Decision of the African Commission on Human and Peoples Rights on the Preliminary Objection

Communication 428/12 – Dawit Isaak v Republic of Eritrea

Summary of the Complaint

1. The Secretariat of the African Commission on Human and Peoples' Rights (the Secretariat) received a Complaint on 29 October 2012 from Prisca Orsonneau, Jesus Alcala and Percy Bratt (the Authors) representing Dawit Isaak (the Complainant), against the State of Eritrea (the Respondent State). The Complaint is submitted in terms of Articles 55 and 56 of the African Charter on Human and Peoples' Rights, (the African Charter).

2. The Respondent State is a State Party to the African Charter having ratified the same on 14 January 1999.

3. The Authors allege that the Complainant (a dual Eritrean and Swedish citizen), editor and co-owner of the newspaper Setit, was arrested by the Eritrean police on 23 September 2001 and since then detained incommunicado, kept at an undisclosed location without having been charged with any offense; and without having been brought before a magistrate and without being allowed access to counsel.

4. The Authors state that according to news reports, presidential adviser Yemane Gebremeskel stated that the Complainant and other journalists may have been arrested for avoiding national service.

5. The Authors aver that the detentions came in the wake of the closing down of eight newspapers by the State authorities on 18 September 2001 and that all those detained have had their bank accounts frozen and assets confiscated.

6. It is alleged that the latest reports indicate that the Complainant is being held at Eiraeiro prison camp, 10 miles north of Asmara, along with a number of other detained journalists.

7. The Authors further allege that as of January 2010, the Complainant was being kept in solitary confinement, in a tiny cell with no windows and was in very poor physical and mental health.

8. The Authors state that no evidence has been brought forth to substantiate the Complainant's arrest, and no formal charges have been lodged after more than nine years of consideration.

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According to the Authors, the Complainant is not allowed to communicate with his family, his friends, the Embassy of Sweden, or any human rights organisation.

Alleged Violations of the Charter

9. The Authors allege that the Respondent State has violated Articles 1, 2, 3, 4, 5, 6, 7 (1), 9, and 18 of the African Charter.

Prayers of the Complainant

10. The Authors pray the African Commission to:
    i. Inquire into the Complainant's whereabouts and the circumstances of his detention;
    ii. Order the cessation of the incommunicado detention of the Complainant;
    iii. Order the Respondent State to allow counsel to meet and confer with the Complainant, in private and unmonitored attorney-client conversation.

Procedure

11. The Communication was received at the Secretariat on 23 October 2012 and the Commission was seized of the Communication at its 13th Extraordinary Session held from 19 – 25 February 2013.

12. During its 16th Extraordinary Session held from 19 to 29 July 2014 in Kigali Rwanda, the Commission declared the Communication admissible and both parties were informed by correspondence dated 04 August 2014. The Complainant was also requested to submit its observations on the Merits in accordance with Rule 108 of the Commission's Rules.

13. On 01 October 2014, the Complainant's submissions on the Merits were received at the Secretariat which acknowledged receipt by correspondence of 02 October 2014 and transmitted same to the Respondent State for its comments in accordance with Rule 108 (1) of the Commission's Rules.

14. To date, the Respondent State has not submitted its observations on the Merits despite several reminders to that effect.

15. On 4 May 2015, the Secretariat received correspondence (**Note Verbale Ref: MOLS/020/15**) from the Respondent State in which the Respondent State objected to the Commission's decision on admissibility of the case.

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16. On 13 May 2015, the Secretariat acknowledged receipt of the correspondence and informed the Respondent State that the matter would be brought to the attention of the Commission.

17. During its 18th Extra-Ordinary Session held from 21 July to 7 August 2015 in Nairobi, Kenya, the Commission considered the matter and decided to make a ruling on the Preliminary Objection before proceeding to the Merits of the Case. In all deliberations pertaining to the matter, the Honourable Commissioner imputed in the preliminary objection on allegations of bias recused herself.

18. The Secretariat informed both parties of its decision to make a ruling on the Respondent State's Preliminary Objection by letter and Note Verbale dated 20 August 2015 and invited the Complainant to make its observations on the same.

19. On 24 August 2015, the Secretariat received the Complainant's Observations on the Respondent State's Preliminary Objection. The Secretariat acknowledged receipt and transmitted the same to the Respondent State via letter and Note Verbale dated 2 September 2015, respectively.

The basis of the Preliminary Objection on the Merits

20. The Respondent State submits that the Commission's decision on Admissibility is contrary to the African Charter in that it alleges violation of rights, involves the same parties, and seeks the exact same remedies as those sought in a case that has already been decided before the Commission.

21. The Respondent State argues that the Complaint fails to comply with Article 56 (7) of the African Charter because a decision was delivered on the case and does not warrant re-litigation.

22. The Respondent State further argues that the decision does not adhere to the requirements of Article 117 of the Transitional Civil Procedure Code of Eritrea and that the case of Dawit Isaak is a matter of national security that should not be reviewed by the Commission.

23. The Respondent State argues that the Commission's decision on Admissibility, to which it objects, did not come up with solid and convincing logic to refute the objections raised. The Respondent State also argues that it was irregular for the Commission to argue on behalf of

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the Complainant when they failed to make submissions regarding the issue of previous settlement of the Communication.

24. The Respondent State further alleges bias on the part of the Commission by citing two main reasons; first that the Commissioner spearheading the Communication who is also the Special Rapporteur on Freedom of Expression and Access to Information conducted a campaign against Eritrea when she wrote a preface, endorsed the contents of and gave welcoming remarks at the launch of the report entitled "The Erosion of the Rule of Law in Eritrea: Silencing Freedom of Expression "on the margins of the Commission's 56th Session on 21 April 2015, in Banjul the Gambia. The Respondent State argues that in so doing, the Commissioner negatively influenced the outcome of the Communication and violated the principle of confidentiality.

25. The Respondent State also argues that the matter has been politicised and can no longer be the subject of adjudication as it was declared at the launch that, "it seems that the legal proceedings are not yielding any result…the Commission should, in its next activity report, urge the AU Assembly, to take appropriate measures, as allowed for under Article 23(2) of the AU Constitutive Act to exert further political pressure on Eritrea".

26. The Respondent State concludes by submitting that the Commission should take all these matters under consideration and dismiss the case.

The Complainant's Observations on the Preliminary Objection

27. In its response, the Complainant indicates that the Commission's decision on Admissibility already addressed the Respondent State's objection hence the Objection amounted to a re-trial of the case. In respect of the Respondent State's allegation that the matter has been politicised, the Complainant argued that the Respondent State's suggestion that the Honourable Commission during a side event at the 56th Ordinary Session in April 2015 urged the "AU Assembly to take appropriate measures" against Eritrea was incorrect as it came from one of the panellists and not a member of the Commission. It attributes this error on the part of the Respondent Stat to the absence of the respected Delegates from the Republic of Eritrea from the actual panel discussion.

The Commission's analysis

On the allegation of the Honourable Commissioner's bias on the matter

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28. The Commission notes that the Respondent State's allegation of bias originated from the launch of a report on 24 April 2015, during the 56th Ordinary Session of the Commission in Banjul, the Gambia entitled "The erosion of the Rule of Law in Eritrea: Silencing Freedom of Expression." The report was a collaboration between the Centre for Human Rights at the University of Pretoria, South Africa and the United Nations mandated University of Peace in Costa Rica in support of the mandate of the United Nations Special Rapporteur on Freedom of Expression and Access to Information.

29. The Commission is required to answer the question whether a judge whose impartiality may legitimately give rise to doubts should refrain from taking part in the decision-making. Ordinarily, impartiality refers to the absence of prejudice or bias.

30. Undoubtedly, the impartiality of an adjudicatory body is critical to the parties before it as this gives assurances of fairness. Impartiality relates to two critical aspects, first that the adjudicatory body must be subjectively free of personal prejudice or bias and; second that the body must be objectively seen as impartial and offer sufficient guarantees to exclude any legitimate doubt in this respect'.[1]

31. In **Communication 281/2003 -** ***Marcel Wetsh'okonda Koso and Others v Democratic Republic of Congo*** [2] the Commission stated that Articles 7 and 26 constitute the two prongs of sound justice; namely to mete out appropriate justice and to guarantee the independence of justice and that independent justice refers to trial before impartial and credible courts.

32. The existence or non-existence of bias can be tested in a number of ways. The Commission will adopt the approach taken by the European Court of Human Rights (the European Court) which identifies two distinctive ways of testing impartiality; the subjective approach and the objective approach.[3] Whereas the subjective approach seeks to ascertain the actual existence of bias by assessing the personal conviction of a given judge in a given case, the objective

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[1] Nsongurua J Udombana, The African Commission on Human and Peoples' Rights and the development of fair trial norms in Africa (2006) 6 African Human Rights Law Journal p. 326.

[2] Communication 281/2003 - *Marcel Wetsh'okonda Koso and Others v Democratic Republic of Congo* (2008) ACHPR Para 76 and 77.

[3] Piersack v Belgium, (Application no. 8692/79) European Court of Human Rights, Judgment Strasbourg, 1 October 1982, Para 30 and 31.

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approach asks whether the same judge offered guarantees sufficient to exclude any legitimate doubt of impartiality.

33. In applying the subjective approach to the facts of this case, the Commission observes that the Respondent State attributes bias to the Honourable Commissioner without providing actual proof of her partiality. In every case where bias is imputed, the Commission will presume the existence of impartiality unless proof to the contrary is provided. As noted above, the Commissioner's participation on the panel in itself is not proof of her partiality as she was well within her mandate.

34. The Commission's mandate is provided for under the African Charter[4] and the drafters of the Charter intended that the Commission should carry out all its functions simultaneously. These functions are for the promotion of human and peoples' rights, the protection of human and peoples' rights and the interpretation of the Charter. Protection is whereupon the Commission carries out sensitisation, public mobilisation and information dissemination activities through seminars, symposia, conferences and missions.[5] The protection of human and peoples' rights occurs when the Commission exercises its communication procedure, friendly settlement of disputes, state reporting (including consideration of Non-Governmental Organisations' shadow reports), urgent appeals and other activities of special rapporteurs and working groups and missions.[6]Article 45 of the African Charter also bestows on the Commission the mandate to interpret provisions of the Charter upon a request by a state party, organs of the AU or individuals. No organ of the AU has referred any case for the interpretation of the Charter to the Commission. However, a handful of NGOs have approached the Commission for interpretation of the various articles of the Charter. The Commission has also adopted many resolutions expounding the provisions of the Charter.

35. These three mandates are complementary and are carried out by the 11 Commissioners appointed in terms of Article 31 of the Charter and exercised in accordance with the Charter and the Rules of Procedure of the Commission as envisaged in Article 42 (2) of the Charter. The Respondent State's allegation of bias, deriving from the actions taken by a Commissioner in the process of exercising one of the mandates set out in the Charter, cannot be sustained on

[4]Article 45 of the Charter.
[5]ACHPR; Mandate of the Commission, http://www.achpr.org/about/mandate/.
[6]ACHPR; Mandate of the Commission, http://www.achpr.org/about/mandate/.

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the subjective test as it strikes to the core of the Commission's functionality. If upheld, it would amount to a unilateral amendment of the Charter, and require the Commission to make a declaratory order outside the scope of its jurisdiction.

36. Further, the Commissioner's comments were statements of fact repeating established findings as ascertained in previous decisions of the Commission. These statements cannot suffice as proof of bias. Consequently, the Commission finds that the allegation of bias fails on the subjective test.

37. The Commission however notes that bias is not easy to read in the mind of the adjudicator but perceptions, impressions and appearances are equally important where bias is alleged. An adjudicator caught up in allegations of bias where there is legitimate fear of lack of impartiality affects the public's confidence in that court's ability to deliver justice. Courts are themselves of no use if they do not inspire confidence in the public in a democratic society. Similarly, this Commission's credibility is at stake where one of its adjudicators is alleged to be biased. The question is therefore whether the imputed statements are sufficient to create doubt in the mind of an objective person of the Honourable Commissioner's impartiality in adjudicating this Communication.

38. The Commission notes that the Honourable Commissioner was speaking from a nuanced perspective as the Special Rapporteur on Freedom of Expression and Access to Information in Africa. That position requires her to keep abreast with allegations of violations of freedom of expression and to follow up on state implementation of recommendations, urgent appeals and any other measures taken by the Commission to protect individuals whose rights have been infringed upon through the exercise of their freedom of expression. The Honourable Commissioner's role is of fact finding, to establish the truth of the allegations and where they are confirmed to facilitate a remedy. This role is not unique to her but to all 11 Commissioners who take up roles on special mechanisms and take action against violations of rights protected by those special mechanisms. Exercising this role, in itself, cannot suffice to sustain the alleged bias.

39. The second approach is whether the specific actions and words of the Honourable Commissioner, in this particular instance constitute a legitimate reason to doubt whether in

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the end her presence on the Commission would strike to the requisite guarantees of impartiality.

40. The Commission's Oral Verbatim Recording of the event reveals that the Honourable Commissioner sat on the panel and made the opening remarks. In those remarks she mentioned the parameters guiding the right to freedom of expression under the Charter and the limitations therein as well as the requirement that any limitation thereof should be provided for under the law.

41. The recording of the Commission also reveals that the Honourable Commissioner mentioned how she sent several letters to the government of Eritrea expressing concerns with violations of freedom of expression including letters in relation to specific cases. She also stated that she sent a letter, in her capacity as Special Rapporteur in October 2011 to the government of Eritrea in respect of Mr Dawit Isaak's continued violation. She also commended the institutions that produced the report and stated that the report was a welcome development in defending freedom of expression.

42. It begs the question whether an objective person would find that these particular words created doubt as to the Honourable Commissioner's impartiality in the current case. The Commission has previously found that how a judicial body is perceived and actual manifest proof of its partiality can discredit it. [7]

43. The current case relates to Mr Dawit Isaak's continued detention in what the Complainant alleges is state action against his exercise of freedom of expression as the former editor of a news publication in Eritrea. The Commissioner publicly endorsed the Commission's previous decision which substantially addresses the same issue and involves the same victim. It does not seem unreasonable, for an objective observer to presume that her pronouncements limited the likelihood that she would reach a different conclusion in the current case.

44. Objectively, the allegations of bias may be arguable. However, the Commission notes the exact words of the Respondent State as "*…her action will negatively influence the outcome of the case…*"

[7] Communication 266/03 - Kevin Mgwanga Gunme et al v Cameroon (2009) ACHPR para 210 and 211.

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The allegation is therefore of future bias and impact on the outcome of the case in which case the Honourable Commissioner's recusal cures the source of the bias.

45. Consequently, the Commission finds that the perception of bias is inconsequential to the determination of whether this case should be dismissed or not.

On allegations of breaching confidentiality

46. The Respondent State alleges that the Honourable Commissioner breached the principle of confidentiality when she pronounced herself publicly on the current case. The Respondent State argues that the Honourable Commissioner spoke of letters that the Commission has sent to the Republic of Eritrea in respect of Mr Dawit Isaak.

47. The Commission ascertained, through the audio recording, that the Commissioner did mention that she sent a letter to the Republic of Eritrea on 3 October 2011. The Commission further retrieved this letter, whose contents relate to Mr Dawit Isaak's continued detention but more specifically to the non-implementation of the Commission's earlier decision. The letter provided that;

> "…the Special Rapporteur is concerned that the State of Eritrea has still not complied with the recommendations of the Commission in ***Communication 275/2003- Article 19/ The State of Eritrea,*** adopted during its 40th Ordinary Session. In this Communication, the Commission held that Eritrea was in violation of **Articles 5, 6, 7(1), 9 and 18** of the African Charter …"

48. As the Commission has ascertained, the specific letter mentioned in the Honourable Commissioner's address did not say anything new. The Honourable Commissioner merely restated a position from a decision that the Commission had already made in which it had made the finding that the Republic of Eritrea violated freedom of expression. The Activity Report in which the decision to publish this report was made, was adopted by the Policy Organs of the African Union in 2007.

49. The Commission therefore finds the allegation of breach of confidentiality unsubstantiated.

On the allegation of the matter being politicised

50. Article 23 (2) of the Constitutive Act of the African Union provides that:

> Furthermore, any Member State that fails to comply with the decisions and policies of the Union may be subjected to other sanctions, such as the denial of transport and communications links

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with other Member States, and other measures of a political and economic nature to be determined by the Assembly.

51. The use of sanctions by the African Union (AU Assembly) is a mechanism for enforcement of the Union's decisions where a Member State refuses to comply. The sanctions are meted out to execute the decision and force the State to implement the decision. The AU Assembly has the mandate to monitor the implementation of policies and decisions of the Union as well as ensure compliance, through appropriate mechanisms in terms of Article 9(1) (e) of the AU Constitutive Act. For this purpose and in appropriate circumstances, it may impose appropriate sanctions for violation of the principles enshrined in the Constitutive Act, such as respect for human rights as provided for in Article 4(m) of the Constitutive, or for non-compliance with the decisions of the Union. The procedure of imposing sanctions is indeed deliberative and political.

52. The Commission notes that Rule 125 of its Rules of Procedure provides that:

> When submitting its Activity Report in accordance with Article 54 of the African Charter, the Commission may request the Assembly to take necessary measures to implement its decisions. The Commission shall bring all its recommendations to the attention of the Sub-Committee on the Implementation of the Decisions of the African Union of the Permanent Representatives Committee.

This provision constitutes the legal basis upon which a decision of the Commission can become subject to the Assembly's scrutiny. This provision is legal and it gives the Commission a legal and procedural guarantee of bringing matters to the attention of the Assembly.

53. When the Commission submits its activity report, it exercises a legal role as an adjudicating body. When the Assembly exercises the processes of deciding whether or not to pass sanctions in terms of Article 23(2) of the Constitutive Act, it exercises its own role in line with its internal rules and political processes outside the scope of this Commission's powers. The two processes should not be conflated to be the same, as appears to be the case when the Respondent State alleges that the matter has been politicised.

54. The Commission, also notes that the recommendation for the "AU Assembly to take appropriate measures" against Eritrea to enforce respect for the Charter and in particular, respect of freedom of expression was made, by another panellist during the launch of the report and not by the Honourable Commissioner.

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55. Consequently, the Commission does not find any grounds upon which the objection that the matter has been politicised can be sustained.

Objection on the Grounds that the decision of the Commission is not sound in law

56. The Commission notes that the Respondent State's objection is grounded upon the principle of *res judicata,* namely that the Commission already pronounced itself on the matter hence the admission of the Communication violated Article 56 (7) of the Charter. The Respondent State submits that the issues raised in the present Communication were already settled by the Commission in **Communication 275/05 – Article 19 v Eritrea**.

57. The rule of *res judicata* can best be understood as follows; that no court should be able to try any case in which the subject matter of the new case is substantially similar to a decided case involving the same parties (or some of them) in a court with the same competencies as the one that previously tried the case. Three things are critical in assessing whether a matter fits the *res judicata* test. One, the matter must be "directly and substantially" similar in both cases. Two, the parties in both cases must be the same or some of the parties in the new case must be a part of the previous claim. Three, the matter must have been finalised in the previous case. All three conditions need to be satisfied in order to conclude that a matter is *res judicata*.

    In **Sudan Human Rights Organisation & Sudan and Centre on Housing Rights and Evictions v The Sudan[8],** the Commission stated that 'a matter shall be considered settled within the context of Article 56 (7) of the African Charter, if it was settled by any of the UN human rights treaty bodies or any other international adjudication mechanism, with a human rights mandate. This Commission is one such adjudication body with a human rights mandate.

58. With regard to the identity of the parties, the Complainant in this particular case was one of the individuals on whose behalf proceedings were initiated before this Commission in **Communication 275/03 – Article 19 v Eritrea.** [9]

59. In respect of the substance of the two cases, the Commission notes that the provisions of the Charter alleged to have been violated and the relief sought by the Complainant in

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[8] Communications 279/03, 296/05 – Sudan Human Rights Organization & Centre on Housing Rights and Evictions v Sudan, (2010) ACHPR 28th Activity Report, para 104.

[9] See Article 19 v Eritrea, para 3.

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Communication 275/03 – Article 19 v Eritrea[10] were basically the same as in the present Communication. The Complainant alleged violations of Articles 1, 5, 7 (1), 9 and 18 of the Charter to which the Commission granted relief in terms of the following recommendation:

i. ''Urges the government of Eritrea to release or to bring to a speedy and fair trial the 18 journalists detained since September 2001, and to lift the ban on the press;
ii. Recommends that the detainees be granted immediate access to their families and legal representatives; and
iii. Recommends that the government of Eritrea takes appropriate measures to ensure payment of compensation to the detainees.''

58. The Commission recalls its decisions in **Kevin Mgwanga Gunme et al v Cameroon**[11]**,** in which it stated that for a case to be *settled*, the treaty or Charter body dealing with the matter should have taken a decision which addresses the concerns, including the relief being sought by the Complainant.

59. The Commission observes therefore that the rights and obligations of the parties were duly determined in **Article 19 v Eritrea.** The Commission also notes that the present Communication is consequent to the Respondent State's failure to implement its decision, which has led to the Complainant being held incommunicado for about 13 years now. The Commission regrets this state of affairs and would like to draw the Respondent State's attention to its obligation to give effect to the rights and freedoms enshrined in the Charter which it voluntarily undertook to adhere to.

60. The Commission notes that any decision on the present Communication will add no value other than to reaffirm what was previously settled.

Decision of the Commission on the Preliminary Objection

61. In view of the above, the African Commission on Human and Peoples' Rights:

i. Upholds the Respondent State's Preliminary Objection; on the grounds of *res judicata;*

[10] See Article 19 v Eritrea, para 3.
[11] Communication 279/03 – Kelvin Gunme et al v Cameroon (2009) ACHPR, 28th Activity Report, para 86.

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ii. Dismisses the Respondent State's Preliminary Objection on grounds of bias, breach of confidentiality and politicisation of the matter;

iii. Dismisses the Communication and will not proceed to consider it on the merits;

iv. Reaffirms its findings in **Communication 275/03: Article 19 and Eritrea t**hat the respondent State should:

   a. release or bring to a speedy and fair trial the 18 journalists (including Mr Dawit Isaak) detained since September 2001, and to lift the ban on the press;

   b. grant detainees immediate access to their families and legal representatives; and

   c. take appropriate measures to ensure payment of compensation to the detainees';

v. Strongly urges the Respondent State to take all necessary measures to implement its decision in the said Communication without further delay; and

vi. Notifies its decision to the parties in accordance with Rule 103 (4) of its Rules of Procedure.

Done in Banjul, the Islamic Republic of the Gambia at the 19th Extra-Ordinary Session of the African Commission on Human and Peoples' Rights held from 16 - 25 February 2016.

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