Communication 431/12 – Thomas Kwoyelo v. Uganda

Summary of the Complaint:

1. The Complaint was received by the Secretariat of the African Commission on Human and Peoples' Rights (the Secretariat) on 19 October 2012. The Complaint is filed by Onyango & Company Advocates (the Complainant) on behalf of Mr Thomas Kwoyelo (the Victim) against the Republic of Uganda (the Respondent State or the Respondent), State Party to the African Charter on Human and Peoples' Rights (the African Charter or the Charter).[1]

2. It is alleged that the Victim was a child soldier, abducted by the Lord's Resistance Army (LRA) in 1987 in Northern Uganda. In March 2009, following the collapse of the Juba Peace Talks, it is claimed that the Victim was shot and severely wounded on the battlefield in the Democratic Republic of Congo.

3. The Complainant further alleges that the Victim was abducted from a hospital while recovering from his injuries and taken to a private residence in Uganda, where he was subjected to torture and inhumane treatment for three months. He was also allegedly denied access to legal counsel and next of kin. In June 2009 and August 2010, he was charged with several offences under the Ugandan Penal Code and the Ugandan Geneva Conventions Act of 1964 respectively.

4. The Complainant states that the Victim applied for amnesty under Uganda's 2000 Amnesty Act. In its decision, the Amnesty Commission declared the Victim was eligible for amnesty, but Uganda's Director of Public Prosecutions (the DPP) refused to issue an amnesty certificate. The matter was brought to the attention of the Ugandan Constitutional Court in September 2011 by Constitutional Reference No.36 of 2011, and the Court decided that the Victim qualified for amnesty and was denied equal protection by the Government of Uganda. The Complainant

[1] The Republic of Uganda ratified the African Charter on 10 May 1986.

avers that the Constitutional Court further ordered cessation of the trial against the Victim. However, the Government of Uganda, through the Attorney General brought two applications to the Court of Appeal of Uganda seeking an interim order for stay of execution of the Constitutional Court decision, which were dismissed on 10 November 2011.

5. The Complainant avers that on 11 November 2011, the International Criminal Division of the High Court of Uganda (the ICD) ceased the Victim's trial. However, the Government of Uganda refused to release the Victim from detention. On 25 January 2012, the High Court issued an order of *mandamus* compelling the Chairman of the Amnesty Commission and the DPP to process and grant amnesty to the Victim, but to no avail.

6. The Complainant further states that on 30 March 2012, the Supreme Court of Uganda stayed the execution of any consequential orders arising from Constitutional Reference No.36 of 2011. It is claimed that the Supreme Court did not give a reason for disregarding the Constitutional Court decision.

7. The Complainant also questions the impartiality of the Supreme Court alleging that the Chief Justice of Uganda who headed the panel of judges of the Supreme Court is also the head of Justice, Law and Order Sector in Uganda, a body that had previously criticised the decision of the Constitutional Court in Constitutional Reference No. 36 of 2011. The Complainant alleges that the Chief Justice played a major role in the formation of the ICD which was meant to try the Victim.

8. The Complainant states that the Supreme Court did not have quorum to consider a constitutional appeal at the time of stay of execution and on 18 October 2012 still did not have a quorum and is therefore unable to hear the case until more judges are appointed to the Supreme Court. It is claimed that there is no timeframe for the appointment of judges and therefore the Victim remains in indefinite detention.

Articles alleged to have been violated:

9. The Complainant alleges that the Respondent State has violated the rights of the Victim as guaranteed in Articles 2, 3, 4, 5, 6, 7.1(a), (b) and (d), 16 and 26 of the African Charter.

Prayers

10. The Complainant prays the Commission to:

    i. Find a violation of the above mentioned articles of the Charter by the State of Uganda;
    ii. Order the Government of Uganda to:
        a. pay adequate compensation to the Victim for the rights violated;
        b. conduct an effective and impartial investigation into the circumstances of the arrest and detention and the subsequent treatment of the Victim;
        c. enforce existing domestic legislation aimed at effecting the State's positive responsibility in preventing torture, cruel and other inhuman treatment or punishment; and
        d. investigate the violations, and bring the perpetrators to justice.

Procedure:

11. The Secretariat received the Compliant on 19 October 2012, and acknowledged receipt of the same on 7 December 2012.

12. At its 13th Extra-Ordinary Session, held in Banjul, The Gambia, from 19 to 25 February 2013, the Commission decided to be seized of the Communication. On 27 February 2013, the Secretariat informed the Complainant of the Commission's decision to be seized and invited the Complainant to submit its arguments on Admissibility. By Note Verbale of the same date, the Secretariat informed the

Respondent State of the seizure decision and transmitted a copy of the complaint to the State.

13. On 24 April 2013, the Secretariat received the Complainant's evidence and arguments on Admissibility. By letter dated 25 April 2013, the Secretariat acknowledged receipt of the same and forwarded to the Respondent State by Note Verbale of the same date giving it two months in accordance with Rule 105(2) of the Rules of Procedure of the Commission to submit its observations on Admissibility.

14. On 25 June 2013, the Respondent State forwarded to the Secretariat its observations on Admissibility. By Note Verbale and letter dated 27 June 2013, the Secretariat acknowledged receipt of the Respondent State's submissions and forwarded same to the Complainant requesting it to submit any observations within one month of the receipt of the Respondent State's submissions. No observations were received from the Complainant.

15. During its 54th Ordinary Session held from 22 October to 5 November 2014 held in Banjul, The Gambia, the Commission declared the Communication Admissible.

16. By correspondence of 22 May 2014, both parties were informed of the Commission's decision and the Complainant was requested to submit its observations on the Merits of the Communication in accordance with Rule 108 of the Commission's Rules.

17. The Complainant's submissions on the Merits dated 24 July 2014 were received at the Secretariat, which acknowledged receipt by a letter dated 4 August 2014. The Complainant's submissions were transmitted to the Respondent State by Note Verbale dated 4 August 2014 with a request for its observations in accordance with Rule 108 (1) of the Commission's Rules.

18. The Respondent State's observations on the Merits dated 9 February 2015 were received at the Secretariat, which acknowledged receipt on 16 February 2015. The Respondent State's submissions were transmitted to the Complainant by correspondence of the same date for its observations in accordance with Rule 108 (2) of the Commission's Rules.

19. On 24 February 2015, the Secretariat received correspondence from the Complainant requesting Annexures to the Respondent State's submissions on the Merits. The Respondent State's submissions on the Merits referred to Annexures that were not available in the document transmitted to the Complainant.

20. On 13 May 2015, the Secretariat acknowledged receipt of the Respondent State's submissions on the Merits and requested the Annexures as requested by the Complainant, and on the same day the Secretariat informed the Complainant that his request had been forwarded to the Respondent State.

21. On 30 June 2015, the Secretariat sent the Respondent State a reminder requesting Annexures to its submissions on the Merits.

22. The Secretariat received the requested Annexures from the Respondent State on 3 September 2015, and acknowledged receipt and transmitted the same to the Complainant via Note Verbale and letter respectively both dated 4 September 2015. In the letter, the Complainant was requested to make its observations, if any, within thirty days of notification pursuant to Rule 108(2) of the Rules of the Commission. No submissions were received from the Complainant.

The Law on Admissibility

Complainant's Submission on Admissibility

23. The Complainant submits that the Communication meets the terms and requirements of Article 56 of the African Charter and has presented evidence and arguments to support the submission.

24. Regarding exhaustion of domestic remedies, the Complainant notes that the Commission has held that the requirement of exhaustion of local remedies is founded on the principle that a government should have notice of a human right violation in order to have the opportunity to remedy such violations before being called before an international body.[2] They note that the Government of Uganda has had ample notice of the violation as theVictim, since his imprisonment in March 2009, has sought judicial review at every level and currently remains detained with no timelines for when his detention may be subject to further review.

25. They argue further that the Commission has set out three criteria which guides it in considering whether a petitioner has fulfilled the exhaustion of local remedies requirement namely that the remedy must be available, effective and sufficient.[3] They argue that the Victim has pursued all available remedies, to the extent that they exist. They note that although the Government may argue that the Victim is held pursuant to a stay issued by the Ugandan Supreme Court, it should be noted that the Supreme Court did not have a constitutional quorum to decide constitutional issues at the time when the stay was issued.

26. The Complainant goes further to state that even if the Government argues that a remedy exists (despite the numerous appeals completed by the Victim), it is clear that such a remedy is 'unduly prolonged' and thus exhaustion of that remedy is not required.

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[2] ACHPR, Communications 25/89-47/90-56/91-10-93 - Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union interfricane des Droits de l'Homme, Les Temoins de Jehovah v. DRC (2002), para. 36.

[3] ACHPR, Communication 147/95 - 149/96 Sir Dawda K. Jawara v The Gambia, (2000), para. 31.

27. With regards to Article 56 (6), the Complainant notes that the Communication is submitted within a reasonable timeframe. The Ugandan Supreme Court stayed the Constitutional Court ruling on March 2012 and since then additional proceedings have not occurred. Although the Charter does not provide a definitive date for a communication to be submitted, the Commission has held that it has to be submitted within a reasonable period of time. To support this, the Complainant cites the jurisprudence of the Commission in Article 19 and others v. Zimbabwe, and Darfur Relief and Documentation Centre v. Sudan[4].

28. The Complainant states that the Victim perfected his communication with the Commission on 19 October 2012 as it became clear he would continue to remain arbitrarily detained and the harm is in fact continuing and ongoing.

29. In relation to Article 56(7), the Complainant submits that the Victim's case has not been settled before any other international body and he prays the Commission to conclude that the Complaint meets the terms and requirements of Article 56 of the African Charter.

Respondent State's submission on Admissibility

30. In its submissions, the Respondent State contends that the Communication is not admissible as it does not satisfy the requirement of Article 56(5) of the African Charter on exhaustion of local remedies.

31. It states that Article 56(5) requires that all local remedies should be exhausted before Communications can be referred to the Commission and the rationale for this is to ensure that the State concerned must have had the opportunity of redressing the alleged wrong by its own means and within the framework of its own domestic system.

[4] ACHPR, Communication 305/05 – Article 19 and Others v. Zimbabwe (2010), para. 91; and Communication 310/05 – Darfur Relief and Documentation Center v. Sudan (2009), para. 75.

32. Citing the jurisprudence of the Commission, the Respondent State asserts that local remedies have not been exhausted in conformity with the well settled principle of finality of court process and legal certainty which begets that the Supreme Court of Uganda hears the Complainant's case as a last and final court within the jurisdiction of Uganda.

33. The Respondent State submits that domestic remedies still exist at the domestic level and argue that the Constitutional Court of Uganda is not the highest court in Uganda but only a Court of first instance for matters calling for Constitutional interpretation.

34. It outlines various articles of the 1995 Constitution of Uganda which recognise the Supreme Court as the final Court of appeal, particularly Article 132(3) which provides that 'any party aggrieved by a decision of the Court of Appeal sitting as a Constitutional Court is entitled to appeal to the Supreme Court against the decision'.

35. The Respondent State avers that the judgment in Constitutional Reference No. 36 of 2011 was delivered on 22 September 2011 and the Attorney General being dissatisfied with the said judgment appealed against the whole judgment on 23 September 2011.

36. They assert that the appeal is currently pending hearing and final determination and further assert that following the lodgement of the appeal, the Respondent State successfully applied to stay execution on the grounds that if execution was allowed to proceed it would in effect render the appeal nugatory.

37. The Respondent State submits that the Supreme Court of Uganda is duly constituted and has quorum to hear and entertain the appeal. They further submit that the Court be allowed an opportunity to hear and pronounce itself on the

finality of the matter regarding the release of the Victim from detention pending the appeal which is the same issues the Commission is being invited to consider.

38. The Respondent State argues that in the discharge of its judicial responsibilities regarding appeals from the Constitutional Court, the Supreme Court is governed by Article 128 of the Constitution which guarantees the independence of the judiciary in the exercise of judicial power and safeguards against direction or control from any person or authority in Uganda.

39. The Respondent State notes that in the event that the Supreme Court of Uganda confirms and upholds the decision of the Constitutional Court of Uganda in Constitutional Reference No.36 of 2011, the Victim will be released and adequately compensated for any wrong visited upon him. The Respondent State requests the Commission to declare the Communication inadmissible as the Victim could still avail himself of remedies locally.

Analysis of the Commission on Admissibility

40. The African Charter in Article 56 sets out seven requirements that a Communication brought under Article 55 of the Charter must satisfy in order to be considered admissible by the Commission. The Commission held in Article 19 v. Eritrea that failure to satisfy any one or more of those requirements render the Communication inadmissible.[5]

41. The Commission notes that the sole contentious issue between the parties on the admissibility of the communication is with respect to the requirement in Article 56(5) of the Charter. After carefully examining the Communication and the submissions of the parties, the Commission is of the view that Articles 56 (1), (2),

[5] ACHPR, Communication 275/03 – Article 19 v. Eritrea (2007), para. 43.

(3), (4), (6) and (7) are satisfied. To this end, the analysis on admissibility will focus on the requirement contained in Article 56(5) of the Charter.

42. Article 56(5) of the African Charter provides that Communications received by the Commission shall be considered "if they are sent after exhaustion of local remedies, if any, unless it is obvious that this procedure is unduly prolonged".

43. The Commission has asserted that the rationale for the exhaustion of local remedies rule both in the Charter and other international instruments is to ensure that before proceedings are brought before an international body, the State concerned must have had the opportunity to remedy the matter through its own local system, thus preventing the Commission from acting as a court of first instance rather than a body of last resort that complements national systems.[6]

44. In the present Communication, the Complainant contends that all local remedies have been exhausted to the extent that they exist and that the Victim remains detained illegally with no timeline for when his detention may be subject to further review. The Respondent State on the other hand argues that local remedies have not been exhausted since the Supreme Court before which an appeal is pending and which is the court of final jurisdiction in the Respondent State has not yet been given the opportunity to hear the matter. The Respondent State also avers that the Supreme Court has the necessary quorum to hear the appeal.

45. The Commission notes that the Victim's right to liberty was upheld by the Court of Appeal on 10 November 2011, following earlier decisions by the Constitutional Court to that same effect. The Commission also notes that the Attorney General filed an appeal to the Supreme Court against this decision on 23 September 2011, and further applied for a stay of execution of the decision of the Constitutional Court. The Commission notes further that the Victim has remained in detention

6 Sir Dawda Jawara v. The Gambia, n 3 above, para. 31

since the appeal was lodged and there is no indication as to when the Supreme Court will hear the matter because it does not have the requisite quorum to do so.

46. While it is the contention of the Respondent State that the Supreme Court has the necessary quorum and should be given the opportunity to hear the appeal, the Commission has confirmed that the Court does indeed have a quorum since 1 August 2013 but does not have the necessary quorum to hear appeals of a constitutional character which can only be decided with a quorum of 7 judges.[7]

47. It follows that at the material time, the Supreme Court did not have the requisite quorum to hear the victim's case. In the present circumstances, the Commission considers that the Supreme Court cannot be considered an available remedy for purposes of exhaustion of local remedies given that at the material time, it could not hear the case in question and there was no indication of the time when the Court will be regularly constituted to hear such cases. It is evident therefore that the remedy could not be utilised in the present case and cannot therefore be invoked to the detriment of the Complainant.[8]

48. The Respondent State has failed to persuade the Commission that at the material time, the Supreme Court as a local remedy was available and effective both in theory and in practice. Although the Respondent State has demonstrated that the Supreme Court can in theory hear the appeal lodged by the Attorney General, it has failed to prove that it could be made use of in practical terms by the victim in the circumstances of lack of quorum. It would therefore be unfair to ask of the victim to await the outcome of the appeal before the Supreme Court while languishing in detention, without any knowledge of when his detention will be

[7] Information obtained during meetings with the Principal Judge of the Supreme Court, His Lordship, Justice Yorokamu Bamwine (28/08/2013) and the Minister of Justice and Constitutional Affairs of Uganda, (29/08/2013),following a promotion mission undertaken by the Commission to the Republic of Uganda from 26 – 30 August 2013. See also http://www.judicature.go.ug/data/smenu/7//Supreme_Court.html

[8] Sir Dawada Jawara v. Gambia, n 3 above, para 34.

reviewed and through no fault of his own. In the circumstances, the Commission considers that all available local remedies have been duly exhausted.

Decision of the Commission on Admissibility

49. In view of the above, the Commission declared the Communication Admissible.

Consideration on the Merits

Complainant's Submission on the Merits

Alleged Violation of Article 3

50. The Complainant contends that the refusal of the Respondent State to grant the Victim amnesty as it did to over 24,000 other individuals amounts to a violation of his right to equal protection under the law. The Complainant submits that even after the Victim's application for amnesty was denied, the Respondent State granted amnesty to 274 other people. The Complainant opines that there is no objective or reasonable explanation why the Victim was 'selectively treated' in this manner by the Respondent State.

51. The Complainant submits that in Legal Resource Foundation v. Zambia, the Commission noted that "the right to equality is very important […]. It means that citizens should expect to be treated fairly and justly within the legal system and be assured of equal treatment before the law and equal enjoyment of the rights available to all other citizens."

52. The Commission, according to the Complainant, has previously asserted that "[…] equality before the law also entails equality in the administration of justice. In this regard, all individuals should be subject to the same criminal and investigative procedures in the same manner by law enforcement and the courts […]."

53. The Complainant also makes reference to the Commission's jurisprudence wherein it states that "[…]parties can only establish that they have not been treated equally by the law, if it is proved that the treatment received was discriminatory or selective...".

54. In light of the above arguments, the Complainant prays the Commission to find a violation of Article 3 of the Charter by the Respondent State.

Alleged Violations of Articles 4, 5, 16(1) and (2)

55. The Complainant avers that the Commission provided its clearest explanation of Article 5 in Ken Saro-Wiwa v. Nigeria when it opined that "Article 5 of the Charter prohibits not only cruel but also inhuman and degrading treatment. This includes not only actions which cause serious physical or psychological suffering, but which humiliate or force the individual against his will or conscience".

56. The Complainant also makes reference to Civil Liberties Organisation v. Nigeria wherein the Commission found that deprivation of family visits constitutes 'inhuman treatment' and that deprivation of light, insufficient food and lack of access to medicine or medical care constitute violations of Article 5.

57. The Complainant states that despite being visibly wounded on his arrest, the Victim was not given medical assistance and when he complained he was allegedly beaten by state agents, who retorted that the available drugs were meant only for soldiers of the UPDF. It is alleged that it took more than 48 hours before the Victim was properly examined by a medical personnel. The Complainant avers

that to date the Victim still experiences pain all over his body and as a result pays regular visits to the prison hospital.

58. The Complainant further submits that he was taken to the private residence of an official of the Chieftaincy of Military Intelligence for over three (3) months where he was forced to sleep on the floor, without any bedding and was afforded no toilet facilities. He was also allegedly deprived of sleep during interrogations and allowed only about three hours a day for exercise and given only one meal a day.[9]

59. According to the Complainant, the acts against the Victim include the infliction of physical, mental and emotional injury, which have affected his physical and mental wellbeing contrary to Article 16 of the Charter.

60. In this regard, the Complainant submits that the Respondent State failed in its positive obligation to prevent cruel, inhuman and degrading treatment and investigate the allegations impartially, in violation of Articles 5, 4 and 16 of the African Charter.

Alleged Violation of Article 6

61. The Complainant states that in Zegveld and Ephrem v. Eritrea wherein it found a violation of Article 6 of the Charter, the Commission observed that all detained persons 'must have prompt access to a lawyer and to their families', and 'their rights with regards to physical and mental health must be protected' and that 'the lawfulness of detention must be determined by a court of law 'or other appropriate judicial authority', and it should be possible to challenge the grounds that justify prolonged detention on a periodic basis.'

[9] The Complainant refers the Commission to paragraphs 14 &15 of the complainant's affidavit, attached as Annexture, in support of the reference Constitutional Court dated 15th August 2011.

62. The Complainant submits that despite the Victim surrendering to the Ugandan Peoples Defence Force (UPDF) in March 2009, he was shot in the process. The Complainant further submits that shortly thereafter, and prior to recovering from his injuries, the Victim was abducted from the hospital by Ugandan military intelligence, taken to a private residence where he was subjected to inhumane treatment and tortured for three months. According to the Complainant, during this time the Victim was neither allowed access to legal counsel nor produced before any court.

63. The Complainant states that in June 2009 the Victim was charged with various offences under Uganda's penal code and moved to Gulu Prison (Northern Uganda) and thereafter to Luzira Upper Prison (Central Uganda). On 26 August of 2010, the Victim was charged with violation of Uganda's 1964 Geneva Conventions Act. The Complainant submits that nearly a year passed after the Victim's arrest before he was allowed access to legal counsel or next of kin.

64. While in detention, the Complainant submits, on 12 January 2010 the Victim petitioned for amnesty under Uganda's Amnesty Act, and was declared eligible for amnesty by the Amnesty Commission. However, the Complainant avers that the DPP refused to issue the Victim an amnesty certificate.[10]

65. On 22 September 2011 the Constitutional Court, following a petition by the Counsel of the Victim dated 25 July 2011, made a unanimous decision that the Victim qualified for amnesty and was denied equal protection. The Complainant states that the Constitutional Court also ordered for the trial of the Victim before the ICD to cease forthwith.[11]

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[10] Submitted as Annexure is a copy of a letter from Uganda's Amnesty Commission stating that the complainant qualified and was eligible for Amnesty.

[11] Submitted as Annexure is a copy of the decision of Uganda's Constitutional Court in Constitutional Reference 36 of 2011 declaring that the complainant was not treated equally under the law and ordering the cessation of his trial by the International Crimes Division.

66. The Complainant states that on 1 November 2011, The Government of Uganda filed Constitutional Application 50 of 2011 in the Court of Appeal seeking to stay the decision of the Constitutional Court in Constitutional Reference 36 of 2011. On the same day, the Complainant submits, the Government filed Constitutional Application 51 of 2011 in the Court of Appeal seeking an Interim Order to stay execution of the same Constitutional Court decision.

67. The Complainant states that on 10 November 2011, the Court of Appeal dismissed both applications and upheld the Victim's right to liberty and equal treatment before the law, and accordingly, on 11 November 2011, the International Criminal Division ceased the Victim's trial. However, the Complainant avers that the Government of the Republic of Uganda refused to release the Victim from detention and that he was held in illegal and unlawful detention without a lawful warrant. According to the Complainant, the Victim sought relief at the High Court and on 25 January 2012 the Court issued an Order of Mandamus compelling the Chairman of the Amnesty Commission and the Director of Public Prosecutions to process and grant a Certificate of Amnesty to the Victim for his immediate release.[12]

68. The Complainant alleges that the DPP and Chairman of the Amnesty Commission again failed and/or refused to obey the court directive and as a result the Victim remained in unlawful and illegal detention. On 30 March 2012, the Complainant states, the Supreme Court stayed the execution of any consequential orders arising from Constitutional Reference No. 36 of 2011. The Complainant submits that this was done without giving any particular reason for curtailing the right to liberty of the applicant whose trial had already been ceased and whose right to liberty and equal treatment before the law had been upheld by the Constitutional Court. The

[12] Submitted as Annexure is a copy of an order of the International Crimes Division ceasing the trial of the complainant.

Complainant submits that the Supreme Court, without legal reason, has perpetuated the illegal detention of the Victim.

69. The Complainant draws the attention of the Commission to the period between 11 November 2011, when the trial of the Victim was ceased and no fresh charges proffered against him, to 30 March 2012, when the Supreme Court stayed all orders from the Constitutional Court. This period of detention, according to the Complainant, was particularly unlawful and violated Article 6 of the African Charter as there were no pending charges against the Victim yet the Respondent State refused to release him and kept him in arbitrary detention without any indication of when his trial would take place.

70. The Complainant submits that rights and freedoms of the Victim should only be deprived as stipulated by domestic and international law, and all other circumstances clearly constitute a violation of the right to security and liberty of the Victim, amounting to arbitrary detention in violation of Article 6 of the Charter.

Alleged Violation of Article 7

71. Relying on the decision of the Commission in Haregewoin Gebre-Sellaise & IHRDA (on behalf of former Dergue officials) v. Ethiopia, the Complainant submits that 'the right to an impartial hearing within a reasonable time is one of the cardinal elements of the right to a fair trial. The Article [Article 7] is specially designed to ensure that the charges which the penal procedure places on the individual are not unremittingly protracted and do not produce permanent harm. An individual who is accused and held in custody is entitled to have his or her case resolved on a priority basis and conducted with diligence.'

72. The Complainant asserts that on 30 March 2012, the Supreme Court stayed the execution of any consequential orders arising from Constitutional Reference No.

36 of 2011. The Supreme Court did not give any particular reason for curtailing the right to liberty of the applicant whose trial had already been ceased and his right to liberty and equal treatment before the law had been upheld by the Constitutional Court.

73. The Complainant contends that the Chief Justice who headed the panel of Judges of the Supreme Court that stayed the execution of the consequential orders was also the head of the Justice Law & Order Sector in Uganda, a body that had previously severely criticized the decision of the Constitutional Court in Constitutional Reference No. 36 of 2011.[13] The Chief Justice never distanced himself from this statement which was publicly available.

74. The Complainant further asserts that the Chief Justice also played a pivotal role in the formation of the International Crimes Division – the Division of the High Court meant to try the Victim. The Complainant submits that the above actions and omissions show that the tribunal that stayed the enjoyment of the right to liberty was partial. The Complainant remarks that justice must not only be done but must also be seen to be done.

75. The Complainant avers that at the time the Supreme Court stayed the enjoyment of the right to liberty by the Complainant, it did not have quorum to entertain a Constitutional Appeal and as of 18 October 2012 still did not have a quorum. Furthermore, there was no timeframe when more judges would be appointed to the Supreme Court and yet the Supreme Court knowing these facts and knowing that the trial of the Complainant had already been ceased by the International Crimes Division and also knowing that there were no fresh charges against the complainant stayed the enjoyment of his right to liberty.

[13] Annexed to the Submission of the Complainant is a copy of a Press statement of the Justice Law & Order Sector in Uganda (which the Chief Justice Heads) allegedly severely criticizing the decision of the Constitutional Court in Constitutional Reference No. 36 of 2011.

76. The Complainant asserts that the Victim was detained without any indication on when he would appear in court as this depended on when the President of the Republic of Uganda would appoint new judges to the bench.

77. The Complainant submits that the above-mentioned actions are in breach of Article 7 of the Charter.

Submission of the Respondent State on Merits

78. The Respondent State disputes several of the submissions of the Complainant presented as facts, and contends that some of the alleged facts are far from the true account of the events.

79. The Respondent State disputes and denies that the Victim was a former 'child soldier' in the Lord's Resistance Army (LRA), or that he ever 'surrendered' on the battlefield, as alleged. The Respondent State claims that credible investigations by the Ugandan Police Force established that the Victim was never abducted by, nor was he a child soldier in the LRA, but that he enlisted in LRA as an adult and rose through the ranks to become a high ranking 'Colonel' and rebel Commander.[14]

80. The State avers that in March 2009, the Victim was shot during active armed combat against the UPDF in Garamba Forest, DRC. He did not 'surrender' as alleged, but on the contrary he was captured by the UPDF after being shot and wounded on the battlefield. In fact, Victim only 'renounced' rebellion in January 2010 in his application for amnesty which was made while on remand in Uganda Government Murchison Prison (Luzira), after being charged with criminal offences.[15]

[14] Paragraph 1.1. of the 'Summary of the Case' in the Chief Magistrate's Court - attached to Complainant's Facts as A, and paragraph 2 of the Indictment attached as B1.

[15] The Amnesty Declaration Form attached to Complainant's Facts as C.

81. The Respondent State also denies that the Victim was ever abducted from hospital by Ugandan military intelligence, detained in any private residence, or subjected to inhumane treatment and torture, or that he was denied access to his next of kin or legal counsel or court.

82. 7. The Respondent State states that after his capture, he was transferred to Uganda and taken to the general military hospital in Bombo, Kampala, for medical treatment. After recovery, he was taken to the 1st Infantry Division Headquarters in Kakiri, Wakiso District, for full recuperation as a prisoner of war (POW).[16]

83. The Respondent State further states that while in recuperative custody, he was treated humanely and in accordance with the law, and he was not tortured as alleged. He was informed of his right to receive visitors and his right to engage legal counsel, but did not request to do so.

84. According to the Respondent State, after establishing that the Victim was suspected of having committed criminal offences, the Uganda Police requested the UPDF to hand him over for prosecution, which was done. He was lawfully detained by Police as a criminal suspect and was informed of his right to receive visitors and engage legal counsel, but did not request to do so.

85. The Respondent further submits that under the Ugandan legal system, where a criminal case involving capital offences (e.g. murder) is brought by the State against a person, the suspect or accused is availed State Counsel at the expense of the State if he has no legal representative. However, even after Criminal cases No. AA 118/09 and 119 /09 were cause-listed for court appearance in June 2009, the Victim was offered to be availed State Counsel by the Government of Uganda, but he declined it.

[16] Copy of the affidavit of Lawrence Ogen Mungu in Constitutional Reference No. 36 /11 attached as R1.

86. The Respondent avers that there were two criminal cases against the Victim for which he was produced before the Chief Magistrates Court at Gulu in June 2009:

    i. Criminal Case No. AA 0118/09 and Gulu CRB 1219/09 in respect of kidnap with intent to murder contrary to Section 243(1)(a) of the Penal Code Act.
    ii. Criminal Case No. AA 0119/09 and Gulu CRB 1220/09 in respect of kidnap with intent to murder contrary to Section 243(1)(a) of the Penal Code Act.

87. The Respondent State avers that when the Victim was produced before the Gulu Chief Magistrates Court, he was committed for trial to the High Court in respect of Criminal Case No. 0118/09.

88. In September 2010, the Victim was charged before the Buganda Road Chief Magistrate's Court with unlawful killing in Criminal Case No. A-9/2010, Gulu CRB 337/2004, and committed to the High Court (War Crimes Division, later re-named as the International Crimes Division).[17]

89. The Respondent admits that the Victim was the first person to be indicted for violations of the Geneva Conventions Act in the High Court's International Crimes Division (ICD). In July 2011, the Victim was arraigned in the ICD on charges of twelve (12) grave breaches of the Fourth Geneva Convention (incorporated in Ugandan domestic law through the Uganda Geneva Conventions Act of 1964) and fifty-three (53) alternative counts of Penal Code violations such as murder, kidnapping, and aggravated robbery, allegedly committed between 1996 and 2009.

[17] The Respondent refers to a copy of the Magistrate's Court proceedings attached to Complainant's submissions.

90. The State avers that the ICD is a special division of the High Court which was created in 2008 in furtherance of the Government's obligations under the 2007 Juba Agreement on Accountability and Reconciliation. Further the ICD was aimed at meeting Uganda's obligation to complement the work of the International Criminal Court [ICC] in prosecuting gross violations of human rights and grave breaches of the Geneva Conventions (war crimes).[18]

91. In response to allegations relating to the denial of amnesty, the Respondent states that whereas it did grant amnesty to various members of rebel groups in different parts of Uganda who renounced rebellion, the Complainant has not discharged his duty to show that the circumstances of their grant of amnesty were similar to the Victim's own arrest and prosecution.

92. The Respondent is of the view that the Complainant has not adduced evidence that the said amnesty reporters from different rebel groups in Uganda (including women and formerly abducted child soldiers and persons) were suspected or accused of committing or had particular responsibility for gross human rights violations, war crimes, or international crimes. As per the State, there is no evidence that these reporters had been criminally charged with such crimes at the time of applying for amnesty. The Respondent opines that such facts cannot be assumed in the absence of witness evidence of their involvement in such crimes.

93. According to the Respondent State there was evidence of the Victim's participation or responsibility for grave breaches of Geneva Conventions, for which he is being prosecuted. In respect to the grant of amnesty to former LRA high ranking Brigadiers Sam Kolo and Kenneth Banya, the Respondent states that the circumstances of their arrest were different from those prevailing at the time of the Victim's arrest.

[18] Attached to the submissions of the Respondent are excerpt from the ICD website and the Agreement on Accountability and Reconciliation, and its Annexure.

94. First of all, the two were arrested in 2005 and 2004 respectively, whereas the Victim was arrested in 2009. By the time of the Victim's arrest, the Complainant states that the Government of Uganda and the LRA had signed the Juba Agreement on Accountability and Reconciliation and the Annexure thereto, in June 2007 and February 2008 respectively. In these documents, they agreed that persons alleged to have committed serious crimes or human rights violations would be prosecuted, and formal courts would exercise jurisdiction over persons alleged to bear particular responsibility for the most serious crimes, especially those amounting to international crimes.[19]

95. Thus, the Respondent State asserts that by signing the Agreement the Government and LRA impliedly agreed that the Amnesty Act would not benefit any members of LRA suspected of particular responsibility for gross violations of human rights e.g. due to their level of command/control. The Respondent opines that unlike Brigadiers Kenneth Banya, Sam Kolo and Col. Onen Kamdulu, the Victim was arrested after the signing of the Juba Agreement, and was being prosecuted for having particular responsibility for international crimes.[20]

96. Secondly, according to the Respondent State, at the time of Mr. Kwoyelo's arrest in 2009, LRA had been driven out of Uganda into Eastern DRC, and relative peace had returned to Northern Uganda, with many people previously living in Internally Displaced Peoples (IDP) Camps having returned to their homes after many years. Accordingly, there were many people confident and willing to testify against the LRA, and many witnesses availed evidence to the police/prosecution as to the many atrocities allegedly committed by the Victim.[21] However, the Respondent State contends that it was not possible to use any such witness evidence to prosecute former rebel commanders of similar crimes after they had already been granted amnesty in the past due to a lack of witness evidence.

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19 Copies of the Agreements attached to the submissions of the Respondent State.

20 Amended Indictment of 5th July 2011 which refers to his command responsibility in the alleged crimes attached as evidence by the Respondent State.

21 The Respondent refers to a statement from the ICD website attached to its submission.

97. Thirdly, the Respondent argues that in 2010 Uganda enacted the International Criminal Court Act (ICC Act), whose purpose was, among others, to give the 2002 Rome Statute of the International Criminal Court (the Rome Statute) force of law, to implement Uganda's obligations under the Rome Statute, to make further provisions in Uganda's law for the punishment of international crimes of genocide, crimes against humanity and war crimes, and to enable Ugandan courts to try, convict and sentence persons who commit such crimes.[22]

98. For the foregoing reasons, the Respondent avers that the Victim's circumstances were materially different from those of similarly high ranking officers like Brigadiers Kenneth Banya and Sam Kolo who were captured in 2004 and 2005 respectively.[23]

99. The Respondent further submits that under the Amnesty Act, amnesty certificates are not issued by the DPP but by the Amnesty Commission.[24] In addition, after the Amnesty Commission sought for clearance from the DPP on whether the Victim was eligible to receive amnesty, the DPP advised that the Complainant was charged with grave breaches of the Geneva Conventions of 1949, which constituted International Crimes for which Amnesty cannot be granted.[25] The Respondent further avers that the DPP is constitutionally mandated to control investigations and prosecutions and in the exercise of his functions, he or she is not subject to the direction or control of any person or authority. The DPP enjoys unfettered discretion in the exercise of his or her powers and functions.[26]

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22 The International Criminal Court Act, 2010 attached as Annexture to the submissions of the Respindent.

23 Affidavit of Kwoyelo in Constitutional Court Reference No. 36 of 2011 attached as Annexture to the submissions of the Respindent.

24 A copy of the Amnesty Act attached to submission.

25 A copy of DPP's letter attached to submission.

26 Excerpt of Article 120 of the Constitution attached to submission.

100. In response to the issue of criminal charges, the Respondent states that the criminal charges against the Victim in Criminal Case No. AA 0119/09 (Gulu CRB 1220 /09) in the Gulu Chief Magistrates Court - in respect of kidnapping with intent to murder contrary to Section 243 (1)(a) of the Penal Code Act - were never withdrawn by the DPP. In that regard, the Respondent states that there are still pending and subsisting criminal charges against the Victim in the Chief Magistrate's Court of Gulu, in respect of which the Constitutional Court did not make any order, and from which the Victim has never legally applied to be discharged by the Magistrate's Court.

101. The Respondent State contends that whereas the ICD ceased the trial of Case No. 02/10 which was before it, it did not issue a release warrant for the Victim which would legally authorize the prison officials to release him from remand custody. In the absence of a release warrant, the Respondent denies the allegation that there was any refusal to release him or that the Victim was held in illegal and unlawful detention.[27]

102. The Respondent State further states that the Victim's lawyers instead of applying for the said release warrant from the ICD, opted to file a civil suit in the High Court Civil Division, seeking an order of *mandamus* to compel the Amnesty Commission and the DPP to issue him an amnesty certificate for his immediate release.

103. The Respondent State also submits that whereas the High Court issued an Order of Mandamus compelling the Chairman of the Amnesty Commission and the DPP to grant certificate of amnesty to the Victim for his immediate release, at the time the order was made (on 25th January 2012), the mandate of the Chairman

[27] A copy of the affidavit of the Prisons Officer Magomu Wilson attached as evidence.

and Commissioners of the Amnesty Commission had expired and they lacked the legal mandate to sign any amnesty certificate.[28]

104. It is further stated that in March 2012, before the amnesty certificate could be legally issued, the Supreme Court issued an order staying the execution of any consequential orders arising from Constitutional Reference No. 36 of 2011.[29] This order was binding on all institutions including the Amnesty Commission, the DPP and the Prison authorities. The 'consequential orders' whose execution was stayed included the grant of an amnesty certificate by the Amnesty Commission, or any order to release the Victim from remand custody.

105. The Respondent further avers that the Attorney General applied for stay of execution of consequential orders arising from the judgment of the Constitutional Court pending its intended appeal against the court's decision. The Application was made under Rules 2(2) and 6(2)(b) of the Supreme Court Rules, and clearly stated the various grounds on which it was sought.[30]

106. Regarding quorum, the Respondent submits that the quorum issue was resolved on 20 June 2013 when new Judges were appointed to the Supreme Court of Uganda, making it fully constituted. The appeal (Appeal No. 1 of 2012) against the Constitutional Court's decision in Reference No. 36 / 11 was accordingly argued before a fully constituted Supreme Court bench in March 2014 and is presently awaiting judgment. As such the Respondent denies the allegation that the Victim has remained in indefinite detention.

107. As far as the alleged partiality of the Chief Justice of the Supreme Court is concerned, the Respondent State disputes that a paper authored by the Justice Law and Order Sector (JLOS) - headed by the Chief Justice - in expressing concerns

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28 Copies of explanatory letters from the Amnesty Commission and Ministry of Internal Affairs, and response from Solicitor General attached to submission.

29 A copy of the Supreme Court Order is attached as evidence.

30 A copy of the Application and supporting affidavit of Lino Anguzu are attached to submission.

about the implications of the Constitutional Court's decision did not amount to a 'severe criticism' of the decision.

108. The Respondent further maintains that the JLOS is a multi-sector organization comprised of various member institutions. According to the Respondent State the Chief Justice is the head of the Judiciary, which is a member institution of the JLOS. The Chief Justice also heads the JLOS Leadership & Steering Committee, which is composed of different heads of JLOS member institutions. Thus Justice Benjamin Odoki, who was the (then) Chief Justice was the head of the Steering Committee.

109. However, the Respondent State indicates that the paper cited in the Complaint was authored by the Transitional Justice Working Group, of which the Chief Justice is not and has never been a member, nor did he ever endorse the views in the said paper.

110. The Respondent further states that the paper did not 'severely criticize' the judgment of the Constitutional Court as alleged. It presented the Group's views on the Amnesty Act and its impact on Uganda's national and international obligations and outlined the challenges presented by the Act to the State's ability to fulfil its duty to ensure justice and accountability for serious human rights violations, crimes against humanity and war crimes committed in Uganda.

111. The Respondent also submits that after the judgment had been delivered, the Permanent Secretary of the Ministry of Internal Affairs wrote to the Chairman of the JLOS Transitional Justice Working Group, requesting the Chairman to advise the Minister on whether he should sign a Statutory Instrument extending the Amnesty Act which was due to expire in May 2012.[31]

[31] A copy of the letter dated 26 March 2012 attached to submission.

112. The JLOS Transitional Justice Working Group accordingly reviewed the Act and made recommendations as to its role and purpose, its effect, its compatibility with national and international laws, and the various options for the future of the Act. According to the Respondent State the review did not refer to the Constitutional Court's judgment.[32]

113. The Chief Justice, the Respondent notes, as Chairman of the JLOS Leadership & Steering Committee thereafter convened a meeting where the relevant JLOS member institutions agreed by consensus on which of the options recommended should be implemented by the Minister of Internal Affairs. The discussion also did not refer to the Constitutional Court's judgment. Whereas the Chief Justice only chaired the meeting, he did not state any personal views on the Group's Report or the Amnesty Act.

114. In relation to the role of the Chief Justice in the creation of the ICD, the Respondent contends that the ICD was established in July 2008 by the then Principal Judge Hon. Justice James Ogoola pursuant to Article 141 of the Constitution of the Republic of Uganda 1995 under the High Court (International Crimes Division) practice directions, Legal Notice No. 10 of 2011. It is one of the Divisions of the High Court of Uganda and was established just as the Criminal Division, Commercial Division, Land Division, Family Division and Anti-Corruption Division, which were established for administrative convenience and efficiency.

115. In light of the above, the Respondent State submits that it has not violated Articles 3, 4, 5, 6, 7.1(a), 7.1(b), 7.1(d), 16 and 26 of the Charter.

[32] A copy of the Group's Review attached to submission.

116. The Respondent State also responds to the arguments of the Complainant proffered under each of the articles of the Charter alleged to have been violated, which is summarized below.

Alleged Violation of Article 3

117. The Respondent asserts that the Victim has at all times been given equal protection of the law. He was availed legal representation at State expense but he declined the offer/right. It is the Respondent's submission that in the case of Zimbabwe Lawyers for Human Rights and the Institute for Human Rights and Development v. Republic of Zimbabwe, the Commission observed rightly that the meaning of the "right to equality carries with it the connotation of equal treatment", however, the Respondent also adds that equal treatment before the law ought to be applied under similar conditions.

118. The Respondent concedes that equal treatment means that all persons within the jurisdiction of the State should expect to be treated fairly and justly and be assured of equal enjoyment of the rights. The Respondent argues that the Complainant was availed all those rights enjoyed by ordinary Ugandans. The Respondent adds that when the Victim was remanded, he was however, held in lawful custody pending trial for various offences that he is alleged to have committed against civilian populations. The Complainant stands accused of grave breaches and violations of human rights of, among others, women and children and further for violations of international humanitarian law. He has been produced before the Ugandan Courts of Record in keeping with the principle of due process and equality before the law. The Respondent State submits that it is not in doubt that one of the salient provisions under the Uganda Constitution of 1995 is the presumption of innocence until proven guilty.

119. That notwithstanding, it is further the Respondent's argument that one of the core principles under the principle of protection of the law, that have been

endorsed by the United Nations System as a whole, is that 'States must (a) ensure that those responsible for serious violations of human rights and humanitarian law are brought to justice and (b) assurance of victims of an effective right to a remedy, including reparations'. The Universal Declaration of Human Rights proclaims: 'Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him or her by the constitution or by law' (Art. 8).

120. The Respondent submits that the phrase 'every individual shall be equal before the law' means that both victims and perpetrators of human rights violations are guaranteed equal and effective protection and perceived perpetrators are subjected to due process of the law.

121. It is the Respondent's submission that a party can assert that they have not been treated equally by the law, however, they have to demonstrate that the conditions under which others perceived to have been treated selectively were indeed similar.

122. The Respondent State argues that the Complainant has not demonstrated to the African Commission that the conditions of the Victim's capture were similar to those of other LRA combatants and that he has been accorded different treatment from those other LRA Combatants/amnesty reporters. The Respondent avers that the circumstances of Mr Thomas Kwoyelo's capture were different from those of other senior Commanders. He refused to surrender, was wounded and captured on the battlefield and taken before courts of law to be tried for alleged human rights violations. The Victim did not renounce rebellion until after 2010 when he was produced in the courts of law for several crimes. Whereas Brigadier Kenneth Banya was captured in 2004 and Brigadier Sam Kolo surrendered on 15 February 2005 following hours of inter-LRA battles between Kolo and Otti camps. These two cases also took place well before the Juba Agreement and talks. the Victim

123. Regarding equal protection under the law, the Respondent avers that the Complainant was successful in the Constitutional Court and in the *mandamus* application in the High Court of Uganda. However, the Respondent avers that it is not in doubt that there were several cases filed against the Victim and the Decision of the Constitutional Court ordering cessation of the trail was in respect of one case. The State being dissatisfied with the decision of the Constitutional Court applied successfully to the Supreme Court for stay of execution of its orders pending the appeal filed before it. Further, the execution of the *mandamus* orders granted in High Court were also stayed by the High Court pending the determination of the appeal before the Supreme Court as not doing so would render the appeal nugatory.

124. It is thus the Respondent's argument that the Complainant has not demonstrated that he has been treated selectively and thus his case does not warrant a declaration that the Respondent State has violated Article 3 of the African Charter.

Alleged Violation of Article 6

125. The Respondent submits that in 2007 the Government of Uganda encouraged the leaders and ranks of LRA to embrace the Juba Agreement, however, the rebel outfit opted otherwise. In March 2009 the Victim was captured on the battlefield in the jungles of Garamba Forest in the Democratic Republic of the Congo and transported to Uganda to undergo recuperation and face trial. He was accorded Legal Counsel by the State but he opted to hire private lawyers.

126. The Respondent avers that despite the orders of the Constitutional Court, no Release Warrants were ever sought by the Victim or his lawyers and none were issued by the Court in order to effect his release from lawful custody. Further, the Supreme Court issued orders staying execution of the Constitutional Court Orders pending disposal of the appeal. The Complainant is thus in lawful custody and

thus the Respondent has not acted in breach of Article 6 of the African Charter in that regard.

Alleged Violation of Articles 4, 5 and 16 (1) and (2)

Article 5

127. The Respondent submits that the circumstances pertaining in Nigeria during March 1995, leading to the decision in Civil Liberties Organization v. Nigeria must be distinguished from the current case. In that case, civilians were tried by the Military Tribunal headed by General Aziza and were convicted for being accessories to treason and sentenced to life imprisonment. The trials were conducted in secrecy and suspects were not given an opportunity to state their defence or to have access to their lawyers or families. They were not made aware of the charges against them until their trial.

128. According to the Respondent State, it is trite that each case ought to be decided on a case by-case-basis. In the instant case, the Respondent claims, the Complainant was availed Legal Counsel at the Respondent's expense and even allowed frequent visits from his Mother. The Respondent further submits that it is a general rule that it is for the party, which alleges a fact to support its claims with proof of the existence of that fact. It goes against this rule for the Complainant to allege torture without producing medical evidence of the same.

129. The Respondent submits that the Complainant has not availed the Commission with forensic documentation in proof of torture and other forms of physical and psychological abuse, as required by the Istanbul Protocol, to justify a finding of violation of Articles, 4, 5 and 16 of the Charter.

130. The Respondent denies that the Victim, a former LRA Commanding officer, was 'forced to sleep on the floor, without any bedding and was afforded no toilet

facilities'. The Respondent also denies that he 'was not given medical assistance or that he was beaten by the Respondent's agents'. In that regard, the Respondent asserts that the Complainant's allegations that he was deprived of the right to respect of the dignity inherent in the human being are unsubstantiated.

Article 7

131. The Respondent contends and avers that it upheld the Victim's rights under Article 7 (1) (b), (c), and (d). The Respondent also adds that according to the Constitution, the Supreme Court is the highest appellate court in Uganda. An appeal was referred to the Supreme Court arising from the decision and consequential orders of the Constitutional Court in Constitutional Reference No. 36 of 2011. The Respondent notes that the appeal would be rendered nugatory if the consequential orders had been enforced prior to the hearing of the appeal. The Respondent asserts that this is sufficient reason for the highest court to intervene in order for a final and binding decision to be arrived at by the superior court of record and in so doing to effect the principle of finality of suits.

132. The Respondent submits that it is not the Chief Justice of Uganda who played a pivotal role in the formation and establishment of the International Crimes Division of the High Court. It is rather the Hon. Justice James Ogoola P.J. (as he then was) that established the ICD on 20 July 2008. Under Article 141(1)(a) of the Constitution the management of the High Court and all its day-to-day business is constitutionally designated to the administrative role of the Principal Judge of Uganda and not the Chief Justice. Thus the Chief Justice of Uganda is the administrative head of the Supreme Court of Uganda whereas the Deputy Chief Justice under Article 136 1 (a) and (b) is head of the Court of Appeal/Constitutional Court.

133. The Respondent submits that it has always afforded the Victim the right to be heard by impartial courts and within reasonable time. Ugandan Courts have in

several decisions recognized that right. Thus, the Respondent denies that the Supreme Court decision that stayed the execution of the consequential orders of the Constitutional Court was partial. The Respondent notes that the lack of quorum in the Supreme Court was brought on by the passing on of Honourable Mr Justice Amos Twinomujuni JSC. in November 2013, however, the Supreme Court of Uganda is now fully constituted, the parties argued their respective cases on appeal in the Supreme Court in June 2014 and the court is yet to deliver its final decision on the appeal.

The Commission's Analysis on the Merits

134. Having closely studied the submissions of the parties on the Merits of the case, the Commission proceeds to analyse the arguments and evidence furnished by the parties against the relevant provisions of the Charter and other applicable laws to establish whether there has been a violation of the provisions of the Charter as alleged in the submissions of the Complainant.

135. As can be discerned from the summary of the submissions of the Respondent State, the latter disputes the veracity of several of the assertions of the Complainant presented as facts. It is, therefore, imperative that the Commission rules on such disputed facts since many of these contested facts have a bearing, direct or indirect, on the outcome of the case. However, the Commission will not delve into the exercise of fact-checking for each and every disputed fact. That is neither desirable, nor necessary. Instead, a more pragmatic approach is followed by making a determination of facts only as and when the Commission finds it relevant and necessary for the analysis of the merits of the case.

Ruling on Some Contested 'Facts' and Applicable Law

136. The Complainant alleges that in March 2009, the Victim, a former child soldier and commander in the LRA, surrendered, was shot and severely wounded on the battlefield in the DRC. And shortly thereafter, and before recovering from his injuries, he was abducted from the hospital by Ugandan military intelligence, and taken to a private residence of an officer of the Chieftaincy of Military Intelligence also known as 'safe house'.

137. Although the fact of the Victim being a child when joining the LRA is contested by the Respondent State, the Commission will not look into the dispute since it is not relevant for any of the issues raised in the case under consideration.

138. The Respondent State also denies the assertion by the Complainant that the Victim surrendered and that he was shot afterwards. Instead, the Respondent states that the Victim was shot and captured during combat in the Garamba Forest in DRC.

139. The background information in the ruling of the Constitutional Court of Uganda dated 22 September 2011 also indicates that the Victim was captured, and hence did not surrender. The affidavit by the Assistant Inspector of Police who was investigating the case of the Victim also corroborates the assertions of the State that the Victim was captured after being shot and wounded during a gun battle between the UPDF and the LRA. The Complainant did not challenge such assertion, nor has he adduced any record or proof showing that the Victim in fact surrendered and was shot afterwards.

140. The Complainant's claim of abduction from hospital, after the Victim was captured, by Ugandan military intelligence is also refuted by the Respondent State. The Respondent avers that after his capture, the Victim was transferred to Uganda and taken to the general military hospital, Bombo Hospital, in Kampala, for medical treatment. After recovery, he was taken to the 1st Infantry Division Headquarters in Kakiri, Wakiso District, for full recuperation as a prisoner of war

(PoW). In support of its claim, the Respondent has attached an Affidavit by the Assistant Inspector of Police. Besides the lack of any evidence to prove the Complainant's claim and the latter's apparent failure to refute the Respondent's assertion, the Commission could not find any logical explanation as to why the Victim would be abducted by the Respondent State when he is already in their custody.

141. In view of the above, the Commission is convinced that the Victim was shot and wounded in active combat duty, not after surrendering, and that he was not abducted by military intelligence as alleged by the Complainant.

142. The finding that the Victim was wounded in the context of a conflict situation while being a member of an armed rebel group triggers the issue of applicable law.

143. It is not disputed that the case at hand relates to and arouse from a conflict situation involving an armed rebel group, the LRA. It is also further established that the Victim was captured in the battlefield in active combat. This gives rise to the question of whether the conflict in question is of such a nature that is governed by the rules of International Humanitarian Law (IHL). There are two types of conflicts to which IHL rules apply. The first type of conflicts involves international armed conflicts, conflicts between the armed forces of two states. This is not the kind of conflict in the case at hand. The second type of conflicts relate to those identified under IHL as constituting 'armed conflicts that are not of an international character' or simply non-international armed conflicts. Given that in the case at hand the conflict concerns the armed forces of Uganda and a rebel group, the LRA, the Commission has to determine whether this constitutes a non-international armed conflict to which rules of IHL pertaining to such type of armed conflicts apply.

144.

Common Article 3 of the Geneva Conventions of 1949 outlines the provisions that regulate what it calls 'armed conflict not of an international character occurring in the territory of one of the High Contracting Parties'. Armed conflict not of an international character or Non-International Armed Conflict (NIAC) is defined in Additional Protocol II of the 1949 Geneva Conventions as one 'which takes place in the territory of a Party to the Protocol between armed forces and dissident armed forces or other organized armed groups'. It then stipulates that the dissident forces must be 'under responsible command, exercise such control over a part of its territory as to enable them to carry out sustainable and concerted military operations and to implement this Protocol'.[33] According to this definition and as further specified in the jurisprudence of both the International Criminal Tribunal for Rwanda and International Criminal Tribunal for the former Yugoslavia, there are four cumulative elements for determining the existence of NIAC. First, the conflict has to be between armed forces of a state and dissident or other organized armed group/s. Second, the conflict takes place in the territory of the state. Third, the dissident or the armed opposition group has to be organized with command and control structure exercising control over a part of the territory of the state. Fourth, the conflict has to be a situation of regular and intense armed confrontation and hence involving direct hostilities between the armed forces of a state and the dissident or opposition armed group.

145. With respect to the first element, it emerges from the facts that the conflict involved the Ugandan armed forces and the LRA, a dissident group that has been engaged in armed rebellion against the government of Uganda since 1986. Accordingly, the conflict situation in this case meets this element. On the second element, while the theatre of the conflict has been northern Uganda, it has been noted that at the time of the capture of the victim the LRA was driven out of

[33] The Commentary of the ICRC on Common Article 3 of the 1949 Geneva Conventions lays down an elaborate requirement/criteria that an armed conflict should fulfil to be regarded as NIAC: Available at https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/1a13044f3bbb5b8ec12563fb0066f226/466097d7a301f8c4c12563cd00424e2b

Uganda's territory. Notwithstanding that the conflict has thus spilled over to neighbouring countries particularly DRC and Central African Republic, this on its own does not deprive it of its Non-International character. As Knut Dormann has rightly observed: '[I]t is important to bear in mind that NIACs may take different forms, ranging from classical civil war situations with armed violence essentially occurring within the confines of one single territory between government armed forces or other organized armed opposition groups, to NIACs spilling over to neighbouring countries, and to armed conflict situations in which multinational forces intervene on the side of a host government against organized armed opposition groups.'[34]

146. Therefore, the armed conflict between the troops of the Government of Uganda and the LRA meets the second element of the definition of NIAC, despite its transnational character.

147. The third and fourth elements entail that the dissident or opposition armed group, in this instance the LRA, is an organized force with command and control and that it engages in protracted combat or direct hostilities with the armed forces of the State. The LRA has possessed organization involving clear leadership and command and control structures. The level of organization that enabled it to prosecute a long armed rebellion in Northern Uganda qualifies the LRA as a dissident armed force or other organized group under Protocol II of the Geneva Conventions of 1949. The LRA has also been engaged in protracted armed combat and hence in direct hostilities with the Ugandan armed force. On both level of organization of the LRA and the nature of the armed confrontation, the situation in the case at hand can thus be considered a NIAC to which the IHL rules relating

[34] Knut Dormann, Detention in Non-International Armed Conflicts in Kenneth Watkin & Andrew J. Norris (Eds), Non-International Armed Conflict in the Twenty-first Century, International Law Studies 88, (2012), p. 347. See also International Committee of the Red Cross (ICRC), International Humanitarian Law and the Challenges of Contemporary Armed Conflicts, Report of the 31st International Conference of the Red Cross and Red Crescent, Geneva, Switzerland, 28 November – 1 December 2011, p. 9.

to NIAC apply. The ICTR, for example, employed this approach, noting that in making such a determination, 'it is necessary to evaluate both the 'intensity' and 'organization of the parties' to the conflict.'[35]

148. Consequently, as a combatant of the LRA who was captured in the battlefield, and rendered *hors de combat*, the determination of whether violations were perpetrated against the victim has to be based not only on the provisions of the African Charter but also the rules of IHL that govern the detention and treatment in detention of detainees in NIACs and, in this case, the Victim, by reference to Articles 60 and 61 of the African Charter on Human and Peoples' Rights. As the Commission held in various communications including *Commission Nationale des Droits de l'Homme et des Libertes v Chad*[36] and *Amnesty International, Comite Loosli Bachelard,Lawyers Committee for Human Rights and Association of Members of Episcopal Conference of East Africa v Sudan*[37] the application of the provisions of the Charter persists even in times of armed conflict. It is also well established in the jurisprudence of the International Court of Justice that in cases of armed conflicts human rights law and IHL rules apply complementarily. In its advisory opinions on the Legality of the Threat or Use of Nuclear Weapon and the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, the ICJ opined that 'the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation…'[38]

149. The foregoing shows that we have a case of concurrent application of both the provisions of the African Charter and the rules of IHL applicable to cases of NIACs.

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[35] ICTR, *Prosecutor v. Akayesu*, Case No. ICTR-96-4·T, judgment, para 620 (Sept. 2, 1998).

[36] Communication 74/92, *Commission Nationale des Droits de l'Homme et des Libertes v Chad*, Ninth Annual Activity Report (1995–1996).

[37] Communications 48/90, 50/91, 52/91, 89/93, *Amnesty International, Comite Loosli Bachelard, Lawyers Committee for Human Rights and Association of Members of Episcopal Conference of East Africa v Sudan*, Thirteenth Annual Activity Report (1999–2000).

[38] International Court of Justice (ICJ), Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, (2004), para. 106.

In such instances of concurrent application of human rights and IHL rules, there are various approaches.

150. First, although both the provisions of the African Charter and IHL rules relating to NIACs apply to the present case, the Commission will only make a finding of violations of the African Charter. The African Commission has already taken a position that the role of IHL rules in the relationship between IHL and the provisions of the African Charter is to serve as standard by reference to which the rights of the Charter are interpreted.[39] In making reference to IHL rules on the basis of Articles 60 and 61 of the African Charter, the African Commission accordingly uses, instead of the Charter standards that apply in normal conditions and peace times, the standards of the IHL rules for making a determination of the existence of violations of the provisions of the African Charter in such situations of NIACs.

151. Accordingly, for the instance case the African Commission applies the standard of treatment specified in Common Article 3, which is generally considered to have achieved a status of customary international law, specifically its reference among others to persons in detention, and Articles 4 and 6 of Additional Protocol II specifically relating to persons deprived of liberty.

152. Second, in the event of tension arising from the concurrent application of IHL and the human and peoples' rights provisions of the African Charter in situations of armed conflict, the Latin maxim of *lex specialis derogat legi generali* applies. The implication of the *lexi specialis* maxim is that when two provisions apply to the same situation and there is divergence, the provision that gives the most detailed guidance should be given priority over the more general one. In relation to the conduct of parties in NIAC including the treatment of individuals captured in situations of NIAC, IHL is considered the *lex specialis*.

[39] See General Comment No. 3 of the African Commission on Human and Peoples' Rights on the Right to Life paras. 13 and 32.

153. Third, on the concurrent application of human rights and IHL in armed conflicts it should be noted that the application of IHL is generally confined to the conduct of hostilities involving the armed fighting between the warring parties. Acts that take place outside of or in context unrelated to the conduct of hostilities are to be regulated by reference to human rights law. It should further be noted that the privileges that IHL attributes to status of combatant does not apply upon capture of non-state combatants. Accordingly, the status of prisoner of war does not apply in situations of NIACs and as such combatants of dissident armed groups upon their capture may be prosecuted for all hostile acts on the basis of domestic law in force at the time of the capture of the non-state combatant.

154. The different rules listed in Common Article 3 of the Geneva Conventions and Articles 4, 5 and 6 of Protocol II to the Geneva Conventions on detention are the ones the Commission relies on, to the extent they are relevant, in analysing the specific rights allegedly violated in the present case. These rules in these instruments can be divided into four broad categories: rules on the treatment of detainees, rules on material conditions of detention, fair trial rights, and procedural safeguards in internment.[40] In the present case, these rules are in particular to be applied with respect to the treatment of the Victim at the time of his capture and from the time of his capture to the time of his transfer to the custody of police for investigation and prosecution. Accordingly, while IHL rules that apply to situations of NIACs are used to make a determination on violations of Charter rights until the point of transfer of the non-state combatant to police custody, from that point onwards the Commission applies the provisions of the African Charter directly. The Commission will thus examine allegations of violations of Articles 5, 6, 7 and 16 of the African Charter by reference to IHL rules relating to NIACs and will analyse those of Article 3 and parts of 7 on their own.

155. The Commission will accordingly analyse the provisions of the Charter allegedly violated against the background of the foregoing framework of analysis

40 ICRC, n 34 above, pp. 15-16. See also Dormann, n 34 above, pp. 349-350.

of the applicable law. The analysis follows the order of the appearance of the articles of the African Charter that have been alleged to have been violated in the present communication.

Alleged Violation of Article 3

156. Article 3 of the Charter relates to equality before the law and equal protection of the law and reads as follows:

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

157. In respect of Article 3 of the Charter, the Complainant contends that the refusal of the Respondent State to grant amnesty to the Victim, while the former has granted amnesty to over 24,066 rebels before and 274 rebels after the Victim's application for amnesty was rejected, without any objective or reasonable explanation, is tantamount to selective treatment and hence a violation of Article 3 of the African Charter.

158. As the Commission has noted in the case of Purohit and Moore v. The Gambia, Article 3 together with Article 2 of the Charter basically form the equal protection and anti-discrimination provisions of the Charter. Article 2 lays down a principle that is essential to the spirit of the Charter and is therefore necessary in eradicating discrimination in all its guises, while Article 3 guarantees fair and just treatment of individuals within a legal system of a given country.[41]

159. Equality before the law as guaranteed under Article 3(1) relates to the right by all to equal treatment under similar conditions. It entails that individuals should expect to be treated fairly and justly within the legal system and be assured of equal treatment before the law and equal enjoyment of the rights available to all

41 ACHPR, Communication 241/01 – Purohit and Moore v The Gambia (2003), para. 49.

other citizens. Its meaning is the right to have the same procedures and principles applied under the same conditions.[42]

160. Equal protection of the law under Article 3(2) on the other hand, means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or class of persons in like circumstances in their lives, liberty, property, and in their pursuit of happiness. It simply means that similarly situated persons must receive similar treatment under the law.[43]

161. In the instant case, what the Complainant is alleging is not that the law - the Amnesty Act - does not provide equal protection to the Victim. Rather what is alleged is that the Amnesty Act has been applied in a discriminatory manner to the Victim resulting in a violation of his right. The issue, therefore, relates to a different application of the law to similar circumstances, which falls within the ambit of Article 3 (2) of the Charter. Equality before the law, as expounded above, does not only refer to the content of legislation, but also to its enforcement. It means that judges and administration officials may not act arbitrarily in enforcing laws.

162. Nevertheless, not all discriminations are tantamount to a violation of the right to equal treatment. In some instances, discrimination, in law or practice, can be justified. International human rights law recognizes what are called positive or justified discriminations. It is, however, noteworthy that as the right to equality and non-discrimination form the bedrock of human rights law, there are stringent requirements that a discriminatory act or differential treatment should fulfil in order to be justified. As the Commission has opined in the case of Kenneth Good v. Botswana, and later reaffirmed in Dabalorivhuwa Patriotic Front v. the Republic of South Africa, a differential treatment is considered a violation of the principles

[42] ACHPR, Communication 294/06 – Zimbabwe Lawyers for Human Rights and Institute for Human Rights and Development in Africa v Zimbabwe (2009), para. 96. See also Communication 323/06 – Egyptian Initiative for Personal Rights & INTERIGHTS V. Egypt, (2011) para. 173.

[43] ACHPR, Communication 294/06 – Zimbabwe Lawyers for Human Rights and Institute for Human Rights and Development in Africa v Zimbabwe (2009), para. 99.

of non-discrimination and equal treatment if: 'a) equal cases are treated in a different manner; b) a difference in treatment does not have an objective and reasonable justification; and c) if there is no proportionality between the aim sought and the means employed'.[44]

163. Differential treatment, therefore, entails the existence of a 'comparator' or other similar situations to compare with.

164. If the existence of a difference in treatment is proven then the next step is to establish whether the treatment was justified or whether there is a reasonable explanation and/or justification.

165. In the instant case, the bone of contention is the denial of amnesty to the Victim by the Respondent State. According to the Complainant, even though the Victim was declared eligible for amnesty by the Amnesty Commission in accordance with the Amnesty Act of 2000, which was subsequently upheld by the Constitutional Court and the Court of Appeal and the High Court of Uganda, the DPP impeded the issuance of the Amnesty Certificate to the Victim by instituting criminal charges.

166. The Complainant argues that the granting of over 24,000 amnesty applications before and 274 more after the Victim's application was rejected including to persons who were holding higher command positions shows that he was selectively treated without any objective or reasonable explanation.

167. The Respondent State on the other hand defends its actions by claiming that the Complainant has failed to prove that the circumstances of the granting of amnesty to members of various rebel groups who renounced rebellion was similar

[44] ACHPR, Communication 313/05 – Kenneth Good v. Botswana, (2010) para. 219. See also ACHPR, Communication 335/06 - Dabalorivhuwa Patriotic Front v the Republic of South Africa, (2013), para. 113.

to that of the Victim. According to the Respondent State, the Complainant has not furnished any evidence that those who had been granted amnesty had been criminally charged for gross violations of human rights or war crimes or other international crimes at the time of applying for amnesty, whereas, there is enough evidence that the Victim had participated or was responsible for grave breaches of the Geneva Conventions, for which he is being prosecuted.

168. What the Respondent State is basically arguing is that the case of the Victim was different from all other applicants who were granted amnesty because he was charged with serious violations of human rights and the others were not. And that is the reason why the DPP blocked his application for amnesty.

169. In this regard, the Complainant opines that even high ranking commanders such as Brigadiers Sam Kolo and Kenneth Banya, who have supposedly committed more heinous crimes, have been granted amnesty as no charges were brought against them.

170. In response, the Respondent State contends that the circumstances of Brigadiers Sam Kolo and Kenneth Banya arrested in 2005 and 2004 respectively were different from those prevailing at the time of the Victim's arrest in 2009 for the following reasons:

i. At the time of the Victim's arrest the Government of Uganda and the LRA had signed the Juba Agreement on Accountability and Reconciliation and the Annexure thereto in June 2007 and February 2008 respectively wherein they agreed that persons alleged to have committed the most serious crimes or human rights violations would be prosecuted before formal courts;

ii. At the time of the Victim's arrest there were many people confident and willing to testify against the LRA since in 2009 the latter had been driven out of Uganda into Eastern DRC, and relative peace had returned to

Northern Uganda with many people previously in IDP camps having returned to their homes after many years. And it was not possible to use such witness evidence to prosecute those that have already been granted amnesty in the past owing to lack of witness evidence; and

iii. In 2010, Uganda enacted the International Criminal Court Act whose purpose was, among others, to give the 2002 Rome Statute force of law, to implement Uganda's obligations under the Rome Statute, to make further provisions in Uganda's law for the punishment of international crimes and to enable Ugandan courts to try, convict and sentence persons who commit such crimes.

171. The Respondent State further argues that under Article 120 of the Constitution, the DPP is mandated to control investigations and prosecutions, and accordingly advised the Amnesty Commission that the Victim was charged with grave breaches of the Geneva Conventions of 1949 for which amnesty cannot be granted.

172. It can, therefore, be deduced that the rejection of the amnesty application of the Victim is a fact and that until the time when the Complaint was filed before the Commission, he was the only person whose application was rejected. It is also confirmed that the Amnesty Commission had issued amnesty certificates to more than 24,000 applicants before him and to 274 after him including to higher ranking members of the LRA.

173. Therefore, there is a *prima facie* case for difference in treatment. However, to find a violation, it has to be shown that the way the relevant provisions of the Amnesty Act have been interpreted and applied in the case of the Victim was materially different from that of other similar cases and that there was no reasonable justification for it. Particularly, the Commission will assess if being charged with serious violations of human rights disqualifies an applicant from being granted amnesty pursuant to the Amnesty Act of 2000.

174. In order to determine whether the Victim was treated differently from other amnesty applicants without any reasonable objective, it is imperative to assess the relevant provisions of the law, the Amnesty Act in this case, and compare their interpretation and application in the case of the Victim with that of the other reporters.

175. Relevant sections of Part two of the Amnesty Act of 2000 which relates to the granting of amnesty provide that:

> 3.1. An Amnesty is declared in respect of any Ugandan who has at any time since the 26th day of January, 1986 engaged in or is engaging in war or armed rebellion against the government of the Republic of Uganda.
>
> 3.2. A person referred to under subsection (1) shall not be prosecuted or subjected to any form of punishment for the participation in the war or rebellion for any crime committed in the course of the war or armed rebellion.

176. The above quoted provisions give general amnesty to rebels whereby no offences are excluded and all forms of insurgency are covered. This assertion/interpretation is also supported by a 2012 paper on the Amnesty Act prepared by the Justice Law and Order Sector for the consideration of the Transitional Justice Working Group, which was annexed by the Respondent State as evidence. The paper expounds that 'according to the Act, amnesty is granted to anyone who 'renounces rebellion', and as such, treats all reporters alike, overlooking the category of crimes allegedly committed (including war crimes, crimes against humanity or gross violations) and failing to require any accounting of the facts/truth in exchange for amnesty. In terms of the pursuit of accountability

for war crimes, crimes against humanity and gross human rights violations, the Amnesty Act is a de jure and de facto blank amnesty'.[45]

177. Even the 2006 amendment to the Amnesty Act that caters for persons who may be found to be ineligible for amnesty, does not specifically indicate that persons suspected of crimes against humanity, war crimes or gross violations of human rights can be found ineligible for amnesty.[46] In effect, this means amnesty can be granted to any and all those who renounce rebellion regardless of the nature of crimes an individual has committed.

178. Amnesty was granted even to those who, like the Victim, had been captured on the battlefield and includes Brigadier Kenneth Banya, who the Respondent State itself concedes was captured on the battlefield in 2004.

179. The Commission is convinced that it is in view of the above understanding that the Amnesty Commission never declared any reporter ineligible for amnesty,[47] and accordingly issued more than 24,000 amnesty certificates.

180. In conformity with its previous practice and interpretation of the Act, the Amnesty Commission had also accepted the Victim's application for amnesty. It was the DPP who decided to block the issuing of amnesty certificate by filing charges against the Victim.

181. In view of the above, it is clear that the Amnesty Act was applied differently to the Victim compared to the case of previous and subsequent applicants for amnesty. The Victim had satisfied all requirements in the Amnesty Act to be granted amnesty: he renounced rebellion and applied for amnesty. The fact that he was charged with grave violations of human rights is not a ground provided in the

45 Justice Law and Order Sector (Uganda), The Amnesty Law (2000) Issues Paper: Review by the Transitional Justice Working Group (2012), p. 6.
46 *Ibid*.
47 *Id*., pp. 6 & 13.

Amnesty Act for denial of amnesty. It was in due recognition of this fact that the JLOs recommended to the Government that the Amnesty Act should be amended so that, among others, 'high level perpetrators and those responsible for the commission of international crimes, including sexual and gender based violence crimes, are excluded from the award of amnesty'.

182. Now, what remains to be determined is whether the justifications preferred by the Respondent State as justification or explanation for the different treatment is valid.

183. In assessing validity, the prime source to look for is legislation or laws. Is there a law that sanctions the differential treatment?

184. The Respondent State is of the view that the difference in treatment was due to and justified by, *inter alia*, the Juba Agreement on Accountability and Reconciliation and the Annexure thereto signed in 2007 and 2008 respectively between the Government of Uganda and the LRA. The Respondent State avers that in the said Juba Agreement, the parties have agreed to try persons alleged to have committed the most serious crimes before formal courts. According to the State, the Juba Agreement was not applicable to the two Brigadiers because they were granted amnesty before the Juba Agreement, while the Victim's application for amnesty was tendered after the agreement was signed.

185. The Juba Agreement was indeed signed before the Victim was captured in March 2009. However, more than 5 years after the signing of the Agreement, the Amnesty Act was not amended to reflect the developments to enable the DPP charge those that have been accused of committing serious violations of human rights. In the absence of such amendments, the government cannot justify the rejection of the amnesty application since under the Act the Victim is still eligible for amnesty. The eligibility of the Victim for amnesty despite the signing of the

Juba Agreement was affirmed by the Amnesty Commission as well as the ICD, the Constitutional Court and the Court of Appeal of Uganda.

186. Moreover, the charges that the DPP brought against the Victim relating to violations of several provisions of the Geneva Conventions Act of 1964 arose out of alleged activities during the rebellion for which, as explained above, he was qualified for amnesty under the Amnesty Act of 2000. Using such charges to block the amnesty application is a significant deviation from the provisions of the Amnesty Act as well as previous practices in the granting of amnesty.

187. Furthermore, the Respondent State has not shown that some other people have also been tried and hence denied amnesty as a result of the Juba Agreement. In fact, the Respondent continued granting amnesty to other applicants. In the absence of proof to the contrary, the Commission finds that the signing of the Juba Agreement without effecting corresponding and corollary amendments to the Amnesty Act is not sufficient and convincing legal ground to warrant differential treatment. It rather opens the door for varying and arbitrary interpretation and application of the Amnesty Act as it has been evidenced in the position taken by the Supreme Court and the lower courts of Uganda in Constitutional Reference No. 36 of 2011.

188. The other legal ground that the Respondent State puts forward as a justification for the differential treatment or to show that it is not in fact a differential treatment is the enactment in 2010 of the International Criminal Court Act whose purpose was, among others, to give the 2002 Rome Statute force of law, to implement Uganda's obligations under the Rome Statute, to make further provisions in Uganda's law for the punishment of international crimes and to enable Ugandan courts to try, convict and sentence persons who commit such crimes. Thus, the argument is that since the ICC Act was enacted in 2010, Uganda 'assumed' additional responsibility to try those alleged to have committed serious violations

of human rights, an obligation that was not present when the two Brigadiers were granted amnesty.

189. From the submissions of both parties, it is clear that the Victim renounced rebellion and applied for amnesty in January 2010, and pursuant to the Amnesty Act that suffices to grant amnesty to the Victim. Accordingly, on 19 March 2010 the Amnesty Commission forwarded the application to the DPP for his consideration, noting that the Victim qualified for amnesty under the provisions of the Amnesty Act. It is also on record that the DPP did not respond to the said application by the Amnesty Commission up until November 2011. The DPP rather proceeded to prefer criminal charges against the Victim on 6 September 2010 before the Chief Magistrate's Court at Buganda Road for various offenses under the 1964 Geneva Conventions Act.

190. The ICC Act was enacted on 25 June 2010, that is, six (6) months after the Victim applied for amnesty, and three (3) months after the Amnesty Commission forwarded the Victim's application stating its view that the Victim is eligible for amnesty under the Amnesty Act of 2000. Therefore, there is no way in which the State could base its argument on provisions of an Act that was not in existence at the time when the alleged differential treatment occurred. That would be a retroactive application of the law, which is a flagrant breach of the principle of legality.

191. Furthermore, the enactment of the Act cannot actually justify the differential treatment, because under international law, Uganda committed itself to investigate and try those responsible for serious violations of human rights from the moment it ratified the Rome Statute, which was in 2002. Its duty to investigate and try those responsible should not be assumed to have started from the time it enacted a law domesticating the Rome Statute no matter what its domestic law may stipulate regarding domestication and enforcement of international treaties. It is a well-established principle of international law that a state cannot invoke its domestic

laws or procedures to vindicate itself from its treaty obligations.[48] The domestication of the Rome Statute, while a commendable measure, cannot justify the differential treatment. The domestication of the Statute is a measure that facilitates domestic application and enforcement of the provisions of the Rome Statute, not a measure marking the commencement of the obligations of a state under the Statute.

192. Accordingly, since Uganda assumed such obligations under the Rome Statute since 2002, that is, the year it ratified the Statute, the DPP should have also refused the amnesty applications of the two Brigadiers in order to try them for serious violations of human rights. But the DPP did not try the two Brigadiers, therefore, the enactment of the Rome Statute Act is not a convincing reason to justify the differential treatment.

193. The third ground upon which the Respondent State justifies or explains its differential treatment is that at the time of the Victim's arrest in 2009 many people were ready and willing to testify against him as a result of the establishment of relative peace in Northern Uganda and the return of those people that were sheltered in IDP camps. And the Respondent argues that it was not possible to use such witness evidence to prosecute those who had already been granted amnesty in the past owing to lack of witness evidence.

194. However, the Respondent has not proffered any proof showing that investigations were indeed conducted against some amnesty applicants suspected of committing serious human rights violations but were closed for lack of witness evidence. No report of police investigation or report by the DPP were adduced to such effect. In the absence of such proof, the Commission is left with no option but to find that the availability or otherwise of witnesses is not persuasive enough to justify differential treatment.

48 Vienna Convention on the Law of Treaties of 1969, Article 27.

195. In light of the above, the Commission is of the view that by interpreting and applying the provisions of the Amnesty Act differently without any reasonable justification or explanation, the Respondent State violated the right to equal protection of the law afforded to the Victim as provided under Article 3 (2) of the Charter.

Alleged Violation of Article 4

196. Article 4 of the African Charter which guarantees the right to life provides that '[h]uman beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.'

197. In its submissions, the Complainant also alleges a violation of the right to life as guaranteed under Article 4 of the Charter. However, the Complainant does not make specific arguments for it or show how the actions or inactions of the Respondent violated the right to life of the Victim.

198. The Commission also observes that from the submissions of the parties and in light of its rulings below with regard to the right to health and freedom from torture, there is no basis to find the Respondent in violation of Article 4 of the Charter.

Alleged Violation of Article 5

199. Article 5 of the Charter reads:

> 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.

200. Freedom from torture is one of the cardinal rules in international law that cannot be derogated from at any time and under any conditions and circumstances including in times of war and emergency. In line with this understanding, Common Article 3 of the Geneva Conventions of 1949 and Article 4(1) and 2(a)(e), (e) & (f) of the Additional Protocol II guarantee absolute freedom from torture, inhuman, and degrading treatment.

201. These rules under Common Article 3 and Additional Protocol II of the Geneva Conventions of 1949 make up what are known as 'rules on the treatment of detainees'. These are norms that aim to protect the physical and mental integrity and well-being of persons deprived of liberty, whatever the reasons may be. As stipulated in Common Article 3 of the Geneva Conventions of 1949 and Articles 4 of Protocol II to the Geneva Conventions, the protection these IHL rules provide include the prohibition of murder, torture, cruel, inhuman or degrading treatment, mutilation, medical or scientific experiments, as well as other forms of violence to life and health. Clearly, there is substantive overlap in the acts prohibited in the IHL rules under Common Article 3 of the Geneva Conventions and Article 4 of Protocol II to the Geneva Conventions on the one hand and Article 5 of the African Charter. All of the acts listed are prohibited under both IHL and human rights law.[49] These prohibitions apply at any time and in any place whatsoever.[50] Irrespective of the circumstances, there is an absolute prohibition of torture, inhumane and degrading treatment.

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[49] ICRC, n 34 above, pp. 15-16.

[50] The absolute character of these obligations is the same as that of a large number of rules in the Protocols and in international humanitarian law in general. In considering the nature of absolute obligations, the International Law Commission stated that: neither juridically, nor from the practical point of view, is the obligation of any party dependent on a corresponding performance by the others. The obligation has an absolute rather than a reciprocal character." It also means that no derogation is allowed, in line with the rule on derogations in the ICCPR, in particular with regard to arbitrary deprivation of life (Art. 6), torture and cruel, inhuman or degrading treatment or punishment (Art. 7) and slavery (Art. 8). International Committee of the Red Cross, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) 8 June 1977, Commentary of 1987 – Fundamental Guarantees, available at https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=5CBB47A6753A2B77C12563CD0043A10B

202. A state has the duty to ensure that detainees are not subjected to acts of torture and other cruel, inhuman and degrading treatment while they are in detention. And this duty is also equally present in times of war as stipulated above. A State Party to the African Charter also has the duty to allow and facilitate visitation by family members and acquaintances, and legal counsel of the detainee's choice.[51] The allegations of the Complainant will accordingly be appraised in light of this fact in particular taking into account the fact that the standard that applies in IHL and in human rights with respect to torture are not different.

203. The Complainant alleges that while in detention, the Victim was denied medicine and proper medical care and visitation by his family and legal counsel. The Complainant also alleges that during his detention in the private residence of an official of the Chieftaincy of Military Intelligence for three months, he was forced to sleep on the floor, without any bedding and was afforded no toilet facilities. According to the Complainant, the Victim was deprived of sleep during interrogations and allowed only about three hours a day for exercise and given only one meal a day. These acts meted out against the Victim by agents of the Respondent State, the Complainant argues, amount to a violation of Article 5 of the Charter.

204. Indeed, if the Complainant were subject to these acts after his capture and before his delivery to police custody, these acts would be in breach of both Common Article 3 of the Geneva Conventions and Article 4 of Protocol II to the Geneva Convention. If such breach of these IHL rules were to happen, it would thus establish violation of Article 5 of the Charter particularly with respect to torture, cruel, inhumane and degrading treatment. Indeed, if proved, the acts (deprivation of medical care or of sleep or absence of toilet) to which the Victim was allegedly subjected would amount at the very least to ill treatment if not to

[51] ACHPR, Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (Luanda Guidelines), (2014), Guidelines 4.

torture. In what follows, the Commission examines whether there is any indication to show that these acts were indeed committed.

205. In response to the alleged acts of torture, the Respondent State denies that the Victim was ever subjected to torture, inhuman and degrading treatment. According to the Respondent State the allegations of torture are untrue and unsubstantiated, and hence should be dismissed.

206. The Respondent avers that the Victim was treated humanely and in accordance with the law while in recuperative custody, and that he was not tortured as alleged. He was also supposedly allowed to have visitors and accordingly his mother paid frequent visits. He was also informed of his right to get a legal counsel, but did not request to do so.

207. The Respondent denies that the Victim was detained in a private residence or subjected to inhumane treatment and torture. The Respondent prefers that he was taken to Bombo Hospital in Kampala for treatment and later to the First Infantry Division Headquarters in Kikiri, Wakiso District as a 'PoW'.

208. While it is not sufficient for the Respondent to merely refute allegations by denying them, the Commission also notes that the onus is on the Complainant to provide relevant supporting materials to corroborate his allegations. Allegation is not the same as proof. The Complainant has in this regard failed to give the required specific details of the alleged violations or to substantiate any of the allegations of torture and inhumane treatment made in the Communication or even to refute the arguments of the Respondent State. There is no adequate material either to show the reference made to his current state of physical pain is a result of the alleged acts of torture or the injury that the Victim suffered during the fighting at which he was captured. The affidavit of the Victim that the Complainant refers to in the submission, which supposedly indicates that he was ill-treated is not in the dossier of evidence submitted to the Commission. The other

Affidavit of the Victim dated 11 October 2011, which is included in the dossier does not support such allegations.

209. The Complainant has not, therefore, provided the kind of details or information required for establishing the occurrence of the alleged acts. In the absence of such details or provision of any other evidence supporting the Complaints, the occurrence of the alleged acts, which are proscribed in both Common Article 3 of the Geneva Convention and Article 4 of Protocol II to the Geneva Conventions, cannot be established reasonably. The Respondent, on the other hand, refutes every single allegation and assertion and supports them, although not in all cases, through evidence.

210. The Commission recognizes that the Respondent has the duty to investigate and try with due diligence those alleged to have committed torture and other cruel, inhumane or degrading treatment or punishment. However, nowhere in its submission has the Complainant indicated that the alleged act of torture and ill-treatment by agents of the State were in any way or form brought to the attention of the concerned State authorities.

211. Even if it were to be argued that the stringent requirements of human rights standards of notifying the relevant authorities of the alleged acts should not apply in relation to Common Article 3 of the Geneva Conventions and Article 4 of Protocol II to the Geneva Conventions, provision of relevant information that establish that the relevant authorities should have learned or known of the occurrence of the acts is necessary.

212. The Commission acknowledges the challenges and risks involved for victims of torture and ill-treatment in reporting acts of torture and ill-treatment while in detention or internment. Nevertheless, in the case at hand, the Victim who was ably, it seems, represented by lawyers did not provide the information necessary to enable the Commission to make a finding that the relevant State authorities were informed or should have noticed or known of the acts. There is also no indication

that this was raised at any point in the various proceedings in the national courts. In the absence of such information, the occurrence of the acts and hence violation of Common Article 3 of the Geneva Conventions and Article 4 of Protocol II to the Geneva Conventions could not reasonably be established.

213. In light of the above, the Commission does not have sufficient information to find that there has been a violation of Article 5 of the Charter in respect to any of the prohibited acts under this article including forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment.

214. It is noteworthy to underscore that as a quasi-judicial body established to complement national jurisdictions in the promotion and protection of human and peoples' rights, the Commission exercises its contentious jurisdiction over matters that were addressed by or at least brought to the attention of concerned and competent national juridical organs. Or it has to be proven that such national remedies are not available, ineffective or insufficient. In the absence of either of these two scenarios, assumption of jurisdiction by the Commission would be tantamount to arrogating to itself the role of a first instance court, which is neither envisaged by the Charter nor practical or necessary or appropriate.

Alleged Violations of Article 6 and 7

215. Articles 6 of the Charter provides that:

> Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.

216. And Article 7 reads:

1. 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 conventions, laws, regulations and customs in force;
    b. The right to be presumed innocent until proved guilty by a competent court or tribunal;
    c. The right to defence, including the right to be defended by counsel of his choice;
    d. The right to be tried within a reasonable time by an impartial court or tribunal.
2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.

217. As established above, the Victim was caught while he was on active combat mission. Thus, the issue of arbitrary arrest does not arise, confining the consideration hereunder to the existence or otherwise of arbitrary detention and mistreatment from the time of capture until the time of transfer to police custody. In assessing the legality of the conditions and manner of his detention during this period the applicable provisions are Articles 6 and 7 of the Charter and Common Article 3 and Article 6 of Additional Protocol II to the 1949 Geneva Conventions.

218. Detention or deprivation of liberty is an inevitable and lawful incidence of armed conflict, including NIAC.[52] The applicable rules of IHL prescribe certain standards of treatment that should apply upon the capture and during the detention those captured in the course of hostilities. Common Article 3 of the Geneva Conventions of 1949 stipulates that '[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those

[52] ICRC, n 34 above, p.15.

placed 'hors de combat' … shall in all circumstances be treated humanely,' including being cared for in case of the wounded and the sick.' Common Article 3 thus proscribes a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture, b) outrages upon personal dignity, in particular humiliating and degrading treatment and c) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees. Protocol II to the Geneva Convention reinforces these guarantees by including to the list of prohibited acts threats to commit the acts in Common Article 3.

219. In relation to the right to liberty, the Complainant alleges that after the Victim was captured in March 2009, he was detained for three months without being allowed to have a legal counsel and without being produced before a court of law, which the Complainant argued constituted arbitrary detention and violation of due process of the law.

220. As a combatant rendered *hors de combat*, the expectation under both Common Article 3 of the Geneva Conventions and Article 4 of Protocol II to the Geneva Conventions is that, as a combatant wounded and captured in combat, the Victim was provided with the necessary medical attention and cared for. As established below in the analysis on Article 16 on the right to health, the Victim was kept in Hospital until his transfer to the First Infantry Division Headquarters in Kikiri, Wakiso District. During this period, the issue of arbitrary detention would therefore have no place. The Victim's arbitrary detention without charges and being taken to court would be an issue from the time of the Victim's transfer to First Infantry Division Headquarters in Kikiri. Even here, given that the circumstances of the capture and detention of the Victim was in armed conflict, what is required is to bring criminal charges and produce the detainee before a court in reasonable period of time.

221. Since the Victim was charged with various offenses in June 2009, the time lapsed from the time of his discharge from hospital after his capture in March 2009 could not be deemed unreasonable. The Commission could not thus find that there

was violation of prohibition of arbitrary detention or due process of law for the time between March and June 2009.

222. In June 2009, the Victim was charged with various offences under Uganda's penal code, and was handed over by the UPDF to the Ugandan Police for prosecution. He was accordingly transferred to Gulu Prison (Northern Uganda) then to Luzia Upper Prison (Central Uganda).

223. The Commission is of the view that from the moment criminal charges were pressed against him and he was informed of the same, that is June 2009, the Victim has the right to exercise all his fair trial related rights under the African Charter.

224. As pointed out earlier, the detention and subsequent treatment of the Victim by the Ugandan Police after criminal charges were instituted against him will be assessed in light of the provisions of the African Charter with no recourse to the standards under IHL.

225. In this regard, the Complainant contends that nearly a year passed after the Victim's arrest in March 2009 before he was allowed access to legal counsel or next of kin. The Complainant does not give the exact date or month when the Victim was allowed to have access to legal counsel. The Complainant fleetingly states that he was allowed access only almost a year after he was captured. This means, the Commission assumes, sometime in early 2010 since he was captured in March 2009.

226. As established above, formal criminal charges were pressed against Mr. Kwoyelo in June 2009, and hence that is the cut-off point where he can start claiming and the state is obliged to respect and protect all his fair trial related rights.

227. The Respondent State denies the allegations and argues that after the Victim was transferred to police custody, he was informed of his right to receive visitors and engage legal counsel, but did not request to do so. Furthermore, the Respondent claims that even after the two criminal cases brought against the Victim were cause-listed for court appearance in June 2009, he was offered to be availed defense counsel by the State, but he declined.

228. The Complainant neither counters the submissions of the Respondent, nor does he provide evidence to substantiate the allegations or to show how he has been disadvantaged or prejudiced by such denial of right by the Respondent. Producing a document that indicates the date when the legal counsel started representing the Victim would have been easy and sufficient since it is the same Complainant before the Commission that represented the Victim before domestic courts.

229. Thus, the Commission is of the view that the Complainant has failed to convince the Commission that his right to legal counsel was denied by the Respondent.

230. Regarding the right to visit by family members, as established above, while the Victim claims that he was denied visitation right, the Respondent counters it by indicating that he was not denied this right and that in fact his mother paid him frequent visits. The Complainant did not adequately substantiate his claim or refute the claim by the State despite being given a chance to counter the submissions of the State. Therefore, the Commission takes the claims of the Respondent as fact.

231. In June 2009, two criminal cases were instituted against the Victim both in respect of kidnapping with intent to murder under the Penal Code Act of Uganda before the Chief Magistrate's Court of Gulu.[53]

232. On 12 January 2010, the Victim officially renounced the rebellion and applied for amnesty to the Amnesty Commission, which declared him eligible for amnesty and forwarded his application to the DPP before issuing an Amnesty Certificate. The DPP failed to respond to the application, effectively delaying the granting of amnesty. At the time, the DPP did not give any reasons or explanations for its decision not to endorse the amnesty application of the Victim as it had in the cases of previous applicants. It was only on 17 November 2011 that the DPP wrote to the Amnesty Commission explaining that the accused (the Victim) is not eligible for amnesty because he is charged with grave breaches of the Geneva Conventions of 1949. But at the time the Victim applied for amnesty, January 2010, no charges relating to the violation of Geneva Conventions were brought against him. As established hereunder, he was only charged with such crimes eight months later.

233. On 26 August 2010 the Victim was charged with violations of Uganda's 1964 Geneva Conventions Act and was arraigned in the ICD on charges of 12 grave breaches of the Fourth Geneva Convention and 53 alternative counts of Penal Code violations such as murder, kidnapping, and aggravated robbery, allegedly committed between 1996 and 2009.

234. On 22 September 2011, the Constitutional Court, following a petition by the counsel of the Victim, unanimously decided that the Victim qualified for amnesty and had been denied equal protection of the law, and accordingly ordered for his trial before the ICD to cease forthwith.

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[53] The two criminal cases are: Criminal Case No. AA 0118/09 and Gulu CRB 1219/09 in respect of kidnap with intent to murder contrary to Section 243 (1) (a) of the Penal Code Act; and Criminal Case No. AA 0119/09 and Gulu CRB 1220/09 in respect of kidnap with intent to murder contrary to Section 243 (1)(a) of the Penal Code Act.

235. On 10 November 2011, the Court of Appeal dismissed the two applications of the Attorney General seeking to stay the decision of the Constitutional Court, and upheld the Victim's right to liberty and equal treatment before the law. Accordingly, on 11 November 2011, the ICD ceased the Victim's trial before it. However, the Respondent did not release the Victim from detention. The Respondent proffers two reasons for not releasing the Victim from prison. The first reason is that the charges that were ordered to be ceased by the Constitutional Court were those relating to the violation of the Geneva Conventions Act of 1964, and thus the criminal charges of 2009 before the Magistrate's Court in Gulu, in respect of kidnapping with intent to murder, were not withdrawn and are therefore still pending. The Respondent further argues that the Constitutional Court did not make any order with respect to these two criminal charges and the Complainant has never legally applied to be discharged by the Magistrate's Court.

236. The Commission notes that the ruling of the Constitutional Court orders the ICD, the court from which the case was referred, to cease only the case before it. The two criminal charges were, therefore, still pending before the Magistrate's Court. The Respondent is thus justified in keeping the Victim in detention.

237. The second reason given by the Respondent is that when the ICD ceased the trial, it did not issue a release warrant for the Victim without which the prison officials would not be able to release him from custody.

238. The Commission is of the opinion that as long as there are other criminal charges pending against the Victim, the prison officials are justified in not releasing him. The existence of other criminal charges coupled with the fact of him being an ex-combatant who can be detained justifiably even when there are no pending cases are perhaps some of the reasons why the Constitutional Court desisted from ordering his release.

239. Following his continued detention, the Victim sought relief at the High Court, which issued an order of *mandamus* compelling the Chairman of the Amnesty Commission and the DPP to process and grant a Certificate of Amnesty for his immediate release. The order was however not honored by the Amnesty Commission and the DPP.

240. According to the Respondent, it was not possible to issue the Certificate of Amnesty because at the time the order was issued, 25 January 2012, the mandate of the Chairman and Commissioners of the Amnesty Commission had expired lacking the legal mandate to sign amnesty certificate.

241. The power to renew the mandates of the Commissioners or to appoint new ones timeously to ensure smooth transition, without creating any irregularities in the functions of the Amnesty Commission, is exclusively that of the Government. The government should thus take full responsibility for whatever nuisances occurred as a result of its failure to appoint Commissioners in good time. It cannot invoke its own flaws or failures to exonerate itself from responsibility.

242. The Respondent further argues that in March 2012, before the Certificate of Amnesty could be legally issued, the Supreme Court issued an order staying the execution of any consequential orders arising from the Constitutional Court case. According to the Respondent the 'consequential orders' whose execution was stayed included the granting of an Amnesty Certificate or any order to release the Victim from custody.

243. The Complainant admits that the Supreme Court stayed the execution of any consequential orders arising from the Constitutional Court case, but adds that the Supreme Court did not give any reasons for curtailing the right to liberty of the Victim as upheld by the Constitutional Court.

244. The Commission notes that although not expressly mentioned in Article 7 of the Charter, the right to a reasoned judgment is an inherent part of the right to fair trial.[54] In this regard, the Commission's Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa recognizes the right to receive reasoned decisions as an essential element of a fair hearing. [55] According to the established case-law of the European Court of Human Rights, judgments of courts and tribunals should adequately state the reasons on which they are based.[56] Giving reasons for decisions or judgments is essential for litigants to be able to decide what course of action to take next including appeal and review. The principle of judicial transparency also demands it.

245. In the instant case, the Commission notes that the Supreme Court did not in fact give any reason for its decision to stay the execution of the consequential orders. Therefore, the Commission is of the considered view that rendering a judicial decision that curtails the fundamental rights of an individual and that overturns a decision of a lower court without giving proper reasons or justification is a violation of the right to fair trial under Article 7(1)(a) of the Charter.

246. The Complainant further challenges the validity of the decision of the Supreme Court by contending that at the time of the stay of execution, 30 March 2012, and as of 18 October 2012, the Supreme Court still did not have a quorum to entertain a constitutional appeal. The Complainant adds that the Supreme Court cannot hear the appeal until such time as judges are appointed and there is no timeframe for the appointment of judges by the President of Uganda.

247. In reply, the Respondent avers that the quorum issue was resolved on 20 June 2013 when new judges were appointed to the Supreme Court, making it fully

54 Office of the High Commissioner for Human Rights (OHCHR) and the International Bar Association (IBA), Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers (2003), p. 293.

55 ACHPR, Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa, 2003, A(2)(i).

56 ECtHR, Garcia Ruiz v. Spain, (1999), para. 26 cited in OHCHR and IBA, n 54 above, p. 293.

constituted. In explaining why the Supreme Court lacked quorum, the Respondent submits that it "regrets… that the lack of 'quorum' in the Supreme Court of Uganda was brought by the passing on of Hon. Mr. Justice Amos Twinomujuni JSC., in November 2013, however, the Supreme Court is now fully constituted, the parties argued their respective cases on appeal…in June 2014 and the court is yet to deliver its final judgment".

248. The Respondent thus does not deny the lack of quorum, rather it tries to explain the reason why there was no quorum. But the explanation given by the Respondent is conflicting. On the one hand, the Respondent claims that the issue of quorum was caused by the passing on of one of the Justices in November 2013 and on the other hand, it contradicts it by stating that the issue of quorum was resolved with the appointment of new judges on 20 June 2013.

249. At the Admissibility stage, the Commission has confirmed that 'the Court does indeed have a quorum since 1 August 2013 but does not have the necessary quorum to hear appeals of a constitutional character which can only be decided with a quorum of 7 judges'.[57]

250. The right to be tried within a reasonable period of time is guaranteed under Article 7(1)(d) of the Charter. In its General Comment No. 13, the Human Rights Committee stated that the right to be tried without undue delay is a guarantee that 'relates not only to the time by which a trial should commence, but also the time by which it should end and judgment be rendered; all stages must take place 'without undue delay'. To make this right effective, a procedure must be available in order to ensure that the trial will proceed 'without undue delay', both in first

[57] Information obtained during meetings with the Principal Judge of the Supreme Court, His Lordship, Justice Yorokamu Bamwine (28/08/2013) and the Minister of Justice and Constitutional Affairs of Uganda, (29/08/2013),following a promotion mission undertaken by the Commission to the Republic of Uganda from 26 – 30 August 2013. See also http://www.judicature.go.ug/data/smenu/7//Supreme_Court.html

instance and on appeal'.[58] In determining undue delay of proceedings, the complexity of the case, the applicant's conduct and that of the competent authorities, should be taken into consideration.[59]

251. There is no indication in the Respondent's submission that the hearing of the case was delayed for any of the abovementioned reasons. Instead, the Respondent argues that the delay was caused by the lack of quorum caused by the passing on of one of the Justices of the Supreme Court. As indicated above, this explanation is contradictory but even if it is accepted, the fault is still imputable to the Respondent State because it is within the power of the Government to appoint Justices of the Supreme Court, which it failed to do on time.

252. From the foregoing, the Commission concludes that even as at August 2013, the Supreme Court did not have quorum to look into constitutional appeals, and therefore has denied the Victim the right to be tried within a reasonable time as guaranteed under Article 7(1)(d) of the Charter.[60]

253. The Complainant also questions the impartiality of the Supreme Court by contending that the Chief Justice of Uganda who headed the panel of Judges of the Supreme Court that stayed the execution of the consequential orders is also the head of the Justice Law and Order Sector in Uganda, a body that had previously severely criticized the decision of the Constitutional Court in Constitutional Reference No. 36 of 2011. The Complainant further alleges that the Chief Justice also played a pivotal role in the formation of the ICD – the division meant to try Mr. Kwoyelo.

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58 UN Human Rights Committee, General Comment No. 13: Article 14 (Administration of Justice) Equality before the Courts and the Right to Fair and Public Hearing by an Independent Court Established by Law (1984), para 10.

59 ECtHR, Kemmache v. France, (1991), p. 20, para. 50; and ECtHR, Martins Moreira Case v. Portugal, (1988), p. 17, para. 45.

60 In its judgment of 8 April 2015, the Supreme Court ordered the trial of the Victim to continue before the ICD of the High Court. Available at http://www.pgaction.org/pdf/countries/Ug-vs-Thomas-Kwoyelo-Supreme-Court-judgement.pdf [accessed on 29 May 2017].

254. The Respondent on its part prefers that the paper cited in the Communication was authored by the Transitional Justice Working Group, of which the Chief Justice is not and has never been a member, nor did he ever endorse the views in the said paper.

255. The Respondent further asserts that the paper did not 'severely criticize' the judgement of the Constitutional Court as alleged. It presented the Group's views on the Amnesty Act and its impact on Uganda's national and international obligations and outlines the challenges presented by the Act to the State's ability to fulfil its duty to ensure justice and accountability for serious human rights violations, crimes against humanity and war crimes committed in Uganda.

256. After carefully studying the said paper submitted as annex by the Complainant, the Commission partly agrees with the Complainant that the article does criticize the decision of the Constitutional Court, but regards the qualification of such criticism as 'severe' as an exaggeration. The paper is largely objective and criticizes the decision from the perspective of the international human rights obligations of Uganda and the Juba Agreement on Accountability and Reconciliation. The paper calls for the revision of the Amnesty Act to enable prosecution of grave violations of human rights.

257. Moreover, the Complainant, besides qualifying the 'criticism' as severe, does not explain how or why it is severe. The Complainant does not pinpoint to sections of the paper that he considers amount to severe criticism. But even if the criticism was severe as alleged, that by itself does not automatically make it biased or prejudiced as long as it is empirical and substantiated.

258. Furthermore, although the Complainant rightly identifies the Justice Law and Order Sector that the Chief Justice heads as the author of the paper, a clear linkage has to be made between the views made in the article and the Chief Justice and

how he had influenced the views and positions expressed in the paper. The Complainant has not made that linkage.

259. In countering the allegation that the Chief Justice played a pivotal role in the formation of the ICD – the division meant to try the Victim, the Respondent argues that the ICD was established in July 2008 by the then Principal Judge Honorable James Ogoola pursuant to Article 141 of the Constitution of Uganda of 1995.

260. The Commission has also been able to confirm that the ICD was indeed established by Justice Ogoola pursuant to the abovementioned constitutional provision and with a view to fulfil the Government of Uganda's commitment to the actualization of Juba Agreement on Accountability and Reconciliation signed in 2008.

261. The impartiality of a judicial body could be determined on the basis of three relevant facts:[61]

1. that the position of the judicial officer allows him or her to play a crucial role in the proceedings;
2. the judicial officer may have expressed an opinion which would influence the decision-making;
3. the judicial official would have to rule on an action taken in a prior capacity.

262. In employing the above requirements to gauge the partiality or otherwise of the Supreme Court, there is no reason to doubt that the Chief Justice plays a crucial role in the judicial proceedings of the Supreme Court of Uganda. What is rather irresolute is whether the paper published by the JLOS can be taken as a view the

[61] ACHPR, Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa, (2003), 5(c).

Chief Justice expressed that influenced the decision of the Supreme Court in staying the execution of the consequential orders.

263. Does the position expressed in the JLOS paper reflect the views of the Chief justice? Was it biased? Did the Chief Justice have any role in convincing his colleagues at the Supreme Court in taking the decision to stay the execution of the consequential orders? How did the Chief Justice play a pivotal role in the establishment of the ICD? If he had any role at all, how is that important in proving that he was biased against the Victim?

264. All these crucial questions have not been addressed by the Complainant. There are thus more questions than answers and under such circumstances, the Commission does not have enough grounds and information before it to find that the Supreme Court or the Chief Justice was partial.

265. Concerning the right to fair trial, the failure of the Supreme Court to provide reasons for its decision staying the execution of the consequential orders arising from Constitutional Reference no. 36 of 2011 violates Article 7(1)(a) of the Charter. The Commission further rules that the unjustified delay in the hearing of the appeal before the Supreme Court caused by the lack of quorum partially violates Article 7(1)(d) of the Charter.

266. The Commission finds no violation of: the right to presumption of innocence until proven guilty under Article 7(1)(b); the right to legal counsel under Article 7(1)(c); and the right to be tried by an impartial court under Article 7(1)(d) of the Charter.

267. The Commission also finds no violation of Article 26 of the Charter relating to independence of Courts as no arguments or evidence were proffered by the

Complainant to corroborate his allegation. Nor do the facts of the case reveal violations of Article 26.

Alleged Violation of Article 16

268. Article 16 of the Charter relates to the right to health and provides that:

> 1. Every individual shall have the right to enjoy the best attainable state of physical and mental health.
>
> 2. State Parties to the present Charter shall take the necessary measures to protect the health of the people and to ensure that they receive medical attention when they are sick.

269. Both Common Article 3 of the Geneva Conventions and the relevant Article 7 of Additional Protocol II of the 1949 Geneva Conventions stipulates that the wounded and the sick should be cared for and in the terms of the latter article 'shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition (without any distinction on any grounds other than medical ones)'.

270. Similarly, Articles 4(2)(a) and 5(1)(d) of the same Additional Protocol prohibit violence to life, health and physical integrity and guarantee the right to medical examination to internees and detainees respectively. These relate to what are referred to as above 'rules on material conditions of detention'.

271. The purpose of the rules on material conditions of detention is to ensure that detaining authorities adequately provide for detainees' physical and psychological needs, which include food, accommodation, health, hygiene, contacts with the outside world, and others. Treaty and customary IHL provide a substantial catalogue of standards pertaining to conditions of detention, as do human rights

instruments, from which a list of standards can be derived that can be used in assessing material conditions of detention.[62]

272. The Complainant avers that although the Victim was visibly wounded from the gunshot he sustained, on his arrest the Victim was not given medical assistance and when he complained, he was beaten by agents retorting that the available drugs are meant only for soldiers of the UPDF. The Complainant also alleges that it took more than 48 hours for any medical personnel to properly examine the Victim. As a result, to date, the Complainant still experiences pain all over his body with routine visits to the prison hospital.

273. These acts, according to the Complainant, which include the infliction of physical, mental and emotional injury violate Article 16 of the Charter. If these acts were to be established, they would be deemed violation of the applicable IHL rules, which is the basis for finding violation of Article 16 of the Charter since the alleged acts complained of refer to the time from the capture of the victim to the time of his transfer to police custody for investigation and prosecution.

274. In Media Rights Agenda et al v. Nigeria, the Commission found that 'the responsibility of the government is heightened in cases where the individual is in its custody and therefore someone whose integrity and well-being is completely dependent on the activities of the authorities. To deny a detainee access to doctors while his health is deteriorating is a violation of Article 16'.[63] The Commission reiterated this same position in *Ken Saro-Wiwa v. Nigeria* wherein the victim was denied medical services despite official requests made by a prison doctor.[64]

62 ICRC, n 34 above, p. 16.

63 Communications 105/93-128/94-130/94-152/96 Media Rights Agenda *et al* v. Nigeria (1998), para. 91.

64 ACHPR, Communications 137/94, 139/94, 154/96 and 161/97 – International Pen, Constitutional Rights Project, Interights (on behalf of Ken Saro-Wiwa) v. Nigeria, (1998), para. 112.

275. What makes the instant case different from the above two is that, in the instant case, first, the Respondent specifically denies the allegations, claiming that the proper and required medical services were provided to the Victim and even provides the name of the hospital where the Victim was treated in Kampala after he was captured, supported by an affidavit. Second, as has been established earlier, the applicable standards to be applied to evaluate the adequacy and timeliness of the medical care provided, are those of IHL. Moreover, the Complainant does not indicate whether the alleged acts and omissions were committed in Uganda or DRC, making it indeterminate, and hence difficult to properly assess the circumstances as the requirements and expectations for the provision of medical services in the battlefield and away from the battlefield are different.

276. The expression 'to the fullest extent practicable' in Article 7(2) of Additional Protocol II was incorporated as a matter of realism, in order to take into account the means and personnel available. In the battlefield, it is sometimes materially impossible to immediately provide the care and attention required. The obligation remains to provide it and to do so as well and as quickly as possible, given the circumstances.[65]

277. In a situation where the Commission does not have specific information on where or under what circumstances the Victim was denied proper medical care for more than 48 hours, it would not be in a position to decide if the State has failed to provide medical care as required.

278. In addition, there is no forensic or medical evidence submitted which proves that the Victim is actually experiencing continuing pain, and that the pain is as a

[65] International Committee of the Red Cross, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) 8 June 1977, Commentary of 1987 – Protection and Care, available at https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/1a13044f3bbb5b8ec12563fb0066f226/cb507989c1767179c12563cd0043a5d3

result of the delay and lack of medical treatment or injuries sustained during a beating while in detention.

279. The regular visits that he is allowed to have to the prison hospital, as conceded by the Complainant, to the contrary hint that he was at least receiving treatment when needed.

280. There are also no records of complaints lodged by the Complainant or the Victim requesting to get treatment; or against denial of treatment; or inadequacy of treatment.

281. As established above, the Complainant was also unable to make a case for torture, inhuman and degrading treatment, which if proven, could have made a case for violation of the right to health.

282. In light of the foregoing, the Commission finds no violation of Article 16 of the Charter by the Respondent State.

Obiter Dictum

283. As it is evident from the analysis above on Article 3 of the African Charter, the amnesties granted in relation to the conflict in Northern Uganda was a bone of contention. In the light of that, in this obiter dictum the Commission addresses the issue of blank amnesties vis-à-vis the international and regional human rights obligations of States Parties to the Charter.

284. One of the issues at the core of this Communication concerned with the application of amnesty as an instrument of conflict settlement. In the case at hand, the Commission has confined its analysis to the issue of whether the application of the Amnesty Act complied with the requirements of the right to equality. Accordingly, the Commission did not examine the question of compatibility of the use of amnesty with the rights guaranteed in the African Charter. However,

pursuant to Article 60 of the African Charter, the Commission deems it fitting that it pronounces itself on this issue given the lack of clear guidance on ensuring compliance with the requirements of the African Charter when states resort to the use of amnesty as necessary means for pursuing the objectives of achieving peace and justice in times of transition from violence to peace. This is further necessitated by the position that the Commission took herein above in finding violation of Article 3 of the Charter in the application of amnesty, which, unless it is read carefully, may be wrongly interpreted as sanctioning blanket amnesty.

285. While amnesties have a long pedigree in peace negotiations and have historically been commonly used as part of peace settlements even for armed conflicts manifesting most atrocious acts, [66] developments in international law have in recent years laid down rules regulating the use of amnesties in peace settlements. These rules of international law aiming at giving force to human rights and IHL principles prescribe the conditions that should be met when societies have to have recourse to amnesties as a necessary means of ending the continuation of armed violence and the violations that inevitably accompany such violence.

286. Amnesty[67] can be defined as the legal measures that are used in transitional processes, often as part of peace settlements, to limit or preclude the application of criminal processes and, in some cases, civil actions against certain individuals or categories of individuals for violent actions committed in contravention of applicable human rights and IHL rules. While amnesties are usually applied for conduct committed before they have been established, there have been instances where they have been used to retroactively nullify legal liability previously established.[68] Amnesties commonly specify a category or categories of

66 Andreas O'Shea, Amnesty for Crimes in International Law and Practice (2002), p. 1

67 The word 'amnesty' is derived from the Greek word *amnestia*, which is closely linked with another Greek term *amnestikakeia*, which means forgetting legally wrongful acts. Today, amnesty is generally understood as immunity in law from either criminal or civil legal consequences or from both for wrongs committed in the past in a political context.

68 Office of the United Nations High Commissioner for Human Rights, Rule-of-Law Tools for Post-Conflict State: Amnesties, (2009), p. 5.

beneficiaries, such as members of rebel forces, state agents or political exiles. Although they can be adopted unilateral acts of the state including as executive decrees, amnesties are usually established as part of a peace settlement that is given a force of law.

287. The exemption from criminal prosecution and, possibly, civil action achieved through amnesty is typically limited to conduct occurring during a specific period and/or involving a specific event or circumstance, usually in armed conflict. Typically, these are not normal or ordinary circumstances. Rather, they are characterized lack of political and socio-economic stability, weak or dysfunctional institutions and diminished security. In such conditions, the compatibility of measures amounting to amnesties with the African Charter can be looked at in two ways. First, as noted in the substantive part of this decision, instead of the direct application of human rights standards that is ordinarily done in normal times, it is the standards of IHL, which apply in times of conflict that are used to assess the existence of violation of Charter rights. Second, such measures have also to be examined on the basis of the limitations clause and hence on the basis of whether they are justifiable and proportional limitations acceptable under international law.

288. Amnesties may exclude some or all conduct, including those that may be deemed crimes under international law. It is now common to make a distinction between blanket amnesties and conditional amnesties. Blanket amnesties, also known as unconditional amnesties, can be defined as those that "exempt broad categories of serious human rights offenders from prosecutions and/or civil liability without the beneficiaries' having to satisfy preconditions, including those aimed at ensuring full disclosure of what they know about crimes covered by the amnesty, on individual basis".[69] As they have the effect of excluding any form of accountability and hence enabling impunity, blanket amnesties are deemed to be

[69] Office of the United Nations High Commissioner for Human Rights, n 74 above, p. 8.

incompatible with human rights and IHL rules. Conditional amnesties are those that usually offer relief from criminal conviction or criminal prosecution altogether for defined category of actors and on meeting certain preconditions including full disclosure of what they know about the conducts covered by the amnesty and acknowledgement of responsibility.

289. A number of widely ratified international human rights and humanitarian law treaties[70] explicitly require States Parties to ensure that criminal proceedings are instituted against suspected perpetrators of prohibited acts in these instruments. It is generally accepted that an amnesty that completely foreclosed accountability measures for such prohibited acts would be in contravention of these instruments. Amnesties are also deemed to be incompatible with human rights treaties like the African Charter that do not explicitly address prosecution but which have been understood to require State Parties to institute judicial measures when serious violations occur unless such amnesties meet the requirements of justifiable restrictions acceptable in human rights treaties. Amnesties that preclude accountability measures for gross violations of human rights and serious violations of humanitarian law, particularly for individuals with senior command responsibility, also violate customary international law.

290. The Inter-American human rights system has a rich jurisprudence relating to national amnesties as a result of its historical context where a number of countries

[70] Uganda is party to the Genocide Convention as well as the four Geneva Conventions and its additional Protocols. It has ratified all of the core international human rights treaties, with the exception of the International Convention on the Protection of all Persons from Enforced Disappearances, as well as other significant treaties like the Optional Protocol to the Convention on the Rights of the Child (CRC) on the use of Children in Armed Conflict (OPCRC-II). Uganda ratified the ICC Rome Statute in 2002 and has also supported and signed important international instruments including the Paris Principles and Commitments of 2007 on the role of children in armed forces or groups. Uganda has also ratified important regional treaties that impose certain human rights obligations such as the constitutive acts of the African Union and the East African Community, the International Great Lakes Conference Protocols and most significantly the African Charter on Human and People's Rights, the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (the Maputo Protocol)10 and the African Charter on the Rights and Welfare of the Child and its corresponding protocol.

in Latin America had adopted amnesties following periods of human rights violations by repressive regimes in an effort to shield officers from accountability for violations. In this regard, the Inter-American Court of Human Rights declared invalid a blanket amnesty in Peru in 2001, which was found to discourage investigations and deny any remedy to the victims. [71] Following the precedent that it set in the blanket amnesty in Peru, the Inter-American Court has since declared the amnesty laws in Chile, Argentina and El Salvador to be incompatible with the States' duty to prosecute crimes and human rights violations.[72]

291. While it is acknowledged that many types of amnesties have been adopted across the world, unconditional amnesties with no accompanying accountability measures are particularly problematic in terms of States' compliance with international obligations, most particularly relative to their duties to respect and protect human rights. Although this is the first instance where the African Commission addresses the issue of amnesties in reasonable detail, there have been instances in particular communications in which the Commission found legal measures completely excluding prosecution with no alternative measures of accountability as being incompatible with the provisions of the African Charter. For example, the Commission held that amnesties could be contrary to the right of individuals to have their cause heard under Article 7(1) of the African Charter,[73] unless they are conditional and constitute justifiable and proportional limitations acceptable under international law.

292. In its normative elaboration of the provisions of the African Charter as well, the African Commission advanced the view that blanket amnesties constitute

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[71] Inter-American Court of Human Rights, Barrios Altos v. Peru, (2001), paras. 41-44.; Loazya Tamayo v Peru, (Reparations) para 168, ("states…may not invoke existing provisions of domestic law, such as the Amnesty Law in this case, to avoid complying with their obligations under international law.")

[72] Human Rights Watch, Selling Justice Short: Why Accountability matters for peace, Report (2009), p. 17

[73] See Communication 245/02: *Zimbabwe Human Rights NGO Forum v Zimbabwe*

violations of specific rights of the African Charter. A case in point is its General Comment No. 4 on prohibition of torture. In this General Comment, the Commission held that states are precluded from extending blanket amnesty for torture as a gross violation of international human rights law, as a crime against humanity and as a war crime. It violates the victim's right to judicial protection and to having his cause being heard.[74]

293. It is, therefore, the considered view of the Commission that blanket or unconditional amnesties that prevent investigations (particularly of those acts amounting to most serious crimes referred to in Article 4(h) of the AU Constitutive Act) are not consistent with the provisions of the African Charter.[75] African states in transition from conflict to peace should at all times and under any circumstances desist from taking policy, legal or executive/administrative measures that in fact or in effect grant blanket amnesties, as that would be a flagrant violation of international law. When they resort to amnesties as necessary measures for ending violence and continuing violations and achieving peace and justice, they should respect and honor their international and regional obligations. Most particularly, they should ensure that such amnesties comply with both procedural and substantive conditions. In procedural terms, conditional amnesties should be formulated with the participation of affected communities including victim groups. Substantively speaking, amnesties should not totally exclude the right of victims for remedy, particularly remedies taking the form of getting the truth and reparations. They should also facilitate a measure of reconciliation with perpetrators acknowledging responsibility and victims getting a hearing about and receiving acknowledgment for the violations they suffered.

Decision of the Commission on the Merits

[74] ACHPR, General Comment on the Right to Redress for Victims of Torture and other Cruel, Inhuman or Degrading Punishment or Treatment under Article 5 of the African Charter on Human and Peoples' Rights, para 28.

[75] See Para 7(1) of the African Charter

294. For the foregoing reasons, the Commission declares that:

i. There is no violation of Articles 4, 5, 6, 7(1)(b) & (c), 16 and 26 of the African Charter.

ii. The Respondent State has violated the rights of the Victim protected under Articles 3 and 7(1)(a) of the African Charter.

iii. There is a partial violation of Article 7(1)(d) of the African Charter relating to the right to be tried within a reasonable time.

295. In view of the above, the Commission:

i. Dismisses the Complainants prayers under 'b', 'c' and 'd' relating to effective and impartial investigation into the arrest, detention and subsequent treatment of the Victim; enforcement of domestic legislation relating to preventing torture, cruel and other inhuman and degrading treatment or punishment; and investigation of the alleged violations and trial of the perpetrators respectively.

ii. Hereby orders the Government of Uganda to pay adequate compensation to the Victim for the violation of Articles 3 and 7(1)(a) and (d) of the African Charter. In assessing the manner and mode of payment of compensation, the Government of Uganda shall consult the Victim and his legal representatives and shall be guided by international norms and practices relating to payment of compensatory damages. The Commission avails its good offices to facilitate the implementation of this ruling.

iii. Requests the Government of Uganda to inform the Commission within one-hundred and eighty (180) days of being notified of this decision, the measures taken to implement the present decision in accordance with Rule 112(2) of the Rules of Procedure of the Commission.

iv. Urge the Uganda Human Rights Commission to use its statutory powers under section 52 (1)(h) of the Constitution of Uganda to monitor the Government's compliance with the decision.

Done in Banjul, The Gambia, at the 23rd Extra-Ordinary Session of the African Commission on Human and Peoples' Rights held from 12 to 22 February 2018.