

**277/2003-Spilg and Mack & DITSHWANELO (on behalf of  
Lehlohonolo Bernard Kobedi) v. Botswana**

**Summary of Facts**

1. The Communication is submitted by Brain Spilg an advocate in South Africa and Unoda Mack, an Attorney with Mack Bahuma & Moncho based in Botswana. The authors of the Communication are appointed *pro deo*<sup>1</sup> representatives for Mr. Lehlohonolo Bernard Kobedi (hereinafter Kobedi), now deceased.
2. The Complainants allege that on the 14 October 1998, Kobedi was convicted and sentenced to death by the High Court of Botswana for murder of a Sergeant of the Police force of Botswana – Sgt. Kebotsetswe Goepamang on 22 May 1993.
3. According to the Complainants, it is alleged that Sgt. Kebotsetswe Goepamang died as a result of a bullet wound, received during the course of a police manhunt on the 22 May 1993 from Kobedi who had escaped from custody. The Complainants however maintained that the shot had been fired by another policeman and not by Kobedi. They claim that he had been wrongly charged with the murder of Sgt. Kebotsetswe Goepamang.
4. The Complainants submit that Sgt. Goepamang had been shot by a high velocity firearm, AK 47, a type used by the police force and not a low velocity firearm such as found in possession of the accused/victim which was a Kalashnikov 9mm. It is further submitted by the Complainants that were it not for gross medical mismanagement by the hospitals and medical staff treating

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

sergeant Goepamang, he would not have died from injuries. The Complainants state that during the trial, crucial ballistic analysis and expert medical evidence was adduced which revealed a contradiction in the initial ballistic analysis relied upon by the Court to convict Kobedi. They claim that there was gross medical negligence towards Sgt. Goepamang during his time in hospital.

5. However, the Complainants allege that the Court refused to receive or test the said objective, material and compelling evidence thereby violating Articles 4, 5 and 7 of the African Charter on Human and Peoples' Rights (hereinafter the African Charter). They claimed that this evidence was critical to proving the innocence of Kobedi and to addressing the question whether the death sentence was the most appropriate punishment.
6. The Complainants also submit that the compulsory requirement under Botswana legislation for Court to impose a death sentence for murder where no extenuating circumstances are shown violates **Article 2,3,4,5 and 7** of the African Charter.
7. Furthermore, the Complainants submit that Kobedi was living under fear of the imposition of the death sentence for over a decade since he was first arrested and was on death row since September 1998. The complainants allege that the long delay in trying Kobedi also exposed him to unnecessary cruel, inhuman and degrading treatment for the reason that he had lived for an unconscionable amount of time awaiting the imposition of a death sentence.
8. It is also alleged by the Complainants that Kobedi was likely to suffer unnecessary inhuman treatment and punishment not only because the execution will be carried out by the cruel method of death by hanging, but also because he

was aware that his medical ailment would have caused him greater and more prolonged agony during the execution than if he were medically fit.

9. Kobedi was executed before the African Commission on Human and Peoples' Rights (hereinafter the African Commission or the Commission) could initiate an appeal for Provisional Measures.
10. From the foregoing, the Complainants request the African Commission to:
  - a. *Hold that there has been a violation of Articles 2, 3, 4, 5 and 7 of the African Charter by the Respondent State.*
  - b. *Urge the Respondent State not to impose the death sentence on the victim and not to carry out the death sentence by the method of hanging.*
  - c. *Adopt such further or other recommendations and procedures as to protect the victim's rights under the African Charter.*

### **Complaint**

11. The Complainants alleges a violation of **Article 2,3,4,5 and 7** of the African Charter.

### **Procedure**

12. The Communication was received at the Secretariat of the African Commission on 18 July 2003.
13. On 21 July 2003, the Secretariat of the African Commission wrote to the Complainants acknowledging receipt of the Communication and requesting information as to the veracity of the information received at the Secretariat of the

African Commission that Kobedi had been executed on the 18 July 2003. There was no response from the Complainants in this regard.

14. At its 34<sup>th</sup> Ordinary Session held from 6 to 20 November 2003 in Banjul, The Gambia, the African Commission decided to be seized of the matter.
15. On 7 November 2003, the Secretariat of the African Commission received a letter from the Complainants in response to its letter of 21 July 2003 which tried to confirm the execution of Kobedi.
16. On 14 November 2003, the Secretariat of the African Commission received a letter from the Complainants indicating that DITSHWANELO, a human right NGO based in Botswana was an interested party in this Communication and is therefore authorized to access any information relating to the Communication.
17. On 4 December 2003, the parties to the Communication were informed accordingly and requested to forward their written submissions on Admissibility of the Communication within 3 months.
18. By Email dated 4 March 2004, the Complainants forwarded a copy of their submissions on Admissibility of the Communication. Annexes to the submissions were transmitted by fax on the same day.
19. On 8 March 2004, the Secretariat of the African Commission acknowledged receipt of the Complainants submissions and forwarded a copy of the said submissions to the Responsible State by DHL courier service.
20. By Note Verbale dated 25 May 2004, the Secretariat received a preliminary response from the Respondent State on the Admissibility of the Communication. It also requested the African Commission to defer consideration of the Communication to the next Session in order to enable it to submit supplementary

arguments after obtaining the original Complaint submitted by the Complainants.

21. At its 35<sup>th</sup> Ordinary Session held in Banjul, The Gambia from 21 May to 4 June 2004, the African Commission considered the request for deferment from the Respondent State and decided to defer consideration of the Communication on the Admissibility to the 36<sup>th</sup> Ordinary Session so as to allow the Respondent State to forward exhaustive written submissions on Admissibility.
22. By Note Verbale dated 15 June 2004, the Respondent State was notified of the African Commission's decision and a copy of the Communication as well as the Complainants' submissions on Admissibility were also transmitted to the Respondent State.
23. By letter dated 15 June 2004, the Complainants were also notified of the decision of the African Commission.
24. By Note Verbale of 16 September 2004 the Secretariat of the African Commission reminded the Respondent State to submit all its arguments on Admissibility.
25. At the 36<sup>th</sup> Ordinary Session held in Dakar, Senegal from 23 November to 7 December 2004, the African Commission heard oral submissions from the Respondent State only and deferred its decision on the matter pending a response from the Complainants on the observations made by the Respondent State regarding the issue of the Complainants' *locus standi*.
26. By Note Verbale dated 13 December 2004, the Respondent state was notified of the decision of the African Commission. By letter of same date the Secretariat of the African Commission by DHL courier service forwarded the preliminary

submission of the State on the question of *locus standi* and its decision to defer consideration on Admissibility pending the Complainants' response on the Respondent State's submissions on *locus standi*.

27. On the 12 January 2005, the Complainants acknowledged receipt of the Secretariat's letter of 13 December 2004 and indicated that a proper response would be sent in due course.
28. By the letter dated 28 February 2005, the Secretariat reminded the Complainants to submit their observations on the question of *locus standi* before 13 March 2005 and informed them that the African Commission would consider the Admissibility of the Communication at its 37<sup>th</sup> Ordinary Session.
29. On 29 April 2005, the Secretariat of the African Commission received the Complainants' response to the Respondent State's observation on *locus standi*.
30. At its 37<sup>th</sup> Ordinary Session held in Banjul from 27 April to 11 May 2005, the African Commission deferred consideration of the Communication pending the finalization of a study on the question of *locus standi* and legal interest within the context of its Communication Procedure.
31. By Note Verbale dated 10 June 2005, the Respondent State was notified of the decision of the African Commission and by the letter of the same date the Complainants were also notified of the African Commission's decision.
32. During the 38<sup>th</sup> Ordinary Session, the African Commission considered the Communication in light of the objections raised by the Respondent State regarding the issue of *locus standi* of the Complainants and decided to declare the Communication Admissible.

33. By Note Verbale and letter dated 15 December 2006, the Respondent State and the Complainants were notified of the African Commission's decision.
34. At its 39<sup>th</sup> Ordinary Session held in May 2006, the African Commission considered the Communication, and decided to defer further consideration thereon to its 40<sup>th</sup> Ordinary Session.
35. At its 40<sup>th</sup> Ordinary Session, the African Commission further considered the Communication and deferred further consideration to its 41<sup>st</sup> Ordinary Session.
36. By Note Verbale and a letter dated 9 February 2007, the parties were reminded of the African Commission's decision on Admissibility and were requested to submit their arguments on the Merits by 8 April 2007, for the African Commission's consideration at its 41<sup>st</sup> Ordinary Session.
37. By Note Verbale and a letter dated 27 April 2007, the African Commission reminded the parties of its request for their arguments on the Merits and requested them to make their submissions latest by 10 May 2007.
38. At its 41<sup>st</sup> Ordinary Session, the African Commission considered the Communication and deferred further consideration to its 42<sup>nd</sup> Ordinary Session to allow both parties submit on the Merits.
39. By Note Verbale and a letter dated 10 July 2007, both parties were notified of the African Commission's decision.
40. By Note Verbale and a letter dated 11 September 2007, the African Commission reminded both parties to submit their arguments on the Merits.

41. By Email of 3 October 2007, the Secretariat received the submissions on the Merits from the Complainants.
42. By Note Verbale dated 17 October 2007, the African Commission forwarded the Complainants' submissions to the Respondent State and by a letter of the same date acknowledged receipt of the Complainant's submission on the Merits.
43. By Note Verbale of 22 October 2007, the Respondent State acknowledged receipt of the Complainants' submissions on the Merits, but informed the African Commission that the submissions were received after the deadline had passed and requested that the Communication be deferred to the 43<sup>rd</sup> Ordinary Session to give it time to submit its own arguments on the Merits.
44. By Note Verbale of 29 October 2007, the Secretariat of the African Commission acknowledged receipt of the Respondent State's Note Verbale and informed the Respondent State that a decision on its request will be made by the African Commission during its 42<sup>nd</sup> Ordinary Session.
45. At its 42<sup>nd</sup> Ordinary Session, the African Commission considered the Communication and deferred its decision to the 43<sup>rd</sup> Ordinary Session to allow the Respondent State to submit its arguments on the Merits.
46. On 13 May 2008, the Secretariat of the African Commission received the Respondent State's submissions on the Merits.
47. At its 43<sup>rd</sup> Ordinary Session, the African Commission considered the Communication and decided to defer further considerations to the 44<sup>th</sup> Ordinary Session to allow the Complainants to be served with the Respondent State's submissions on the Merits.



48. By a letter dated 17 June 2008, the Complainants were notified and served with a copy of the Respondent State's submission on the Merits.
49. At its 44<sup>th</sup> Ordinary Session, the African Commission considered the Communication and decided to defer further consideration of same to its 45<sup>th</sup> Ordinary Session to allow the Complainants to respond to the Respondent State's submissions on the Merits.
50. By Note Verbale and a letter dated the 5 January 2009, both parties were informed of this decision and the Complainants were requested to send their response before 5 March 2009.
51. At its 45<sup>th</sup> Ordinary Session, the African Commission considered the Communication and deferred further consideration, thereon, to its 46<sup>th</sup> Ordinary Session to allow the African Commission to prepare a decision on the Merits.
52. At its 46<sup>th</sup> Ordinary Session, the African Commission considered the Communication and again deferred its decision on the Merits to its 47<sup>th</sup> Ordinary Session.
53. By Note Verbale and a letter dated 14 December 2009, the Secretariat of the African Commission notified both parties of its decision.
54. At its 47<sup>th</sup> Ordinary Session, the African Commission considered the Communication and decided to defer its decision on the Merits to its 48<sup>th</sup> Ordinary Session.

55. At its 48<sup>th</sup> Ordinary Session, the African Commission considered the Communication and decided to defer its decision on the Merits to its 49<sup>th</sup> Ordinary Session.
56. At its 49<sup>th</sup> Ordinary Session, the African Commission considered the Communication and decided to defer decision on the merit to the 50<sup>th</sup> Ordinary Session, and by a note verbale and a letter dated 16 August 2011, both the Complainant and the Respondents were informed of the Commission's decision.
57. At its 50<sup>th</sup> Ordinary Session, the African commission considered the decision on the merits and made comments. The Commission requested the Secretariat to incorporate its comments on the Communication and present it to the 10<sup>th</sup> Extra-ordinary Session for revision and adoption.
58. At its 10<sup>th</sup> Extra-ordinary Session held from 12 to 16 December 2011, in Banjul, The Gambia, the African Commission considered and adopted the Communication on Merit.

## **Submissions on Locus Standi**

### **Respondent State's Submissions on *Locus Standi***

59. The African Commission was seized of this Communication at its 34<sup>th</sup> Ordinary Session held in Banjul, The Gambia from 6 to 20 November 2003.
60. In its preliminary submissions, the Respondents State argues that the Communication should be declared inadmissible on the ground that the authors lacked *locus standi* to submit or assume authorship of the Communication. The Respondent State argues that both Unoda Mack, a national of Botswana, and Brain Spilg SC, a national of South Africa were briefed as *pro deo* to argue the

appeal of Kobedi before the Botswana Court of Appeal at the instance of the Registrar of the High Court of Botswana. The Respondent State argues that though Kobedi accepted to have them as his legal representatives, they were not, as it were, the personal choice of Mr. Kobedi.

61. The Respondent State submits that the Communication dated 11 July 2003 and addressed to the African Commission was signed by Kobedi. However, it argues that paragraph 15 of the Complainants written submissions on Admissibility sent by Email on 4 March 2004 lists the two lawyers as the authors of the Communication. The Respondents State assert that the said written submissions, do not, indicate to the African Commission the legal interest that Messrs Brain Spilg SC and Unoda Mack, jointly and severally, have in the Communication such that they should assume authorship of it, and the basis and source of that legal interest. The Respondent State argues that, instead, what Brain Spilg SC and Unoda Mack attempt to do in paragraph 3-14 of the submissions on Admissibility is to make a case for the African Commission to hear a matter originated by the deceased.
62. The Respondent State adds that Brain Spilg SC is a national of a foreign country, and as such, the only connection he has with Botswana is in relation to the privilege accorded him by Botswana to appear before her Courts. The Respondent State therefore questions whether Brain Spilg SC has any legitimate legal interest in the affairs of the country?
63. The Respondent State further argues that neither the laws of Botswana nor international laws incorporate the *actio popularis doctrine*. Consequently, Messrs Brain Spilg SC and Unoda Mack must demonstrate a sufficient legal interest in the Communication for them to possess *locus standi* to author it. The Respondent State contends that in adhering to the African Charter, it did not understand that

it was giving strangers the *carte blanche* to occupy Botswana and utilize its resources in dealing with Communications of this nature.

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

### **Complainants' Submissions on *Locus Standi***

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

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

to indicate their legal interest, the Respondent State challenges the very purpose and function for which the African Commission was established.

67. Additionally, the Complainants argue that Article 56 of the African Charter which governs the Admissibility of a Communication lists only seven Admissibility requirements, and that 'legal interest' or 'citizenship of the Complainant' are not included in that list. They argue further that Article 56 provides a minimum threshold requirement, which is intended to encourage, rather than stifle the submission of allegations of human rights violations before the African Commission. Furthermore, stated that Article 56 assist the African Commission to ensure that vexatious Communications are sifted out, and allow issue-driven Communications to be entertained by it,.
68. Regarding the Respondent State's argument that *actio popularis* is not part of their domestic law, the Complainants submit that this assertion is irrelevant because the Respondent State did not sign a domestic document, but sign an international human rights document, which by its very nature is intended to have remedial consequences. This requires signatory States to submit themselves to scrutiny by the African Commission in respect of the alleged violations of human and peoples' rights.
69. In conclusion, the Complainants assert that by requiring the Complainants to demonstrate direct legal interest in a Communication would be restrictive and 'impermissibly narrow which will fail to have regard to the accepted constitutional norms and the express provisions of the African Charter'. Furthermore, the Complainants submit that such an approach would also fail to take into account the function and purpose of the African Commission. Consequently, it is the Complainants' prayers that a generous and purposive

construction be given to Article 56 in order to give effect to the spirit of the African Charter.

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

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

#### *African Commission's Ruling on the Preliminary Determination on Locus Standi*

72. Having looked at the Admissibility requirement under Article 56 and bearing in mind the objections raised by the Respondent State on the *locus standi* of the Complainants, the African Commission decides as follows:

73. The African Commission notes that neither the African Charter nor its Rules of Procedure makes provisions on the *locus standi* of parties before it. In fact, the only Charter provision that could bear any relevance to the issue of *locus standi* is Article 56(1) of the African Charter. This provision relates to authors of a Communication submitted before the African Commission and provides:

*"Communications relating to Human and Peoples' Rights referred to in Article 55 received by the Commission shall be considered if they:*

*(1) indicate their authors even if the later request anonymity; .... “*

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

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

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

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

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<sup>2</sup> 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 Droit de l’Homme/ Mauritania.

<sup>3</sup> Ibid.

<sup>4</sup> See also, WOAT/OMCT v Zaire [Communication No. 25/89, 47/90, 56/91, 100/93]

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

77. In Communication 155/96<sup>6</sup>, for example, the African Commission endorsed the *actio popularis* doctrine when it “thank(ed) the two human rights NGOs who brought the matter under its purview: the Social and Economic Rights Action Center (Nigeria) and the Center for Economic and Social Rights (USA). Such is the demonstration of the usefulness to the African Commission and individuals of *actio popularis*, which is wisely allowed under the African Charter.” The *actio popularis* doctrine allows persons interested in the protection of human rights in Africa to seize the African Commission on behalf of persons who for one reason or the other, cannot do so on their own.

78. The rationale for this broad approach to *locus standi* is in view of the fact that the African Commission, mandated to promote and protect human and peoples’ rights in Africa<sup>7</sup>, bears in mind the fact that in some instances, individuals in Africa whose rights are violated, may be faced with practical difficulties that may preclude them from pursuing national or international legal remedies on their own behalf. The African Commission has therefore adopted the practice of entertaining Communications from persons who are interested in protecting human rights on the continent. These may be the victims themselves or civil society organizations acting on behalf of victims of the alleged violations.<sup>8</sup> This

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<sup>5</sup> African Commission on Human and Peoples’ Rights Information Sheet No. 2.

<sup>6</sup> Communication 155/96 - The Social and Economic Rights Action Center and the Center for Economic and Social Rights/Nigeria, 15<sup>th</sup> Annual Activity Report of the African Commission on Human and Peoples’ Rights 2001-2002, at Para. 49.

<sup>7</sup> See Article 30 of the African Charter on Human and Peoples’ Rights.

<sup>8</sup> See for instance Communication 137/94, 156/96, 161/97 - International PEN, Constitutional Rights Project, Civil Liberties Project and INTERIGHTS (on behalf of Ken Saro-Wiwa Jnr) /Nigeria.



*actio popularis* principle has been confirmed in various subsequent decisions of the Africa Commission.<sup>9</sup>

79. Also in relation to the requirement of citizenship, the African Commission has made it clear through its jurisprudence that the person or NGO filing the Communication need not be a national or be registered in the territory of the Respondent State. An endless list of examples of this would include the many cases submitted to the African Commission by individuals and NGOs of non-African origin.<sup>10</sup>
80. The African Commission, therefore, notes that the foregoing was its approach to *locus standi* when it became seized of the present Communication, and is still its current approach to the issue. Accordingly, the African Commission would address this Communication in light of its broad approach to *locus standi* at the time it became seized of this Communication.
81. The African Commission further disagrees with the Respondent State's assertion that neither the laws of Botswana nor international law incorporates the *actio popularis doctrine*, and notes that this is a common practice within regional and international human rights systems which is aimed at conferring legal standing to certain groups who will not be required to have a sufficient interest in a case or to maintain the impairment of a right. To this effect, different bodies had setup different criteria with regards to accessibility to their complaint mechanisms. The African Commission notes that, the European human rights system<sup>11</sup> and the UN Human Rights Committee,<sup>12</sup> generally requires that the

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<sup>9</sup> Communications No. 64/92, 68/92, 78/92, Kristan Achutcan on Behalf of Aleke Banda, Amnesty International on behalf of Orton and Vera Chirwa v. Malawi; Communications No. 54/91, 61/91, 98/93, 164-169/97, 210/98, Malawi African Association and others v. Mauritania .

<sup>10</sup> See for instance Communication 31/89, Maria Baes/Zaire, instituted by a Danish national and Communication 235/2000 – Curtis Doebbler/ Sudan instituted by an American citizen.

<sup>11</sup> See Article 34 of the European Convention on Human Rights

person submitting a case to be a victim of the violation. But there are exceptions to this rule, where non-victims may bring a complaint on behalf of the victim(s).<sup>13</sup> On the other hand, the American Convention of Human Rights permits any person or group of persons, or any non-governmental entity legally recognized in one or more Member States of the Organization to submit a matter before the Inter-American Commission.<sup>14</sup> The practice of the African Commission though somewhat similar to the *actio popularis* position under the Inter-American system, is even wider as it places no restriction as to who can bring a Communication before it. As long as the conditions under Article 56 of the African Charter are met by the person standing before it, the African Commission will enter the Communication. The rationale for the Commission's comparative broader approach to the issue of *locus standi* has been associated with the peculiarity of the African situation, and the perceived generous intent of the African Charter.<sup>15</sup>

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

83. The African Commission holds the fact that Mr. Brain Spilg SC is not a Citizen of Botswana as argued by the Respondents will have bearing on this Communication. It is simply not a requirement for authorship of a

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<sup>12</sup> See Article 1 of the Optional Protocol to the International Convention on Civil and Political Rights

<sup>13</sup> See for example, Article 2 of the European Convention on Human Rights, which guarantees the right to life. Also, under the International Covenant on Civil and Political Rights, Fact Sheet No 7 provides for situations whereby a non-victim may bring a claim on behalf of another person, with or without the victim's written consent. In certain cases, you may bring a case without such consent – Office of the High Commissioner for Human Rights, Fact Sheet No. 7 [www.unhchr.ch/html/menu6/2/fs7.htm](http://www.unhchr.ch/html/menu6/2/fs7.htm) (accessed on 8 April, 2011). See also Fact Sheet No. 15, Centre for Human Rights, 1991, Geneva.

<sup>14</sup> See Article 44 of Inter-American Convention on Human Rights

<sup>15</sup> See generally, "Capacity to Bring a Communication before the African Commission on Human and Peoples' Rights (Locus Standi), Working Document of the African Commission, 40<sup>th</sup> Session, 15 – 29 November, 2006, Banjul, The Gambia

<sup>16</sup> Para. 69-73 above.

Communication. Any interested individual can bring a Communication on behalf of a victim and such individuals need not be citizens of States Parties to the African Charter. The fact that Mr. Brain Spilg SC is a national of another country is immaterial. As long as he satisfies the conditions set out in Article 56 of the African Charter, the African Commission will entertain the Communication as it has done, in several other cases where Communications have been instituted by non-nationals of States against whom the Communication is being instituted.<sup>17</sup>

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

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

### **The Law on Admissibility**

### **Complainants' Submissions on Admissibility**

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<sup>17</sup> Foot note 9 above.

86. The Complainants submit that they have fulfilled all the requirements of Article 56 of the African Charter.
87. The Complainants submit that the Communication is jointly presented by Advocate Brain Spilg SC assisted by Attorney Unoda Mack and Ms Alica Mogwe (on behalf of Ditshwanelo). By detailing their contact email addresses as [spilg@law.co.za](mailto:spilg@law.co.za) for Brain Spilg SC and [legal.ditshwanelo@info.bw](mailto:legal.ditshwanelo@info.bw) for Ditshwanelo, the Complainants argue that they complied with Article 56(1) of the African Charter.
88. With regards to Article 56(2) of the African Charter, the Complainants contend that not only have they outlined the Charter provisions which are allegedly violated by the Respondent State to include Articles 1, 2, 3, 4, 5 and 7 of the African Charter, but that they have also made submissions in support of the alleged violations. The Complainants submit that the Communication, therefore, satisfies the requirements of Article 56(2) of the African Charter.
89. With regards to the requirement of decorum, the Complainants submit that the tone of language used in the Communication meets the requirement of Article 56(3) of the African Charter.
90. Concerning the requirement of evidential weight envisaged under Article 56(4) of the African Charter, the Complainants aver that the Communication is based on primary evidence that has been either verified under oath or is within the personal knowledge of the authors. While conceding that there is a single reference to a media article, the Complainants argued that not only is that information tangential, but also that the source of the article is verified under oath by the newspaper's editors and forms part of the records of the Botswana Court of Appeal. The Complainants submit that the provisions of Article 56(4) have been adequately met.

91. On the requirement of exhaustion of local remedies under Article 56(5) of the African Charter, the Complainants aver that they have exhausted all available local remedies with respect to Kobedi's case. In particular, aver the Complainants, the highest Court in Botswana, the Court of Appeal, has determined the case. They therefore submit that the Communication satisfies the requirements of Article 56(5) of the African Charter.
92. With regards to the reasonable time factor under Article 56(6) of the African Charter, the Complainants argue that the Communication was submitted within a period of four months since the Kobedi's stay of execution appeal was disposed of by the Botswana Court of Appeal. The Communication, argues the Complainants, also meets the requirements of Article 56(6) of the African Charter.
93. With regards to Article 56(7) of the African Charter, the Complainants submit that the instant case has not previously been determined by the African Commission and there are no other international avenues that are being explored by the Complainants as far as this matter is concerned. The Communication, contends the Complainants, satisfies the provision of Article 56(7) of the African Charter.

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

94. In its written submission dated 25 May 2004 the Respondent State asserted that it did not concede the other grounds upon which the Complainants rely for the Admissibility of the Communication.
95. However, in its oral submission made at the African Commission's 36<sup>th</sup> Ordinary Session held from 23 November to 7 December 2004 in Dakar, Senegal,

the Respondent State opted not to furnish further submissions apart from those on *locus standi*. The Respondent State stated that in the event that the African Commission rules in favor of the Complainants on the issue of *locus standi*, they would not contest the Admissibility of the Communication.

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

The Admissibility of the Communications submitted before the African Commission is governed by the seven conditions set out in Article 56 of the African Charter.

96. The current Communication is submitted pursuant to Article 55 of the African Charter which allows the African Commission to receive and consider Communications, other than from States Parties. Article 56 of the African Charter provides that the admissibility of a Communication submitted pursuant to Article 55 is subject to seven conditions.<sup>18</sup> The African Commission has stressed that the conditions laid down in Article 56 are conjunctive, meaning that if any one of them is not satisfied, the Communication will be declared inadmissible.
97. Article 56(1) of the African Charter requires that a Communication received under Article 55 of the African Charter shall be considered if it "indicates their authors even if the latter requests anonymity". Article 56(1) of the African Charter will, therefore, be satisfied if the Communication discloses the identity and details of the authors thereof.<sup>19</sup> The purport and intent of Article 56(1) of the African Charter is to ensure that the African Commission is in communication with the author. It is only through this medium of communication that the African Commission will be assured of the author's

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<sup>18</sup> See Article 56 of the African Charter on Human and Peoples' Rights.

<sup>19</sup> See Communications 54/91, 61/91, 98/93, 164/97, 210/98; Malawi African Association et al v. Mauritania, paragraph 78, (ACHPR) 13<sup>th</sup> Activity Report

continued interest in the case, or to request, as provided for under Rule 104 of the Rules of procedure, supplementary information if the case so requires.<sup>20</sup>

98. In the instant Communication, the Complainants have disclosed that it is jointly presented by Advocate Brain Spilg SC assisted by Attorney Unoda Mack and Ms Alica Mogwe (on behalf of Ditshwanelo). The Communication also discloses the contact Email addresses of the Complainants as [spilg@law.co.za](mailto:spilg@law.co.za) for Brain Spilg SC and [legal.ditshwanelo@info.bw](mailto:legal.ditshwanelo@info.bw) for Ditshwanelo. The African Commission is, therefore, holds that the Complainants have complied with Article 56(1) of the African Charter.
99. Article 56(2) of the African Charter requires that the Communication must be compatible with the Constitutive Act of the African Union and with the African Charter. With respect to the Constitutive Act, the African Commission will not receive any Communication brought before it, which seeks a prayer a remedy of which will contravene any provision of the said Constitutive Act. Thus, in **Katangese's Peoples' Congress V. Zaire**,<sup>21</sup> a redress which infringed on the doctrine of *Uti Possidetis Juris*<sup>22</sup> enshrined in Article 3 of the OAU Charter and now in Article 4 (b) of the Constitutive Act, was rejected and the case declared Inadmissible.
100. In **Kevin Mgwanga Ngumne et al V. Cameroon**,<sup>23</sup> the African Commission, drawing inspiration from its previous decisions affirmed that, the condition relating to compatibility with the Charter, basically requires that: (a) the Communication should be brought against a State party to the African Charter;<sup>24</sup> (b) the Communication must allege *prima facie* violations of rights protected by

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<sup>20</sup> See Communication 108/93, Monja Joana V. Madagascar, paragraph 6, (ACHPR) 10<sup>th</sup> Activity Report

<sup>21</sup> Communication 75/92, (ACHPR) 8<sup>th</sup> Activity Report

<sup>22</sup> A principle under International Law which states that, colonially inherited boundaries are inviolable

<sup>23</sup> Communication 266/2003, paragraph 38, (ACHPR), 38<sup>th</sup> Session

<sup>24</sup> Communication 5/88, Prince J.N Makoge V. USA, (ACHPR)

the African Charter;<sup>25</sup> (c) the Communication should be brought in respect of violations that occurred after ratification of the African Charter or where violations that began before the State Party ratified the African Charter have continued even after such ratification.<sup>26</sup> To be in conformity with the African Charter also requires the petition to contain a certain degree of specificity, and that the allegations are not vague.<sup>27</sup>

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

**102.** Article 56(3) of the African Charter requires that the Communication should be presented with a certain degree of decorum. This Article prohibits the use of disparaging and/or insulting language in presenting a Communication. Although Article 56(3) does not define what constitutes disparaging or insulting language, the African Commission in the case of *Ilesanmi v. Nigeria*<sup>28</sup> the Commission held *inter alia*, that, to be insulting, the language must be aimed at undermining the integrity and status of the institution (Respondent State) and bring it into disrepute.<sup>29</sup> In this case, the African Commission held the Complainant's averments that, "the police and customs officials are corrupt, that they deal with drug smugglers, that they extort money from motorists and that the President himself was corrupt and had been bribed by the drug smugglers" as an insulting language. In *Ligue Camerounaise des Droits de l'Homme v.*

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<sup>25</sup> Communication 1/88, Frederick Korvah V. Liberia, (ACHPR)

<sup>26</sup> Communication 97/93, John K. Modise (2) V. Botswana (ACHPR)

<sup>27</sup> Communication 35/89, Seyoum Ayelle V. Togo, Paragraph 2 (ACHPR) See also, Communication 142/94, Muthuthurin Njoka V. Kenya, Paragraph 4 (ACHPR)

<sup>28</sup> Communication 268/2003, (ACHPR) 18<sup>th</sup> Activity Report

<sup>29</sup> Ibid, Para. 39



*Cameroon*,<sup>30</sup> the African Commission also held that averments such as “Paul Biya must respond to crimes against humanity”, “30 years of the criminal neo-colonial regime incarnated by the duo Ahidjo/Biya”, “regime of torturers”, and “government barbarisms”<sup>31</sup> as insulting language.

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

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

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

106. In the case of *Sir Dawda K Jawara v. Gambia*<sup>34</sup> the African Commission held that while it will be dangerous to rely exclusively on news disseminated through the mass media, it would be equally damaging if the African Commission were

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<sup>30</sup> Communication 65/92, (ACHPR) 10th Activity Report

<sup>31</sup> Ibid, Para. 18

<sup>32</sup> Communication 260/02 (AHRLR) 2004, 43.

<sup>33</sup> Ibid, Para. 48

<sup>34</sup> Communication 149/96, (ACHPR) 13<sup>th</sup> Activity Report

to reject a Communication because some aspects of it are based on news disseminated through the mass media. For this reason, the African Commission believes that the present Communication meets Complainants the requirements of Article 56(4) of the African Charter.

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

**108.** The African Commission notes that the submissions of the Complainants that Kobedi’s case has been dealt with by the Botswana Court of Appeal, the apex court in the Respondent State, are relevant to the issue of exhaustion of local remedies. The African Commission is, therefore, satisfied that the Communication has not contravened the provision of Article 56(5) of the African Charter.

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

Commission, therefore, holds that the Complainants have satisfied Article 56(6) of the African Charter.

**110.** By virtue of Article 56(7) of the African Charter, Article 55 Communication will be considered if the Communication does not deal with cases that have already been settled by African Commission or another international settlement body. The requirement under Article 56(7) of the African Charter is founded on the *non bis in idem* rule<sup>35</sup> which ensures that no State may be sued or condemned more than once for the same alleged human rights violations. The rule also seeks to uphold and recognize the *res judicata*<sup>36</sup> status of decisions issued by international and regional tribunals and/or bodies such as the African Commission. Accordingly, the African Commission will not entertain any Communication with the same facts and parties<sup>37</sup> as that, which has been settled by another international body.

**111.** In *Bob Ngozi Njoku v. Egypt*<sup>38</sup> the African Commission noted that Article 56(7) of the African Charter "...talks about cases which have been settled..."<sup>39</sup> and not cases which are still pending before other international mechanisms.

**112.** The African Commission is satisfied that the Complainants, in their written submissions, have exhaustively addressed the seven Admissibility requirements under Article 56 of the African Charter and hereby declares the Communication Admissible under Article 56 of the African Charter.

### **Submissions on the Merits**

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<sup>35</sup> Also known as the Principle or Prohibition of Double Jeopardy

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

<sup>37</sup> Communication 266/02 Kevin Mgwanga Ngumne et al. v. Cameroon, Para. 55

<sup>38</sup> Communication 40/90, (ACHPR) 11th Activity Report

<sup>39</sup> Ibid, paragraph 56, See also, Communication 260/02 Bakweri Lands Claim Committee v. Cameroon, Para. 52

## **Complainants' Submissions on the Merits**

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

### **Alleged Violation of Articles 2 and 3 (Right not to be Discriminated and Right to Equality before the law)**

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

### **Alleged Violation of Article 4 (Right to Life)**

115. The Complainants argue that because the imposition of the death penalty is qualitatively different from any other sentence or sanction that may be imposed by a Court of Law, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case. The Complainants rely on the decision of the Inter-American Commission on Human Rights in *Downer & Tracey v. Jamaica* to argue the fact that the death

penalty is an exceptional form of punishment which must also be considered in interpreting Article 4 of the African Charter.

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

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

**118.** It is argued by the Complainants that, if before his execution, it can be demonstrated by credible and cogent evidence that there was an incorrect conviction or that the condemned man is deserving of a lesser sentence than the death penalty, then the right to life protected under Article 4 of the African

Charter can only have content if such evidence can be tested. It is contended by the Complainants that the application of the doctrine of *functus officio* to exclude fresh, credible and cogent evidence that could have the effect of a lesser sentence violates Article 4 of the African Charter.

**119.** It is averred further by the Complainants that as far as the trial of Kobedi is concerned, this fresh evidence includes, crucial ballistic analyses that Sgt. Goepamang was struck by a high velocity firearm, AK 47, a type used by the police force and not a low velocity firearm, Kalashnikov 9mm, found in possession of the Victim; vital ballistic analyses that Sgt. Goepamang was shot from the side and not from the front as contained in the High Court judgment; and expert medical evidence of gross medical negligence towards Sgt. Goepamang during his time in hospital.

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

**121.** The Complainants further argue that the imposition of the death penalty on Kobedi without recourse to any meaningful post-conviction enquiry as to the appropriate sentence to be imposed by the Courts in the Respondent State also offends Article 4 of the African Charter.

**Alleged Violation of Article 5 (Torture, Cruel, Inhuman and Degrading Treatment)**

122. The Complainants contend that Kobedi, according to his Medical Report suffers from a weak heart condition. They also state that the Medical Report proves that Kobedi does not only have an A-V shunt but also needs surgery. They inform the African Commission that the Medical Report presents the following conditions of Kobedi: *left subclavian arteriovenous shunt with no present evidence of heart failure or arrhythmia; irritable bowel syndrome; and mild degenerative osteoarthritis of the spine.* It is submitted by the Complainants that Kobedi was a sick man whose health condition ought to have been taken into consideration in deciding the method to be adopted for his execution.
123. The Complainants further submit that the adoption of hanging as a method of executing the death penalty, and the failure of the Courts in the Respondent State to have regard to the medical condition of Kobedi violates Article 5 of the African Charter, not so much because he is aware that his medical ailment will cause him greater and more prolonged agony during the execution than if he were medically fit, but also because execution by hanging exposes the condemned man to a higher likelihood of unnecessarily painful and torturous death through strangulation.
124. The Complainants aver that the post-appeal process dealing with Clemency Petitions also constitutes a violation of Article 5 of the African Charter in that the victim, his lawyers and family members were not informed of the unsuccessful outcome of the Clemency Petition, thus, depriving the convict and his family members the important opportunity to have closure with the dignity of their last farewells.

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

**Alleged Violation of Articles 7 (Right to Fair Trial)**

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

127. The Complainants submit that the above situation could only be made possible by one of two reasons; that counsel dealing with the matter at that initial stage did not have the necessary skills and competence required in defending a death penalty case; or the evidence could not be expected to have been acquired by the lawyer at that stage and therefore amounts to new evidence discovered after the appeal. They further argue that this lack of competence on the part of



counsel vitiated the entire proceedings and amounted to a breach of the fair trial procedure provided for in Article 7 of the African Charter.

**128.** The Complainants also submitted that this fresh evidence was not only critical to the determination of Kobedi's guilt, and the question whether the death sentence was the most appropriate sentence in the circumstance, but that the refusal by the Court of Appeal of the Respondent State to receive or test the said objective, material and compelling evidence also violated Kobedi's fair trial rights guaranteed under Article 7 of the African Charter.

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

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

## Respondent State's Submissions on the Merits

131. The Respondent State submits as a preliminary issue, that the procedure adopted by the African Commission in dealing with the post-admissibility processes in this Communication contravenes Rule 119(2) (3) of the African Commission. It contends that by virtue of Rule 119 (2), once the African Commission decides on the Admissibility of a Communication, the Respondent State shall file its submissions without any further reference to the Complainants and the Complainants should only be allowed to reply to the State's submission in terms of Rule 119 (3).
132. It is further contended by the Respondent State that by virtue of the above, the Complainants are required to disclose the full particulars of their Complaint at the very initial stage. In submitting that the African Commission erred when it simultaneously asked both the Complainants and the Respondent State, to make their submissions on the Merits, the Respondent State prays the African Commission to purge and expunge from its records any submissions made by the Complainants in this regard.
133. With regards to the substantive matter, the Respondent State argues that the compulsory requirement under Botswana law for the Courts to impose the death penalty for murder, where no extenuating circumstances are shown; the adoption of the doctrine of "*functus officio*" by the Court of Appeal of the Respondent State with regards to the trial of Kobedi and the use of hanging as a method of execution of Kobedi does not in anyway contravene Articles 2,3,4,5 and 7 of the African Charter.

### **On the Alleged Violation of Articles 2 and 3 (Right not to be Discriminated and Right to Equality before the law)**

- 134.** Concerning the alleged violation of Articles 2 of the African Charter, the Respondent State submits that this Article deals with the issue of discrimination, and argued further that the legislation in the Respondent State did not in any way discriminate against the victim as the death penalty would be imposed on anyone found guilty of murder without any extenuating circumstance.
- 135.** In reply to the alleged violation of Article 3 of the African Charter, the Respondent State, while noting that this Article deals with the twin concepts of equality before the law and equal protection of the law, submitted that the victim's right to be treated equally before the law was not interfered with in anyway by the Respondent State throughout the trial process.
- 136.** Concerning the allegation that the victim was not afforded equal protection of the law, the Respondent State contends that Mr. Kobedi was at all times during the trial process provided with high quality legal representation and was not treated unequally vis-à-vis any other person in a similar situation. These, argues the Respondent State, shows that the allegations of the Complainants with regards to the allege violations of Articles 2 and 3 of the African Charter are baseless.

#### **On the Alleged Violation of Article 4 (Right to Life)**

- 137.** In response to the alleged violation of Article 4 of the African Charter, it is submitted by the Respondent State, that not only is the imposition of the death penalty reasonable in the circumstance, but also that the procedures followed before the death sentence was carried out on Kobedi did not amount to the arbitrary taking of his life. The Respondent State further contends that the trial of

Kobedi went through the proper judicial process of the Courts in Botswana and did not at anytime derogate from the procedures whatsoever.

**138.** The Respondent State avers that the jurisprudence of the African Commission did not regard the death penalty as inherently contrary to the African Charter, but rather that such penalty should only be imposed with necessary due process safeguards being in place. In referring the Commission to the Thirteenth Activity Report of the Commission,<sup>40</sup> the Respondent State argues that the African Commission did not declare the imposition of the death penalty a contravention of Charter Rights, but urged States that still had the death penalty to among other things limit its imposition only to crimes of the most serious nature as well as to consider establishing a moratorium on executions.

**139.** The Respondent State argues that because due process was followed and safeguarded by the judicial system of Botswana in the trial of Kobedi, his execution cannot amount to a contravention of Article 4 of the African Charter as alleged by the Complainants.

### **On the Alleged Violation of Article 5 (Torture and Cruel, Inhuman and Degrading Treatment)**

**140.** In view of the alleged violation of Article 5 of the African Charter, the Respondent State, whilst referring the African Commission to Article 6 of the International Covenant on Civil and Political Rights, argues that, the death penalty is expressly recognized and not prohibited under international human rights law. It is averred by the Respondent State that since the African Charter<sup>41</sup> provides that the African Commission shall draw inspiration from international

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<sup>40</sup> Thirteenth Annual Activity Report of the African Commission on Human and Peoples' Rights, OAU Doc AHG/Dec 153 (XXXVI) annex IV

<sup>41</sup> See Article 60 of the African Charter

law and human rights, including international instruments in interpreting Charter Rights, the African Commission should not read Article 5 of the African Charter as prohibitive of the death penalty.

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

**142.** It is also argued by the Respondent State that, the Communication does not reveal facts of any inhuman conditions or treatment whilst the victim was in prison custody. It submits that even if fear, despair and mental anguish are the inevitable concomitants of the sentence of death, the Complainants have not demonstrated that in all circumstances of the case, the delay since the passing of the death penalty sentence on the victim goes beyond what is constitutionally permissible. In referring the African Commission to Supreme Court decision in Zimbabwe<sup>42</sup> it is further argued by the Respondent State that an element of delay between the lawful imposition of a sentence of death and the exhaustion of available remedies is inherent in the review of the sentence; thus, even prolonged periods of detention under a severe custodial regime on death row cannot generally be considered to constitute cruel, inhuman or degrading treatment if the convicted person is merely availing himself of appellate remedies. Thus, it is contended that Article 5 of the African Charter has not been violated in any way.

### **On the Alleged Violation of Articles 7 (Right to Fair Trial)**

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<sup>42</sup> Catholic Commission for Justice and Peace in Zimbabwe v Attorney General, Zimbabwe & Ors, 1993 (4) SA 239 (ZS)

**143.** In conceding that there was indeed a long delay in the trial of Kobedi, the Respondent State argues that, such delays were occasioned by the defence and not by the State. For example, the Respondent State submits that there was a delay of up to six (6) months between July and December 2001 when Mr. Brain Spilg SC was appointed *pro deo* to represent the victim because the victim rejected several *pro deo* counsels including Mr. Joina and insisted on having Mr. Brain Spilg SC appointed *pro deo* to represent him. Again, it argues that there was another delay of up to sixteen (16) months between November 1999 and July 2001 in the trial because no opposing affidavits were filed on behalf of the victim. It is contended by the Respondent State that because these delays were due in part by the indolent acts of Kobedi and his lawyers, they cannot amount to a contravention of the fair trial rights guaranteed under Article 7 (1) (d) of the African Charter.

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

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

**145.** The Respondent State had raised as a preliminary issue challenging any consideration by the African Commission of any further submissions filed by the Complainants in terms of Rule 119 (2) and (3) of the African Commission's Rules of Procedure. They argue that by virtue of Rule 119(2), only the Respondent State is required to make submissions after the African Commission's decision on

admissibility and the Complainants are only accorded a right to reply pursuant to Rule 119 (3). In requesting that the submissions made by the Complainants in this direction should be expunged, it contends that by requesting both parties to submit their arguments on the Merits, the African Commission did not properly apply Rule 119 (2) & (3) of the Rules of Procedure of the African Commission.

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

### **Decision of the African Commission on Alleged Procedural Irregularity**

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

*1. If the Commission decides that a Communication is Admissible under the Charter, its decision and text of the relevant documents shall as soon as possible, be submitted to the State Party concerned, through the Secretary. The author of the Communication shall also be informed of the Commission's decision through the Secretary.*

*2. The State Party to the Charter concerned shall, within the 3 ensuing months, submit in writing to the Commission, explanations or statements elucidating the issue under consideration and indicating, if possible, measures it was able to take to remedy the situation.*

*3. All explanations or statements submitted by a State Party pursuant to the present Rule shall be communicated, through the Secretary, to the author of the Communication who may submit in writing additional information and observations within a time limit fixed by the Commission.*

*4. States Parties from whom explanations or statements are sought within specified times*

*shall be informed that if they fail to comply within those times the Commission will act on the evidence before it.*

**148.** The African Commission notes that while the afore cited Rule 119(2) only makes reference to the State Party, and Rule 119 (3) limits the choice of the Complainants to a reply only, it is important to point out here that, the Communication Procedure under the African Charter is dealt with in three distinct phases - **Seizure, Admissibility and Merits**. There are different requirements to be satisfied at each of these phases. As such, the African Commission has adopted a practice that does not require the Complainants to make a full submission in their initial address to the African Commission. This is one reason why the African Commission will not expunge the submissions on the Merits made by the Complainants.

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

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



## Decision of the African Commission on the Substantive Claim

151. By this Communication, the African Commission has been invited to determine whether or not the compulsory requirement under Botswana law for the courts to impose the death penalty for murder, where no extenuating circumstances are shown; the adoption of the doctrine of "*functus officio*"<sup>43</sup> by the Court of Appeal of the Respondent State with regards to the trial of Kobedi; and the use of hanging as a method of execution of Kobedi, constitutes a violation of Articles 2,3,4,5 and 7 of the African Charter.

### Allege Violation of Articles 2 and 3.

152. Article 2 of the African Charter provides:

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

Article 3

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

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

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<sup>43</sup> The Doctrine of *functus officio* is dealt with more detailly under the Section dealing with the allege violation of article 7.

- 154.** The Complainants argue that the compulsory requirement under Botswana legislation that a Court must impose the death penalty for murder, absent only extenuating circumstance limits the factors that can be taken into consideration in respect of sentencing. They submit that the exclusion of considerations such as rehabilitation or such other factors personal to the victim violates Articles 2 and 3 of the African Charter. In this regard, they argue that the distinction between taking into account extenuating circumstances and not taking into account mitigating factors is both arbitrary and discriminative.
- 155.** Concerning the alleged violation of Article 2 of the African Charter, the Respondent State submits that this Article deals with the issue of discrimination, and argued that the legislation in the Respondent State did not in anyway discriminate against the victim as the death penalty would be imposed on anyone found guilty of murder without any extenuating circumstance.
- 156.** In reply to the alleged violation of Article 3 of the African Charter, the Respondent State, while noting that this Article deals with the twin concepts of equality before the law and equal protection of the law, submitted that the victim's right to be treated equally before the law was not interfered with in anyway by the Respondent State throughout the trial process.
- 157.** Concerning the allegation that the victim was not afforded equal protection of the law, the Respondent State contends that Kobedi was at all times during the trial process provided with high quality legal representation and was not treated unequally vis-à-vis any other person in a similar situation. These, argues the Respondent State shows that the allegations of the Complainants with regards to the alleged violation of Articles 2 and 3 of the African Charter are baseless.

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

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

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

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<sup>44</sup> See the case of *Brown v. Board of Education of Topeka* (1954) 347 U.S. 483

**161.** In the present Communication it has not been shown how the victim was denied the enjoyment of any of the Charter Rights based on his ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status. It has not also been shown how the victim was accorded differential treatment or how the victim was discriminated against by the Respondent State in anyway. Apart from making general conclusions, the Complainants did not sufficiently present facts and evidence that would convince the African Commission of any violation of Articles 2 and 3 of the African Charter. The African Commission therefore finds that there was no violation of Articles 2 and 3 of the African Charter.

#### **Alleged Violation of Article 5**

**162.** According to Article 5 of the African Charter “every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited”.

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

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<sup>45</sup> See *International Pen, Constitutional Rights Project, Interights (on behalf of Ken Saro-Wiwa) v. Nigeria (Comm. nos 137/94, 139/94, 154/96 and 161/97)*, para. 79.

164. While it is accepted that there is no rule of international law which prescribes the circumstances under which the death penalty may be imposed, the African Commission has cautioned that the death penalty should only be imposed after a full consideration of not only the circumstances of the individual offence, but also the circumstances of the individual offender.<sup>46</sup>
165. The Complainants have made reference to the fact that the adoption of hanging as a method of executing the death penalty, and the failure of the Courts in the Respondent State to have regard to the medical condition of Kobedi violates Article 5 of the African Charter.
166. By invoking Article 60 of the African Charter, the African Commission will rely on the jurisprudence of the UN Human Rights Committee <sup>47</sup> to hold that where a death sentence has been imposed, it must be carried out in such a way as to cause the least possible physical and mental suffering. This approach was applied in *Ng v. Canada* <sup>48</sup> wherein the UN Committee found that the particular method of gas asphyxiation amounted to cruel, inhuman and degrading treatment.
167. The African Commission, therefore, believes that, the carrying out of a death sentence using a particular method of execution may amount to cruel inhuman or degrading treatment or punishment if the suffering caused in execution of the sentence is excessive and goes beyond that is strictly necessary.
168. The African Commission holds that under the African Charter, a parallel obligation to prevent torture or ill-treatment derives from the undertaking given

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<sup>46</sup> Communication 240/01, Para. 31

<sup>47</sup> Human Rights Committee, *General Comment No. 20*, Para. 6.

<sup>48</sup> Communication No 469/1991, Human Rights Committee, 7 January 1994, UN doc. CCPR/C/49/D/469/1991, Para. 16.2 and 16.4.

by the States Parties in Article 1 thereof “to adopt legislative or other measures to give effect” to the rights contained in the Charter. The importance of such safeguards has been recognized by the African Commission in the Robben Island Guidelines.<sup>49</sup>

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

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

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

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<sup>49</sup> *Robben Island Guidelines, para. 20.*

172. Whilst the above definition is useful, it fails to outline those categories of actions that would constitute a violation under Article 5 of the African Charter. To resolve this issue, the African Commission will in terms of Article 60 of the African Charter rely on the jurisprudence of the Human Rights Committee which has over the years, made a determination on whether the length of detention on death row amounted to a violation of the prohibition against 'torture or cruel, inhuman or degrading treatment or punishment'.<sup>50</sup> In *Randolph Barrett and Clyde v. Jamaica*,<sup>51</sup> the Human Rights Committee held that in the review of criminal convictions and sentences, an element of delay between the lawful imposition of a sentence of death and the exhaustion of available remedies is inherent in the review of the sentence; thus, even prolonged periods of detention under a severe custodial regime on death row cannot generally be considered to constitute cruel, inhuman or degrading treatment if the convicted person is merely availing himself of appellate remedies.

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

174. It was submitted by the Complainants that failure to publish the unsuccessful outcome of the clemency petition and failure to give notice of the date and time of execution amounts to cruel, inhuman and degrading punishment and

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<sup>50</sup> Under Article 7 of the International Covenant on Civil and Political Rights

<sup>51</sup> Communication 270/271/1988 (30 March 1992).

treatment in breach of Article 5 of the African Charter as thus, depriving the convict and his family members of the important opportunity to have closure with the dignity of their last farewells.

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

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

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

### **Alleged Violation of Article 7**

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<sup>52</sup> See Communications 25/89, 47/90, 56/91, 100/93; Free Legal Assistance Group et al. V. Zaire

<sup>53</sup> Para. 41



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

**179.** From the arguments and analysis of both the Complainants and the Respondent State, the essential question that must be asked here is whether the trial of the Kobedi complied with the provisions of Article 7 of the African Charter.

**180.** Article 7 of the African Charter on Human and Peoples' Rights provides that:  
"Every individual shall have the right to have his cause heard. This comprises:  
a) *The right to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by the conventions, laws, regulations, and customs in force;*  
b) *The right to be presumed innocent until proven guilty by a competent court or tribunal;*  
c) *The right to defence, including the right to be defended by counsel of his choice;*  
d) *The right to be tried within a reasonable time by an impartial court or tribunal.*

**181.** A holistic reading of Article 7 brings to the fore one core issue - having access to appropriate justice. The notion of access to appropriate justice is an important indicator of a sound and effective criminal justice system. The

African Commission bears this in mind in addressing the different heads of the alleged violation of Article 7 of the African Charter as contended herein.

- 182.** Before addressing the question of whether article 7 of the African Charter has been violated or not, it will perhaps be useful to start by considering the meaning and purpose of the doctrine of *functus officio* and the current trend of the law in relation to its application in the context of judicial decision making processes by apex courts.
- 183.** From the authorities<sup>54</sup> reviewed, the doctrine of *functus officio* provides that once a decision maker has done everything necessary to perfect his or her decision, he or she is then barred from revisiting that decision, other than to correct clerical or other minor errors. The policy rationale underlying this doctrine is the need for finality in proceedings.
- 184.** For the doctrine of *functus officio* to be engaged, it is necessary that the decision in issue be final. In the context of judicial decision making, a decision may be described as final only when “it leaves nothing to be judicially determined or ascertained thereafter, in order to render it effective and capable of execution, and is absolute, complete and certain”.<sup>55</sup>
- 185.** The modern trend of the law is to invest apex Courts with “Review Jurisdiction” by which the Court may review a decision made or given by it on

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

<sup>55</sup> *Kurukkal v. Canada (Minister of Citizenship & Immigration)* 2009 FC 695, [2010] 3 F.C.R. 195

certain grounds.<sup>56</sup> These factors may include, but are not limited to grounds such as exceptional circumstances which have resulted in miscarriage of justice; or discovery of new and important matter or evidence which after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him or her at the time when the decision was made.

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

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

*“On the second aspect on which the appellant seeks to lead medical evidence, the opinion of the medical experts that the deceased's wounds were caused by a high velocity bullet and not a 9mm pistol as used by the appellant is based on their assessments of the medical records of the post-mortem findings. They did not see the wounds. The evidence given at the trial by the pathologist called by the State is also his opinion again based on the same records, the doctor who conducted the post-mortem examination having died before the trial. The assessment of the trial doctor and the Appellant's specialists differs and while it may be the position that the specialists are more experienced than the trial doctor, their opinions are untested. It cannot be said that after due cross-examination their opinions would necessarily prevail and there is no doubt that this would affect the result of the trial. Their opinion remains what it is: mainly their opinion. It must be weighed against the direct evidence of the eye witnesses at the trial, which evidence was*

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<sup>56</sup> See for example Article 133 of the Ghanaian Constitution, 1992

*believed by the trial court and by this court on appeal, who testified that it was the appellant and nobody else who shot the deceased it cannot be said with any certainty that they are likely to be believed purely on the strength of medical opinions. This court cannot find that there is no doubt – or even a probability – that the evidence of the medical specialists would reverse the trial court’s verdict and that therefore there is a miscarriage of justice. The evidence which the appellant now seeks to lead does not, on both aspects give rise to one of the exceptional cases where the court, being functus officio, might be constrained to re-open the case.”*

- 188.** The African Commission finds that the direct evidence of the eye witnesses at the trial to the effect that it was the appellant and nobody else who shot the deceased was uncontroverted both at the lower court and before the court of appeal. Contrary to the assertion of Counsel for Kobedi, the court of appeal did not rely on the testimony of an unqualified forensic expert but based its decision on the unchallenged evidence of eye witnesses.
- 189.** The African Commission consequently agrees with the conclusion of the court of appeal that “the evidence which the appellant now seeks to lead does not give rise to one of the exceptional cases where the court being functus Officio might be constrained to re-open the case.”
- 190.** In the light of the foregoing the African Commission finds that the Court of appeal did not misdirect itself by invoking the doctrine of functus officio and refusing to re-open the trial of Kobedi and that there was no miscarriage of justice in the circumstance of the case. The result is that the right to fair trial under Article 7(1) (b) was not vitiated.

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

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

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

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

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

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

### **Right to be assisted by Counsel**

**195.** On the question as to whether the appellant was adequately defended, the Court of Appeal of the Respondent State had this to say.

*“He was represented for some 5 1/2 months by Mr. Dikgokgwane whose cross-examination of those witnesses who were recalled was searching and vigorous. The appellant in his evidence was well led and the submissions to the trial court were full and detailed. At no time during the trial was there any complaint by the appellant about the adequacy of Mr. Dilegokgwane’s services, nor at the appeal stage.*

*Appellant only raised the matter in the proceedings before Kirby J. Like Kirby J, as stated earlier, I am of the view that the appellant was adequately represented----- I am unable to find that he did not have a fair trial or that the adequacy or inadequacy of his defense was such that it constitutes a special circumstance as to why the doctrines of *functus officio* or *res judicata* do not apply and that on this ground he be allowed a retrial.*

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

### **Delays in the Trial**

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

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

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

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

## **Alleged Violation of Article 4**

- 201.** While the African Commission affirms that a higher threshold of rights is intended for those who are charged with capital offences,<sup>57</sup> and that the imposition of capital punishment in breach of the due process guarantees under Article 7 of the Charter constitutes a violation of the right to life protected by Article 4 of the Charter,<sup>58</sup> the African Commission finds that there were no such breaches of due process guarantees under Article 7 of the African Charter in the instant case to warrant a violation of Article 4 of the African Charter.
- 202.** While further affirming that capital punishment would also constitute a violation of Article 4 of the African Charter where the imposition of death sentence is disproportionate to the gravity of the offence committed,<sup>59</sup> the African Commission holds that the imposition of the death penalty to the ‘most serious crimes’ would not constitute a violation of the right to life protected under Article 4 of the African Charter.<sup>60</sup>
- 203.** Although the African Charter and the African Commission’s Resolution on the Death Penalty<sup>61</sup> does not afford a definition of what constitutes ‘most serious crimes’, the African Commission holds that the phrase ‘most serious crimes’ should be interpreted in the most restrictive and exceptional manner possible and that the death penalty should only be considered in cases where

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<sup>57</sup> Communication 218/98, Civil Liberties Organization, Legal Defence Centre, Legal Defence and Assistance Project v. Nigeria, Para. 34

<sup>58</sup> Communications 137/94, 156/96, and 161/97 International Pen and Others (on behalf of Saro-Wiwa) v. Nigeria, Para. 78; Communication 61/91, 98/93, 164/97 à 196/97 and 210/98, Malawi African Association and Others v. Mauritania, Para. 120; and Human Rights Committee, General Comment No. 32, Para. 59.

<sup>59</sup> Communication 240/2001 Interights et al. (on behalf of Bosch) v. Botswana, Para. 50

<sup>60</sup> See Thirteenth Annual Activity Report of the African Commission on Human and Peoples’ Rights, OAU Doc AHG/Dec 153 (XXXVI) annex IV

<sup>61</sup> Ibid



the crime is intentional, and results in lethal or extremely grave consequences. In this regard the African Commission relies on Article 60 of the African Charter to note that the Rome Statute<sup>62</sup> has identified murder, though in a slightly different context, as one of the 'most serious crimes' under international law.

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

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

**206.** The African Commission having found that due process was followed and safeguarded by the judicial system of Botswana in the trial of Kodedi and in particular that the Court of Appeal rightly upheld the principle of *functus officio* and *res judicata*, and upon finding that the appellant was tried, convicted and sentenced to death on account of one of the 'most serious crimes', the African

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

Commission holds that his execution cannot in the circumstances amount to a violation of Article 4 of the African Charter.

**For these reasons, the African Commission finds:**

- a. There has been a violation of Articles 5 of the African Charter by the Respondent State;**
- b. There has been no violation of Articles 2, 3, 4 and 7 (1) (d) of the African Charter by the Respondent State;**
- c. Strongly urges the Republic of Botswana to take all measures to comply with the Resolution urging States to envisage a Moratorium on the Death Penalty;**
- d. Urges the Respondent state to take urgent measures with a view to abolish the death penalty;**
- e. Requests the Republic of Botswana to report back to the African Commission when it submits its report in terms of article 62 of the African Charter on measures taken to comply with this recommendation.**

**Done in Banjul, The Gambia during the 10<sup>th</sup> Extra-ordinary Session of the African Commission on Human and Peoples' Rights, December 2011.**