

Brief of Amicus Curiae in support of the Emergency Communication to the African Commission on Human and Peoples' Rights on behalf of Ibrahim Halawa and 493 Others (ACHPR/COMM/1846/14)

Executive Summary

This amicus curiae is submitted by the African Centre for Democracy and Human Rights Studies ("ACDHRS"), The Human Rights Institute of South Africa ("HURISA"), The Institute for Human Rights and Development in Africa ("IHRDA"), The International Service for Human Rights ("ISHR"), Le Réseau des Défenseur des Droits Humains en Afrique Centrale ("REDHAC"), and the Zimbabwe Human Rights NGO Forum, (the "Authors"), as amicus curiae in support of an Emergency Communication to the African Commission on Human and Peoples' Rights on behalf of Ibrahim Halawa (the "First Victim"), an Irish national of Egyptian descent, together with 493 others (collectively the "Victims"). The Victims were arrested and charged for their alleged roles in violence during protests that took place on 16 and 17 August 2013 in the Ramses area of central Cairo, Egypt whilst exercising their right to freedom of assembly, opinion and expression.

The Victims are facing a mass sham trial for crimes which carry the death penalty. In light of the serious risk of irreparable harm to the Victims and the extreme urgency of this case, the Authors respectfully ask the Commission to intervene in accordance with Rule 98(1) of its Rules of Procedure by requesting that Egypt adopt immediate Provisional Measures to safeguard the Victims' rights, bodily integrity and security, in the manner set out at paragraph 77 of the Complainant's Communication.

The facts are set out in full in Reprieve's Communication. In summary, the Victims, who have to date already suffered numerous violations of their human rights, face the threat of the death penalty following irregular proceedings which have, to date, failed to respect even the most basic guarantees of a fair trial. The 494 Victims await what is expected to be a critically unfair mass trial which will, by its scale necessarily deny the Victims the right to present their own defence and rights of due process. The trial has been postponed four times since the initial arrests in August 2013. Most recently the hearing was postponed from 8 February 2015 to 29 March 2015.¹

The First Victim, a minor at the time of his detention and a foreign national, is in a particularly vulnerable situation in light of his young age and separation from his family.

Request for Interim Relief

¹ The hearing was initially scheduled to take place on 16 July 2014, despite the Victims being arrested in August 2013. It was then postponed to 12 August 2014 after adjustments had been made to the dock to permit more Victims to be present, and then to 1 December 2014, 8 February 2015, and now 29 March 2015.

The nature and scale of the trials which have to date taken place, and are likely to take place, fail to afford the minimum procedural safeguards, standards of fairness and due process required under the African Charter.² Any mass trial is likely to conclude in the ordering of the death penalty upon the Victims. This act is both contrary to international law and to the African Commission's Resolution ACHPR/Res.136 which urges states to observe a moratorium on the death penalty.

In view of the serious risk of irreparable harm to the Victims and the extreme urgency of this case, the Commission is therefore implored to intervene in accordance with Rule 98(1) of its Rules of Procedure by ordering that Egypt adopt immediate Provisional Measures to safeguard the Victims' rights, in the manner set out at paragraph 77 of the Complainant's Communication.³

The Authors submit that a request for Provisional Measures at this phase of the domestic proceedings is warranted by the gravity of the continuing and threatened violations and is wholly in keeping with the Commission's protective mandate pursuant to Article 45 of the Charter.

Specifically, it is established in the case law of the Commission that the Commission may, in circumstances where the complainants have alleged gross violations of the right to fair trial, request urgent Provisional Measures to suspend the death sentence until the Commission considers the merits of the case.⁴ The Commission has also requested that the Secretary General of the African Union intervene at a diplomatic level to guarantee a stay of execution pending the outcome of the Commission's consideration.⁵

The Authors note that the African Court on Human and Peoples' Rights recently granted Provisional Measures in circumstances in which the Detainee "*face[d] an imminent trial which carrie[d] with it the threat of the death penalty, following a period of arbitrary detention based on interrogations carried out in the absence of a lawyer*".⁶ The Court unanimously ordered the Respondent State to:

² The imposition of the death penalty on a large scale for the punishment of political crimes when there is no evidence substantiating the Victims' guilt, and in cases where there is an alternative explanation of the facts, is a grave violation of human rights law.

³ There is a clear precedent for the Commission to grant provisional measures in circumstances when there is a real risk of torture or similar ill treatment – *INTERIGHTS (on behalf of Jose Domingos Sikunda) v. Namibia* (Communication 239/01).

⁴ *International Pen and Others v. Nigeria, African Commission on Human and Peoples' Rights*, Comm. Nos. 137/94, 139/94, 154/96 and 161/97 (1998), para. 29; *INTERIGHTS (on behalf of Safia Yakubu Husaini et al) v. Nigeria*, Comm. No. 269/03 (2005); see also [*Interights et al (on behalf of Mariette Sonjaleen Bosch) v Botswana* Comm, No, 240/2001(2003) (see ACHPR, Seventeenth Annual Activity Report of the African Commission on Human and Peoples' Rights 2003-2004, 2 at 95)].

⁵ *INTERIGHTS (on behalf of Safia Yakubu Husaini et al) v. Nigeria*, Comm. No. 269/03 (2005).

⁶ *African Commission on Human and Peoples' Rights v Libya* (App. No. 002/2013), Order for Provisional Measures, African Ct. Humans & Peoples' Rights, 25 March 2011), para.3.

*“1. refrain from all judicial proceedings, investigations or detention that could cause irreparable damage to the Detainee, in violation of the Charter or any other international instruments to which [the Respondent State] is a party;
2. to allow the Detainee access to a lawyer of his own choosing;
3. to allow the detainee visits by family members;
4. to refrain from taking any action that may affect the Detainee’s physical and mental integrity as well as his health”.*⁷

In light of the series of serious human rights violations in Egypt detailed in this Communication, the Commission is urged to bring this matter to the Assembly of Heads of State and Government of the African Union and the Peace and Security Council of the African Union as a matter of urgency, in accordance with Rule 84 of the Commission’s Rules of Procedure.

Furthermore, in *International Pen and Others (on behalf of SaroWiwa) v. Nigeria*⁸ the accused were convicted and sentenced to death following a trial that categorically failed to fulfil the standards required for a fair trial. The Commission held that the arbitrary execution violated articles 4 and 7 of the African Charter:

*“given that the trial which ordered the executions itself violates article 7, any subsequent implementation of sentences renders the resulting deprivation of life arbitrary and in violation of article 4”.*⁹

Aggravating factors

The Authors request that the Commission consider this urgent request for Provisional Measures against the backdrop of the political repression and deteriorating standards of human rights protection currently prevailing in Egypt.

It should be noted that the Victims were arbitrarily arrested and detained for peacefully exercising their civil rights to assemble, associate and express their views and opinions, as guaranteed by Articles 9.2 10.1 and 11 of the Charter. This took place at a time when national protests were taking place in the country, not least the brutal dispersal of the Raba’a al-Adawiyya protest camp two days prior to the Victims’ arrest.

The Victims’ trial must also be considered in the context of the Egyptian government’s widespread use of mass, sham trials as a tool to silence political opposition. In these cases hundreds of political opponents have been sentenced to death or have received lengthy

⁷ Ibid.

⁸ [2000] AHRLR 212 (ACHPR 1998).

⁹ [2000] AHRLR 212 (ACHPR 1998), para. 103.

custodial sentences following cursory, procedurally irregular trials in which the accused were deprived of the right to defend themselves.¹⁰

Furthermore, an unprecedented number of people in Egypt are also being charged with crimes that warrant the death penalty. This stands in stark contrast to the growing African and international consensus in favour of abolishing capital punishment, most notably the 2014 *Cotonou Declaration on the Abolition of the Death Penalty in Africa* in which the African Union has joined together with the UN General Assembly and the UN Commission on Human Rights¹¹ in calling for the abolition of the death penalty. The Commission has also itself called for a moratorium on the death sentence.

The present case bears similarities to *International Pen and Others v. Nigeria* in which the Commission agreed with the complainants that the real reason for the trial, conviction and ultimate execution of the victims in that case was the victims' expression and dissemination of views that opposed those of the Respondent State. Accordingly, the Commission found that there had been a violation of Articles 9.2 10.1 and 11 of the Charter.

In light of the above the Authors therefore request that the Commission urgently request Provisional Measures to ensure that the government scrupulously uphold the rights of the Victims to ensure that their trial meets the highest standards of justice.

Ongoing Breaches of Charter Rights

The Victims are being detained in conditions that amount to a breach of the following rights guaranteed by the Banjul Charter and international human rights law:

(i) Torture, Cruel, Inhuman and Degrading Treatment

The Egyptian authorities' treatment of the Victims whilst in prison constitutes a breach of Article 5 of the African Charter which prohibits the use of torture and other mistreatment.¹²

¹⁰ 'Egypt: UN Experts 'outraged' at confirmation of 193 death sentences, United Nations Office of the High Commissioner for Human Rights', available at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14801&LangID=E#sthash.cbhMRM39.dpuf>

¹¹ Declaration of the Continental Conference on the Abolition of the Death Penalty in Africa (the Cotonou Declaration), 4 July 2014; Resolution ACHPR/Res.136(XXXVIII) 08; General Assembly Resolution 62/149 See also the Second Optional Protocol to the International Covenant on Civil and Political Rights.

¹² "Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited".

Torture, in its simplest form, is the intentional infliction, by act or omission of severe physical or mental pain and suffering for the purpose of punishment, interrogation, coercion, or discrimination.

The details of the torture, degradation and other mistreatment inflicted on the Victims by the Egyptian authorities include the following:

- multiple physical beatings including with implements such as whips, chains, and sticks;¹³
- application of electric shocks for the purpose of causing pain;¹⁴
- denial of medical treatment;
- psychological torture from prison guards;¹⁵
- subjected to sexual humiliating and inappropriate physical contact during strip searches;
- placed in highly overcrowded and unhygienic conditions;
- placed in solitary confinement;¹⁶ and
- have not received adequate food.

These acts and omissions constitute torture, cruel, inhuman or degrading treatment contrary to Article 5 of the African Charter.

In considering ill-treatment it is important to consider the powerlessness of the victim; the severity of the treatment, including its duration, physical and mental effects produced, and the sex, age, and health of the victim.

In this present case some of the Victims (including the First Victim) have been imprisoned by the Egyptian authorities at a time when they are deemed minors. They have remained in adult prisons for a substantial period of time in appalling and dangerous conditions. This further exacerbates the violations committed against the Victims. Furthermore, the African Charter on the Rights and Welfare of the Child 1990 states that the death sentence is not to be applied to crimes committed by children (Article 5).¹⁷ The Authors draw attention to the

¹³ This was deemed to violate Article 5 in *Khalilova v. Tajikistan*, HRC, Communication 985/2001, 18 October 2005, UN Doc. CCPR/C/85/D/895/2001, para. 6.2 available at <http://www1.umn.edu/humanrts/undocs/985-2001.html>.

¹⁴ This was deemed to violate Article 5 in *Muteba v. Zaire*, HRC, Communication 124/82, 25 March 1983, UN Doc. Supp. No. 40 (A/39/40) at 182 (1984), para 8.2 available at <http://www1.umn.edu/humanrts/undocs/session39/124-1982.htm>.

¹⁵ This was deemed to violate Article 5 in *Bamaca-Velasquez v. Guatemala*, IACHR, Merits, 25 November 2000, Series C, No. 70, para. 158.

¹⁶ This was deemed to violate Article 5 in *Liesbeth Zegveld and Mussie Ephrem v. Eritrea*, African Commission on Human Rights, Communication 250/2002 (2003), para. 55.

¹⁷ Article 5 states that the “death sentence shall not be pronounced for crimes committed by children”.

African Commission's adoption of the Robben Island Guidelines¹⁸ which provides an absolute prohibition of torture and ill-treatment and request that the Commission seek to intervene to uphold these standards in the present case.

(ii) Right to liberty and security of the person

By imprisoning the Victims without material evidence in support of the allegations raised against them, we submit that the Egyptian authorities have breached the Victims' right to liberty and security of the person as guaranteed by Article 6 of the African Charter.¹⁹

The details of the failure to observe the Victims' rights to liberty and security of the person include:

- issuing arrests without warrants (an act in violation of the Egyptian Criminal Procedure Code);
- arresting the Victims without tendering any evidence to support the assertion that there was a real threat to the life of the nation which warranted an emergency response;
- formal charges being put to the Victims several months after the Victims' arrest;²⁰
- charges being made despite the fact that primary evidence which is relied upon by the Public Prosecution (and which consists of video footage, photographs, and witness statements) fails individually to identify or name the Victims;²¹ and
- non-observance of the age of the Victims and the special additional rights which are afforded to juveniles under section O of the Principles and Guidelines on the Rights to a Fair Trial and Legal Assistance in Africa.²²

In light of the above considerations, the Authors assert that the Egyptian authorities are holding the Victims in denial of their rights under Article 6 of the African Charter.

¹⁸ Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading treatment or Punishment in Africa, adopted by the African Commission on Human and Peoples' Rights at its 32nd Session, 17-23 October 2002.

¹⁹ *"Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained"*.

²⁰ The Commission has held that "[w]here individuals have been detained without charges being brought,...this constitutes an arbitrary deprivation of their liberty and thus violates article 6", *Constitutional Rights Project & Another v. Nigeria (2000)*, AHRLR 191 (ACHPR 1998), para 55.

²¹ In the case of the First Victim, formal charges were only laid against him seven months after his arrest and at the time when his case was eventually referred to the Cairo Court of Criminal Appeal and these referred to evidence in which the First Victim was neither named nor identified.

²² This includes consideration of the fact that no child shall be subjected to arbitrary arrest or detention, that a child's parent/guardian/family relatives should be notified immediately of that child's arrest, and that no child should be held in a cell with adult detainees.

(iii) Right to a fair trial

The Victims have been and most likely will continue to be treated unfairly and contrary to the minimum fair trial standards required under international law and Article 7 of the African Charter.

In accordance with the African Charter, a state is obliged to respect, among other things, the Victims' right to a defence including the right to be defended by counsel of his choice, the right to be presumed innocent until proved guilty by a competent court or tribunal and the right to be tried within a reasonable period of time by an impartial court or tribunal.

The details of the Egyptian authorities' failure to observe the Victims' rights to a fair trial include:

- subjecting the Victims to initial and subsequent interrogation without lawyers present;
- failing correctly to record some of the Victims' agents as juveniles²³ and thus denying these Victims additional rights of protection afforded to minors;
- detaining the Victims for long periods of time before providing the Victims' with the details of the case being laid against them;²⁴
- having extensive delays before any formal hearings are scheduled;
- repeatedly deferring the hearing of the Victims' case;
- denying the Victims' access to the courtroom either to hear or to participate in any proceedings;
- when access has been permitted, screens have been erected by the authorities to prevent the Victims from hearing the case against them;
- obstructing the Victims' the right to legal representation during the hearings (including at hearings to determine whether Victims should remain on remand in prison);²⁵
- denying permission for lawyers to have access to many of the hearings or to be provided with information that they can use to prepare defences;²⁶

²³ The First Victim was 17 years old at the time of his arrest although his age was incorrectly recorded by police authorities as being 18 years old. Despite his lawyers and his family providing evidence of his correct date of birth, the official records remain unamended. The First Victim is therefore being incorrectly treated as an adult in the proceedings against him.

²⁴ The charges against the First Victim were eventually laid out to him on 25 February 2014, seven months after the First Victim's initial arrest.

²⁵ The Egyptian Criminal Procedure Code states that the Public Prosecution may only hold a suspect for a period of 45 days without charge in the course of an investigation and, once 45 days has expired, the Court of First Instance must sanction any continued pre-trial detention if the Public Prosecution can make a case that such extended detention is necessary for further investigation. The Victims have not had an opportunity to be legally represented at such hearings.

- failing to permit lawyers the right to appear in court so as to make individual submissions; and
- conducting mass trials which prevent any consideration of individual's cases.

In view of the denial of the Victims' access to legal advice and representation, the Authors draw the attention of the Commission to the decision in *Avocats Sans Frontieres (on behalf of Bwampamye) v. Burundi*²⁷ in which the Africa Commission noted that:

“the right to a fair trial involves fulfilment of certain objective criteria, including the right to equal treatment, the right to defence by a lawyer, especially where this is called for by the interests of justice, as well as the obligation on the part of courts and tribunals to conform to international standards in order to guarantee a fair trial to all”.

Conclusion

The Authors fully support the Emergency Communication by Reprieve, and ask the Commission urgently to request Provisional Measures to ensure that the Government of Egypt scrupulously uphold the rights of the Victims, to ensure their safety, bodily integrity and security, and to ensure that their trial meets the highest standards of justice.

In view of the evolving situation in Egypt, the Authors further request permission to appear before the Commission to make additional oral arguments and to address any questions the honourable Commission may have during the hearing of this Communication, in accordance with Rule 99, paragraph 16, of the Rules of Procedure.

²⁶ In *Constitutional Rights Project and Another v. Nigeria* (2000) AHRLR 235 (ACHPR 1999) several individuals were held “incommunicado with no access to lawyers, doctors, friends or family”. The African Commission held that this “clearly violates Article 7(1)(c)”.

²⁷ [2000] AJRLR 48 (ACHPR 2000).