right to family and private life, the right to freedom of assembly, association, and expression, as well as the right to movement, as rights that may be impacted by the restrictions of the right to liberty and security.⁶³
140. The Commission emphasises that, according to Article 6 of the African Charter and the guidelines referred to above, liberty is the norm⁶⁴ and that its deprivation can only occur on grounds and under conditions laid down by law. This means that the law must provide for the possibility of deprivation of liberty and that it must take place under the conditions and by the proper procedure before the competent authority. Under the law of the Respondent State⁶⁵, police officers may arrest the detainee, but they must bring him before a judge within 48 hours and inform him of his right to legal counsel.⁶⁶
141. The Commission notes that, in the present case, the victim was detained by security agents and placed in custody for fort-five25 days (when the case was referred to the Commission) without ever being brought before a judge and without a lawyer. The detention continues under the same conditions until the date of this decision, even after the Commission ordered the victim's release as a Provisional Measures. The Commission notes that, in any case,

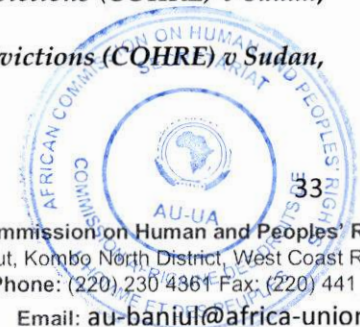
⁶² Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003 (M).

⁶³ *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan*, Communication 279/03-296/05, para 171.

⁶⁴ *Sudan Human Rights Organisation and Centre on Housing Rights and Evictions (COHRE) v Sudan*, Communication No. 279/03-296/05, para. 171.

⁶⁵ Article 33(1) do Code of Criminal Procedure (CCP).

⁶⁶ Article 60(1) of the CCP.





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incommunicado detention forty-five (25) days cannot be considered compatible with the requirements of lawful detention.

142. The Commission recalls that in *Sir Dawda K. Jawara v The Gambia*, it acknowledged *incommunicado detention* as arbitrary deprivation of liberty, and as a gross human right violation.⁶⁷ Furthermore, in *Liesbeth Zegveld and Mussie Ephrem v Eritrea*, the Commission observed that arrest and detention in an unknown location is contrary to Article 6.⁶⁸

143. For these reasons, the Commission finds a violation of Article 6 of the African Charter.

On the violation of the right to be heard and the right to a fair trial

144. Article 7 of the African Charter provides that "Every individual shall have the right to have his cause heard..."

145. The Commission recalls that in *Dino Noca v The Democratic Republic of Congo*, it has observed that the right to be heard requires 'unfettered access to a court having jurisdiction to hear his case'⁶⁹ and with sufficient powers to establish the violations and order reparations.⁷⁰

146. In the present case, the Complainants assert that the arrest of the victim on 17 September 2018, without subsequently being brought before a court. Thus, the issue is not the existence of judicial bodies competent to deal with alleged violations of the victims' rights, but the impossibility of accessing them in order to obtain justice.

147. The Commission notes that if a victim can access the courts and even not have their rights protected, the impossibility of accessing them because of *incommunicado detention* by the authorities of a State, as is the case of the victim in the instant Communication, constitutes the most primary form of violation of the right of persons to have their causes heard, in accordance with Article 7 of the African Charter.

⁶⁷ *Sir Dawda K. Jawara v Gambia (The)* Communication 147/95-149/96

⁶⁸ *Liesbeth Zegveld and Mussie Ephrem v Eritrea*, Communication 250/02, para 59.

⁶⁹ *Dino Noca v Democratic Republic of Congo* Communication 286/2004 para 190.

⁷⁰ *Zimbabwe Human Rights NGO Forum contra o Zimbabwe* Communication 245/02 para. 215.



On the violation of the right to freedom of expression

148. Article 9(2) of the African Charter provides that “Every individual shall have the right to express and disseminate his opinions within the law.”
149. For greater respect of freedom of expression, it is necessary to promote individual’s right to hold opinions, seek, receive and impart information and ideas without interference or restrictions of any kind.⁷¹
150. In *Kenneth Good v Botswana*⁷², the Commission noted that expression is limited to protect the rights or reputation of others, for national security, public order, health, or morals. Freedom of expression is therefore not absolute. **However**, in the 2002 *Declaration of Principles on Freedom of Expression in Africa* and expanded in the 2019 *Declaration of Principles on Freedom of Expression and Access to Information in Africa* made it clear that restrictions on freedom of expression “shall be provided by law, serve a legitimate interest and be necessary in a democratic society.”⁷³
151. In *Malawi African Association and Others v Mauritania* the Commission stated that ‘the expression ‘within the law’ must be interpreted in reference to international norms’.⁷⁴
152. Further to the above, the Commission in *Amnesty International and Others v Sudan* observed that freedom of expression is essential to the development of political consciousness and participation in the public affairs of one’s country.⁷⁵ A higher degree of tolerance as well as a higher threshold are therefore expected and

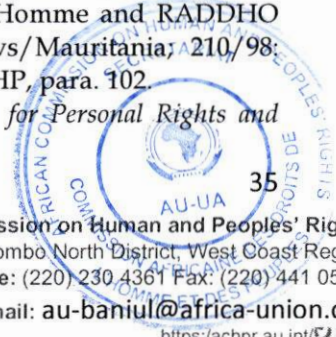
⁷¹ Declaration on Principles of Freedom of Expression in Africa, Resolution on the Adoption of the Declaration of Principles on Freedom of Expression in Africa, ACHPR/Res.62, 23 October 2002, preamble

⁷² **Communication 313/05: Kenneth Good v. Republic of Botswana (2010) CADHP, para. 187.**

⁷³ Declaration on Principles of Freedom of Expression in Africa, Resolution on the Adoption of the Declaration of Principles on Freedom of Expression in Africa, ACHPR/Res.62, 23 October 2002.

⁷⁴ Communications 54/91: *Malawi African Association vs/Mauritania*; 61/91: *Amnesty International vs/Mauritania*; 98/93: *Ms. Sarr Diop, Union Interafricaine des Droits de l’Homme and RADDHO vs/Mauritania*; 164/97 à 196/97: *Collectif des Veuves et Ayants-droit vs/Mauritania*; 210/98: *Association Mauritanienne des Droits de l’Homme vs/Mauritania (200) CADHP, para. 102.*

⁷⁵ *Amnesty International and Others v Sudan*; also cited in *Egyptian Initiative for Personal Rights and INTERIGHTS v Egypt*, Communication 323/06, para 246





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required when political speech is directed towards government and government officials.⁷⁶

153. In *Law Offices of Ghazi Suleiman v Sudan*, the Commission stated that the public expression of views about government, that contribute to political debate, warrants special protection as it adds special value to society.⁷⁷

154. **In the instant case, the Complainants submit that** the two-volume book published by the Victim, is purely political commentary which criticizes the political system, and particularly the president; and encouraging the general public to take active interest in the leadership of the country, and to organize themselves in a peaceful non-violent way, to advance this cause. The Complainants further argue that there is nothing in the books that has the potential to cause instability, or concern. The contents of the books are not disparaging, defamatory or inflammatory. The views expressed in the book are just critical comments that are expected from any civilian encouraging political consciousness and participation.

155. **The Commission notes that in the absence of a response from the Respondent State, it is forced to accept the complainants' allegations and consider that the victim's detention following the publication of her book, without any judicial process, constitutes a violation of her right to freedom of expression, provided for in Article 9 of the African Charter.**

On the right to travel abroad

156. Article 12 of the African Charter provides that:

1. *Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law.*
2. *Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality.*

⁷⁶ *Kenneth Good v Botswana*, Communication 313/05, para 198;

⁷⁷ *Law Offices of Ghazi Suleiman v Sudan*, Communication 228/99, para 52



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3. *Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the law of those countries and international conventions.*
4. *A non-national legally admitted in a territory of a State Party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law.*
5. *The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups.*

157. Article 12 sets out a broad range of rights encompassing the rights to freedom of movement and residence, the right to leave, asylum and prohibition against mass expulsion or expulsion without due process. It is an article that sets out a range of different rights but they have been interpreted as having a close relationship with each other.

158. In *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan*, the Commission held that freedom of movement generally asserts that a citizen of a state has the right to leave that state and return at any time.⁷⁸ The Commission interpreted the right as including the right to “travel to, reside in, and/or work in, any part of the State the citizen wishes, without interference from the State.

159. In *Sir Dawda Jawara v The Gambia*, the **Commission indicated** that freedom of movement includes the right to ingress and egress.⁷⁹ The Commission held, in this case, that restricting the travel outside the Gambia, of former government officials and parliamentarians violated freedom of movement provided for in Article 12 of the African Charter.

160. Similarly, in *Law offices of Ghazi Suleiman v Sudan* where Mr. Ghazi was threatened with arrest by security officials, if he traveled to Sinnar to give a lecture on human rights, the Commission found these threats to be in violation of Article 12 of the **African Charter**, as he was acting to promote and protect human rights in his country. Specifically, the Commission stated that the acts were disproportionate to the Victim’s work of advancing human rights.

⁷⁸ *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan*, Communication 279/03-296/05, para 187.

⁷⁹ *Sir Dawda K. Jawara v Gambia (The)*, Communication 147/95-149/96, para 70.





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161. **The Commission notes, however, that this is not an absolute right. It may be subject to restrictions laid down by law which are necessary for the protection of national security, public order, public health or public morality, in accordance with Article 12(2) of the African Charter.**
162. In the present communication, the **Respondent State's** actions of detaining the Victim, in response to an expression of his politically dissenting opinion, and limiting his movement in, and out of the country, which started even before his detention, **constitute a violation of their right to freedom of movement under Article 12(1) and (2) of the African Charter.**

On the violation of the right to participation in the government of one's country and other freedoms

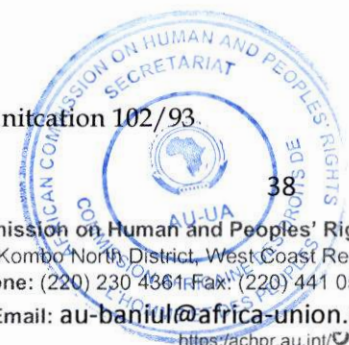
163. Article 13(1) of the African Charter provides **that** *"Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law."*
164. The content of **this provision** has been established in the Commission's jurisprudence in a number of Communications – *Modise v Botswana*,⁸⁰ *Dawda Jawara v Gambia*,⁸¹ *Constitutional Rights Project v Nigeria*⁸² and *Legal Resources Foundation v Zambia*⁸³.
165. In the above cited jurisprudence, it has been established that this right entails the right of citizens to directly or indirectly take part in the conduct of public affairs through electoral processes and have access to public services and property without discrimination of any kind.
166. In the present Communication, the Complainants aver that the Victim's political activism, expressed through authoring a book calling on Eritreans to take interest in their national politics, was the basis for his discrimination, **depriving him of his right to participate in the public life of her country, in accordance with Article 13(1) of the African Charter. However, the complainants do not demonstrate to what extent the victim was participating in the government of**

⁸⁰ *Modise v Botswana* 97/93 AR

⁸¹ *Jawara v The Gambia* (n 68 above)

⁸² *Constitutional Rights Project and Civil Liberties Organisation v Nigeria* Communication 102/93.

⁸³ *Legal Resources Foundation v Zambia* Communication 211/98.





his country through the publication of the book and how her detention jeopardised that participation.

167. Based on the failure to substantiate the alleged violation by the Complainants, the Commission considers that the allegation of a violation of Article 13(1) of the Charter has not been established.

On violation of Article 1 of the African Charter

168. Article 1 of the African Charter, provides that "*Member States of the Organisation of African Unity, parties to the present Charter, recognise the rights, duties and freedoms set forth in this Charter and undertake to adopt legislative or other measures to give effect to them.*"

169. This provision implies that States must give effect to the provisions of the African Charter. By ratifying the African Charter, the State of Eritrea undertook to ensure respect for the rights protected by the African Charter by taking the necessary measures to prevent violations and by remedying any violations. **Consequently**, by violating **Articles 1, 2, 3, 4, 5, 6, 7, 9, 12(1)(2), 13(1) and 16(1)** of the African Charter, the **Respondent** State has also violated Article 1 of the African Charter.

Complainants' Submissions on Reparations

170. The Complainant have submitted that as the Respondent State is in violation of the African Charter provisions addressed in the Communication, and accordingly request that the Commission urge the State immediately release the Victim and/or provide compensation for the harm he has sustained as a result of the unlawful detention without trial.

171. The Complainants further submit that in the event that the Respondent State opts to take further legal action against the Victim, that the Commission instruct the Respondent State to do so in accordance with obligations of the latter emanating from the African Charter.

172. In addition to this, the Complainants submit that the denial of family contact and preventing the Victim's family from knowing his whereabouts amounts to inhumane treatment of the Victim in contravention of article 5 of the African





Charter. In light of this, they request that the Victim be accorded access to his family.

173. Finally, the Complainants request that bail considerations be upheld in the event that the Respondent State decides to pursue lawful action against the Victim.

The Commission's Observations on the Request for Remedies

174. The Commission reiterates its position that the duty to make reparation arises from Article 1 of the African Charter whenever a State party fails to fulfil its obligations and that failure entails the violation of human rights⁸⁴. The Commission notes that in the present case, a violation of Articles 1, 2, 4, 5, 6, 7, 9(2), 12(1)(2), 13(1) and 16(1) of the African Charter has been established. The Commission also notes that in addition to the existence of a violation, the award of reparations requires that there be damage, proven by the complainant, and that this damage has resulted from the violation committed (causal link).
175. The Commission notes that reparations can take different forms. In *El-Sharkawi v. Egypt*, the Commission, relying on the Basic Principles and Guidelines on the Right to a Remedy for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2005), stated that

*Full and effective reparations include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. The Guidelines also state that compensation should be provided for any economically assessable injury, such as physical or mental injury; lost opportunities, including employment, education and social benefits; property damage and loss of income, including loss of earning potential; pain and suffering; and the costs of legal assistance or specialized legal assistance, medical and psychological and social services.*⁸⁵

176. The Guidelines on Conditions of Arrest, Custody and Pre-trial Detention in Africa (Luanda Guidelines) state that:

⁸⁴ Communication 318/06 – Open Society Justice Initiative v. Côte d'Ivoire (2015) ACHPR, para 198.

⁸⁵ Communication 396/11 - El-Sharkawi v. Republic of Egypt, § 344.





Any person who has been the victim of unlawful or arbitrary arrest or detention, or of torture and ill-treatment in police custody or pre-trial detention, shall have the right to seek and obtain effective redress for the violation of his or her rights. This right extends to the immediate family or dependants of the direct victim. Remedies include the following:

a. Restitution to restore the victim to the situation that would have existed if the violation had not occurred.

b. Compensation, including any quantifiable damages resulting from the violation of the right and any physical or mental harm (such as physical or mental injury, pain, suffering and emotional distress, loss of opportunity, including education, damage to property and loss of actual or potential income, injury to reputation or dignity, and costs of legal or specialist assistance, medicines, medical services and the like), as well as legal costs, and psychological and social services).

c. Rehabilitation, including medical and psychological care as well as legal and social services.

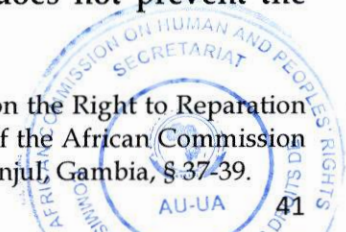
d. Satisfaction and guarantees of non-repetition.⁸⁶

177. In this case, the Complainants are requesting compensation in general in favour of the victim. Although the complainants do not refer specifically to it, the Commission considers that the compensation in question includes material and moral damages, the conditions of which are analysed below.

a) Compensation for material and moral damages

178. The Commission notes that the Complainant seeks monetary compensation for material and non-material damages. In order to award compensation, in addition to the existence of the violation, it is necessary to establish the victims involved, the damage suffered and its link to the violation found. With regard to material damage, the Complainants does not present any material damage he suffered and the proof thereof. In these circumstances, the claim for compensation for material damage suffered is null and void, and there is no point in analysing the other conditions. However, this does not prevent the

⁸⁶ Luanda Guidelines, § 38. In the same vein, see General Comment No. 4 on the Right to Reparation for Victims of Torture in Africa, adopted at the 21st Extraordinary Session of the African Commission on Human and Peoples' Rights held from 23 February to 4 March 2017 in Banjul, Gambia, § 37-39.





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victim from claiming material damages before the domestic courts. The other elements required for monetary compensation for non-material damages are analysed below.

i) About the Victims

179. The Commission notes that there is no doubt that the victim of violations is the one who has suffered these violations *in persona*. This is a natural consequence of the ownership of rights. If a person's right is violated, the victim is the holder of that right. However, in international law, the notion of victim is broader. For example, in the Basic Principles and Guidelines on the Right to a Remedy for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2005), the victim is defined as follows:

Persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute serious violations of international human rights law or serious violations of international humanitarian law. Where appropriate, and in accordance with national law, the term "victim" shall also include the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims at risk or to prevent victimization.⁸⁷

180. Under the Luanda Guidelines mentioned above, compensation extends to the immediate family or dependants.⁸⁸ In *Zongo v. Burkina Faso*, concerning the lack of diligence of the State in the investigation of the deaths of four (4) persons, including journalist Norbert Zongo, the African Court held that "it is reasonable to consider that those who acted (directly or by representation) in the front line of this case and who suffered the most from this situation are the

⁸⁷ Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2005), § 8.

⁸⁸ Luanda Guidelines, § 38.



spouses, children, fathers and mothers of the deceased"⁸⁹, who appear in the final decision as indirect victims.

181. The Commission notes that in this case, the direct victim is Mr Berhane Abrehe Kidane; the indirect victims are his wife and the children, y any. Although the complainants alluded to the detention of the victim's wife in their observations on the merits, the Commission considers that she cannot be included in this case at this stage of the proceedings. However, she benefits from the right to reparations for moral damage in her capacity as wife, not as a victim.

ii) On Moral Damages and the Causal Link

182. The Commission notes that the Complainants do not specify the amount of monetary compensation sought for non-material damage. They simply ask the Commission to order appropriate reparations. The Commission shares the view of the African Court on the issue of moral damages and their causal link. It should be noted that the African Court's position was inspired by the case law of its Inter-American counterpart⁹⁰. In *Zongo v. Burkina Faso*, the African Court states that:

*As regards the causal link between the unlawful act and the non-material damage suffered, the Court considers that such a link may arise from the violation of a human right, as an automatic consequence, without the need for any proof.*⁹¹

⁸⁹ Beneficiaries of the late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement burkinabé des droits de l'homme et des peuples v Burkina Faso (Reparations) (2015) 1 AfCLR 258, § 50.

⁹⁰ IACHR: Caracazo v. Venezuela, Judgment of 29 August 2002. Reparations and Costs, paragraph 50 ... "the presumption that human rights violations and a situation of impunity in relation to such violations cause grief, anguish and sorrow, both to the victims and to their relatives. See in this regard Idem: Aloeboetoe v. Suriname, (Reparations and Costs), judgment of 10 September 1993, paragraph 76: Idem1 Loayza Tamayo v. Peru (Reparations and Costs), Judgment of 27 November 1998, para. 140: Idem: Gonzalez Medina and Others v. Dominican Republic, 27 February 2012 (Preliminary Objections, Merits, Reparations and Costs), para. 270; Idem: Myrna Mack v. Guatemala, Judgment of 25 November 2003 (Merits, Reparations and Costs), para. 243; IACHR: Mapiripan Massacre v. Colombia, (Merits, Reparations and Costs), Judgment of 15 September 2005, para. 146' "Beyond the above, in a case such as the Mapiripan massacre, the Court considers that no evidence is necessary to show the serious impact on the mental and emotional well-being of the victims' relatives.

⁹¹ Beneficiaries of the late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement burkinabé des droits de l'homme et des peuples v Burkina Faso (Reparations) (2015) 1 AfCLR 258, § 55.





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183. The Commission notes that the African Court considers that once there has been a violation, there is moral damage. In this case, as a violation has been committed, the existence of moral prejudice is therefore legally presumed and the causal link with the violations found is also established. However, the question arises as to the extent of the non-material damage. In this respect, the Commission leaves it up to the national authorities to determine the amount of financial compensation. In any case, it should be noted that the compensation to be awarded by the Respondent State must "be fair, adequate and proportionate to the material, moral and other damage suffered." ⁹²

Reparations Requested

184. The Commission recalls that violations of Articles 1, 2, 3, 4, 5, 6, 7, 9(2), 12(1)(2), 13(1) and 16(1) of the African Charter have been established. In effect, reparations will be determined according to the violations found. Indeed, the Commission notes that the Complainants requested the following:

- (i) immediate and continuous disclosure of the victim's location and situation;
- (ii) guarantee of the victim's safety and well-being during his detention;
- (iii) regular and unhindered communication with and access to the family;
- (iv) regular and unhindered access to medical treatment of the victim's choice;
- (v) regular and unhindered access to legal representation of the victim's choice; and
- (vi) immediate release of the victim and respect for their right to a fair trial.

185. With regard to the first request, the Commission recalls that, having found that the incommunicado detention was arbitrary, it naturally accepts the request for disclosure of the victim's place of detention. With regard to the second request, in particular the guarantee of safety, the Commission considers that it is not in a position to fulfil it, since it has not considered the victim's safety, nor has the Complainants made any observations on it. However, the Commission considers that the Respondent State must improve the victim's conditions of detention, taking into account his state of health and age. This, if the Respondent State does not release him.

⁹² General Comment No. 4 on the Right to Reparation for Victims of Torture in Africa, adopted at the 21st Extraordinary Session of the African Commission on Human and Peoples' Rights held from 23 February to 4 March 2017 in Banjul, The Gambia, § 37.



186. With regard to regular and unhindered communication with and access to the family, the Commission considers that this request would be the natural way to redress the incommunicado detention. Similarly, the request for regular and unhindered access to medical treatment of the victim's choice, would be the natural way to put an end to the deprivation of his access to doctors and medical treatment. Lastly, the Commission considers that the request for regular and unhindered access to a lawyer would be the natural way to remedy the violation of the right to be assisted by a lawyer. Therefore, these four (4) requests for reparations are granted.

187. With regard to the request for release, the Commission recalls the principle according to which reparation aims to put the victim in the situation they would have been in had the violation not occurred⁹³. In this case, the best way to rectify the arbitrary placement of the victim in incommunicado detention without trial, is his immediate release, therefore, the request for the victim's release is granted. If the Respondent State decides to bring the victim to justice, it must guarantee respect for her right to a fair trial, including access to a lawyer of her choice, or to legal aid if she is unable to hire her own lawyer, and to an independent and impartial court.

Commission's decision on Merits

188. In light of the foregoing, the African Commission:

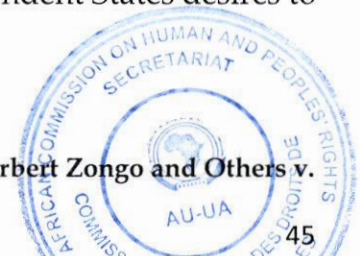
a. Declares that:

a. Articles 1, 2, 3, 4, 5, 6, 7, 9(2), 12(1)(2), 13(1) and 16(1) of the African Charter on Human and Peoples' Rights have been violated;

b. The African Commission further calls on the Respondent State to:

i. Immediately release the Victim from arbitrary detention and ensure that he enjoy full due process rights, in case the Respondent States desires to take further legal action against him;

⁹³ **Lucien Ikili Rashidi v. Tanzania (merits and reparations), § 118 and Norbert Zongo and Others v. Burkina Faso (reparations), § 60.**





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- ii. Urgently facilitate immediate access to medical treatment of his preference;
 - iii. Urgently ensure the payment of adequate compensation of the Victim, for violation of his rights.
- b. The African Commission further urges the Respondent State to report on the steps it has taken to implement these decisions in accordance with Rule 112(2) of its Rules of Procedure, within one-hundred and eighty (180) days.

Adopted during the 78th Ordinary Session, held virtually from 20 February to 8 March 2024.