



COMMUNICATION 461/13

**Eskinder Nega Fenta and Reeyot Alemu
(represented by Media Legal Defence
Initiative, Freedom Now and Lincolns Inn)**

v

**The Federal Democratic Republic of
Ethiopia**

Adopted by the:

African Commission on Human and Peoples' Rights

During the 72nd Ordinary Session, held virtually, from 19 July to 2 August 2022



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



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



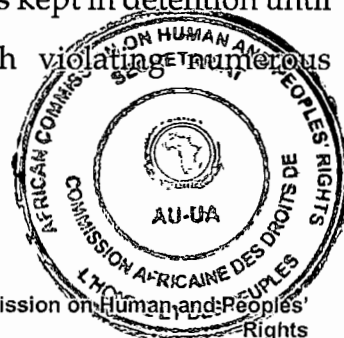
Decision of the African Commission on Human and Peoples' Rights on the Merits

Communication 461/13 – Eskinder Nega Fenta and Reeyot Alemu (represented by Media Legal Defence Initiative, Freedom Now and Lincolns Inn) v. the Federal Democratic Republic of Ethiopia

Summary of the Complaint:

1. The Secretariat of the African Commission on Human and Peoples' Rights (the Secretariat), received a Complaint on 12 November 2013 from Eskinder Nega Fenta and Reeyot Alemu (the first and second Complainants respectively), represented by Media Legal Defence Initiative, Freedom Now and Lincolns Inn. Both Complainants are journalists in Ethiopia.
2. The Complaint is submitted against the Federal Democratic Republic of Ethiopia (the Respondent State), State Party to the African Charter on Human and Peoples' Rights (the African Charter).¹
3. The First Complainant alleges that he was arrested on 14 September 2011 on suspicion of terrorism, five (5) days after publishing an online column criticising the 2009 Proclamation on Anti-Terrorism No 652/2009 (The 2009 Anti-Terrorism Proclamation), suggesting that it was being used to target journalists and critics of the Government. He was initially detained in Maekelawi, the Federal Police Criminal Investigation Prison, and was denied access to legal counsel and not allowed contact with family members. The First Complainant avers that he was kept in detention until 10 November 2011 when he was formally charged with violating numerous

¹ The Federal Democratic Republic of Ethiopia ratified the African Charter on 15 June 1998.





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provisions of the 2009 Anti-Terrorism Proclamation and the 2004 Ethiopian Criminal Code.

4. The Complainant further avers that he was sentenced to 18 years imprisonment on 13 July 2012 after a judgment of the Federal High Court on the 27 June 2012. On 2 May 2013, he appealed to the Federal Supreme Court. His sentence was upheld although the court dismissed the charge of leading a terrorist organisation under Article 7(2) of the 2009 Anti-Terrorism Proclamation.
5. The First Complainant filed an appeal in the Cassation Division of the Federal Supreme Court on 9 May 2013 but subsequently abandoned it by failing to request for a hearing of the appeal. The deadline for filing a hearing request expired on the 31 July 2013.
6. The Second Complainant avers that she was arrested on 21 June 2011 shortly after she published an article in the independent newspaper, *Feteh*, criticising the Ethiopian Government's plan to build a hydroelectric dam and its associated fund-raising plans. She was detained in Maekelawi, initially in solitary confinement and without access to visitors. She was charged with violating Articles 32(1) (a), 38(1) and 684 (1) and (2) of the Ethiopian Criminal Code and Articles 4, 7 and 9 of the 2009 Anti-Terrorism Proclamation.
7. On the 26 January 2012, the Second Complainant was sentenced to 14 years imprisonment and a fine of 33,000 Ethiopian Birr, the equivalent of 1,870 USD. On 31 July 2012, she appealed before the Federal Supreme Court which reduced her sentence to 5 years. The Second Complainant was acquitted of 2 out of the 3 charges brought against her. On 8 January 2013, the Cassation Division of the Federal Supreme Court upheld the decision on appeal and maintained the charge of participating in a terrorist organisation.
8. The Second Complainant further claims that in early 2012, she was diagnosed with tumours (fibroadenoma) in both breasts. She underwent an operation on 24 April 2012 to remove some of the tumours from the left breast. After the operation, she was forced to return to prison without being allowed time to recover. A control visit was





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scheduled for October 2013 but it had not taken place.

9. The Second Complainant submits that 15 months after her surgery, the surgical stitches had not been removed. She bled regularly from her left breast and suffered severe pains. She claimed she suffered great discomfort and displayed symptoms indicating that her health was in jeopardy.
10. The second Complainant made a request for Provisional Measures to the end that the Ethiopian Government should have her examined by an independent medical expert in order to determine the best medical treatment for her. Furthermore, she requested that the Government of Ethiopia be urged to ensure that such medical treatment is provided to her without delay.
11. The Complainants assert that the 2009 Anti-Terrorism Proclamation and its subsequent application and implementation have resulted in a significant number of prosecutions of dissenting voices in Ethiopia. The Complainants submit that this constitutes a serious or massive violation of human and peoples' rights both *de jure* and *de facto*.

Articles alleged to have been violated

12. The Complainants allege violation of Articles 7, 9 and 16 of the African Charter by the Respondent State.

Prayers

13. The Complainants request the African Commission on Human and Peoples' Rights (the Commission) to:
 - a. Refer the matter to the African Court on Human and Peoples' Rights in accordance with Article 58 of the African Charter and Rules 84 (2) and 118 of its Rules of Procedure or alternatively.
 - b. Draw the attention of the Assembly of Heads of State and Government of the African Union (AU) to the situation in accordance with Article 58 of the African Charter and Rules 84 (2) and 118 of its Rules of Procedure.
 - c. Consider the Complainants' Complaint as an individual Complaint in accordance with Article 55 of the African Charter and Rule 93 of its Rules of Procedure.



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- d. Authorise a hearing before the Commission concerning the request for referral to the African Court under Rule 99 (1) of its Rules of Procedure;
- e. Order that Provisional Measures be taken by the Government of Ethiopia in relation to the situation of the Second Complainant;
- f. Find that the Respondent State has violated Articles 7,9 and 16 of the African Charter;
- g. Order Ethiopia to make reparations to the Complainants, consisting of, among others, lost income, lost profits and compensation for emotional suffering;
- h. Declare that the 2009 Anti-Terrorism Proclamation violates Ethiopia's obligations under international law and in particular its obligations to respect the right to freedom of expression, the right to a fair trial and the obligation to generally respect human rights in the context of anti-terrorism measures;
- i. Order Ethiopia to bring the 2009 Anti-Terrorism Proclamation in line with Ethiopia's obligations under international law and in particular its obligations to respect the right to freedom of expression, the right to a fair trial and the obligation to generally respect human rights in the context of anti-terrorism measures.

Procedure

14. On 12 November 2013, the Secretariat received the Complaint and acknowledged receipt of the same on 21 November 2013 by a letter Ref: ACHPR/COMM/ETH/1301/13, dated 19 November 2013.

15. At its 15th Extraordinary Session held from 7 to 14 March 2014 in Banjul, The Gambia, the African Commission considered the said Communication and decided to be seized of it. It also issued Provisional Measures to the effect that the Government of Ethiopia should have the Second Complainant examined by an independent medical expert without delay in order to determine the best medical treatment and have it administered to her. However, the Commission refused to grant the request to refer the matter to the African Court on Human and Peoples' Rights and to hold an oral hearing for this purpose because Ethiopia has not ratified the Protocol to the Charter on the Establishment of the Court. The Commission also refused to grant the request to draw the attention of the Assembly of



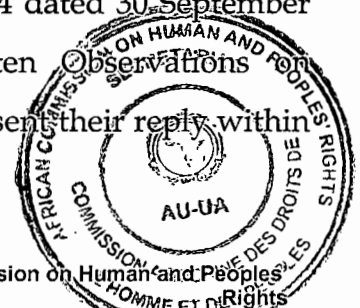
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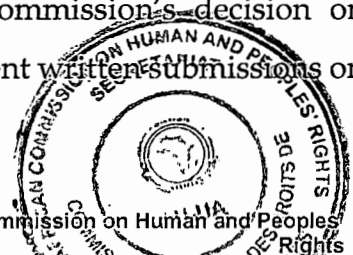
Heads of State and Government of the AU in accordance with Article 58 of the African Charter because the Complaint did not reveal the existence of a series of serious or massive violations of human and peoples' rights.

16. By a letter Ref: ACHPR/COMM/461/13/ETH/360/14 dated 18 March 2014 the Secretariat notified the Complainants about the Commission's decision on seizure and provisional measures and invited them to present written submissions on admissibility within two months of notification.
17. By a *Note Verbale* Ref: ACHPR/COMM/461/13/ETH/361/14 dated 18 March 2014, the Respondent State was informed about the Commission's decision on seizure and Provisional Measures and the request for the Complainants to present written submissions on admissibility within two months of notification.
18. On 28 May 2014, the Secretariat received the Complainants' Submissions on the Admissibility of the Communication, which was duly acknowledged by letter Ref: ACHPR/COMM/461/13/ETH/935/13 dated 30 May 2014.
19. By a *Note Verbale* Ref: ACHPR/COMM/461/13/ETH/936/13 dated 30 May 2014, the Complainants' written submissions on admissibility were transmitted to the Respondent State with a request for the latter to submit its written observations on admissibility within two months of notification.
20. On 19 and 23 September 2014, the Secretariat received the Observations of the Respondent State on the Admissibility Submissions of the Complainants, which was duly acknowledged by a *Note Verbale* Ref: ACHPR/COMM/461/ETH/1673/14 dated 30 September 2014.
21. By a letter Ref: ACHPR/COMM/461/13/ETH/1672/14 dated 30 September 2014 the written Observations of the Respondent State on the Admissibility Submissions was transmitted to the Complainants for their reply within one month of notification.
22. By a *Note Verbale* Ref: ACHPR/COMM/461/13/ETH/1673/14 dated 30 September 2014, the Respondent State was informed that its written Observations on admissibility had been transmitted to the Complainants to present their reply within one month of notification.





23. The Secretariat did not receive any reply from the Complainants within the one month deadline granted to them and no request for extension of time to submit the same was also received.
24. Consideration of the admissibility of the Communication was deferred during the 17th Extraordinary Session of the Commission held from 17 to 28 February 2015.
25. By letter dated 26 April 2015, the Complainants having referred to earlier correspondences inquired about the non-implementation of the Provisional Measures by the Respondent State.
26. In response to the Complainants' inquiries, by letter Ref: ACHPR/COMM/461/13/ETH/777/15 dated 15 May 2015, the Secretariat informed the Complainants that the Commission at its 56th Ordinary Session held from 21 April to 7 May 2015, in Banjul, The Gambia, decided to send a reminder to the Respondent State to implement the said Provisional Measures and to report back on the implementation within the timeline required to do so.
27. The Commission has not received any report to date on the implementation of the Provisional Measures by the Respondent State.
28. By a letter dated 22 July 2015 the Secretariat was informed by the legal Representatives of the Complainants that the Second Complainant was unexpectedly released from Prison on the 9 July 2015 whilst the First Complainant is still serving his prison term.
29. At its 20th Extraordinary Session held from 9 to 18 April 2016, the Commission considered and declared the Communication partially admissible.
30. By a letter Ref: ACHPR/COMM/461/13/ETH/1789/16 dated 17 November 2016 the Secretariat notified the Complainants about the Commission's decision on Admissibility and invited them to present written submissions on the Merits within sixty (60) of the notification.
31. By a *Note Verbale* Ref: ACHPR/COMM/461/13/ETH/1788/14 dated 17 November 2016, the Respondent State was informed about the Commission's decision on Admissibility and the request for the Complainants to present written submissions on the Merits within two months of the notification.





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32. On 02 June 2017, the Secretariat received the Complainants' Submissions on the Merits of the Communication, which was duly acknowledged by letter Ref: ACHPR/COMM/461/13/ETH/403/17 dated 05 June 2017.
33. By a *Note Verbale* Ref: ACHPR/COMM/461/13/ETH/402/17 dated 05 June 2017, the Complainants' written submissions on the Merits were transmitted to the Respondent State with a request for the latter to submit its written observations on the Merits within 60 (sixty) days of the notification.
34. The Secretariat did not receive the Observations of the Respondent State on the Merits Submissions of the Complainants within the stipulated period.
35. On 01 November 2016, the Secretariat had received a Notice of Motion for Dismissal of the Communication from the Respondent State and by a *Note Verbale* Ref: ACHPR/COMM/461/13/ETH/1882/16 dated 25 November 2016 the Secretariat acknowledged receipt of the Notice of Motion for Dismissal,
36. By a letter Ref. ACHPR/COMM/461/13/ETH/1952/16 dated 29 November 2016, the Secretariat transmitted same to the Complainant's for their written Observations within thirty (30) days of the notification and informed the Respondent State accordingly by a *Note Verbal* Ref. ACHPR/COMM/461/13/ETH/1951/16 dated 29 November 2016.

The Law on Admissibility

Submissions of the Complainants on Admissibility

37. The Complainants argue that they have fulfilled all the requirements of Admissibility provided under Article 56 of the African Charter and submit as follows in support of their claim.
38. Regarding Article 56 (1), the Complainants submit that they are legally represented by Yakaré-Oulé (Nani) Jansen, Patrick Griffith and Korieh Duodu, who are the authors of the Complaint and this submission on admissibility. That they have been identified as Eskinder Nega, born on 7 November 1969 in Addis Ababa, Ethiopia and Reyeget Alemu, born on 21 January 1980 in Adama (Nazareth), Ethiopia. Both of them are of Ethiopian nationality and an address for correspondence with them and their representatives has been provided.





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39. On Article 56 (2), the Complainants submit that it has been complied with, in accordance with the Commission's compatibility requirements. First, the Complainants are Ethiopian nationals who personally suffered violations of their rights as protected under the African Charter. Second, Ethiopia ratified the African Charter on 15 June 1998 and the alleged violations took place in the second half of 2011.
40. On Article 56 (3) the Complainants submit that no inappropriate language has been used in communicating the violations of their rights under the African Charter.
41. The Complainants also submit on Article 56 (4) that the Communication is based on their personal experience and not founded exclusively on news reports. In addition they have sought to provide the Commission with as much relevant documentary evidence including all court and medical documents which they had access to and reports from various human rights organisations.
42. The Complainants submit that the Communication also complies with the requirement of the exhaustion of local remedies in accordance with Article 56 (5) of the African Charter. The Complainants argue that The First Complainant appealed the first instance judgment delivered by the Federal High Court (Lideta Criminal Bench) against him on 13 July 2012. On 2 May 2013, the Federal Supreme Court upheld the judgment in first instance. The First Complainant decided not to request a hearing in the Cassation Division of the Federal Supreme Court as he was convinced that it would not constitute an effective remedy of his criminal conviction. The Complainants submit that domestic remedies pursuant to Article 56(5) should be exhausted, only if they are available, effective and sufficient. Where domestic remedies do not meet the aforementioned criteria, a victim does not have to exhaust them before bringing a complaint.
43. Regarding the Second Complainant, the Complainants also submit that she has exhausted all available and effective domestic remedies when she appealed her criminal conviction to the Federal Supreme Court, which partially upheld her conviction on 21 July 2012. In addition, the Cassation Division of the Federal Supreme



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Court decided negatively for her on 8 January 2013 and upheld the judgment of the Federal Supreme Court.

44. On Article 56(6), the Complainants aver that the complaint was filed within a reasonable time. The decision in the First Complainant's Appeal was delivered on the 2 May 2013 and the Second Complainant's conviction was upheld by the Cassation Division of the Federal Supreme Court on the 8 January 2013. The last court decision was handed down only 5 months prior to the filing of the complaint on behalf of the First Complainant and 4 months prior to filing on behalf of the Second Complainant.
45. The Complainants submit that, the present Communication falls within the scope of Article 56(7) because it has not been settled by an international or regional mechanism. The Complainants submit that a complaint filed with the UN Working Group on Arbitrary Detention regarding the First Complainant and the UNESCO Committee regarding both Complainants do not amount to a settlement within the meaning of Article 56(7) of the African Charter.
46. In light of the foregoing, the Complainants submit that their Communication meets all requirements for admissibility and respectfully requests the Commission make a declaration of admissibility and proceed to the merits stage.

Submissions of the Respondent State on Admissibility

47. The Respondent State submits generally that the Communication does not comply with the requirements stipulated under Article 56 of the African Charter.
48. The Respondent State submits that the Communication is improperly brought before the African Commission for two reasons - first, that it is incompatible with the African Charter and secondly, that the Complainants have not exhausted local remedies. With regards to the first assertion, the Complainants were charged with and sentenced for the crime of terrorism which is not covered under the African Charter. With respect to the exhaustion of local remedies, the Respondent State observes that the First Complainant failed to present the case before the Cassation Division of the Federal Supreme Court, claiming it would not constitute an effective remedy. That such a claim is unfounded. The Respondent State submits that local remedies are available





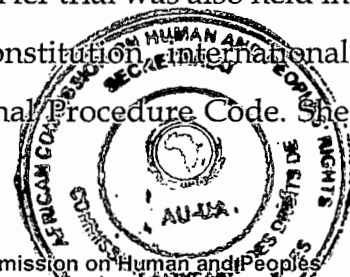
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and effective but were not exhausted by the Complainants.

49. The Respondent State further submits that the Communication is not compatible with Articles 56(2), (5) and (6) of the Charter. With regard to Article 56(2), the Respondent State submits that compatibility with the Charter or the Constitutive Act of the African Union entails that any Communication filed in such a matter should prove a *prima facie* case of violation of a specified Article, failing to do so would entail that there can be no communication before the African Commission. In this case, the Complainants were prosecuted for violating the Anti-Terrorism law of the nation under a free and fair court of law and were found guilty of the offence. The crime they were convicted for has nothing to do with the freedom of expression or opinion; rather it is a result of terrorism charges.
50. The Respondent State also submits that the Communication does not satisfy the requirement of Article 56 (7) of the African Charter. In this regard, both the complainants', Mr. Eskinder Nega Fenta under communication no. 1116/2012 and the Second Complainant Ms. Reeyot Alemu under communication no. 1124/2012 represented by Media Legal Defense have brought the case to the United Nations Educational, Scientific and Cultural Organization (UNESCO). As a result the UNESCO has been dealing with the case of the two complainants for the past two years. Hence, this is a clear violation of Article 56(7) of the African Charter.
51. The Respondent State further submits that the first Complainant was charged with crimes committed in violation of domestic laws after a thorough investigation of his participation in terrorist activities and backed by evidence. That his trial took place in public and he was given the opportunity to defend himself and represented by a lawyer. Due process was followed throughout the process of the trial. The Respondent State also submits that the second Complainant was charged with crimes under the Ethiopian Criminal Code and Anti-Terrorism Proclamation. Her trial was also held in public with due respect and observance of the FDRE Constitution, international human rights treaties and relevant provisions of the Criminal Procedure Code. She was also represented by a legal counsel of her choice.





52. The Respondent State also avers that freedom of expression is guaranteed under the FDRE Constitution and the Government strongly believes that the media plays a significant role in furthering democratic culture in the society and promoting development activities. However, those who abuse it for the purpose of advancing instability and terrorism in the country cannot be serving the noble cause of journalism. The Respondent State avers that the Government has a duty to ensure national security and public safety and nobody is above the law.
53. Regarding the second Complainant's allegation that her right to health was violated due to the inadequate medical treatment she received during her incarceration, the Respondent State submits that the right to health is one of the fundamental human rights in Ethiopia which is protected under article 89 of the FDRE Constitution. The allegation that second complainants' right to health has been violated is untrue and unfounded. The Ethiopian Federal Prison administration health facility gives every prisoner medical care free of charge. Furthermore, any medical care that's beyond the capacity of the medical care of the prison medical facility will be addressed by the country's best medical care facilities as per Article 11(4) of the Directive no. 138/99. As a result, Ms. Reyote's was first admitted to the Kality prisons administration medical care facility. However, since her case required a specialized medical care she was referred to Tikur Anbesa Specialized Hospital, which hosts the Medical Faculty of the Addis Ababa University, to get further treatment. This fact could be verified from Ms. Reeyot's Medical records.²
54. The Respondent State argues that the facts raised in the Communication do not show *prima facie* violations of the provisions of the Charter. Thus they are not compatible with Article 56 (2), and do not fall within the *rationae materiae* jurisdiction of the Commission.

² With respect to protection to the health of prisoners, as per the United Nations General Assembly Resolution no. 37/194 the principles of Medical ethics relevant to the role of health personnel, particularly physicians, in the protection of prisoners and detainees against any torture and other cruel, inhumane or degrading treatment or punishment is respected and employed by the Ethiopian Prison Administration.





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55. The Respondent State further argues that it has ratified many international human rights instruments including the African Charter and has undertaken its obligations to promote and protect human rights. It has actively and regularly engaged with the Commission and submitted its periodic reports under Article 62. All the above are a clear manifestation of the country's commitment to both the regional mechanism and the protection of human rights in general in the country.

56. For the foregoing reasons, the Respondent State requests the Commission to dismiss the Communication.

The African Commission's Analysis on Admissibility

57. Article 56 of the African Charter sets out seven requirements that a Communication brought under Article 55 of the African Charter must satisfy in order to be Admissible for consideration by the Commission. Those requirements apply cumulatively.³ Failure to satisfy any one or more of those requirements renders the Communication inadmissible, unless the Complainant provides sufficient justifications as to why any of the requirements could not be met.⁴

58. The Complainants submit that all the requirements under Article 56 have been complied with. The Respondent State however argues that the Communication does not meet the requirements stipulated under Article 56 of the African Charter. In particular, the Respondent State submits that the Communication does not comply with Articles 56 (2), (5) and (7); namely, that it is not compatible with the African Charter or the Constitutive Act of the African Union; that local remedies have not been exhausted and that the Complainants' case was being adjudicated before the United Nations, Educational, Scientific and Cultural Organisation (UNESCO).

59. The Respondent State did not raise objections with regards to the other requirements under Article 56, apart from raising a general objection at the beginning of its submissions. After a careful examination of the facts and submissions by both parties,

³Rule 106, Rules of Procedure of the Commission, 2010; Communication 304/05 - *FIDH & Others v Senegal (2006)* ACHPR, para 38.

⁴ Communication 275/2003 - *Article 19 v. Eritrea* (2007) ACHPR.





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the Commission is satisfied that the Complainants have fulfilled the requirements under Articles 56(1), (3), (4) and (6). In this regard, the Commission will proceed to analyse the arguments of both parties with regards to the requirements under Articles 56(2), (5) and (7) of the African Charter.

60. Article 56(2) provides that "*Communications... received by the African Commission shall be considered if they: are compatible with the Charter of the Organisation of African Unity or with the present Charter.*" In proving that the above requirement has been met, the Complainants submit that the Commission has in its previous decisions stated that the condition of compatibility requires that: the Communication should be brought against a State Party to the African Charter by someone who is competent to do so; the Communication should be brought in respect of violations that occurred after the State's ratification of the Charter or which began before such ratification and continued thereafter; and the Communication must allege *prima facie* violations of rights protected by the African Charter. They cited **Kevin Mwanga Gunme et al v. Cameroon**⁵ in support of their argument.

61. The Complainants further argue that all three requirements are met. First, the Complainants are Ethiopian nationals who personally suffered violations of their rights as protected under the African Charter. They have authorised their legal representatives to file a complaint with the Commission on their behalf. Second, Ethiopia ratified the Charter on 15 June 1998 and the violation of the Complainants' rights began when they were prosecuted for terrorism in the second half of 2011. The alleged violations continue up to the time of filing this Communication. Mr Nega is still in prison whilst Ms Alemu was unexpectedly released in July 2015. The said violation of the Complainants' rights occurred within Ethiopian territory. Third, the Complainants submit that the following rights of the Complainants protected by the Charter have been violated: Right to Freedom of Expression (Article 9), Right to a Fair Trial (Article 7) and Right to health (Article 16).

⁵ ACHPR, Comm. No. 266/03 (2009), para. 71





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62. The Commission observes that the requirements of Article 56(2) have been well articulated in its decision in **Kevin Mwanga Gunme et al v. Cameroon**⁶ as cited by the Complainants. Based on this decision and the submissions of the Complainants, the Commission notes that the present Communication is brought against the Federal Democratic Republic of Ethiopia (FDRE), a State Party to the African Charter by the Complainants who are nationals of Ethiopia; the Communication before the Commission is brought in respect of alleged violations that occurred in 2011, after Ethiopia had ratified the African Charter; and the Communication alleges *prima facie* violations of rights protected by the African Charter. Therefore, the Commission finds that the Complainants have satisfied Article 56 (2) of the Charter.
63. Regarding Article 56(5), a Complainant should exhaust local remedies unless it is obvious that the procedure is unduly prolonged. Therefore the onus is on the Complainants herein to provide sufficient reason(s) to support their allegation that they have complied with the said requirement.
64. The Complainants submit that it is a well-established principle that the provisions of Article 56(5) should be interpreted "in the light of [the] duty to protect human and peoples' rights as stipulated in the Charter"⁷ and that for domestic remedies to be exhausted, they have to be "available, effective and sufficient."⁸ That the Commission

⁶ ACHPR, Comm. No. 266/03 (2009), para. 71.

⁷ Communication nos. 54/91 & 61/91 & 96/93 & 98/93 & 164/97 & 196/97 & 210/98, *Malawi African Association, Amnesty International, Ms Sarr Diop, Union interafricaine des droits de l'Homme and RADDHO, Collectif des veuves et ayants-Droit, Association mauritanienne des droits de l'Homme v. Mauritania*, par. 85. The communication concerned allegations that the government, after it took power in a coup d'état in 1984, was marginalising Black Mauritanian ethnic groups. The Commission addressed the requirement that local remedies must be exhausted and held that the requirement should not be applied literally as it is sometimes "neither practicable nor desirable" for the complainants or the victims to pursue such internal channels of remedy in every case of a violation of human rights.

⁸ Communication no. 284/03, *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v. Zimbabwe*, par. 101 - 102. The communication concerned the implementation of the Access to Information and Protection of Privacy Act (AIPPA). The Commission, in paragraph 101 outlined the respective burdens on the claimant and respondent in showing 'exhaustion of local remedies': 'If a Complainant wishes to argue that a particular remedy does not have to be exhausted because it is unavailable, ineffective or insufficient, the procedure is as follows: the Complainant states that the remedy did not have to be exhausted because it is ineffective (or unavailable or insufficient) - this does not yet have to be proven; the Respondent State must then show that the remedy is available, effective and sufficient; and if the Respondent State is able to establish this, then the Complainant must either demonstrate that he or she did exhaust the remedy, or that it could not have been effective in the specific case, even if it may be effective in general.'; Communication no. 250/02, *Liesbeth Zegveld and Mussie Ephrem v. Eritrea*, par. 36 - 37. The communication concerned the alleged illegal arrest of 11 former Eritrean government officials in Asmara, Eritrea on 18 and 19 September 2001 in violation of



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has held that, if domestic remedies do not meet the aforementioned criteria, a victim does not have to exhaust them before bringing a complaint. The Commission has further held that a remedy can only be considered effective "if it offers a prospect of success."⁹

65. The Complainants submit that in August 2012, the First Complainant, appealed the first instance judgment by the Federal High Court (Lideta Criminal Bench) delivered against him on 13 July 2012. On 2 May 2013, the Federal Supreme Court upheld the judgment in first instance. Thereafter, the First Complainant decided not to request a hearing in the Cassation Division of the Federal Supreme Court as he was convinced that it would not constitute an effective remedy of his criminal conviction. The deadline for filing an application for a hearing expired on 31 July 2013.
66. The Complainants argued that the First Complainant was justified in his conviction that the cassation procedure had minimal or no prospect of success, given that the Cassation Division of the Federal Supreme Court is not an actual appeal instance and can only reconsider a decision if there has been a "fundamental error of law". The Complainants submit that a hearing at the Cassation Division of the Federal Supreme Court would indeed have been a mere formality with no actual prospect for relief for the First Complainant since the human rights violations contended for by the First Complainant do not come within the narrow scope of review afforded by the Cassation procedure.
67. The Complainants also submit that, under Article 80(3) (a) of the Constitution of Ethiopia, the Federal Supreme Court has the power of Cassation review over any and every final court decision containing a fundamental error of law. This is further specified in Article 10 of Proclamation No. 25/1996, which states that such a fundamental error of law is the sole ground for approving a Cassation review. Thus,

Eritrean law and the African Charter. The Commission refers to Inter-American Court of Human Rights case law on the burden of proof in exhausting domestic remedies: "The Court also opined that where a party raises non-exhaustion of local remedies because of the unavailability of due process in the State, the burden of proof will shift to "the State claiming non-exhaustion and it has an obligation to prove that domestic remedies remain to be exhausted and that they are effective."; Communication 147/95, 149/96 *Sir Dawda K. Jawara v. The Gambia*, para. 31

⁹ Communication 147/95, 149/96 - *Sir Dawda K. Jawara v The Gambia*, para. 31 & 32





for a case to be deemed suitable for cassation review, it must concern not merely an error in law, but a *fundamental* one, which is a narrowly constructed concept interpreted to refer to situations worthy of judicial review and in need of legal interpretation.

68. The Complainants submit that in brief, it is taken to refer to situations which involve the application of incorrect laws, issues related with the jurisdiction of the courts and issues related to legal interpretation as set out in the Complainant's Expert Report provided.
69. The Complainants also submit that, due to the narrow interpretation given to the scope of the fundamental error of law test, only very few cases are accepted as having a fundamental error of law by the Cassation Division of the Federal Supreme Court. In support of this submission, the Complainants relied on the Commission's decision in *Interights, Asadho et Maître O Disu v. République Démocratique du Congo*,¹⁰ where the Commission held that a cassation review "*did not constitute an effective remedy because it could review only the respect for the rules of procedure and not the substance of the claim. Consequently, [an appeal in cassation] was not capable of curing the alleged violations.*"
70. The Complainants further submit that the primary basis of the First Complainant's appeal to the Federal Supreme Court was the insufficiency of the evidence brought by the Ethiopian government and challenging the factual events which the Ethiopian government alleged qualified as "terrorism". That the main thrust of his appeal was based on the fact that the government convicted him without proving his guilt. As such, the core of the First Complainant's challenge to his conviction was factual and therefore would inevitably fall outside the jurisdiction of the Cassation Division of the Federal Supreme Court.

¹⁰ Communications nos. 274/03 and 282/03, *Interights, Asadho et Maître O Disu v. République Démocratique du Congo*. The communication concerned alleged human rights abuses of individuals, both military and civilian, who were accused of involvement in the assassination of the President of the Democratic Republic of Congo in 2001. The Commission again reaffirmed its findings in the *Sir Dawda K. Jawara* communication on exhaustion of remedies and discussed what constitutes an effective remedy, finding that a court that only reviewed procedure rather than substance could not provide an effective remedy and therefore if that option was not used it did not mean that domestic remedies had not been exhausted.



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71. The Complainants submit that in accordance with the Commission's case law, there was therefore no requirement for the First Complainant to seize the Cassation Division of the Federal Supreme Court in order to meet the Commission's admissibility requirements on exhaustion of domestic remedies.
72. In addition, the Complainants submit that a cassation review could never be considered an effective remedy as practice has shown that it is impossible for him to receive a fair trial in Ethiopia. In this context, the First Complainant referred to the history of persecution he has suffered in Ethiopia, as well as the numerous fair trial violations he suffered in the proceedings that led to his current detention.
73. The Complainants further submit that the Commission has held previously in a Communication filed against Ethiopia that an *"exception to the rule of domestic remedies [applies] where the domestic situation of the State does not afford due process of law for the protection of the right or rights that have allegedly been violated"*¹¹.
74. The Complainants argue that the Commission, as well as various other international human rights bodies have stated that the exhaustion rule serves the purpose of giving the Respondent State the opportunity to become aware of the human rights violation and remedy it.¹²

¹¹ ACHPR, *Haregewoin Gabre-Selassie & IHRDA (on behalf of former Dergue officials) v. Ethiopia*, Comm. No301/05 (2011), par. 111. The communication concerned a group of officials from Ethiopia's former Dergue regime who had been detained and charged collectively for human rights abuses that occurred during the regime. The Commission endorsed the line of case law that found that domestic remedies have to be available, effective and sufficient to be effective remedies. The Commission also stated that for there to be an exception to the rule on the exhaustion of domestic remedies, there must be a breach of a right enshrined in the Charter. In *Haregewoin Gabre-Selassie* the Commission explicitly referred to the right to a fair trial enshrined under Article 7 of the Charter and held that if a State did not afford due process of law for the protection of the right then there would be an exception to the exhaustion requirement.

¹² ACHPR, *Darfur Relief and Documentation Centre v. Sudan*, Comm. No. 310/05 (2009), par. 71.

The communication concerned Sudanese men who had been unlawfully detained in military prison and the Sudanese government's renegation on its agreement to compensate them. The Court stated: 'The Commission has stated that the justification for this requirement is that a government should be aware of a human rights violation in order to have a chance to remedy such violation, thus protecting its reputation which may be tarnished by being called to plead its case before an international body. This requirement also precludes the African Commission from becoming a tribunal of first instance, a function which it cannot fulfil practically or legally.'; ACHPR, *Amnesty International v. Sudan*, Comm. No. 48/90 (1999), par. 32. The communications alleged that the government was responsible for human rights violations, including extra-judicial executions, arbitrary arrests and detentions since July 1989, the arrest, detention and torture of opposition group members since June 1990 and the suppression of Sudanese Christians. The Commission restated that one of the reasons for the exhaustion requirement is to ensure that the government is aware of a human rights violation in order to have the chance to remedy it.



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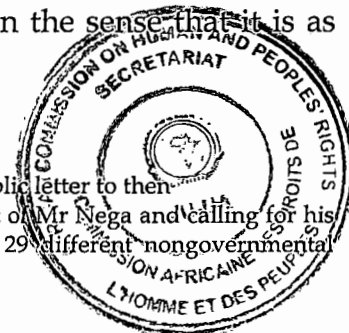
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75. The Complainants submit that this interest was fully protected when the First Complainant pursued the single substantive appeal available against his criminal conviction, namely an appeal to the Federal Supreme Court. This appeal was rejected. Moreover, the First Complainant's trial and criminal appeal received widespread attention from the media, non-governmental organisations, international institutions, and other governments.¹³ As such, there is no realistic possibility that the Ethiopian government was unaware of the situation or did not have the opportunity to remedy the situation.
76. The Commission notes that the procedure for exhausting local judicial remedies in this case is as follows: the Federal High Court, then the Federal Supreme Court and then the Cassation Division of the Federal Supreme Court. The Respondent State in this case contends that the First Complainant failed to exhaust local judicial remedies which were available and effective because the latter has on his own volition, failed to present an appeal to the Cassation Division of the Federal Supreme Court.
77. The Commission also notes that the First Complainant is not contesting that an opportunity to appeal to the Cassation Division of the Federal Supreme Court is not available but rather, that it is not an effective recourse because it is only a formality with no prospect of success due to the limited nature of its jurisdiction and therefore decided not to proceed with the hearing of the Appeal filed at the Cassation Division of the Federal Supreme Court on 9 May 2013.
78. The Commission further reiterates that a remedy is effective if it offers prospects of success and, that is, the appropriate relief that is capable of adequately and timely redressing the specific violation suffered. However, the effectiveness of a remedy does not depend on the certainty or guarantee of a favourable outcome for the complainant.¹⁴ It is enough that the complaint is arguable, in the sense that it is as

¹³ For example, on 17 December 2012, 16 members of the European Parliament issued a public letter to then Ethiopian Prime Minister Hailemariam Desalegn, raising concern about the imprisonment of Mr Nega and calling for his release. A similar letter was sent to the Ethiopian government on 9 October 2012 by 29 different nongovernmental organisations.

¹⁴ *M.S.S v Belgium and Greece* (2011) ECHR (Application No. 30696/09) para. 289





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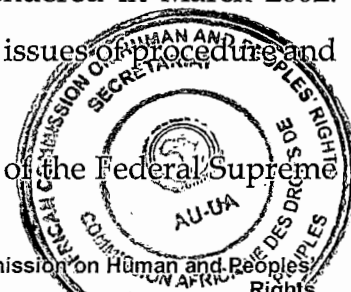
susceptible to being adjudged meritorious as it may be adjudged unmeritorious upon full examination of supporting and opposing evidence, and legal arguments.

79. In light of the above, the Commission has reviewed Article 80(3)(a) of the Constitution of Ethiopia which states, *"the Federal Supreme Court has a power of cassation over any final court decision containing a basic error of law"* and Article 10 (1) of Proclamation No. 25/1996 which states: *"In cases where they contain fundamental error of law, the Federal Supreme Court, shall have the power of cassation over: 1) final decisions of the Federal High Court rendered in its appellate jurisdiction..."*

80. It is clear from the above provisions that, for the Cassation Division of the Federal Supreme Court to entertain an appeal, it must be satisfied that it is an appeal against a final decision of the Federal Supreme Court which is alleged to have contained a basic/fundamental error of law or that it is an appeal against a final decision of the Federal High Court sitting in its appellate jurisdiction, which is alleged to have contained a basic/fundamental error of law. The term 'basic' is defined in the oxford law dictionary as 'essential', 'primary' and 'fundamental' meaning the decision appealed against must be one with an essential error of law.

81. The Complainants in this Communication relied on the case of **Interights, Asadho et Maitre O.Disu v DRC** and argued that the Commission should dispense with the requirement of exhaustion of local remedies because the Cassation Division of the Federal Supreme Court only has jurisdiction over procedural and not substantive issues and seizing it will only be a formality with no prospect of success. The Commission observes that the facts of the said case are distinguishable from this present case. In the former case, the Commission found that the Transitional Constitution that created the Supreme Court of Cassation had the force of law on the 1st April 2003, three months after the Communication was filed before the Commission and thus its jurisdiction was not applicable to decisions rendered in March 2002. Secondly, the jurisdiction of the said court was only limited to issues of procedure and not substance.

82. In the present case, the jurisdiction of the Cassation Division of the Federal Supreme Court is over matters of basic error of law





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and not matters of procedure *simpliciter*. The Complainants have also submitted that an Appeal was filed in the Cassation Division of the Federal Supreme Court on behalf of the Second Complainant and on the 8 January 2013, the said court did not allow her appeal because it found no fundamental error of law but rather confirmed the decision of the Federal Supreme Court which to the effect, upheld the Federal High Court's conviction on only one of the three charges that were leveled against the Second Complainant and varied the sentence by reducing it from 14 to 5 years of imprisonment.

83. The Commission notes that the outcome of the Second Applicant's appeal go to show that, the Cassation Division of the Federal Supreme Court is an Appellate body capable of rendering judicial remedy on matters which are not purely procedural but on substance as in this case.

84. In light of the above, the Commission finds that the Cassation Division of the Federal Supreme Court is available and also effective as has been used by the Second Complainant. The latter had the opportunity to have her case argued and adjudged and succeeded in getting a confirmation of the reduction of sentence earlier delivered by the Federal Supreme Court. The Complainants do not also allege that there were impediments in pursuing the remedies on behalf the Second Complainant.

85. With Respect to the Second Complainant, the Commission observes that her case has gone through the whole gamut of judicial procedures and processes available to her in Ethiopia. From the Federal High Court to the Federal Supreme Court and then to the Cassation Division of the Federal Supreme Court which was not the case for the First Complainant.

86. In light of the foregoing reasons, the Commission is not satisfied that local judicial remedies have been exhausted in respect of the First Complainant but that same have been exhausted in respect of the Second Complainant.

87. Since the conditions listed under Article 56 of the African Charter are cumulative, in line with the Commission's jurisprudence, when a communication does not meet one of these conditions, it is inadmissible. In such a case, it is unnecessary for the





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Commission to consider the other conditions with respect to the First Complainant.

88. In light of the above, the last requirement on Article 56 (7) will be analysed in respect of the Second Complainant.

89. The Complainants submit that, a communication falls within the scope of Article 56(7) if it involved the same parties, the same issues, raised by the complaint before the African Commission, and must have been settled by an international or regional mechanism.¹⁵ According to them, this is not the case with the present Communication.

90. The Complainants also aver that in July 2012, the Media Legal Defence Initiative, one of the legal Representatives filed Communications with UNESCO's Committee on Conventions and Recommendations (the "UNESCO Committee") on behalf of the Complainants, Woubshet Taye, Martin Schibbye and Johan Persson under UNESCO's 104 EX/Decision 3.3.¹⁶

91. The Complainants submit that in accordance with 104 EX/Decision 3.3 and 77 EX/Decision 8.3, which sets out the procedure.¹⁷ The UNESCO Committee examines the Communication in a closed session, at which the Respondent State can be present.

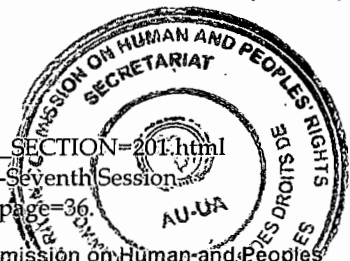
92. The Complainants submit that the party who files the Communication cannot be present at the examination and receives a letter from the UNESCO Committee after the session, summarising the main points that have been considered and inviting the submission of further comments if necessary and that this process is repeated until the matter is either dismissed or otherwise resolved.

93. The Complainants submit that while the Complainants' situation is being considered by the UNESCO Committee, it should be stressed that these proceedings are not of a judicial nature, as is made clear by Article 7 of 104 EX/Decision 3.3: "*Considering that, in matters concerning human rights within its fields of competence, UNESCO, basing its efforts on moral considerations and its specific competence, should act in a spirit of*

¹⁵ ACHPR, *Kevin Mgwanga Gunme et al. v. Cameroon*, Comm. No. 266/03 (2009)

¹⁶ See http://portal.unesco.org/en/ev.php-URL_ID=15249&URL_DO=DO_TOPIC&URL_SECTION=201.html

¹⁷ See UNESCO, Resolutions and Decisions adopted by the Executive Board at its Seventy-Seventh Session (1967), p. 36, available at <http://unesdoc.unesco.org/images/0011/001132/113206e.pdf#page=36>.





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international cooperation, conciliation and mutual understanding, and recalling that UNESCO should not play the role of an international judicial body".

94. The Complainants also submit that 77 EX/Decision 8.3 explicitly states that the UNESCO Committee cannot take any formal or binding action in relation to the human rights violations it has taken under examination:¹⁸ [...] *Unesco is not authorized under its Constitution to take any measures in connection with complaints regarding human rights.*
95. The Complainants aver that therefore, as the UNESCO Committee does not have the required mandate for dispute settlement and is not an international judicial body, a complaint filed with the UNESCO Committee regarding the Complainants does not amount to a settlement in the sense of Article 56(7) of the African Charter.
96. In line with the Commission's jurisprudence, for a matter to be settled in accordance with Article 56(7), it requires that the Treaty or Charter body dealing with the matter has considered the matter and took a decision which addresses the issues and concerns of the Complainant, including the relief (s) being sought. It is not enough for the matter to simply be discussed by these bodies.
97. The Commission further observes that with respect to the Communications filed before UNESCO, it involves both Complainants and others not named in this Communication. The procedure is also not of a judicial nature because its outcome will either be to resolve or dismiss the claims of the Complainants. The Commission is of the opinion that since there is no evidence to show that the UNESCO is specifically dealing with, or is intended to deal with the allegations raised in the present Communication then it cannot be authoritatively concluded that the matter has been dealt with or is being settled in accordance with Article 56 (7) of the African Charter.

Decision of the Commission on Admissibility

¹⁸ 77 EX/Decision 8.3, Art. 4, p. 14





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98. In view of the above, the African Commission on Human and Peoples' Rights declared the Communication Inadmissible in respect of the First Complainant and Admissible in respect of the Second Complainant.

Consideration on the Merits

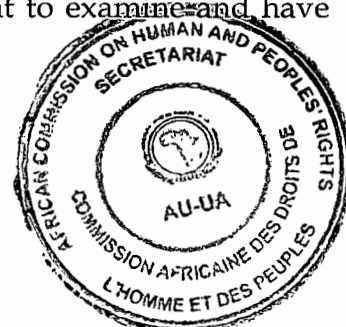
Complainant's Submission on the Merits

Alleged violation of Article 7

99. The Second Complainant alleges that the Respondent State violated her right to a fair trial which led to a criminal legal process that was imbalanced and prejudicial to her from the time of her arrest, trial and throughout her period of imprisonment. She stated that the Commission held in *Article 19 v Eritrea*¹⁹ that Article 7 of the Charter is a non-derogable right which cannot be departed from for any reason, in whatever circumstances and in *Mgwanga Gunme et al v. Cameroon*,²⁰ the Commission also stated that its protection is important to ensure the protection of other rights in the Charter. She submits that the provisions of Article 7 of the Charter have been further elaborated by the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003 Principles) and the Principles on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (2015 Principles) and Resolution on the Right to Recourse and Fair Trial (1992 Resolution). That the 2003 Principles has read into the Charter the right to be informed of the reason for one's arrest, the right to be brought promptly before a court, the right to legal representation and defence, the right to be tried by an independent and impartial tribunal and the right to examine and have examined the witnesses against them.

¹⁹ Communication No. 275/03 (30 May 2007), para. 98

²⁰ Communication No. 266/03 (27 May 2009), para. 126





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100. The Second Complainant also alleges that she was not promptly informed of the reasons for her arrest and the charges brought against her. She was held in detention for 76 days (21 June to 5 September 2011) and she learnt about the charges for the first time on 5th September 2011 at a "charging hearing". She alleges that the charge sheet was extremely vague regarding the times and dates and provided little detail to substantiate the alleged terrorists' activities that she was accused of. It also has a list of nine anonymous witnesses without the summary of their statements and a list a journalistic articles that had no bearing with the alleged charges of terrorist activities that she was accused of. Therefore, her rights to be informed of the reasons of her arrest and the charges levelled against her were violated.

101. The Second Complainant further alleges that she was not promptly brought before a court of law and was not tried without undue delay. That she was arrested on 21 June 2011 but her first appearance in court was in September 2011 and the whole trial including the appeal ended in January 2013; lasting approximately 17 months. She cited *Liesbeth Zegveld and Mussie Ephrem v. Eritrea*²¹ where the Commission underlined the importance of the right to be promptly brought before a court. Therefore, she submits that her right to be promptly brought before a court of law and be tried without undue delay were violated.

102. The Second Complainant alleges that her right to legal representation and to adequately prepare for her defence were violated. She stated that she was denied access to legal counsel during the first three months of her detention before she was charged with an offence, and during this time, she was subjected to many interrogations over a long period of time. She also had no legal representation during the charging hearing because her lawyers were not given notice of the hearing date and she was not allowed to hold private meetings with her lawyers or discuss certain details about her case and also denied the right to call two expert witnesses in her defence. In supporting her argument, the Second Complainant relied on the Commission's jurisprudence in *Avocats Sans Frontières (on behalf of Gaetan Bwampantye)*

²¹ ACHPR, *Liesbeth Zegveld and Mussie Ephrem v. Eritrea*, Communication No. 250/02 (20 November 2003), para 56.





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v. Burundi where the Commission underlined the importance of equality of arms in criminal proceedings²², *Media Rights Agenda v. Nigeria* where it held that a detainee held for 49 days without access to a lawyer was a violation of Article 7(1)(c)²³ and *Egyptian Initiative for Personal Rights and Interights v. Egypt* where it held that the absence of lawyers for the accused persons at the critical early interrogation stage was a violation of Article 7(1)(c)²⁴.

103. The Second Complainant also alleges that the Respondent State violated her right to be presumed innocent in that the Ethiopian authorities conducted a negative publicity campaign against her aimed at prejudicing the outcome of her trial. Government officials including the Prime Minister made public statements declaring their guilt prior to the end of the trial and a documentary was shown on national television accusing the Second Complainant as terrorist. It is also alleged that during the trial the prosecution failed entirely in discharging the burden of proving her guilt, instead, she was expected to refute the baseless allegations made against her. She cited the Commission's jurisprudence in *Haregewoin Gebre-Sellaise & IHRDA (on behalf of former Dergue officials) v Ethiopia*,²⁵ *Law Office of Ghazi Suleiman v. Sudan*²⁶ and *Media Rights Agenda v. Nigeria*²⁷ to support her arguments.

104. The Second Complainant further alleges that she was not tried by an independent and competent tribunal because the government interfered in the judicial process in terms of negative publicity against her, countless fair trial violations during the proceedings which the Appeals Court failed to address, existence of a pattern in Ethiopia to invariably convict journalists under repressive laws for their reports and commentaries on matters of public interest and cases of sentence of owners of Ethiopian publications to lengthy custodial sentences in absentia without any real evidence to support the convictions. Therefore, her right to be tried by an independent

²² Communication No. 231/99 (6 November 2000), para. 27.

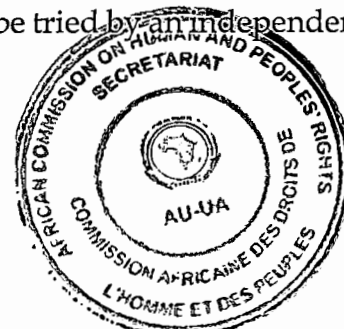
²³ Communication No. 224/98 (6 November 2000), para 55

²⁴ Communication No. 334/06 (1 March 2011), para. 133.

²⁵ Communication No. 301/05 (7 November 2011).

²⁶ Communication No. 222/98-229/99 (3 May 2003), para. 54

²⁷ Communication No. 224/98 (6 November 2000), para. 48





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and competent tribunal was also violated. She also referenced the Commission's jurisprudence²⁸ to support her submissions.

105. She also alleges that her right to examine a witness was violated because the trial Court denied her the right to call two expert witnesses who would have provided expert opinion regarding whether her activities amounted to journalistic work or otherwise and did not provide any reason for the denial. She also submits that the Federal Supreme Court failed to recognise the relevance of the expert evidence on appeal and instead speculated on the ability of the of the said witnesses to refute prosecution evidence and concluded that the Second Complainant's activities did not amount to journalistic work. In support of her submissions, she cited the decisions of the European Court of Human Rights²⁹ in this regard.

Alleged violation of Article 9

106. The Second Complainant submits that the Respondent State has violated her right to freedom of expression as enshrined in Article 9 of the Charter because she was prosecuted, detained and convicted on baseless charges that were solely aimed at punishing her for her legitimate journalistic work. The Second Complainant submits that the Commission has elaborated the obligations of State Parties under Article 9 of the Charter in its Declaration of Principles on Freedom of Expression in Africa and made reference to Article 1 thereof which defines Freedom of Expression and Information as "... a fundamental and inalienable human right and an indispensable component of democracy" and Article 16 thereof which obligates State Parties to make every effort to give practical effect to the principles outlined in the Declaration. That the importance of this right has also been confirmed by the Commission in many of its decisions such as *Constitutional Rights Project, Civil Liberties Organisation and Media*

²⁸ *Wetsh'okonda Koso and others v. Democratic Republic of Congo*, Communication No. 281/03 (27 May 2009), para. 79.

²⁹ European Court of Human Rights ("ECtHR"), *Popov v. Russia*, Application No. 26853/04 (13 July 2006), para. 188; ECtHR, *Bocos-Cuesta v. The Netherlands*, Application No. 54789/00 (10 November 2005), para. 72-73 and ECtHR, *Wierzbicki v. Poland*, Application No. 24541/94 (18 June 2002).





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Rights Agenda v. Nigeria,³⁰ *Amnesty International v. Zambia*³¹ and *Scanlen & Holderness v. Zimbabwe*.³²

107. The Second Complainant also submits that freedom of expression constitutes one of the essential foundations of a democratic society and may only be restricted in certain circumstances in line with international standards. In support of her submissions, she cited the case of *Konate v Burkina Faso*³³ where the African Court laid the three-part test in determining the restrictions; which are (i) whether the restriction was provided by law, (ii) whether the restriction served a legitimate purpose and (iii) whether the limitation was necessary to achieve the set objective and that this test was also applied by the Commission.³⁴ The Second Complainant avers that she is an accomplished journalist who is well known for her critical stance on the policies of the Ethiopian Government and as a result, was subjected to threats and attempted intimidation to make her abandoned her journalist work but she was undeterred. She avers that she continued her work and publications and founded her own monthly magazine called *Change* and established her own publishing house but it was shut down in November 2010. She then worked as editor of *Addis Press*, columnist for *Feteh Newspaper*, regular contributor to the *Ethiopian Review*, all of which were also shut down. That as a result of her work, she was finally arrested, prosecuted and convicted of conspiracy to commit terrorist acts and participating in a terrorist organisation under the 2009 Terrorism Proclamation (Proclamation of 2009) and Criminal Code respectively.

108. The Second Complainant submits that the restriction of her right to freedom of expression did not meet the any of the conditions provided above because the restriction was not provided by law, it did not serve a legitimate purpose and was not

³⁰ ACHPR, *Media Rights Agenda, Constitutional Rights Project, Media Rights Agenda and Constitutional Rights Project v. Nigeria*, Communication No. 105/93-128/94-130/94-152/96 (31 October 1998) (31 October 1998), para. 54.

³¹ ACHPR, *Amnesty International v. Zambia*, Communication No. 212/98 (5 May 1999), para. 54.

³² ACHPR, *Scanlen & Holderness v. Zimbabwe*, Communication No. 297/05 (3 April 2009), para. 110.

³³ African Court on Human and Peoples' Rights ("ACHPR"), *Konaté v. Burkina Faso*, Application No. 004/2013 (5 December 2014), para. 125.

³⁴ ACHPR, *Morim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v. Sudan*, Communication No. 379/09 (10 March 2015), para. 114.





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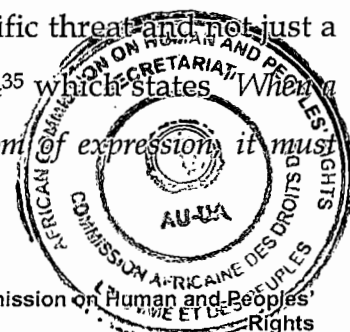
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necessary in a democratic society. To substantiate this argument, she avers that the Proclamation of 2009 does not meet the standard of being provided for by law because it contains broad definitions of "terrorist acts" in Article 3 thereof and "terrorist organisation" in Article 7 thereof. That to meet this criterion it is not merely the existence of a rule in a national legislation but the law must be sufficiently precise so that individuals would be able to regulate their conduct accordingly. The Second Complainant also submits that the various criminal offences listed in Article 7 thereof read together with the overly broad definition of terrorist acts in Article 3 thereof results in creating an ambiguity in scope which makes it impossible for a member of the public to know whether his or her actions fall within the scope of the law or not. She further submits that the provisions refer to a wide variety of legitimate conduct as many activities of everyday life are enumerated therein. That the Proclamation of 2009 also fails to define specific terms used which leaves its application being opened to abuse such as against members of the media. She also submits that the wording used to describe the intent in Article 3 is broad and unspecific. That the phrases *"intending to advance a political, religious or ideological cause", "coercing the government, intimidating the public or a section of the public or destabilising or destroying the fundamental political, constitutional or economic or social institutions of the country" or "destabilising an institution"* are broad, unspecific and set no borders.

109. In light of the aforementioned, the Second Complainant submits that the restriction of her freedom of expression on the basis of the Proclamation was not provided by law and thus constitutes a violation of Article 9 of the Charter.

110. The Second Complainant submits that the restriction of her freedom of expression does not serve a legitimate interest. She submits that whilst the protection of national security constitutes a legitimate interest, the Respondent State has failed to demonstrate a direct link between the expression and a specific threat and not just a mere risk. She referenced UNHRC General Comment No. 34³⁵ which states *"When a State party invokes a legitimate ground for restriction of freedom of expression, it must*

³⁵ Para 35





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demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat." to support this submission. She therefore submits that she was only prosecuted and convicted for doing her job as journalist and this could not serve any legitimate interest under any circumstances.

111. The Second Complainant submits that the restriction was not necessary in a democratic society. That the Johannesburg Principles on National Security, Freedom of Expression and Access to Information (Johannesburg Principles) provides that the restriction sought to be justified on grounds of national security is not legitimate unless its genuine purpose and demonstrable effect is to protect a country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force.³⁶ She submits that the nature and severity of the restriction or sanctions is also relevant in assessing the proportionality of the interference and referenced the Konate case where the African Court held that harsh criminal penalties imposed on Konate on charges of defamation represented a disproportionate interference with his right to freedom of expression.

112. She also submits that none of her articles have incited violence or can be in any way understood as a threat to national security. Instead, her work contributes to a political debate that is vital in every democratic society. Therefore, her prosecution and conviction under Articles 4, 7 and 9 of the Proclamation of 2009 and Article 684(1) and (2) of the Criminal Code cannot be considered necessary to counter the threat of terrorism and to protect the State's national security and thus constitute a violation of her right to freedom of expression.

Alleged violation of Article 16

³⁶ Principle 2 (a). See also principle 6.





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113. The Second Complainant submits that her right to health was violated because she was diagnosed with tumours in both breasts but not given adequate care and treatment whilst in detention which contributed to a significant deterioration of her health. She also submits that her conditions of detention were inappropriate, she suffered delays in receiving treatment, received inappropriate post-operative care and insufficient medication and was not transferred to an appropriate specialist establishment for treatment and care, was not given follow-up appointments as they were cancelled, was not seen by any medically trained personnel post the operation and her medical file declared lost upon a request from the Commission to make it available. She also submits that as a result of the poor treatment and care and the horrendous living conditions in the prison, she was suffering from fibroadenoma, typhoid, chronic gastritis and sinusitis at the time she was released in 2015. She relied amongst others on the Commission's *Principles and Guidelines on the Implementation of ECOSOC Rights in the Charter of 2011*, *Purohit and Moore v The Gambia*³⁷, *Media Rights Agenda and others v Nigeria*³⁸, *International Pen and Others (On behalf of Saro-Wiwa v Nigeria)*³⁹, *Malawi African Association and Others v Mauritania* and *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v Sudan* in support of her submissions.

114. The Second Complainant also submits that she suffered both pecuniary and non-pecuniary damages as a result of the alleged violations resulting in her imprisonment and should be awarded damages. She alleges that due to her imprisonment for 49 months, she was prevented from continuing her professional work as a journalist, high school teacher and tutor and therefore lost income to the tune of ETB 327,369. She was also prevented from continuing her studies in political science at the Indira Ghandi Open University School of Correspondence which she had paid for as well as receiving relevant books for the course which she had ordered. That she eventually had to terminate her studies because she had no choice.

³⁷ Communication No. 241/01 (29 May 2003), para 80

³⁸ Communication No. 105/93-128/94-130/94-152/96 (31 October 1998), paras 89-91

³⁹ Communication No. 137/94-139/94-154/96-161/97 (31 October 1998), para. 112





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115. She further submits that she is also entitled to non-pecuniary damages because it is well established in international law that where an individual suffers physical and/or mental harm as a consequence of a breach of their rights, damages should be available as part of the possible remedies. That she suffered serious and debilitating physical and mental injuries as a result of the acts and omissions of the Respondent State, particularly the conditions of her detention, her treatment whilst in detention including failure to provide appropriate medical assistance had a serious impact on her life.
116. The Respondent State did not submit on the merits within the timeline stipulated in line with Rule 108(1) of the Commission's Rules of Procedure 2010. However, prior to communicating the Commission's decision on Admissibility on **17 November 2016**, the Respondent State filed a motion to dismiss the Communication dated 6 October 2016 and received at the Commission's Secretariat on 1 November 2016.

Respondent State's Submission on the Motion to dismiss the Communication

117. The Respondent State submits that the Communication should be dismissed against the Second Complainant because her 14 years imprisonment by the Federal High Court was reduced to 5 years by the Federal Supreme Court on appeal and she was released on parole in July 2015 after serving three years out of the five years. As a result of her release, the Communication should be dismissed by the Commission because there is no cause of action.
118. The Respondent State also submits that the MLDI filed a similar communication at the UNESCO Executive Board and same was considered and dismissed during its 197th Session held in October 2015. It alleges that this is contrary to Rule 93 (2) (j) of the Commission's Rules of Procedure 2010 and should therefore be dismissed because the matter was determined by another international proceeding.
119. The Respondent State further submits on why the Communication should also be dismissed against the First Complainant. However, since the Commission has declared the case against the First



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Respondent inadmissible, it will not be necessary to summarise and analyse the issues raised therein.

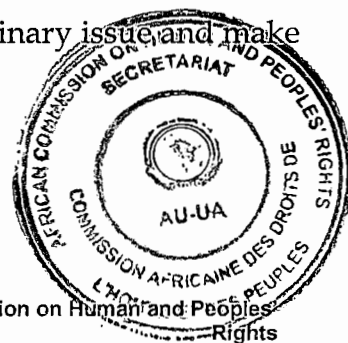
Second Complainant's Response to the Respondent State's Motion

120. The Second Complainant submits that the Respondent State only reiterated its submissions on Admissibility which the Commission has already considered during its deliberation on the Admissibility of the Communication and has declared it partially Admissible during its 20th Extra-Ordinary Session held from 9- 18 June 2016.
121. The Second Complainant submits that the Commission's Rules of Procedure 2010 and case law do not provide for the possibility of filing a motion for dismissal. The Second Complainant also reiterates that its arguments were already made and were considered at the Admissibility stage. The Second Complainant submits therefore that the motion should be dismissed without further consideration.
122. The Second Complainant also submits that even if the motion for dismissal was to be interpreted as a request for review of the decision on Admissibility, Rule 107(2) of the Rules of Procedure 2010 of the Commission does not provide for a possibility of a review once a Communication is declared Admissible. She also relied on the Commission's jurisprudence in *Leisbeth Zegveld and Mussie Ephrem v Eritrea*⁴⁰ and urged the Commission to dismiss it without further consideration.
123. As stated earlier, the Commission does also not deem it necessary to summarise and analyse the issues raised in respect of the First Complainant.

Commission's Analysis on the Merits

124. Before delving into the analysis on the merits, the Commission would like to deal with the motion to dismiss the Communication as a preliminary issue and make a finding.

⁴⁰ Communication No. 250/02, para 47





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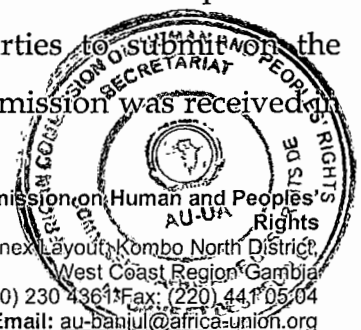
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125. On the 1 November 2016, the Secretariat received a motion for the dismissal of this Communication dated 6 October 2016. The motion was submitted pursuant to Article 56(7) of the Charter and Rule 93 (2) (j) of the Commission's Rules of Procedure 2010. The Respondent State's submits that the Communication should be dismissed because there was no pending cause of action since the Second Complainant's 14-year sentence was reduced on appeal to 5 years and she was already released from prison on 15 July 2015 after serving 3 out of the 5 years. In addition, the same complaint was submitted on her behalf before the UNESCO Executive Board and the latter has considered and dismissed the Complaint.

126. The question is whether this motion is competent and can be entertained by the Commission? Article 56(7) of the Charter states "Communications relating to human and peoples' rights referred to in Article 55 of the Charter received by the Commission, shall be considered if they" *...do not deal with cases which have been settled by these States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organization of African Unity or the provisions of the present Charter*". Rule 93 (2) (j) of the Commission's Rules of Procedure 2010 also provides that "The Secretary shall ensure that Communications addressed to the Commission contain the following information" *"...An indication that the complaint has not been submitted to another international settlement proceeding as provided in Article 56(7) of the African Charter"*.

127. Article 56 (7) of the Charter is one of the conditions precedent for a Communication to be brought under Article 55 of the Charter to be declared admissible or otherwise, whilst rule 93 (2) (j) of the Rules of Procedure 2010 is a requirement for an individual Complaint to be seized by the Commission. In this Communication, the Commission considered and decided to be seized of the Complaint at its 15th Extraordinary Session held from 7 to 14 March 2014 in Banjul, The Gambia, having been satisfied that it has met all the requirements under Rule 93 of its Rules of Procedure 2010 and same was officially communicated to the parties on 18th March 2014. The Commission also requested the parties to submit on the admissibility of the Communication. The Complainants' submission was received in May 2014 whilst the Respondent's State





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written Observations on the Complainants' submissions were received in September 2014. The Commission had during its 20th Extra-Ordinary Session held from 9- 18 June 2016 considered the submissions of both parties on all the legs of Article 56 of the Charter and decided to declare the Communication admissible in respect of the Second Respondent having been satisfied that all the requirements under Article 56 of the Charter including Article 56 (7) thereof were met. The Commission also noted that the arguments stated in the motion were the same arguments canvassed by the Respondent State at the admissibility stage. Further, the Commission now observes that the motion for dismissal was received on 1 November 2016, after it had taken a decision on the admissibility of the Communication, which decision was taken in June 2016, five (5) months prior to the receipt of the motion.

128. In *Article 19 v Eritrea*, the Respondent State filed a motion for dismissal of the Communication in response to the Commission's request for the Respondent State to submit its written observations on the Complainant's written submissions on the merits of the Communication on grounds of double jeopardy. The Commission decided to refuse the Respondent State's request for dismissal of the Communication and held that there is no provision in its rules to dismiss a matter after it has been declared admissible⁴¹.

129. In light of all the afore-mentioned, the Commission finds that the motion for dismissal is not competent in law. For the avoidance of doubt the Commission opines that the provisions relied on to bring the application are not applicable under the circumstances as they deal with seizure and admissibility of communications which the Commission has already addressed respectively. Further and in any event, there is no provision in the Commission's Rules of Procedure 2010 which allows the Commission to dismiss a Communication after it has been declared admissible.

Alleged violation of Article 7

⁴¹ Communication 275/03, paras 83-85





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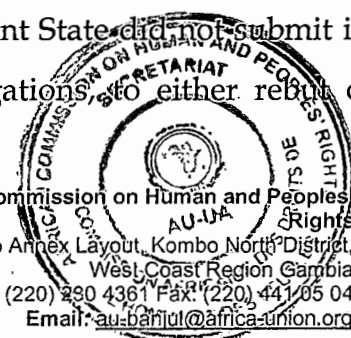
130. Article 7 (1) of the Charter provides that *"Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;*
(b) the right to be presumed innocent until proved guilty by a competent court or tribunal; (c) the right to defense, 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." It is clear from the provision that the right to be heard requires that the complainant or victim must have unfettered access to appropriate justice which respects and protects her fair trial rights as prescribed by law.

131. The Second Complainant alleges violation of Article 7 of the Charter because (a) she was not promptly informed of the reasons for her arrest; (b) she was not promptly brought before a court of law and her trial was unduly delayed; (c) her right to a legal representation was violated; (d) her right to be presumed innocent was violated; and (e) she was not tried by an independent and competent tribunal.

Not promptly informed of the reasons for arrest and charges brought against her

132. The Second Complainant alleges that she was arrested and detained for 76 days effective 21 June 2011, without being informed of the reasons for her arrest and the charges levelled against her. She was only informed for the first time at a "charging hearing" held on 5th September 2011. She also alleges that the charge sheet was extremely vague regarding the times and dates and provided little detail to substantiate the alleged terrorists activities that she was accused of. The charge sheet also has a list of nine anonymous witnesses without the summary of their statements and a list a journalistic articles that had no bearing with the alleged charges of terrorist activities that she was accused of.

133. The Commission however notes that the Respondent State did not submit its written observations to the Second Complainant's allegations, to either rebut or confirm them despite being given the





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opportunity to do so. In such a situation, the Commission has always been guided by international best practice. This was reiterated in *Alhassan Abubakar v Ghana* where it held *"like other international monitoring organs, where the respondent Government does not provide any substantive information in reply to the petitioners' allegations, the African Commission will decide the facts as alleged by the complainant."*⁴² In light of this observation, the Commission will determine the merits of this Communication based on the facts alleged by the Second Complainant and supporting evidence provided.

134. The Commission notes that there was a delay of 76 days on the part of the agents of the Respondent State before disclosing the reasons for the arrest and the charges brought against the Second Complainant. The question is whether this delay was unreasonable to warrant a violation of Article 7 of the Charter.

135. In its Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, the Commission provides that *"anyone who is arrested shall be informed, at the time of arrest, of the reasons for his or her arrest and shall be promptly informed, in a language he or she understands, of any charges against him or her."*⁴³ The right to be promptly informed of the reasons for arrest and the charges levelled against an arrested person is also reiterated by the Commission in its Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa.⁴⁴ This requirement is fundamental to the fair trial rights of a person because every person has a right to liberty and security of the person and must not be subjected to arbitrary or unlawful arrest and/or detention. Therefore, where a person's right to liberty is curtailed as a result of being arrested and/or detained he or she must be promptly informed about it so as to provide the opportunity for the lawfulness of the arrest/detention be challenged promptly in a court of law by the arrested/detained person, if necessary.⁴⁵ In *Media*

⁴² ACHPR, Communication 103/93 *Alhassan Abubakar v Ghana*, para 10

⁴³ ACHPR, Principles and Guidelines on The Right to a Fair Trial and Legal Assistance in Africa – provisions applicable to Arrest and Detention 2003, para 2(a).

⁴⁴ ACHPR, Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (Istana Guidelines) 2015, para 4(b) and para 5.

⁴⁵ A similar requirement is provided in Article 9(2) of the ICCPR. The Constitution of the Federal Democratic Republic of Ethiopia also provides that "persons arrested have the right to be informed promptly, in a language they understand, of the reasons for their arrest and of any charge against them".



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Rights Agenda v Nigeria, the Commission had, in expounding on the guarantees of the right to fair trial under Article 7 of the Charter observed that the right to fair trial includes, among other things, the requirement that persons who are arrested “shall be informed at the time of arrest, in a language which they understand of the reason for their arrest and shall be informed promptly of any charges against them. The failure and/or negligence of the security agents who arrested the convicted person to comply with these requirements is therefore a violation of the right to fair trial as guaranteed under Article 7 of the Charter”.⁴⁶ Further, Article 60 and 61 of the Charter also allows the Commission to draw inspiration from international human rights law in determining applicable principles of law. In *P. Grant v. Jamaica*, the Human Rights Committee in determining whether Article 9(2) of the ICCPR was violated held that the complainant’s right was violated in a case where the complainant was only informed of the charges against him 7 days after he had been detained.⁴⁷ In *G. Campbell v. Jamaica*, it also held that a delay of 45 days or more does not meet the requirements of Article 9(2)⁴⁸ of the ICCPR.

136. Therefore, having regard to the facts presented, the position of the law and jurisprudence, the fact that the Respondent State is also a party to the ICCPR, and the absence of any contrary facts or evidence from the Respondent State, the Commission is satisfied that a delay of 76 days is unreasonable and thereby finds that the Second Complainant’s right to be promptly informed of the reasons of her arrest and the charges levelled against her has been violated.

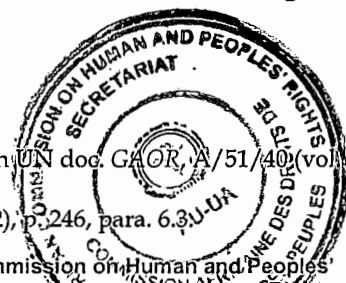
Undue delay in the trial

137. The Second Complainant alleges that she was arrested on 21 June 2011 but her first appearance in court was in September 2011 and the whole trial including the

⁴⁶ ACHPR, Communication 224/98 Media Rights Agenda v Nigeria, para 43

⁴⁷ Communication No. 597/1994, *P. Grant v. Jamaica* (Views adopted on 22 March 1996), in UN doc. GAOR, A/51/40 (vol. II), p. 212, para. 8.1.

⁴⁸ Communication No. 248/1987, *G. Campbell v. Jamaica* (Views adopted on 30 March 1992), p. 246, para. 6.3.





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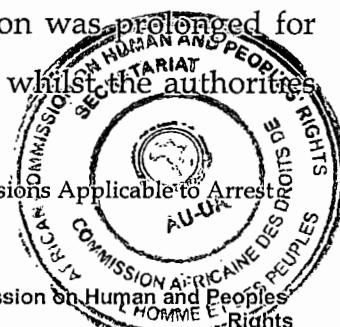
appeal ended in January 2013; lasting approximately 17 months. Therefore, her right to be promptly brought before a court of law and be tried without undue delay were violated

138. The Commission notes that the right to be tried within a reasonable time is fundamental because the right to liberty of a person has been curtailed and any such curtailment must not continue for an unreasonable period of time. Thus, such a person shall within the shortest possible time be able to know his fate in accordance with law and due process and be given the opportunity to challenge it as guaranteed in Article 7 (1) (d) of the Charter. In this regard, the Commission stated in the Luanda Guidelines that "All persons shall have the right to a fair trial, within a reasonable time, in accordance with international law and standards, including the principles set out in the African Commission on Human and Peoples' Rights' Guidelines on the Right to a Fair Trial and Legal Assistance in Africa" reiterating the right to a fair trial within a reasonable time. In the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, the Commission has also expounded on this right which must be accorded to the person arrested and detained so as to *inter alia* prevent the violation of the detainee's fundamental rights.⁴⁹ This fundamental right is equally guaranteed under the Ethiopian Constitution.⁵⁰

139. The Commission also notes that these allegations have not been contested by the Respondent State since it did not submit its observations on the merits of the case. However, the Commission has not only relied on that but also perused the records and evidence provided. In her signed statement, the Second Complainant stated that upon her arrest on 21 June 2011, she was kept in solitary confinement in Maekelawi Detention Centre for 13 days and was interrogated for very long hours. Thereafter, she was moved to a cell with female 30 prisoners within the Maekelawi Detention Centre. She also submitted that on 11 July 2011, her detention was prolonged for another 28 days by the Ethiopian Federal First Instant Court whilst the authorities

⁴⁹ Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa- Provisions Applicable to Arrest and Detention, para 3 (a) and (b)

⁵⁰ Articles 19 (3) and 20(1)





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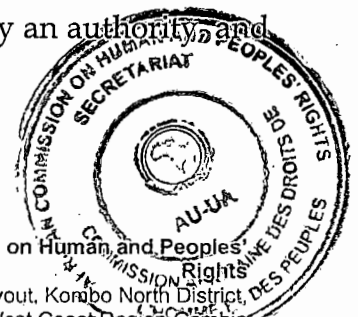
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continued their investigations against her. That she was only brought before a court of law on 5 September 2011 for a "charging hearing" and was ordered to remain in custody; and on 8 September 2011, she was transferred to Kaliti Prison. She also submitted that the trial proper lasted 4 months because it commenced in September 2011 and she was convicted on 19 January 2012.

140. From the facts above, it is clear that the Second Respondent was not promptly brought before a judicial officer/court of law after her arrest and detention on 21 June 2011. It is also clear from the facts that the delay was not as a result of the actions of the Second Complainant and there is no counter evidence on record demonstrating why it took the Respondent State 76 days to bring her before a judicial officer/court of law contrary to Article 19(4) of the Constitution of Ethiopia. In the absence of any justification for the delay in commencing the trial by the State Respondent, the Commission finds that the notion of "trial within a reasonable time" as provided in Article 7(1) (d) of the Charter was violated. This finding is made notwithstanding the fact that, the trial lasted for 4 months after its commencement because the violation occurred from the time she was arrested and kept in detention till September 5 when she made her maiden appearance.

Right to legal representation violated

141. Article 7(1) (c) of the Charter provides that *every individual shall have the right to defense, including the right to be defended by counsel of his choice*. The Luanda Guidelines also reiterated the obligation of the State to ensure that the arrested person have the right of access, without delay, to a lawyer of his or her choice, or if the person cannot afford a lawyer, to a lawyer or other legal service provider, provided by state or non-state institutions. The access to a lawyer and other legal service providers, should be without delay; at the latest prior to and during any questioning by an authority and





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thereafter throughout the criminal justice process.⁵¹ A similar protection is also provided under Article 20 (5) of the Ethiopian Constitution.

142. The Second Complainant alleges that she was denied access to legal counsel during the first three months of her detention before she was charged with an offence, and during this time, she was subjected to many interrogations over a long period of time. She also had no legal representation during the "charging hearing" because her lawyers were not given notice of the hearing date and she was not allowed to hold private meetings with her lawyers or discuss certain details about her case because the meetings were always held in the presence of a security guard who would listen to their discussions. She was also denied the right to call two expert witnesses in her defence. In supporting her argument, the Second Complainant relied on the Commission's jurisprudence in *Avocats Sans Frontières (on behalf of Gaëtan Bwampamye) v. Burundi*; *Media Rights Agenda v. Nigeria* and *Egyptian Initiative for Personal Rights and Interights v. Egypt*.

143. The Commission notes that the right of an arrested person to have access to a lawyer and legal services without delay is one of the fundamental guarantees applied in procedural law especially in matters relating to deprivation of liberty. This is to ensure that there is equality of arms and the arrested person also has the opportunity to be defended appropriately and adequately. In this Communication, the Respondent State has not challenged the veracity of the allegations made by the Second Complainant. In the absence of any counter evidence, the Commission would therefore reiterate its decision in *Avocats Sans Frontières (on behalf of Gaëtan Bwampamye) v. Burundi*, where it underlined the importance of equality of arms in criminal proceedings⁵² and holds that the Second Complainant should have been allowed access to a lawyer without delay including during the initial and various interrogations held by the State agents whilst in detention and the "charging hearing".

⁵¹ Luanda Guidelines – Rights of an arrested person, para 4(d) and Access to legal services, para 9(d) (i), para 9(a) (i) (ii). See also Principles and Guidelines to a Fair Trial and Legal Assistance, G- Access to lawyers and legal Services and H- Legal aid and legal assistance.

⁵² Communication No. 231/99 (6 November 2000), para. 27.





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Failing to do so, the Respondent State had deprived the Second Complainant of the opportunity to challenge the legality of her long detention and also to respond effectively to questions posed by investigators during the investigation and the prosecutor during the "charging hearing". The Commission also agrees with the Second Complainant's articulation of its jurisprudence in *Media Rights Agenda v. Nigeria* where it held that a detainee held for 49 days without access to a lawyer was a violation of Article 7(1) (c)⁵³ and *Egyptian Initiative for Personal Rights and Interights v. Egypt* where it held that the absence of lawyers for the accused persons at the critical early interrogation stage was a violation of Article 7(1) (c)⁵⁴ of the Charter.

144. In light of the above, the Commission finds that the Second Complainant having been denied access to a lawyer from the time of her arrest on 21 June 2011 to the time of the preliminary hearing on 5 September 2011 without any justification; and thereafter, in cases where she had access to lawyers, was not allowed to hold private meetings with them is a violation of Article 7(1) (c) of the Charter.

Right to presumption of innocence violated

145. The Second Complainant also alleges that the Respondent State violated her right to be presumed innocent, in that the Ethiopian authorities conducted a negative publicity campaign against her aimed at prejudicing the outcome of her trial. Government officials including the Prime Minister made public statements to the Parliamentarians declaring her and others guilty prior to the end of the trial and a documentary called 'Akeldama' was shown on national television accusing the Second Complainant as terrorist. It is also alleged that during the trial the prosecution failed entirely in discharging the burden of proving her guilt, instead, she was expected to refute the baseless allegations made against her. She cited the Commission's jurisprudence in *Haregewoin Gebre-Sellaise & IHRDA (on behalf of former Deroute officials)*

⁵³ Communication No. 224/98 (6 November 2000), para 55

⁵⁴ Communication No. 334/06 (1 March 2011), para. 133.





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v Ethiopia,⁵⁵ *Law Office of Ghazi Suleiman v. Sudan*⁵⁶ and *Media Rights Agenda v. Nigeria*⁵⁷ to support her arguments.

146. Article 7(1) (b) of the Charter provides that "*every individual shall have the right to be presumed innocent until proved guilty by a competent court or tribunal*". The presumption of innocence until proven guilty by a competent court of law is a basic principle under criminal law and international human rights law which requires that the accused person/ defendant is given the benefit of the doubt both before and during the trial as well as outside and within the trial, until guilt or criminal responsibility is fully established by the court. In the Principles and Guidelines to a Fair Trial and Legal Assistance in Africa, the Commission expounded on the right of an accused person to be presumed innocent until proven guilty by a competent court of law and stated that public officials shall maintain the presumption of innocence of the accused person. They are allowed to inform the public about criminal investigations or charges; but shall not express a view as to the guilt of any suspect.⁵⁸ The UN Human Rights Committee also expressed a similar position by stating that this obligation requires all public authorities to refrain from prejudging the outcome of the trial.⁵⁹

147. The Commission notes that the Respondent State had not responded to these allegations by challenging or otherwise its veracity. In the absence of such counter evidence, it will make a finding based on the facts before it. The Commission agrees with the Complainant that the presumption of innocence requires the state not to engage in any negative publicity or statement or documentary against her with the objective of prejudging the trial and determining her guilt before it ended. This has been clearly enunciated by the Commission in *Haregewoin Gebre-Sellaise & IHRDA (on behalf of former Dergue officials) v Ethiopia*, and *Law Office of Ghazi Suleiman v. Sudan* and

⁵⁵ Communication No. 301/05 (7 November 2011).

⁵⁶ Communication No. 222/98-229/99 (3 May 2003), para. 54

⁵⁷ Communication No. 224/98 (6 November 2000), para. 48

⁵⁸ Paragraph N (e).

⁵⁹ Human Rights Committee, General Comment 13, Article 14 (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 14 (1994), para 7.





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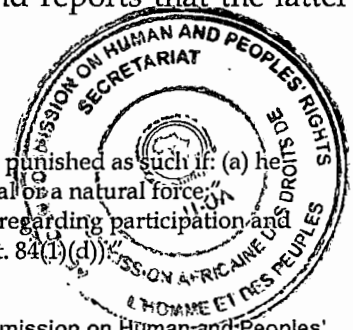
cited by the Second Complainant. Therefore, the negative publicity campaign conducted against her by the Government officials including the Prime Minister's public statements declaring her and others guilty prior to the end of the trial and the 'Akeldama' documentary shown on national television accusing the Second Complainant as terrorist aimed at prejudicing the outcome of her trial offends the principle of presumption of innocence and is a violation of Article 7(1) (b).

148. The Second Complainant also alleges that she was charged with violating Articles 32(1) (a)⁶⁰, 38(1)⁶¹ and 684 (1) and (2)⁶² of the Ethiopian Criminal Code and Articles 4, 7 and 9 of the 2009 Anti-Terrorism Proclamation but none of the evidence showed that she was involved in an offence. Instead, she was required to prove her innocence and also in the process was denied the right to bring expert witnesses. The Commission reiterates that the presumption of innocence also means that the prosecution has a legal obligation to prove the guilt of the accused person beyond reasonable doubt and not for the accused person to prove his/her innocence. The Commission notes that the judgment of the Federal High Court found the Second Complainant guilty of aiding persons for the purpose of a terrorist act, supplying of information helpful to the terrorism act in covert operations and sentenced her to 14 years imprisonment. The Commission also notes that the basis of the conviction and sentence was not adequately substantiated in the reasoning of the Court. The evidence relied upon in the judgment were the statements of witness's No. 6 and 7 who testified being observers when files in the email account of the Second Complainant were opened and printed by the investigator, and the Second Complainant borrowing a digital camera from her at different times respectively. It made a finding that the Second Complainant had established a working relationship with the 1st defendant and was forwarding inciting and instigative information and reports that the latter

⁶⁰ "Any person shall be regarded as having committed a crime as a principal criminal and punished as such if: (a) he actually commits the crime either directly or indirectly, in particular by means of an animal or a natural force;

⁶¹ "Where two or more persons enter into an agreement to commit a crime the provisions regarding participation and aggravation of punishment due to the above-mentioned circumstances are applicable (Art. 84(1)(d)).

⁶² money laundering and aiding under the provision of Article 684 of the Criminal Code





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posted on his website despite evidence confirming that the Second Complainant was working within the context of her profession as a journalist.⁶³

149. The Commission therefore agrees with the facts as stated by the Second Complainant, having regard to the circumstances of the case including the wide negative publicity regarding her guilt prior to the end of the trial, and the fact that upon appeal, she was acquitted of two (2) out of the three (3) counts brought against her and received a reduction of sentence from 14 to 5 years and thereby finds a violation of Article 7(1) (b) of the Charter.

Not tried by a competent and independent court

150. The Second Complainant alleges that her right to be tried by an independent and competent tribunal was also violated. She also referenced the Commission's jurisprudence⁶⁴ to support her submissions.
151. The trial by a competent and independent court/ tribunal is fundamental because firstly, it seeks to guarantee the right of the individual to have his/her dispute decided or resolved by a neutral body or authority. Secondly, it also guarantees the rule of law and separation of powers. Article 7 (1) (d) of the Charter provides for the trial by an impartial court or tribunal. It did not specifically state that that the trial should be by a competent, independent and impartial court as provided in Article 14(1) of the ICCPR. However, the Commission in providing interpretative guidance on Article 7 read with Article 26 has through its **Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa** obligated States to ensure that judicial bodies shall be established by law to have adjudicative functions to determine matters within their competence on the basis of the rule of law and in accordance with proceedings conducted in the prescribed manner and all judicial bodies shall be independent from the executive branch and shall base their decisions on objective

⁶³ See Annex 14B of the Complaint, page 11

⁶⁴ Communication No. 281/03 -*Vetsh'okonda Koso and others v. Democratic Republic of Congo*, para. 29.





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evidence, arguments and facts presented before it. It also provides that judicial officers shall decide matters before them without any restrictions, improper influence, inducements, pressure, threats or interference, direct or indirect, from any quarter or for any reason and the process for appointments to judicial bodies shall be transparent and accountable and the establishment of an independent body for this purpose is encouraged. Any method of judicial selection shall safeguard the independence and impartiality of the judiciary.⁶⁵ Similarly, the jurisprudence of the Commission and the Human Rights Committee have also recognized that the right to have once cause heard by an independent and impartial court is absolute and without exception.⁶⁶

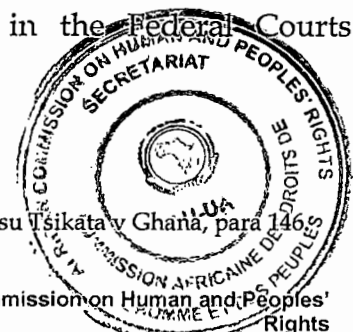
152. The Second Complainant argued that the trial was not done by a competent and independent court because the government interfered in the judicial process in terms of the negative publicity against her which shows a real or perceived problem with the independence of the court. Secondly, that the prosecution failed to prove its case and the court shifted the burden on the Second complainant to prove her innocence which amounts to a total disregard of elementary criminal procedure and thereby exposes the incompetence of the court in addition to other fair trial rights violations. Thirdly, that the fair trial issues were not addressed by the appellate court.

153. In the absence of any counter evidence and/or submissions from the Respondent State, the Commission would like to examine whether the trial court was competent and independent. The competence of a court or tribunal is the authority or power of the court or tribunal to exert jurisdiction over a person or thing or to determine cases or suits. The Commission notes that this matter was brought before the Federal High Court of Ethiopia which has jurisdiction over such matters.⁶⁷ The Second Complainant did not also raise any objection to the Court's jurisdiction. In the absence of such objection, the Commission shall take notice of the fact that the court is competent to adjudicate such matters as provided in the Federal Courts Proclamation.

⁶⁵ Para A- General principles applicable to all proceeding, 4(g)(h) and 5.

⁶⁶ See UN HRC General Comment No. 32, para 19, ACHPR Communication 322/06, Tsatsu Tsikata v Ghana, para 146

⁶⁷ See Article 12 of the Federal Courts Proclamation No. 25/1996



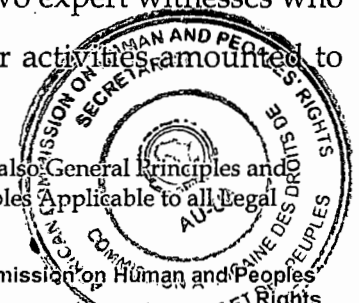


154. The next question is whether the Federal High Court was independent and impartial in adjudicating the case brought against the Second Respondent. For a court to be considered independent, the adjudicators must ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected, and it shall be impartial if it determines cases on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.⁶⁸ The Second Complainant argues that the negative statements by the Respondent State at the pre-trial and trial period clearly demonstrated the government's hostility and bias towards the Second Complainant and other journalists and thereby influenced the conduct of the proceedings and outcome of the decision of the trial court. The Commission notes that the Respondent State had not countered these allegations by submitting its written observations, in the absence of such, and having regard to the facts and evidence established and circumstances of the case, the Commission agrees with the view of the Second Complainant in that, the negative pre-trial campaign particularly the statement of the Prime Minister to Parliament and the *Akeldama* documentary aired on television had or could have influenced the proceedings and its outcome to the detriment of the Second Complainant. For these reasons, the Commission finds that the Second Complainant though tried by a competent Court the latter was not independent and impartial in the conduct of its proceedings thereby violating Article 7 (1) (d) of the Charter.

Right to examine a witness violated

155. The Second Complainant also alleges that her right to examine a witness was violated because the trial Court denied her the right to call two expert witnesses who would have provided expert opinion regarding whether her activities amounted to

⁶⁸ UN Basic Principles on the Independence of the Judiciary (1985), principles 2 and 6. See also General Principles and Guidelines on the Rights to a Fair Trial and Legal Assistance in Africa- (A) General Principles Applicable to all Legal Proceedings, paras 4 and 5





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journalistic work or otherwise and did not provide any reason for the denial. She also submits that the Federal Supreme Court failed to recognise the relevance of the expert evidence on appeal and instead speculated on the ability of the said witnesses to refute prosecution evidence and concluded that the Second Complainant's activities did not amount to journalistic work. In support of her submissions, she cited the decisions of the European Court of Human Rights⁶⁹ in this regard.

156. The right to examine a witness is provided for in Article 7(1) (c) of the Charter which guarantees the right to a defence. This provision is designed to guarantee to the right to an effective defence, as well as providing the accused with the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution. In its **Principles and Guidelines on Fair Trial and Legal Assistance in Africa**, the Commissions states that *the accused has a right to examine, or have examined, witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. However, the said right may be limited to those witnesses whose testimony is relevant and likely to assist in ascertaining the truth.*⁷⁰

157. From the above, it is clear that the right to examine witnesses is not absolute. This means that the court can restrict this right in line with its national legislation. However, such a restriction must not deny the right of the accused person to examine a relevant witness whose testimony is likely to assist the court in ascertaining the truth or has probative value. In the present communication, the Second Complainant alleges that she called four witnesses at the trial to testify regarding her being a journalist but she was denied the right to call two other expert witnesses to provide expert opinion as to whether her activities amounted to journalistic work without any reasons and that on appeal the decision of the lower court was upheld.

⁶⁹ European Court of Human Rights ("ECtHR"), *Popov v. Russia*, Application No. 26853/04 (13 July 2006), para. 188; ECtHR, *Bocos-Cuesta v. The Netherlands*, Application No. 54789/00 (10 November 2005), para. 72-73 and ECtHR, *Wierzbicki v. Poland*, Application No. 24541/94 (18 June 2002).

⁷⁰ Para N – Provisions applicable to proceedings relating to criminal charges, 6 (f). See also UN HRC GC No. 13, para 39.





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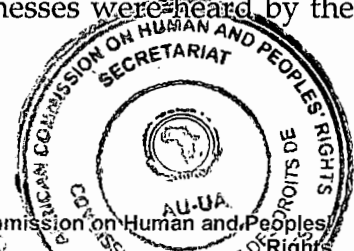
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158. The issue is whether the denial amounts to a violation of her right to examine a witness. In *Bulut v Austria*, the European Court on Human Rights reiterated that the principle of equality of arms implies that the applicant must be "afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage vis-à-vis his opponent."⁷¹ The Second Complainant has confirmed that she was allowed to lead evidence on four witnesses to show that she was a journalist but not on two others who would have provided expert opinion on her journalistic work without any reasons. There is also evidence on record that on appeal to the Federal Supreme Court, the latter confirmed the decision of the trial court on the issue, on the basis that the evidence was not relevant as it would not have refuted the prosecution's evidence that the Second Complainant was engaging in the collection and transmission of information for an individual who works for a terrorist organization. The Commission notes that the facts as they stand borders on the issue of evaluation of evidence at the national court of the Respondent State. The decision not to allow the expert evidence of the two expert witnesses should have been made upon the assessment of the evidence before it based on its rules of evidence. The Commission notes that, based on the facts before it, the trial court gave no reasons why it has refused the testimony of the two expert witnesses. However, the Federal Supreme Court has made its own assessment of the facts before upholding the correctness of the trial court's ruling on this issue. The Commission further notes that it is not within its competence to determine whether the Federal High Court and the Federal Supreme Court had properly evaluated the evidence before it so as to determine the relevance or otherwise of the testimonies of the two experts since this is within the remit of the national court in line with its national laws.

159. In light of the above, the Commission is of the view that the denial to examine the two expert witnesses is not a denial of justice and the right to a defence within the meaning of Article 7(1) (c) of the Charter because four witnesses were heard by the court.

⁷¹ Judgment of 22 February 1996, Reports of Judgments and Decisions 1996-II, § 47





Alleged violation of Article 9

160. Article 9 of the Charter states (1) *"Every individual shall have the right to receive information.*

(2) Every individual shall have the right to express and disseminate his opinions within the law".

161. The Commission in its **Declaration of Principles on Freedom of Expression in Africa (the Declaration)** aimed at supplementing Article 9 of the Charter provides that freedom of expression and information, including the right to seek, receive and impart information and ideas, either orally, in writing or in print, in the form of art, or through any other form of communication, including across frontiers, is a fundamental and inalienable human right and an indispensable component of democracy.⁷² The Commission also recognises that the exercise of this right carries with it responsibilities, which therefore in general allow for certain restrictions or limitations on the right. However, any restrictions on freedom of expression and access to information must be provided by law, serve a legitimate aim and is a necessary and proportionate means to achieve the stated aim in a democratic society⁷³. In *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria*, the Commission opines that Freedom of expression is a basic human right, vital to an individual's personal development and political consciousness, and to his participation in the conduct of public affairs in his country, and comprises the right to receive information and to express one's opinion for which its limitations must be strictly proportionate with and absolutely necessary for the advantages, which follow and not to erode the right itself such that it becomes illusory.⁷⁴

⁷² Principle 10

⁷³ Principle 9(1)

⁷⁴ Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria, para 36 and 42.





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162. The Commission takes note of Article 27 (2) of the Charter which establishes certain restrictions in the exercise of the rights and freedoms enshrined in the Charter. However, the Commission also recognises that the right to express oneself through the media by practicing journalism shall not be subject to undue legal restrictions.⁷⁵
163. The Second Complainant submits that the Respondent State has violated her right to freedom of expression as enshrined in Article 9 of the Charter because she was prosecuted, detained and convicted on baseless charges that were solely aimed at punishing her for her legitimate journalistic work. This was a restriction of her right to freedom of expression which did not meet the any of the conditions provided in *Konate v Burkina Faso* because the restriction was not provided by law, did not serve a legitimate purpose and was not necessary in a democratic society.
164. The Respondent State did not submit its observations on the merits including on this issue. In determining whether the Respondent has violated Article 9 of the Charter as alleged, the Commission would rely on the facts and evidence before it. The issue for determination is whether the Second Complainant's right to freedom of expression was restricted, if yes, whether such a restriction is provided by law, serve a legitimate aim and is a necessary and proportionate means to achieve the stated aim in a democratic society.

Restriction of Freedom of Expression

165. The Second Complainant submits that she is an accomplished journalist who is well known for her critical stance on the policies of the Ethiopian Government and as a result, was subjected to threats and attempted intimidation to make her abandoned her journalistic work but she was undeterred. She submits that she continued her work and publications and founded her own monthly magazine called *Change*; established her own publishing house but it was shut down in November 2010 because her advertising clientele were warned by some members of the government not to

⁷⁵ Principle 19(1)





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advertise with her magazine as it was critical of government and this made it difficult to continue with the publication of the magazine. That she then worked as editor of *Addis Press*, columnist for *Feteh Newspaper*, regular contributor to the *Ethiopian Review*. *Addis Press* and *Feteh* were also shut down due to numerous death threats received by its journalists as well restricting their revenue base through warnings given to their advertising clientele not to advertise with these papers. She submits that as a result of her work, she continued to receive death threats and intimidation directly and indirectly from the government officials; Ethiopian People's Revolutionary Democratic Front (EPRDF) as well as warnings from her school Director to stop writing about politics. Similar threats were also received by her parents from their neighbours for her to stop writing articles. She also submits that she was finally arrested, prosecuted and convicted of conspiracy to commit terrorist acts and participating in a terrorist organisation under the 2009 Terrorism Proclamation and Criminal Code respectively in 2011, four days after she had published an article on *Feteh* criticising the Ethiopian Government's plans to build a hydroelectric dam and its associated fund-raising activities.

166. The Commission notes that the Charter guarantees the right of every person to express and disseminate his or her opinion orally, in writing, in print or in any other form of Communication within the law. The Commission also notes that Article 29 (1) and (2) of the Ethiopian Constitution provides that *"Everyone has the right to hold opinions without interference" and "Everyone has the right to freedom of expression without any interference. This right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any media of his choice."* In this case, the Second Complainant as a citizen of Ethiopia was exercising her right to express her opinion on particular issues of concern to her in writing and print and disseminating same through a media of her choice as protected by the Constitution. It is therefore the obligation of the Respondent State and/or its officials or agents to ensure that this right is respected and protected by the Respondent State. Therefore, by sending the Second Complainants death threats, contributing actively to the closure of her



magazine as well as other newspapers that she was working with, intimidating her and her parents to make her stop writing her articles would amount to a restriction of /interference with her right to freedom of expression unless same is provided by law, serves a legitimate aim and is a necessary in a democratic society.

Is the restriction/interference provided by law

167. In determining whether the restriction of a person's freedom of expression and access to information is provided by law, the Commission has stated in *OSJI v Cameroon* as follows; *"in order to determine whether a denial of a broadcasting licence was "prescribed by law", the interference must have some basis in domestic law and the law should be... formulated with sufficient precision... to foresee, to a degree that is reasonable... the consequences which a given action may entail. Second, the domestic law must afford a measure of legal protection against arbitrary interferences by public authorities."*⁷⁶ Similarly, in its Principle 9(2) of the Declaration _____ the Commission has also set out the criteria for determining whether the restriction/interference is provided by law. That is, the domestic law must be clear, precise, accessible and foreseeable as well as provide effective safeguards from arbitrary interference and abuse.

168. The Second Complainant submits that she was arrested and charged with violating Articles 32(1)(a), 38(1) and 648 (1) and (2) of Criminal Code of Ethiopia 2004 and Articles 4, 7 and 9 of the 2009 Proclamation. She submits that the Proclamation of 2009 does not meet the standard of being provided for by law because it contains broad definitions of *"terrorist acts"* in Article 3 thereof and *"terrorist organisation"* in Article 7 thereof. That to meet this criterion it is not merely the existence of a rule in a national legislation but the law must be sufficiently precise so that individuals would be able to regulate their conduct accordingly. The Second Complainant also submits that the various criminal offences listed in Article 7 thereof read together with the

⁷⁶ Communication 290/04 - *OSJI v Cameroon*, para 140





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overly broad definition of terrorist acts in Article 3 thereof results in creating an ambiguity in scope which makes it impossible for a member of the public to know whether his or her actions fall within the scope of the law or not. She further submits that the provisions refer to a wide variety of legitimate conduct as many activities of everyday life are enumerated therein. That the proclamation also fails to define specific terms used which leaves its application being opened to abuse such as against members of the media. The Complainant also submits that the wording used to describe the intent in Article 3 thereof is broad and unspecific. That the phrases *"intending to advance a political, religious or ideological cause", "coercing the government, intimidating the public or a section of the public or destabilising or destroying the fundamental political, constitutional or economic or social institutions of the country" or "destabilising an institution"* are broad, unspecific and set no borders. In light of the aforementioned, the Second Complainant submits that the restriction of her freedom of expression on the basis of the Proclamation was not provided by law and thus constitutes a violation of Article 9 of the Charter.

169. Article 3 of the Proclamation of 2009 defines *"terrorist acts"* as *"Whosoever or a group intending to advance a political, religious or ideological cause by coercing the government, intimidating the public or section of the public, or destabilizing or destroying the fundamental political, constitutional or, economic or social institutions of the country:" (1) causes a person's death or serious bodily injury; (2) creates serious risk to the safety or health of the public or section of the public; (3) commits kidnapping or hostage taking; (4) causes serious damage to property; (5) causes damage to natural resource, environment, historical or cultural heritages; (6) endangers, seizes or puts under control, causes serious interference or disruption of any public service; or (7) threatens to commit any of the acts stipulated under sub-articles (1) to (6) of this Article; is punishable with rigorous imprisonment from 15 years to life or with death."*

170. Article 4 of the 2009 Proclamation states *"Whosoever plans, prepares, conspires, incites or attempts to commit any of the terrorist acts stipulated under sub-articles (1) to (6) of Article 3 of this Proclamation is punishable in accordance with the penalty provided for under the same Article."*



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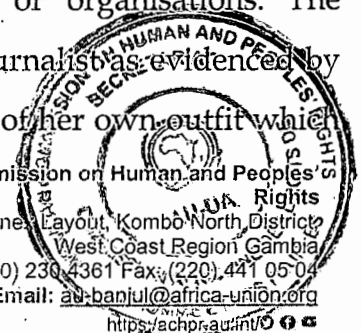
Article 7 (1) of the 2009 Proclamation states *"Whoever recruits another person or takes training or becomes a member or participates in any capacity for the purpose of a terrorist organization or committing a terrorist act, on the basis of his level of participation, is punishable with rigorous imprisonment from 5 to 10 years."*

Article 7(2) of the 2009 Proclamation states *"Whoever serves as a leader or decision maker in a terrorist organization is punishable with rigorous imprisonment from 20 years to life."*

Article 9 of the 2009 Proclamation states *"Whoever knowingly or having reason to know that a property is a proceed of terrorist act acquires or possesses or owns or deals or converts or conceals or disguises the property is punishable, subject to the property being forfeited, with rigorous imprisonment from 5 to 15 years."*

Article 2 (4) of the 2009 Proclamation states *"terrorist organization" means: a) a group, association or organization which is composed of not less than two members with the objective of committing acts of terrorism or plans, prepares, executes or cause the execution of acts of terrorism or assists or incites others in any way to commit acts of terrorism; or b) an organization so proscribed as terrorist in accordance with this Proclamation."*

171. From the above provisions, the Commission notes that the definition of 'terrorist acts' and the elements that constitute terrorists acts in Article 3 thereof are broad, not precise and not formulated with sufficient precision to foresee the consequences which a given action may entail. For example, it is not clear as to what amounts to "destabilizing or destroying the fundamental political, constitutional or, economic or social institutions of the country" or "creation of serious risk to the safety or health of the public or section of the public." Secondly, the offences enumerated therein are broad enough to include legitimate/lawful acts which would otherwise be protected under national and international law. Also, the definition of 'terrorism organization' in Article 2 thereof and the "terrorist acts" in Articles 4 and 7 thereof are all linked to the broad definition of Article 3 thereof and the offences listed therein. Therefore, the application of these provisions is susceptible to being used arbitrarily or in an abusive manner against certain category of persons or groups or organisations. The Commission also notes that the Second Complainant is a journalist as evidenced by the various media houses she worked for, the establishment of her own outfit which





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was later forced to close and the international awards received for the work she was doing as a journalist and disseminating information to the general public⁷⁷. Further, that the publication of articles in the media on issues of interest to the general public as a journalist are activities which are protected under the Charter and the Constitution of the Respondent State. Therefore, there is no basis for its restriction under the 2009 Proclamation as a terrorist act, and doing so is a violation of Article 9 of the Charter.

Does the restriction serve a legitimate aim and is necessary in a democratic Society?

172. In determining whether the restriction serves a legitimate aim and is necessary in a democratic society, the Commission refers to its jurisprudence in *OSJI v Cameroon* where it opined *"that the interferences with the Victim's freedom of expression do not meet the requirement of lawfulness under Article 9 (2) of the African Charter and Principle II (2) of the Declaration on Freedom of Expression. The Commission therefore need not examine whether these interferences pursued a legitimate aim and were necessary in a democratic society."*

173. In light of the above, the Commission also notes that it has made a finding that the restriction has no basis in domestic law as it does not meet the requirements of lawfulness because it is not formulated with sufficient precision to foresee the consequences which a given action may entail and thus violates Article 9 of the Charter. Therefore, it will not examine whether the restriction serves a legitimate aim and is necessary in a democratic Society.

Alleged violation of Article 16

⁷⁷ See para 11 of Witness Statement of Second Complainant dated 14 January 2017; See also Annexes III, IV A and B and XVII A and B





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174. Article 16 (1) of the Charter provides that *"Every individual shall have the right to enjoy the best attainable state of health."* Article 16 (2) provides that *"State Parties to the present shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick."*
175. The scope and application of the Article 16 of the Charter has been clearly espoused by the Commission in its **Principles and Guidelines on the Implementation of ECOSOC Rights in the African Charter on Human and Peoples' Rights (the Guidelines) of 2011** wherein it *inter alia* states *"the right to health is an inclusive right that encompasses both health care and the underlying determinants of health."* It also sets out the minimum core obligations of states to ensure the best attainable state of physical and mental health which include among others, ensuring the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalised groups. In *Purohit and Moore v The Gambia*, the Commission stated that *"enjoyment of the human right to health as it is widely known is vital to all aspects of a person's life and well-being, and is crucial to the realisation of all the other fundamental human rights and freedoms. This right includes the right to health facilities, access to goods and services to be guaranteed to all without discrimination of any kind."*
176. The Second Complainant submits that her right to health was violated because she was diagnosed with tumours in both breasts but not given adequate care and treatment whilst in detention which contributed to a significant deterioration of her health. She also submits that her conditions of detention were inappropriate and she suffered delays in receiving treatment. She received inappropriate post-operative care and insufficient medication and was not transferred to an appropriate specialist establishment for treatment and care, was not given follow-up appointments as they were cancelled, was not seen by any medically trained personnel post the operation and her medical file declared lost upon a request from the Commission to make it available. She further submits that as a result of the poor treatment and care and the horrendous living conditions in the prison, she was suffering from fibroadenoma, typhoid, chronic gastritis and sinusitis at the time she was released from prison in 2015. She relied amongst others on the





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Commission's *Principles and Guidelines on the Implementation of ECOSOC Rights in the Charter of 2011* and jurisprudence⁷⁸ in support of her submissions.

177. To determine whether the Second Complainant's right to health was violated by the Respondent State, the Commission notes that at the initial stage of the prosecution of this Communication, the Second Complainant had raised the issue of her health status and therefore requested the Commission to issue Provisional Measures. When the Commission decided to be seized of the Communication, it also issued provisional measures requesting the Respondent State through the highest office of the land, to provide medical care to her using the expertise of an independent medical expert to avoid irreparable harm to the Second Complainant and to report back on the actions taken in this regard within 15 days. The Commission notes that the Provisional Measures letter was dispatched on 3 April 2014 and received by an official/agent of the Respondent State on 9 April 2014, however, no report was ever received on actions taken by the Respondent State and the status of the health of the Second Complainant. A reminder was sent on 15 May 2015 but to no avail.

178. The Commission also notes the medical evidence on record which shows that the Second Complainant's breasts were examined and diagnosed at the Addis Ababa University, Faculty of Medicine (See Annex 1). Annex 2 is a Fine Needle Aspiration Cytology Report (FNAC Report on the two breasts and Annex 3 shows the breast ultrasound and surgery that were carried out on the breasts in the United States of America where she currently resides, after her release from prison in 2015.

179. The Commission notes further that in its Guidelines on the right to health it has indicated that one of the core minimum obligations of State Parties is to *"ensure that prisoners and other persons deprived of their liberty, under any form of detention, have access to conditions of detention consistent with human dignity and the highest attainable standard of health. Measures taken must ensure adequate food, clothing, exercise, physical security,*

⁷⁸ Communication 241/01 *Purohit and Moore v The Gambia*, para 80, - Communication 105/93 - 128/94 - 130/94 - 152/96 - *Media Rights Agenda & Constitutional Rights Project v Nigeria*, paras 89, Communication 137/94-139/94-154/96-161/97 - *International Pen and Others (On behalf of Saro-Wiwa v Nigeria)*, para 112, Communication 54/91-61/91-98/93-164/97 to 196/97-210/98 *Malawi African Association and Others v Mauritania* and Communication 378/09 - *Monim Elgak Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v Sudan*





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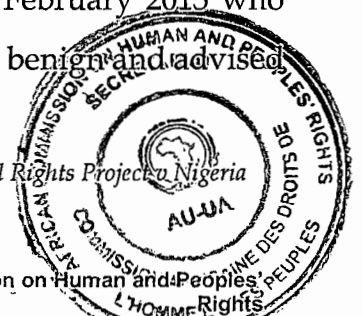
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reading material, rehabilitation programmes and medical treatment. This should include access to trained medical personnel, essential drugs, and access to preventives measures against diseases. Special emphasis should be given to the health needs of women in prisons and other places of detention."

180. From the medical evidence and the provisional measures issued by the Commission, the second Complainant needed medical care. Therefore, it was the responsibility of the Respondent State to provide it to her without any distinction. This responsibility was heightened because she was deprived of her liberty and in the custody of the agents of the Respondent State.⁷⁹ It was also the responsibility of the Respondent State to ensure that the medical treatment include access to trained medical personnel, essential drugs and access to conditions of detention consistent with human dignity and the highest attainable standard of health.

181. The question is whether the Respondent State has complied with its obligations. The Second Complainant states that she was diagnosed with breast tumor in her left breast in early 2012 and had a surgery of the tumor without anaesthesia leaving her in extreme pain during and after the surgery. She was taken back to prison immediately after the operation and did not have any post operation treatment or observation at the hospital. The stitches were to be removed by the treatment doctor after one week but the prison authorities failed to take her back to the hospital claiming that she had no appointment and the nurse at the prison health facility also failed to nurse the wound thereby leaving the stitches unattended for the duration of her detention. She also submits that she used her clothes and some cotton given by the nurse to remove the bleeding of the breasts daily with great pain and suffering and that she only had one post operation visit at the hospital in July 2012 but the stitches were not removed and another appointment was scheduled for 13 January 2013 but it was cancelled. She finally saw a Radiologist on 12 February 2013 who confirmed that she has fibroadenoma on both breasts which were benign and advised

⁷⁹ See Communication 105/93 - 128/94 - 130/94 - 152/96 - Media Rights Agenda & Constitutional Rights Project v. Nigeria (31 October 1998) ACHPR, para 91





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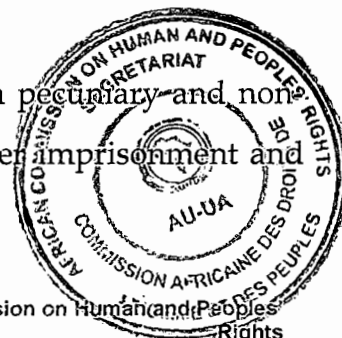
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that a Fine Needle Aspiration (FNA) Procedure be conducted to confirm same but instead she was compelled to do a biopsy, a more intrusive procedure as recommended by the Prison Facility nurse on 13 March 2013 despite indicating FNA as her preference as per the Radiologist's advice. Upon receipt of the biopsy results, another surgery of the right breast was recommended but after series of failed appointments, she was not operated upon and she stayed with so much discomfort and pain on the right breast for the remainder of her time in prison. She also submits that due to the unsanitary conditions of the prison, she also contracted typhoid, chronic gastritis and sinusitis until the time she was released from prison in 2015.

182. In light of the above, the Commission notes that the Respondent State did not comply with its minimum core obligations under Article 16 of the Charter as exemplified in its jurisprudence and the Guidelines; in that it has not provided the Second Complainant with access to conditions of detention consistent with human dignity and the highest attainable standard of health due to poor sanitary conditions of the prison. It has also failed to take measures to ensure adequate and timely medical treatment including access to essential drugs, trained medical personnel and preventives measures against diseases, having regard especially to her health needs as a woman because the treatment and care given to her was grossly inadequate to guarantee her health. It rather left her in a situation which was both life threatening and jeopardized her health. In the absence of any counter evidence and/or submissions from the Respondent State and having regard to its non-response to the Provisional Measures issued to prevent irreparable harm to the Second Complainant, the Commission finds a violation of Article 16 of the Charter by the Respondent State.

Reparations

183. The Second Complainant alleges that she suffered both pecuniary and non-pecuniary damages as a result of the violations resulting in her imprisonment and should be awarded damages.





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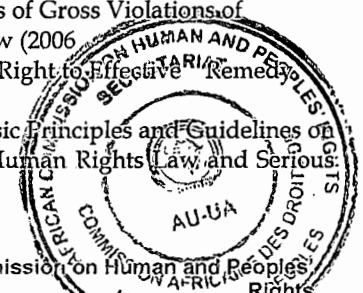
184. The Commission notes that Article 1 of the Charter obligates State Parties to recognise and give effect to the rights, duties and freedoms enshrined in the Charter. Therefore, any violation of these rights by the State shall give rise to redress and reparation to the victims of the violations. This is also in line with the Commission's established jurisprudence⁸⁰ and international law⁸¹. In its **Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa**, the Commission has established that everyone has the right to an effective remedy for violation of the rights granted by the Charter which includes access to justice and reparation for the harm suffered.⁸² The Commission further established that reparation also include restoration, and material and /or financial compensation and it must be fair, adequate, effective, sufficient, appropriate, satisfactory to the victim and proportionate to the damage suffered.⁸³
185. The Second Complainant submits that her imprisonment for 49 months (21 June 2011 – July 2015), prevented her from continuing her professional work as a journalist, high school teacher and tutor and therefore lost income to the tune of ETB 327,369. She was also prevented from continuing her studies in political science at the Indira Ghandi Open University School of Correspondence which she had paid for and received relevant books for the course which she had ordered. That she eventually had to terminate her studies because she had no choice.
186. These allegations are stated in the signed witness statement dated 14 January 2017. There is also no counter evidence disproving that the Second Complainant is a journalist, teacher and tutor who was in gainful employment at the time of her arrest

⁸⁰ See Communication 59/91 - *Emgba Mekongo Louis v. Cameroon* para 2; Communication 253/02 - *Antonie Bissangou v Congo* para 84; Communication 313/05 - *Kenneth Good v Botswana* para 244(1); Communication 318/06 - *Open Society Justice Initiative v. Côte d'Ivoire* para 19; Communication 379/09 - *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v Sudan* para 142(iii)(a); Communication 389/10 - *Mbiankeu Geneviève v. Cameroon* para 130

⁸¹ UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2006)

⁸² Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa - (c) Right to Effective Remedy para (a) and (b) (2003)

⁸³ Communication 389/10 - *Mbiankeu Geneviève v. Cameroon* paras 131-132; See also UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2006)





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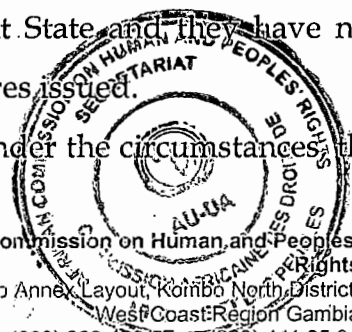
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and her enrolment to the Indira Ghandi Open University. In the absence of any evidence to the contrary, the Commission is minded to believe the facts stated in the signed witness statement of the Second Complainant wherein she stated the outfits she has worked for as a journalist, the incident at the school where she was a teacher and her work as a tutor. Therefore, the Commission finds that she is entitled to compensation for loss of earnings and potential earnings due to her imprisonment which should be paid by the Respondent State subject to presentation of the relevant documentary evidence and verification of the actual amounts due and payable if the human rights violations had not occurred.

187. The Second Complainant further argues that she is also entitled to non-pecuniary damages because it is well established in international law that where an individual suffers physical and /or mental harm as a consequence of a breach of their rights, damages should be available as part of the possible remedies. That she suffered serious and debilitating physical and mental injuries as a result of the acts and omissions of the Respondent State, particularly the conditions of her detention, her treatment whilst in detention including failure to provide appropriate medical assistance had a serious impact on her life.

188. The Commission also notes that following the arrest and detention of the Second Complainant, she was kept in very unsanitary conditions, subjected to prolonged interrogations, emotional stress, refused access to visitors, and when she was diagnosed with tumor in her breasts; had typhoid, chronic gastritis and sinusitis but did not receive adequate and appropriate medical care. As a result, she had to endure prolonged pain and suffering and insomnia. This situation inevitably led to frustration, anger, emotional stress and anxiety about the risks to her health. Her right to health continued to be violated by the Respondent State throughout her time in prison despite the Provisional Measures issued by the Commission in this regard. These facts have not been countered by the Respondent State and they have not reported on the implementation of the Provisional Measures issued.

189. In light of the above, the Commission holds that under the circumstances, the Second Complainant is entitled to non -





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pecuniary damages for the extended pain and suffering physically and emotionally, anxiety, frustration and diseases contracted whilst in prison for 49 months, and the impact it has and continues to have on her life. The Commission therefore holds that the Respondent State should pay financial compensation that is adequate and satisfactory to the victim as well as proportionate to the damage suffered by the Second Complainant, in line with international law and standards applicable to payment of compensatory damages. In assessing the quantum and mode of payment, the Respondent State shall also consult the Second Complainant and her legal representatives.

Decision of the Commission on the merits

190. For the foregoing reasons, the Commission:
- i. declares that the Respondent State has violated the rights of the Second Complainant protected under Articles 7, 9 and 16 of the Charter;
 - ii. requests that the Respondent State pays adequate, suitable and satisfactory compensation to the Second Complainant for the violation of her rights under the Charter as follows:
 - (a) for loss of earnings and potential earnings due to her imprisonment subject to presentation of the relevant documentary evidence and verification of the actual amounts due and payable if the human rights violations had not occurred; and
 - (b) for the extended pain and suffering physically and emotionally, anxiety, frustration and diseases contracted whilst in prison for 49 months, and the impact it has and continues to have on her life. The compensation should be adequate, satisfactory and proportionate to the damage suffered by the Second Complainant, in line with international law and standards applicable to payment of compensatory damages. In assessing the quantum and mode of payment, the Respondent State shall also consult the Second





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Complainant and her legal representatives;

- iii. declares that the 2009 Anti-Terrorism Proclamation is not in line with the Respondent's State obligations under international law;
- iv. request the Respondent State to take steps to amend the 2009 Anti-Terrorism Proclamation to bring it in line with international law and standards relating to the combat of terrorism; and
- v. requests the Respondent State 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 2010.

Adopted at the 72nd Ordinary Session of the African Commission on Human and Peoples' Rights held virtually from 19 July – 2 August 2022

