



ACHPR
African Commission on
Human and Peoples' Rights

Human Rights our
Collective Responsibility

Communication 734/19

**J (Represented by the Initiative for Strategic
Litigation in Africa (ISLA) & Kenya Legal and
Ethical Issues Network on HIV & AIDS (KELIN))**

v

The Republic Namibia

*Adopted by the
African Commission on Human and Peoples' Rights
During the 78th Ordinary Session done virtually from 23 February to 08 March 2024*



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



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

Communication 734/19: J (Represented by the Initiative for Strategic Litigation in Africa (ISLA) & Kenya Legal and Ethical Issues Network on HIV & AIDS (KELIN)) v. Namibia

Summary of the Complaint:

1. The Secretariat of the African Commission on Human and Peoples' Rights (the Secretariat) received a Complaint on 28 April 2019 from Initiative for Strategic Litigation in Africa (ISLA) & Kenya Legal and Ethical Issues Network on HIV & AIDS (KELIN) (the Complainants), [REDACTED] against the Republic of Namibia (the Respondent State), a State Party to the African Charter on Human and Peoples' Rights (the African Charter).¹
2. The Complainants allege that the Victim, a 24-year-old Kenyan citizen, upon completion of her Bachelor of Science degree, began searching for job opportunities in May 2017. During the process of searching for job opportunities online, she came across a job advertisement on her Facebook page for a company called 'Technomed.'
3. The Complainants state that upon opening the job advertisement on Facebook, the Victim was redirected to another website detailing an application process for a job with a company named 'Bio Tech.' She completed an application form for the job through the online portal "Namibia Jobs" on the website <http://namibianjobs.co.na>. The Complainants aver that, about six days later, the Victim received an email indicating that she had been shortlisted for a position as a Finance Associate with Bio Tech, and would be based in Windhoek, Namibia.
4. The Complainants submit that about a week later, the Victim received a telephone call informing her that the position needed to be filled immediately and she would be contacted by Bio Tech's local agent based in Nairobi, Kenya, for the purpose of facilitating her travel plans. Three days later, a man alleging to be an agent of Bio-Tech in Kenya, contacted her via telephone. He informed the Victim that she needed to obtain a yellow fever vaccination certificate, which was required in order to travel to Namibia. He arranged a meeting with her the next day, in order to assist her obtain the vaccination certificate.

¹ Namibia ratified the African Charter on 16 September 1992

5. The Complainants aver that on 16 June 2017 the Victim met the agent as agreed. He escorted the Victim to a health facility for the yellow fever vaccination. Once the vaccination certificate was issued to the Victim, the agent informed her that she was required to travel to Namibia from Nairobi on the same day by road. The Complainants state that the agent booked and paid for a bus ticket for that evening, and the Victim departed Nairobi at 06:30pm on the same day.
6. The Complainants submit that the bus journey took her through Arusha, Dar-es-Salaam, Mbeya and Tunduma in Tanzania, and through Nakonde and Lusaka in Zambia. At the border crossing points in Kenya, Tanzania and Zambia, the Victim was in control of her passport and completed all the border checks together with other passengers on the bus. However, the Complainants aver that, at the Namibian border control point, the driver of the bus asked her for her passport and processed her entry into Namibia, while she remained seated in the bus.
7. The Complainants submit that on 22 June 2017, upon entering Namibia, the Victim was handed by the bus driver to two men who demanded that she hand over her travel documents and mobile phone to them and was escorted to a red Volkswagen passenger vehicle. They arrived in Windhoek on the morning of 23 June 2017, and she was taken to a guesthouse with other young women, where she spent ten days.
8. The Complainants aver that on the eleventh day, one of the men in charge of the guesthouse summoned the Victim together, with other young women, to the living room, where they found eight men waiting. The men chose a woman with whom they would have sexual intercourse, including the Victim. The Victim reported that the man raped her repeatedly.
9. The Complainants state that the Victim thereafter, for a three-month period, was sexually exploited and raped by approximately two hundred men. During this period, the Victim was subjected to forced oral and anal sex, forced sexual intercourse with women, forced to use sex toys, forced participation in orgies, sexual acts that involved physical bondage and the exercise of 'dominance' where she would be suspended from the ceiling and whipped.
10. According to the Complainants, the perpetrators would burn cigarettes on the Victim's breasts, forced her to get into a physical fight with another young woman and, on many occasions, these activities were digitally recorded by those sexually exploiting her. The Complainants allege that the Victim became pregnant in August 2017, and was forced to terminate the pregnancy. Further, on several occasions, the Victim was forcibly injected and drugged with unknown substances. As a result, the

Victim would lose consciousness for hours or even days. The Victim reported that she was also raped while intoxicated.

11. The Complainants submit that the Victim escaped from her captors on the evening of 18 October 2017, and hid overnight at a bus station nearby. The following day, she looked for the Kenya High Commission in Namibia and on enquiry from a person on the street, was advised to ask for directions from the Police Station.
12. According to the Complainants, on the basis of that advice the Victim located the nearest Police Station which was the Central Police Station in Windhoek (the Central Police Station). On arrival, the Victim informed the Police Officer at the reception that she was a victim of trafficking for purposes of sexual exploitation, who had been trafficked into Namibia from Kenya for purposes of forced prostitution. The Complainants state that the Victim was interrogated by the Police and threatened with criminal sanctions. She asked to be taken to the Kenya High Commission, but the request was refused.
13. The Complainants allege that at the Central Police Station, the Victim was physically assaulted by the Police Officers for mentioning names of persons who were involved in her exploitation, who were of local descent or Police Officers. The Complainants further allege that the Victim was detained at the Central Police Station before being moved to Klein Windhoek Police Station, a detention center for illegal immigrants arrested in Windhoek. On arrival, the Victim was put in handcuffs and was made to sit on the floor the entire night.
14. The Complainants submit that on 20 October 2017, the Victim was transferred from Klein Windhoek Police Station to a shelter for abused women. At the shelter, the Victim again requested to be taken to the Kenya High Commission, to no avail. Still traumatized by the violence and accusations made by the Namibian Police, and in a bid to find the Kenya High Commission, the Victim ran away from the shelter on the same day and arrived at the High Commission at around 05:30pm. The Complainants state that the offices were closed and the security guards outside the building advised her to seek help from the City Police. The Victim approached the City Police who took her back to Klein Windhoek Police Station, where she was detained as an illegal immigrant awaiting deportation.
15. The Complainants further state that from 20 October 2017, until her departure from Namibia, the Victim remained in custody without an explanation from the officials on the reasons for her detention or the investigation being undertaken in her case. During this period, she was in urgent need of medical care for a pelvic infection; however, no

medical care was provided to her. According to the Complainants, while in custody a fellow detainee advised the Victim to write a letter to the Kenya High Commission, which she did. The letter was delivered to the High Commission through the assistance of the detainee's mother.

16. The Complainants aver that three days later, officials from the Kenya High Commission visited the Victim and instructed her to cooperate with the Police Officers and further cautioned her against involving the immigration officials. The Victim cooperated with the Police and provided all the information in her possession about her attackers. The Complainants state that despite the Victim's cooperation with the police, on several occasions they threatened to charge her with various offences, including being an illegal immigrant and providing false information.
17. The Complainants submit that after four weeks of being unlawfully detained at the Klein Windhoek Police Station, a fellow detainee advised the Victim to write a note notifying the media of her predicament and seeking assistance. This note was delivered to One Africa TV through the assistance of one of the fellow detainee's sister. The Complainants aver that through the intervention of Erica Gebhardt, a journalist at One Africa TV, the Legal Assistance Center (LAC), an NGO based in Windhoek, was notified of the Victim's predicament. The Complainants further submit that the LAC was informed that the Victim would only be released from custody, if she produced an air ticket to return to Kenya, at which point she would be allowed to depart the country.
18. The Complainants state that the LAC facilitated the process of obtaining the air ticket, through a friend of the Victim in Kenya, so as to secure her release from detention. At the time of the Victim's departure from Namibia, the LAC had still not obtained any information regarding the continued detention of the Victim, or the status of the investigation into the allegations of trafficking for purposes of sexual exploitation.
19. The Complainants aver that the Victim left Namibia on 23 November 2017, aboard a South African Airways flight to Nairobi, and that Immigration Officers accompanied her to the Hosea Kitako International Airport. The LAC's attempts to get the Respondent State to put measures in place, on its own or in cooperation with Kenya, towards ensuring the safety of the Victim, while in transit and on arrival in Kenya, were fruitless.
20. The Complainants allege that the Victim was only able to access medical assistance on arrival at the offices of KELIN in Kenya. The medical examinations conducted at the time of her arrival in Kenya revealed a wide array of medical issues including

psychological trauma arising from the period during which she was held in captivity, wounds from the physical and sexual abuse and the forced abortion obtained while she was in captivity. According to the Complainants, the Victim was only capable of engaging in litigation-related deliberations, after she had undergone a series of intensive counselling sessions with a psychiatrist and clinical psychologist.

Articles alleged to have been violated:

21. The Complainants allege violations of Articles 2, 5, and 18(3) of the African Charter and Articles 2 and 4 of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (the Maputo Protocol) by the Respondent State.

Prayers:

22. The Complainants request:

- i. Declaration by the Commission of violation by the Respondent State arising from a failure to identify the Victim as a victim of human trafficking for purposes of sexual exploitation:
 - a) Article 2 of the African Charter;
 - b) Article 5 of the African Charter and Article 4(2)(g) of the Maputo Protocol; and
 - c) Article 18(3) of the African Charter and Article 2 of the Maputo Protocol;
- ii. Recommendation to the Respondent State to investigate and prosecute the perpetrators of the violations;
- iii. Provision of compensation by the Respondent State in the amount of USD 200,000 to the Victim for violation of the Charter and the Maputo Protocol; and
- iv. An order directing the Respondent State to provide the Victim an amount of USD 5000, to cover necessary ongoing medical, psychological and material assistance.

Procedure:

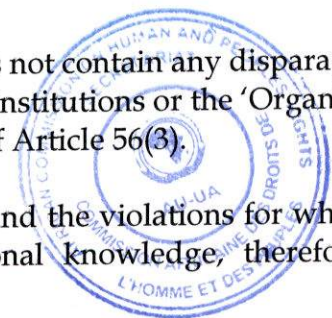
23. The Secretariat received the Complaint on 28 April 2019. On 02 May 2019, the Secretariat wrote to the Complainants, in response to the request to keep the identity of the Victim anonymous, reiterating the Commission's position that it will not be possible to effectively address the alleged violations if the identity of the Victim is kept anonymous from the Respondent State; however, the Victim would be anonymous in all public documents. By a letter dated 28 July 2019, the Complainants wrote to the Secretariat accepting the Commission's stance on issue of anonymity.

24. The Communication was seized during the 65th Ordinary Session held from 21 October to 10 November 2019, in Banjul, The Gambia.
25. On 13 November 2019, the Parties were informed of the Commission's decision to be seized of the matter, with the Complainants requested to present evidence and arguments on admissibility within two months of the notification.
26. On 21 January 2020, the Complainants transmitted their submissions on Admissibility, and on 08 April 2021, the Respondent State's submissions on Admissibility were received by the Secretariat. On 21 May 2021, the Secretariat received the Complainants additional observations on admissibility.

Admissibility

The Complainants Submissions on Admissibility

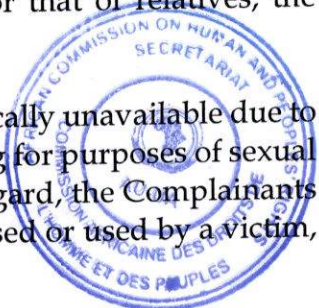
27. The Complainants contend that the Communication satisfies the admissibility requirements stipulated in Article 56 of the African Charter.
28. Regarding Article 56(1), the Complainants submit that the Communication was filed by the Victim's representatives on her behalf. It is further submitted that the Victim's full names were provided to the Commission, which subsequently granted the request to withhold the Victim's identity from the public.
29. With respect to Article 56(2), the Complainants contend that Namibia, a signatory to both the African Charter and the Maputo Protocol, has violated Articles 2, 5, 6 and 18(3) and Article 2 and 4 respectively. It is contended that the Victim was under the territorial jurisdiction, as well as effective control of the Respondent State, and further that the violations occurred within the period in which Namibia was bound by the African Charter.
30. The Complainants aver that the Communication does not contain any disparaging or insulting language directed at the Respondent State, institutions or the 'Organization of African Unity,' thereby meeting the requirement of Article 56(3).
31. The Complainants submit that the Communication and the violations for which the Victim is seeking remedies are within her personal knowledge, therefore the requirement set out in Article 56(4) is met.



32. With regards to Article 56(5), the Complainants aver that domestic remedies are ineffective when necessary investigations and prosecution have not taken place. The Complainants refer to **Zimbabwe Human Rights NGO Forum v. Zimbabwe** in which the Commission held that it is the role of the State to prosecute, and expecting Victims to pursue private prosecution is unfair.
33. The Complainants cited a European Court of Human Rights case, **Selmouni v. France**, which held that the Complainant satisfied the requirement of exhaustion of local remedies, because the Government had failed to conduct an effective investigation. In making this finding, the Court determined that the burden lies on the Government to conduct an investigation capable of leading to the identification and punishment of those responsible.
34. The Complainants further contend that the requirement to exhaust domestic remedies requires that only judicial remedies need to be exhausted, citing the Commission's jurisprudence in **Amnesty International and Others v. Sudan**.
35. The Complainants also refer to **R.B v. Hungary**, in which the European Court of Human Rights held that by lodging a criminal complaint with the police, the Victim had pursued an effective remedy, because there was no evidence that a proper investigation was "in principle not capable of leading to the identification and, if appropriate, punishment of those responsible." The Court further stated that "by virtue of that remedy, the State was afforded an opportunity to put matters right."²
36. The Complainants further submit that domestic remedies are practically unavailable due to fear. In this regard, the Complainants cited **Abubakar v. Ghana** in which the Commission deemed local remedies to be unavailable to the complainant after he escaped to Côte d'Ivoire, stating "the complainant was fleeing political persecution - it would not be logical to ask the complainant to go back to Ghana in order to seek a remedy from national legal authorities."³ Similarly in **Gabriel Shumba v. Zimbabwe**, the Commission emphasized that when the complainant cannot access the local remedies because of a generalized fear for his or her life, or that of relatives, the remedies would be considered unavailable.
37. The Complainants also aver that domestic remedies are practically unavailable due to the particular circumstances of a survivor of human trafficking for purposes of sexual exploitation, mis-identified as an illegal immigrant. In this regard, the Complainants submit that a remedy cannot be available if it cannot be accessed or used by a victim,

² Complainants submissions on Admissibility, paragraph 42

³ Complainants submissions on Admissibility, paragraph 43



and further that a remedy is considered available only if the complainant can make use of it in the circumstances of his case.⁴

38. Lastly, the Complainants submit that the requirement of exhaustion of local remedies should not be applied literally, especially in cases where it is impractical or undesirable for the Victim to seize the domestic courts.
39. In applying the legal principles to the facts, the Complainants submit that the Respondent State had an opportunity to investigate, prosecute and remedy the violations which the Victim was subjected to in the hands of her captors, and grant her a criminal law remedy, but failed to do so.
40. The Complainants submit that the Victim escaped from her captors and went to the Central Police Station where she reported that she was a victim of human trafficking and handed her laptop and cell phone to the police, which contained relevant evidence of her allegations. However, she was accused of providing false information and unlawfully detained in the police station.
41. The Complainants further submit that on 14 June 2018, Ms. Corrina van Wyk, of the LAC, had a meeting with Commissioner Agas in which he indicated that the police investigation in the case of human trafficking for purposes of sexual exploitation had been concluded and the case closed.⁵ The Complainants aver that where a case is closed by the police for lack of evidence, there is no available judicial remedy for the Applicant to take the criminal case further in Namibia, as stated in Section 2(1) of the Criminal Procedure Act 25 (2004): "The authority to institute and conduct a prosecution in criminal proceedings in respect of any offence in relation to which a magistrate's court or the High Court in Namibia has jurisdiction, vests in the State and must, pursuant to and in accordance with Article 88(2) of the Namibian Constitution, be exercised by the Prosecutor-General in the name of the Republic of Namibia."⁶
42. The Complainants further submit that the Victim feared for her life, feared being found by the traffickers, and feared for her family's lives given that she had provided the traffickers with her home address. Therefore, requiring the Victim to return to Namibia to exhaust domestic remedies would not be possible, as she is fearful of the police force in Namibia generally, as well as those members of the police force who she perceived as having links with the international trafficking syndicate that held her

⁴ Complainants submissions on Admissibility, paragraph 45, 46

⁵ Complainants submissions on admissibility, paragraph 17 and 50

⁶ Complainants submissions on admissibility, paragraph 51

captive. Furthermore, the Complainants aver that the Victim fears being found by the transnational syndicate that lured her into captivity. Extensive security measures had to be put in place in Kenya to facilitate the Victim's re-integration back into society, and it would not be practical for these measures to be replicated should she be required to return to Namibia.

43. The Complainants submit that the Victim was in unlawful detention for a prolonged period of time, with no charges levelled against her, and further the condition imposed by the Respondent State for her release was that she demonstrates she was capable of immediately departing from the country upon her release, by being in possession of an airline ticket. The Victim opted to be released from detention, and as a consequence had to depart from Namibia upon her release.
44. With respect to Article 56(6), the Complainants invoke the exception to the exhaustion rule on the basis of unavailability and ineffectiveness of the domestic remedies.
45. The Complainants note that the Commission held in **Michael Majuru v. Zimbabwe** that where there is a good and compelling reason why a Complainant could not submit his/her complaint for consideration on time, the Commission may examine the complaint to ensure fairness and justice.
46. In this regard, the Complainants submit that, as at 15 June 2018 the Victim became aware that the effort to secure a criminal justice remedy in Namibia had reached an end, with the case being closed for lack of evidence; the Communication was filed ten (10) months thereafter.
47. The Complainants request the Commission to consider the physical and mental state the Victim was in, following the traumatic events that she had endured. This is evidenced in the reports AS9, AS10 and AS11, annexed to the submissions on admissibility.⁷ Under these circumstances, in order to determine the Victim's ability to engage in legal proceedings on the subject matter of this Communication, the Complainants commissioned a Forensic Psychological Health Assessment from Mr. Felix Opondo, a Clinical Psychologist, in November 2017. Owing to the number of sessions necessary to enable the assessor evaluate the Victim's state, it took nearly one year to get an indication that she was capable of undertaking legal proceedings, subject to protective measures being put in place.

⁷ AS9: "Psychological Report," February 2019, "Medecins sans Frontieres; AS10: Sexual Violence Recovery Centre Report," 27 November 2017; AS11: Medical Report for Client "Name withheld," 06 December 2017

48. The Complainants submit that the Communication was submitted within six (6) months from the date that the Forensic Psychological Health Assessment⁸ was provided to them.
49. Accordingly, the Complainants submit that the Victim's circumstances present compelling justification for filing the complaint in excess of six months after becoming aware of unavailability of the domestic remedies. As such, it is in the interests of fairness and justice that the Commission find that the requirement set out in Article 56(6) has been met.
50. The Complainants submit that the complaint has not been settled by a different competent body with the capacity to provide a remedy that is equal to that which the Commission can provide and accordingly the Communication meets the requirement set out in Article 56(7) of the Charter.

The Respondent State's Submission on Admissibility

51. The Respondent State submits that it does not take issue with fulfilment of the admissibility requirements of Article 56(1), (3), (4) and (7).
52. With regards to Article 56(2) and the Respondent State's obligations under the Banjul Charter and the Maputo Protocol, it is submitted that the State condemns 'trafficking in persons' in the strongest terms and stresses that it remains committed to its obligation to combat and prosecute discrimination and violence against women, especially trafficking. The Respondent State submits that it regrets that the Victim was allegedly subjected to sexual exploitation and cruel and inhuman treatment at the hands of the perpetrators.
53. The Respondent State avers that the sexual violence and bodily harm suffered at the hands of the alleged traffickers was conduct committed in their private capacity. The State further avers that, whereas it undertakes to honour its obligations under the Banjul Charter and the Maputo Protocol, in respect of prosecuting and penalizing the alleged perpetrators and enabling the victim to obtain compensation, the conduct of the perpetrators is in no way attributable to any failure of the State to honour its obligations under the Banjul Charter and the Maputo Protocol.
54. The Respondent State further contends that it promulgated the Combating of Trafficking in Persons Act (2018), which became operational on 14 November 2019.

⁸ Annex AS12: Forensic Psychological Health Assessment, 12 September 2018

The State notes that the Act makes provisions for visitors' entry permits and/or temporary residence permits to be issued to foreign 'trafficking in persons' victims, in addition to exonerating foreign victims from contraventions of the Immigration Control Act.

55. The Respondent State submits that a criminal investigation into the matter commenced immediately, Reference 01/10/2017, and that a criminal case (Reference CR 252/02/2020) has been opened after evidence establishing a *prima facie* case was collected.
56. Regarding Article 56(5), the Respondent State refers to the Commission's jurisprudence in **Haregewoin A. GabreSelassie & IHRDA v. Ethiopia**, which states that "another rationale for the exhaustion requirement is that a government should have notice of human rights violation in order to have the opportunity to remedy such violation, before being called to account by an international tribunal." The Respondent State unequivocally refutes that it was give notice and an opportunity or ample time to respond to the alleged claims.
57. The Respondent State submits that, even though the Complainant obtained legal counsel in Namibia and consequently in Kenya, the Complainant never actually sought legal recourse in the Republic of Namibia. The State submits that it was not given ample notice of the alleged violations, nor given the opportunity to remedy it, because no legal action was ever instituted against anybody or any institution.
58. The Respondent State notes that the Commission held, in **Desmond Nunugwo v. Federal Republic of Nigeria**, that whereas the State had clearly failed to investigate, the Commission should in addition be satisfied that the Complainants exhausted all local remedies available to vindicate their rights through the national judicial processes. The fact that the State knew or should have known of the violation is not enough to relieve the Complainants of fulfilling this requirement. Local remedies in this regard should be exhausted in respect of the alleged rights violations which are brought before the Commission. Thus, it should be determined whether there are any judicial remedies at domestic level which could have been pursued by the Complainants to compel the State and its responsible authorities to take the steps to undertake the requisite investigation and facilitate access to justice for the rights allegedly violated.
59. The Respondent State submits that the Victim has failed to indicate that any such steps were taken, neither indicate that local courts were approached, nor that it was

impossible to do so; therefore, the State submits that the Communication is inadmissible.

60. The Respondent State further submits that its judicial system is competent to identify victims of trafficking and prosecute the crime of 'trafficking in persons,' as per the laws in the State, particularly the Combating of Trafficking in Persons Act (2018).
61. The Respondent State submits that the following matters were successfully tried within the courts in the Respondent State, which demonstrate the capacity of the State to deal with trafficking cases: *S v. Lukas* (2015) in which Johanna Lukas was convicted in the High Court of Namibia, on five counts of child trafficking in persons under the Prevention of Organized Crime Act (2004), as well as several charges under the Combating of Rape Act (2000); and *S v. Koch* (2018) in which Bertus Koch was convicted in the High Court of Namibia, on five counts of child trafficking, as well as five counts of violating the Combating of Immoral Practices Act (1980).⁹
62. Accordingly, the Respondent State submits that the Victim can obtain effective and sufficient relief in line with her prayers to the Commission. The Respondent State further submits that Section 26 of the Combating of Trafficking in Persons Act (2018) provides that a trafficking victim may be compensated for loss and/or damage of property including loss of incomes, which constitutes a suitable and available remedy.
63. The Respondent State takes note of the Victim's unease, concerns and reservations concerning returning to Namibia; however, the State submits that as a primary witness, the Victim's testimony can be obtained and submitted in accordance with Section 11 of the International Co-operation in Criminal Matters Act (2000), which provides that a Magistrate's Court may issue an order that a person may give a statement or testify by videoconference.
64. In response to the allegations on the impediments to the finalization of the investigations, the Respondent State refers to **Chacha v. Tanzania**¹⁰ in which the Commission held that where the average duration of cases is two years and two months, local remedies may not be considered as unduly prolonged. The State submits that overriding impediment to the investigations can be attributed to the effect of the Covid-19 pandemic, on the ability of the police to effectively continue the investigations, owing to the restrictions placed on the movement of persons and work from home orders. A further impediment to investigations arises from challenges

⁹ Respondent State submissions, paragraph 26

¹⁰ Respondent State submissions, paragraph 35

with Interpol; the Namibian police lodged a request for assistance to the National Central Bureau, and "a response is still awaited."¹¹

65. In conclusion, the Respondent State avers that the Victim has not met the requirement of Article 56(5), given that there are sufficient and effective judicial remedies.
66. With regards to Article 56(6), the Respondent State submits that the Victim has not met this requirement on account of the fact that the Victim has not exhausted the available legal remedies. To buttress this, the State refers to the Commission's jurisprudence in **Majuru v. Zimbabwe** and **Desmond Nunugwo v. Federal Republic of Nigeria**.¹²
67. In conclusion, the Respondent State avers that the Victim has not met the admissibility requirements under Article 56(2), (5) and (6).

The Complainant's Additional Submissions on Admissibility

68. The Complainants reiterate their submissions on admissibility. The Complainants submits that the requirement under Article 56(2) has been met, given that the Victim travelled to Namibia where the alleged violations were committed, and thereafter travelled from Namibia upon release from detention.
69. Regarding Article 56(5), the Complainants aver that the sufficiency of local remedies relate to their ability to redress the Victim's complaints. The Complainants further aver that the State was given the opportunity to provide a remedy for the violations, but they were not sufficient.
70. Further, the Complainants infers from the reference of the new case that this new criminal case was opened in May 2020 (03/2020), with Mr. Garboeb appointed as the investigating officer. This was done by the State after the Complainants filed the complaint before the African Commission. The African Commission notified the parties of seizure by letter dated 13 November 2019. Upon seizure the Complainants filed submissions on Admissibility on 21 February 2020. It is the Complainants submission that some of the State's actions taken in the police investigation were taken after receiving notice of the complaint filed before the African Commission.

¹¹ Respondent State submissions, paragraph 37

¹² Respondent State submissions, paragraph 42, 44

71. With regards to Article 56(6), the Complainants reiterate that the application was submitted within a reasonable period of time. To the extent that there was a delay, the Complainants submit that there was a compelling reason for this.

The Commission's Analysis on Admissibility

72. 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, which apply conjunctively and cumulatively.¹³
73. In relation to the requirement in Article 56(1) of the African Charter, which provides that Communications should indicate their authors even if the latter requests anonymity, the Commission notes that the identity and the address of the Complainants has been provided, in addition to the name of the Victim being represented in the Communication. Accordingly, the Commission finds that the requirement under Article 56(1) of the African Charter is fulfilled.
74. Concerning Article 56(2), which provides that Communications shall be compatible with the Charter of the Organization of African Unity or with the present Charter, the Commission points out that this requirement implies compatibility *ratione personae*, *ratione materiae*, *ratione temporis* and *ratione loci* of the Communication with the Constitutive Act of the African Union and the African Charter.¹⁴
75. The Commission notes the Respondent State's contention that the sexual violence and bodily harm suffered at the hands of the alleged traffickers was committed in their private capacity, further submitting that the conduct of the perpetrators is in no way attributable to any failure of the State to honour its obligations under the Banjul Charter and the Maputo Protocol.
76. The Commission observes that the present Communication is brought against a State party to the African Charter, alleges *prima facie* violations of rights protected by the African Charter and is brought in respect of violations that occurred after the State's ratification of the African Charter. In addition, the substantive jurisdiction of the African Commission covers the provisions of the Maputo Protocol, given that Namibia has ratified this human rights instrument.¹⁵

¹³ See Communication 304/2005: FIDH & Others v Senegal (2006) ACHPR, paragraph 38.

¹⁴ On issues of compatibility and jurisdiction, see Communication 375/09: Priscilla Njeri Echaria v. Kenya (2011) ACHPR paras 31-39. See also, Communication 307/05: Chinhomo v. Zimbabwe (2007) ACHPR paras 40, 48; Communication 300/05: SERAC v. Nigeria (2008) ACHPR paras 37-38; Communication 266/03: Kevin Gunme v. Cameroon (2009) ACHPR paras 68-72.

¹⁵ Namibia ratified the Maputo Protocol on 11 August 2004.

77. The Commission notes that neither the arguments nor the prayers made by the Complainants are contrary to any of the principles contained in the African Charter or the Constitutive Act of the African Union. Consequently, the Commission considers that the requirement under Article 56(2) has been met.
78. With respect to Article 56(3) of the African Charter, which provides that Communications shall be considered if they are not written in disparaging or insulting language directed at the State concerned and its institutions, or to the Organization of African Unity, the Commission has not observed any insulting or disparaging language in the Communication, and accordingly finds that Article 56(3) of the Charter has been complied with.
79. In relation to Article 56(4) of the African Charter, the Commission notes the Complainants contention that the alleged violations, for which the Victim is seeking remedies, are within her personal knowledge. Furthermore, various documents were submitted in support of the Victim's allegations, such as: Annex AS2: a photocopy of Immigration stamp on entry in Namibia; Annex AS4: Email from the Victim to the Media in Namibia, 15 November 2017; Annex AS5: Photocopy of air ticket with the Victim's name, from Windhoek, Namibia to Nairobi, Kenya; among others.
80. Having reviewed the documents submitted in support of the Communication, the Commission has not found evidence that the information submitted is based exclusively on news disseminated through the media; consequently, the Commission finds that the requirement of Article 56(4) has been fulfilled.
81. Article 56(5) of the African Charter requires that Communications be submitted after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged. In this regard, the Commission notes that it is a generally accepted principle in international law that before an international body is approached, the applicant must exhaust all available legal domestic remedies.¹⁶

¹⁶ Chidi Anselm Odinkalu and Camilla Christensen, 'The African Commission on Human and Peoples' Rights: The Development of its Non-State Communication Procedures,' Volume 20 Human Rights Quarterly 1998, Pg.256. See also, Communications 54/91: Malawi African Association v. Mauritania; 61/91: Amnesty International v. Mauritania; 98/93: Ms. Sarr Diop, Union Interafricaine des Droits de l'Homme and RADDHO v. Mauritania; 164/97, 196/97 - Collectif des Veuves et Ayants-droit v. Mauritania; 210/98: Association Mauritanienne des Droits de l'Homme v. Mauritania

82. According to the Commission's established jurisprudence, local remedies are deemed to be exhausted only if they are available, effective and sufficient.¹⁷ A local remedy is considered available "if the petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success, and it is found sufficient if it is capable of redressing the complaint."¹⁸ The Commission has consistently held that remedies which fail to meet these standards do not need to be exhausted, and will consider the exhaustion requirement satisfied.¹⁹ Therefore, a remedy may exist in theory, however may not need to be exhausted if it is unavailable, inadequate, or ineffective.²⁰
83. In the present Communication, the Commission notes the Respondent State's submission that its judicial system is competent to identify victims of trafficking and prosecute the crime of 'trafficking in persons' as per the laws in the State, particularly the Combating of Trafficking in Persons Act (2018).
84. The Commission observes, however, that the Combating of Trafficking in Persons Act became operational on 14 November 2019, as indicated in paragraph 54, whereas the Complaint refers to alleged violations which occurred in 2017, and furthermore was submitted to the Commission on 28 April 2019 – that is, before the law became operational in Namibia.
85. On review of the Combating of Trafficking in Persons Act,²¹ the Commission notes that the law does not include any provision stipulating that it has retroactive effect, nor does the State submit that it does. In light of the fact that this law was enacted after the alleged violations were committed, it is clear that, in light of the fact that the law is not retroactive, the remedy under this law is not available to the Victim in the instant case.
86. However, the Commission also takes note of the State's submissions which indicate cases successfully tried in its courts, highlighted in paragraph 61, which demonstrate its capacity to deal with trafficking cases under the Prevention of Organized Crime Act (2004), the Combating of Rape Act (2000) and the Combating of Immoral Practices Act (1980). Therefore, conceivably local remedies exist in the Respondent State in relation to the violations which the Victim was subjected to. However, as noted from

¹⁷ Communication 147/95-149/96: Sir Dawda K. Jawara v. The Gambia (2000) ACHPR, paragraphs 30–31

¹⁸ Communication 379/09: Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v Sudan (2014) ACHPR, paragraph 49, See also Jawara v. Gambia paragraph 32

¹⁹ Communication 288/04: Gabriel Shumba v. Zimbabwe (2012) ACHPR, paragraph 49

²⁰ Id, paragraph 77

²¹ Combating of Trafficking in Persons Act (2018), "Article 2. Objects of Act:

The objects of this Act are to [...] (c) provide for - (i) the prosecution of persons who commit offences in terms of this Act;" accessed at <https://namiblii.org/akn/na/act/2018/1/eng@2018-04-06>

the Commission's jurisprudence, while remedy may exist in theory, it may not need to be exhausted if it is unavailable, inadequate, or ineffective. Accordingly, the Commission will proceed to determine whether the existing remedies in the Respondent State were available, adequate and sufficient, in relation to the Victim in the present Communication.

87. In the present Communication the Complainants contend that the Respondent State's insufficient investigation led to the failure to prosecute the Victim's traffickers, rendering the remedies unavailable and ineffective. The Complainants submit that, following escape from her captors on 18 October 2017, the Victim went to the Central Police Station, reported that she was a victim of human trafficking and provided the police with her laptop and phone. As detailed in paragraph 15 above, the Victim remained in detention from 20 October 2017 until her departure from the Respondent State, without any explanation from the police on the reasons for her detention, or information on an investigation being undertaken in her case. The Complainants further submit that on 14 June 2018, Ms. Van Wyk, of the LAC, was informed by Commissioner Agas that the police investigation in the case of human trafficking for purposes of sexual exploitation had been concluded and the case closed.
88. The Respondent State, on the other hand, avers that the Complainant never sought legal recourse in the Republic of Namibia, and submits that a criminal investigation into the matter commenced immediately and a criminal case opened, as indicated in paragraph 55.
89. In its jurisprudence, the Commission has, in a number of cases, determined that the available remedies were ineffective when authorities knew of a violation but failed to act;²² for example, when the State fails to investigate or prosecute those responsible for alleged violations despite having notice of the allegations, the Commission will consider the remedies ineffective, although available.²³
90. This is further elaborated in **Zimbabwe Human Rights NGO Forum v. Zimbabwe**, in which the Commission held: "The responsibility of maintaining law and order in any country lies with the State, specifically with the police force of that State. As such, it is the duty of the State to ensure through its police force that where there is a

²² See Communications 54/91, 61/91, 98/93, 164/97 & 196/97, 210/98 *Malawi African Association, Amnesty International, Ms Sarr Diop, UIADH and RADDHO, Collectif des veuves et ayants droit, AMDH v. Mauritania*; Communications 48/90, 50/91, 52/91, 89/93, *Amnesty International, Comité Loosli Bachelard, Lawyers Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v. Sudan*.

²³ Communication 379/09: *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v. Sudan* (2014) ACHPR, paragraph 56. See also Communication 386/10: *Dr. Farouk Mohamed Ibrahim (represented by REDRESS) v. Sudan*; Communication 275/03: *Article 19 v. Eritrea*

breakdown of law and order, the perpetrators are arrested and brought before the domestic courts of that country. Therefore, any criminal processes that flow from this action, including undertaking investigations to make the case for the prosecution, are the responsibility of the State concerned and the State cannot abdicate that duty. To expect victims of violations to undertake private prosecutions where the State has not instituted criminal action against perpetrators of crimes, or even follow up with the Attorney General what course of action has been taken by the State, as the Respondent State seems to suggest in this matter, would be tantamount to the State relinquishing its duty to the very citizens it is supposed to protect.”²⁴

91. Similarly, in **Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v. Sudan**, the Commission held: “[I]n these circumstances, the Commission has noted that it is not the victim’s task to exhaust domestic remedies, but rather the State’s obligation to investigate the violations alleged and to prosecute the persons involved on its own initiative and in accordance with international trial standards.”²⁵
92. In the present Communication, as at the date that the complaint was submitted to the Commission in April 2019, the Victim had been informed that the police investigation on the allegations she reported had closed – this information was relayed to the Victim’s legal representative by Commissioner Agas. By closing the investigation on the Victim’s case, there was no other judicial remedy available to the Victim to take the criminal case further in Namibia.
93. Furthermore, the Commission takes note of the Complainants submissions which indicate that the Victim, who reported to the Police that she was subjected to human trafficking for purposes of sexual exploitation, was allegedly accused of providing false information and unlawfully detained in the police station, for a prolonged period of time, with no charges levelled against her. It is further reported that the Victim was interrogated by the Police and threatened with criminal sanctions. The condition provided by the Respondent State for the Victim’s release was that she demonstrates she was capable of immediately departing from the country upon her release.
94. The Commission also takes note of the Respondent State’s contention regarding the impediments to the finalization of the investigations, referencing **Chacha v. Tanzania** in which the African Court held that local remedies were not considered prolonged for a case of two years and two months. However, the Commission notes a substantive difference with the present Communication – the instant case concerning the Victim

²⁴ Communication 245/02/: Zimbabwe Human Rights NGO Forum v. Zimbabwe (2006) ACHPR, paragraph 70

²⁵ Supra note 24, paragraph 62. See also Communication 275/03: Article 19 v. Eritrea, (2007) ACHPR, paragraph 72

has not progressed beyond investigation to a case before the local courts, whereas in **Chacha v. Tanzania** the issue of undue prolongation of domestic remedies was in reference to the duration of time that applications were pending in the High Court.²⁶

95. Based on the above, the Commission concludes that the State's failure to investigate the alleged violations rendered the existing local remedies ineffective, given that they did not offer any reasonable prospect of success without the necessary investigations. According to the established case law of the Commission, a remedy that has no prospect of success does not constitute an effective remedy,²⁷ thereby meeting the exception to the requirement of exhaustion of local remedies. Accordingly, the Commission finds that the requirement under Article 56(5) has been met.
96. Article 56(6) of the African Charter provides that the Commission shall consider Communications which "are submitted within a reasonable period from the time domestic remedies are exhausted, or from the date the Commission is seized of the matter."
97. In its jurisprudence, the Commission has specified that it will focus on when domestic remedies were exhausted or when the Complainant realized that the domestic remedies were not available, sufficient, or effective.²⁸ Additionally, based on its practice the Commission determines whether a good and compelling reason has been demonstrated to illustrate why the complaint was submitted for consideration within a reasonable amount of time, to ensure fairness and justice.²⁹
98. In the present Communication, the submissions indicate that the Victim and Complainants were informed that the police had closed the investigation, thereby rendering local remedies ineffective, by 15 June 2018 as detailed in paragraph 46; however the complaint was submitted to the Commission on 28 April 2019. As elaborated in paragraphs 47 and 48, the Complainants indicated that the Victim's physical and mental state necessitated an assessment before legal proceedings could be instituted at the Commission. The complaint was subsequently submitted to the Commission within six (6) months of receipt of this assessment.

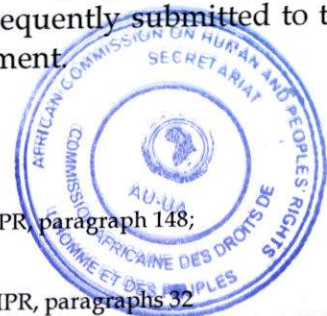
²⁶ Application 003/2012: *Chacha v. The United Republic of Tanzania* (2014) AFCHPR, paragraph 148;

<https://africanlii.org/afu/judgment/african-court/2014/48>

²⁷ Communication 147/95-149/96: *Sir Dawda K. Jawara v. The Gambia* (2000) ACHPR, paragraphs 32

²⁸ Communication 386/10: *Dr. Farouk Mohamed Ibrahim (represented by REDRESS) v. Sudan* (2013) ACHPR, paragraph 71

²⁹ *Id.*, paragraph 75; *See also* Communication 308/05: *Michael Majuru v. Zimbabwe*, paragraph 109



99. The Respondent State, however, submits that this requirement has not been met because the Victim has not exhausted the available legal remedies.
100. In this regard, the Commission observes that in **Darfur Relief and Documentation Centre v. Sudan**, which was submitted to the Commission 2 years and 5 months after exhausting local remedies, the Commission reasoned that "there is no sufficient reason given as to why the Communication could not be submitted within a reasonable period, and therefore declared the Communication inadmissible."³⁰
101. In assessing compliance with Article 56(6), the Commission notes from the Complainants submissions that the Forensic Psychological Health Assessment³¹ is dated 12 September 2018, and was transmitted to the Complainants on 31 October 2018.³² The complaint was submitted to Commission approximately six months thereafter, on 28 April 2019.
102. In light of the circumstances of the present Communication, the Commission finds that the need for a psychological evaluation of the Victim, to determine whether she was capable of engaging in the complaint before the Commission, presents a compelling reason for not submitting the complaint immediately after it was determined that local remedies were ineffective and could not be exhausted in the Respondent State. Based on this, the Commission finds that the requirement under Article 56(6) has been met.
103. Article 56(7) of the African Charter stipulates that Communications received by the Commission shall be considered if they "do not deal with cases which have been settled by those 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."
104. In the present Communication, the Complainants submit that the complaint has not been settled by a different competent body, whereas the State indicates that it does not take issue with fulfilment of the admissibility requirements of Article 56 (7).
105. The Commission does not find evidence which indicates that the issues and claims have been brought before, or settled, by any other international forum, and accordingly finds that Article 56(7) of the African Charter has been satisfied.

³⁰ Communication 310/05: Darfur Relief and Documentation Centre v. Sudan (2009) ACHPR, paragraph 76

³¹ Annex AS12: Forensic Psychological Health Assessment

³² Annex AS13: Email from Caroline Kituku to Matilda Lasseko, Initiative for Strategic Litigation in Africa (ISLA), Reference: Psychological Report, dated 31 October 2018

Decision of the African Commission on Admissibility

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

- (i) Declares this Communication admissible in accordance with Article 56 of the African Charter;
- (ii) Adjourns consideration of the Communication for the parties to make their submissions on the Merits in accordance with Rule 107(2) of its 2010 Rules of Procedure; and
- (iii) Requests the Complainants to forward submissions on the Merits within sixty (60) days of notification pursuant to Rule 108(1) of the 2010 Rules of Procedure.

MERITS

Summary of the Parties' Submissions

Complainant's submission on the merits

107. The Complainants make their submissions in three arguments which are:

- (i) Whether the Respondent State violated Articles 5 of the Charter and Article 4(2)g of the Maputo Protocol for failing to take appropriate measures to prevent, condemn and respond to trafficking of the victim by providing redress and prosecuting the perpetrators?
- (ii) Whether the Respondent State violated Articles 2 and 18 (3) of the Charter and Article 2 of the Maputo Protocol by discriminating against the victim and;
- (iii) Whether the victim is entitled to remedies from the Respondent State?

108. The Complainants preface their submissions with an over-arching argument to the effect that Article 1 of the Charter imposes on the Respondent State, the duty to protect human rights which has two positive obligations, the first, to prevent others from violating human rights and the second, to investigate and prosecute those violations. Citing the *SERAC*³³ decision, they submit that "governments have a duty to protect their citizens, not only through appropriate legislation and effective enforcement, but also by protecting them from damaging

³³ Comm. No. 155/96 (2001) *The Social and Economic Rights Action Centre (SERAC) v Nigeria*, para 57

acts that may be perpetrated by private parties. This duty calls for positive action on the part of governments in fulfilling their obligations under the human rights instruments." Relying on the European Court's findings in *Osman v the United Kingdom*³⁴, they further aver that in order to determine whether the Respondent State has satisfied its positive obligations the Commission must use the "Due diligence" test and enquire "a) the state 'knew or ought to have known' that b) there was a real and immediate risk to rights, and c) the state failed to take measures of prevention reasonably within its power."

109. In their first substantive submission, the complainants explore whether the Respondent State violated Articles 5 of the Charter and Article 4(2)(g) of the Maputo Protocol for failing to take appropriate measures to prevent, condemn and respond to trafficking of the victim by providing redress and prosecuting the perpetrators. They submit that the Respondent State violated Article 5 of the Charter, which guarantees the right to respect for the dignity and prohibits cruel, inhuman and degrading treatment. The Complainants also refer to Articles 16(1) and (2) of the UN Convention against Torture which enjoin states to prevent cruel, inhuman and degrading treatment. On the determination of what amounts to "cruel, inhuman and degrading treatment, the Complainants rely on *International Pen and Others v Nigeria* in which the Commission stated that "Article 5 of the African Charter prohibits not only torture, but also cruel, inhuman or degrading treatment. This includes not only actions which cause serious physical or psychological suffering, but which humiliate the individual or force him or her to act against his will or conscience."³⁵For the test, they rely on the jurisprudence of the European Court which has decided that to qualify an act as 'ill-treatment,' the act must "attain a minimum level of severity. The assessment of this minimum ... depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc".³⁶

110. The Complainants proffer that the Respondent State has a due diligence obligation to respond to violations of Article 5 of the Charter. They further state that the Maputo Protocol incorporates due diligence in Articles 2, 4, 25 and 26 calling on States to prevent, punish and eradicate violence against women and girls, whether occurring in private or public. In addition to the Maputo Protocol and Article 5, the Complainants make reference to Declaration on the Elimination of Violence against Women (DEVAW) and the decisions of the CEDAW

³⁴ Appl. 23452/94, Judgment of 28 October 1998, at para.116

³⁵ Communication NO. 137/94, 139/94, 154/96, 161/97 [1998] ACHPR 1; (31 October 1998)

³⁶ Ireland v UK (1978) ECHR (Series A) para 162.

Committee in *Hakan Goekce et al. v. Austria*, which affirmed due diligence when considering complaints on the failure of the State to effectively investigate and prosecute cases on violence against women.³⁷ Citing the decisions of the Commission in *Zimbabwe Human Rights Forum v Zimbabwe*³⁸ and *Egyptian Initiative for Personal Rights and Interights v Egypt*³⁹, the Complainants contend that the Respondent State is responsible for the violations of Article 5 of the Charter and Article 4(2)(g) of the Maputo Protocol perpetrated against the victim by private actors because it failed to do its due diligence and prevent, investigate, prosecute, and punish the acts of violence.

111. The Complainants allege that the Victim was raped; forced into sexual acts that involved physical bondage and the exercise of dominance;⁴⁰ had her hair pulled; was beaten, kicked, slapped and punched; forced to get into physical fight with another young woman, while the rapist observed; her breast was burnt with cigarettes and forcibly injected and drugged with unknown substances, as a result she would lose consciousness for hours. The Complainants argue that treatment against the victim amounts to physical and emotional trauma and the victim was subjected to cruel, inhuman and degrading treatment.
112. The Complainants aver that the Respondent State became aware that the victim was a victim of trafficking for purposes of sexual exploitation, when she first reported at the Central Police Station on 19 October 2017, following the victim's escape from her captors on 18 October 2017. They further argue that according to the affidavit of Joshua Ndidalewa (Annex 7), Commissioner Agas (Annex 5) and Mr. Dumeni (Annex 4), the police interrogated her and threatened her with criminal sanctions, and her request to be sent to the Kenyan High Commission was refused. It is also submitted that the laptop and cellphone that the victim handed over to the police as evidence was surrendered to one of the traffickers, whom they thought was her father. The aforementioned cellphone was submitted to the victim's forensic investigator, who in six days uncovered evidence corroborating her human trafficking allegations, whereas the police in Namibia had both the phone and the aforementioned laptop, but could not derive any evidence. The Complainant avers that the Victim's forensic investigator also found evidence of spyware on the victim's phone, evidence which once again had not been discovered by the Police in the Respondent State. The Complainants contend that by the 14th of June in 2018, the police in the Respondent State had

³⁷ Communications No. 5/2005; Banu Akbak et al. v. Austria, No. 6/2005

³⁸ Communication No. 245/02 (2006).

³⁹ Communication No. 323/2006

⁴⁰ "she would be suspended from the ceiling, tied to chairs"

closed the case for lack of evidence. It is the view of the Complainant that the police in the Respondent State did not conduct as effective investigation, because they failed to find the forensic evidence in the devices which were availed to them; surrendered the evidence to one of the traffickers in error; threatened her with criminal sanctions; unlawfully detained the victim for four weeks; and prematurely closed the investigation. The Complainants submit that the Respondent State had not opened a docket by 30 January 2020.

113. The Complainants also aver that there is further evidence of ineffective investigation by the Respondent State in that the Case file was only transmitted to the Prosecutor General by the Police in 2020, after this Communication had been submitted to the Commission. Furthermore, the Complainant submits that the Prosecutor General of Namibia concluded that there were various gaps in the investigation carried out by the Police and that there was a *prima facie* case of human trafficking to be prosecuted. According to the Complainant, the Prosecutor General wrote to the Inspector of Police on the 14th of April 2020, giving guidance on investigations that needed to be carried out on the case. The Complainants also take issue with the fact that the victim was booked as an illegal immigrant and placed in a pre-deportation facility at Klein Windhoek. The Complainants aver that this determination was unjustified, given all the evidence demonstrating that she was indeed a victim of Trafficking In Persons (T.I.P).

114. The Complainants also submit to the Commission that the Maputo Protocol also places a positive obligation on States to eliminate the root causes of violence, and to provide appropriate remedies to women and girls whose rights have been violated. They contend that the Maputo Protocol in Article 4(2)(C) places a positive obligation on States to study the causes of violence and promote awareness and other measures to eliminate these causes.

115. The Complainants further advance that in addition to the inhuman, cruel and degrading treatment, the victim was also a victim of human trafficking in contravention of Article 4(2)(G) of the Maputo Protocol. They refer to the *Palermo Protocol*⁴¹ which, they argue provides the internationally recognised definition of human trafficking. The Palermo Protocol defines human trafficking as “the recruitment, transportation, transfer, harboring, or receipt of persons by improper means (such as force, abduction, fraud, or coercion) for an improper purpose

⁴¹ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime; General Assembly resolution 55/25 of 15 November 2000.

including forced labor or sexual exploitation.”⁴² The Complainants also refer to Article 5 and 7 of the United Nations High Commissioner For Human Rights Principles and Guidelines on Human Rights and Trafficking⁴³; CEDAW’s General Recommendation No 38 of 2020; Article 6(5), 6(6), 6(8), 9(2) of the Palermo Protocol; to elaborate the importance of an adequate Law enforcement in response to human trafficking.

116. In their second argument, the Complainants aver that the Respondent State has violated Articles 2 and 18(3) of the Charter and Article 2 of the Maputo Protocol by discriminating against the victim. They contend that the victim was subjected to human trafficking for sexual exploitation and that constitutes discrimination. The Complainants refer to CEDAW General Comment 35 of 2017 which interprets the non-discrimination clause to be a due diligence obligation in which States should be held responsible should they fail to prevent, investigate, punish and provide reparation in cases of Gender Based Violence (GBV).
117. The Complainants also request the Commission to “substantive equality approach to determine multiple-discrimination on the basis of sex, gender and age”. Here, the Complainants submit that the Commission should abandon the “Comparator test” for discrimination and instead apply a test that is based on the victim’s disadvantage, recognizing the systematic way in which women are subjected to sexual violence.
118. In their final submission, the Complainants seek a declaration from the Commission that the Respondent State violated Articles 2; 5 and 18(3) of the Charter and Articles 2; 4(2)(g) of the Maputo Protocol. The Complainants further appeal for the victim to be awarded \$20 000 in compensation and \$50 000 to cover medical costs.

The Respondent State’s submissions on the merits

119. The Respondent State submits that at all relevant times, they complied with Article 1 of the Charter and all its due diligence obligations. They submit that the due diligence test the Commission ought to use is to assess “whether the measure of diligence, responsibility or prudence exercised by a state was reasonable” citing the jurisprudence of the ECOWAS Court of Justice⁴⁴ Relying further on the jurisprudence of the ECOWAS Court of Justice, they contend that due diligence

⁴² Article 3(a)

⁴³ /2002/68/Add.1 (2002).

⁴⁴ IHRDA & WARDC (on behalf of Mary Sunday) v The Federal Republic of Nigeria 2018

test is one of means and not outcome⁴⁵ and one that considers the resources of the State to be taken into account.⁴⁶ The Respondent State further submits that when assessing compliance with due diligence, the Commission ought to give consideration to “the difficulties involved in policing modern societies”⁴⁷ and that “the existence of a violation does not in itself prove the failure to take preventative measures”.⁴⁸

120. The Respondent States further contend that they complied with Article 1 of the Charter because they promulgated the following Legislative measures:

121. The Combating of Immoral Practices Act, 1980 (Act No 21 of 1980); Domestic Violence Act, 2003 (4 of 200-3); Prevention of Organized Crime Act, 2004 (Act No. 29 of 2004); Affirmative Action (Employment) Act, 1998 (Act 4 of 1998); Labour Act, 2007 (Act 11 of 2007); Married Persons Equality Act, 1996 (Act 1 of 1996); Abortion and sterilization Act, 1975 (Act 2 of 1975); Combating of Rape Act, 2000 (Act 8 of 2000); Social Security Act, 1994 (34 of 1994); Criminal Procedure Amendment Act, 1977 (Act 51 of 1977); Police Act, 1990 (Act 19 of 1990); International Co-operation in Criminal Matters Act, 2000 (Act 9 of 2000) and Combating of Trafficking in Persons Act, 2018 (Act No. 1 of 2018).

122. Regarding allegations of violations of Article 5 of the Charter and Article 4(2)(g) of the Maputo Protocol, the Respondent State submits that they have promulgated laws and various educational and awareness campaigns on T.I.P, however the contraventions of these laws are inevitable. It is further contended that since the Respondent State had no knowledge of the sexual violence and bodily harm meted upon the complainant, those violations cannot be attributed to them. The Respondent State argues that after learning of the allegations of violations, they immediately instituted an investigation and also filed a high-priority request with INTERPOL Kenya. It is further averred by the Respondent State that at all times, the Complainant was given timeous, reasonable and proportionate assistance using the National Standard Operating Procedures for the Multi-Disciplinary Management of Gender-Based Violence and Violence against Children in Namibia.

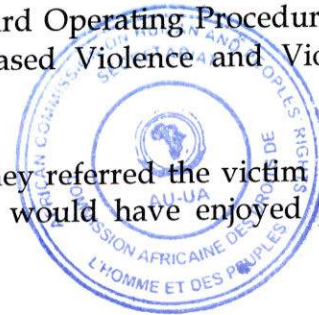
123. The Respondent State further submit that they referred the victim to the Friendly Haven Shelter, where, they argued, she would have enjoyed police

⁴⁵ Hadijatou Mani Koraou v The Republic of Niger 2008

⁴⁶ Dorothy Njemanze and 3 others v Federal Republic of Nigeria case 2017

⁴⁷ Osman v United Kingdom ECHR 1998

⁴⁸ Velasquez Rodrigues v Honduras IACHR 1988



protection and psycho-social support. It is further submitted that the victim was placed in protective police custody from 14 October 2017 to 23 October 2017, because the Respondent State was of the view that she was a danger to herself and those at the Friendly Haven Shelter, and out of respect of her apprehension to being at the Shelter. The Respondent State further contends that the victim was never refused access or assistance of the Kenyan High Commission and their evidence for this is the fact that she had several visits and was able to make practical arrangements for her repatriation. Regarding the victim's need for medical attention, the Respondent State argues that the victim never informed the police of her injuries, and further that when she went to the police to file a report, the victim was wearing a "sleeveless black top" and "no scars or injury were observed" by one Mr Ndidalelwa, whom the State claims to have assisted her.

124. The Respondent States postulates that the criminal investigation was instituted on the 1st of October 2017 and a criminal case (reference number 252/03/2020) was opened and is still ongoing. They further enlist, the COVID-19 pandemic and unresponsiveness from the Kenyan Interpol as explanations for delays. The Respondent State also submits that in addition to the ongoing criminal investigations, the victim could have sought civil proceedings as well as private prosecution. Additionally, the Respondent State argues that the Namibian police force and judiciary are trained on T.I.P and the courts have had cases on T.I.P prosecuted both at High and Supreme Court. Furthermore, the Respondent State contends that the investigation led to the identification of the perpetrator as well as a submission to the office of the Prosecutor General for further guidance.

125. The Respondent State takes issue with the Complainant's evidence, they argue that the Complainant's medical report did not indicate the doctor's qualifications and that the Complainant had only one compelling witness statement and nothing else to corroborate her accounts of events. They also allege that the Complainant's allegations are baseless and unsubstantiated and should be dismissed on that basis, citing as authority, the decisions of the Commission in *Farouk Mohamed Ibrahim v Sudan*;⁴⁹ *Givemore Chari (represented by Gabriel Shumba) v Republic of Zimbabwe*;⁵⁰ and *David Mendes (represented by the Centre for Human Rights) v Angola*.⁵¹ The Respondent State takes the view that the Complainant manufactured all her claims and was illegally in the country, ran into financial problems and devised the story of her trafficking, in order to benefit

⁴⁹ Communication 386/10

⁵⁰ Communication 351/2007

⁵¹ Communication 413/12

from funded repatriation. The Respondent States opines that given the Complaint's experience working in human rights discipline, she had the information requisite to devise her story at her disposal. The Respondent State prays for the Commission to find that no violations of the Charter or Maputo Protocol have occurred; that the Respondent State has at all times exercised its due diligence obligations; that the Complainant has failed to adduce the requisite evidence; that the Complainant has failed to justify her claim for reparations and alternatively that the Commission defer its findings on reparation per Rule 121 and finally that she pursues civil claims in the Namibian Courts.

THE COMMISSION'S FINDINGS ON ALLEGED VIOLATIONS OF ARTICLE 5 OF THE CHARTER AND 4(2)(G) OF THE MAPUTO PROTOCOL

The Commission's Analysis on the Merits

126. Having considered the submissions of the Parties on the merits, the Commission will analyse the arguments and evidence furnished by them.

Alleged violation of Article 5 of the African Charter and Article 4(2)(g) of The Maputo Protocol

127. The Complainant alleges violations of Articles 5 of the African Charter and 4(2)(g) of the Maputo Protocol. At the core of their Complaint is the alleged violation of the victim's right to respect of her inherent human dignity and freedom from cruel, inhuman and degrading treatment protected under Article 5 of the African Charter. Both Articles concern the prohibition of "All forms of exploitation, cruel, inhuman or degrading punishment and treatment", however Article 4 2(G) of the Maputo Protocol protections are framed from a gendered perspective, focusing on T.I.P as a particular form of cruel, inhuman or degrading treatment. In view of this, the Commission will consider the allegations of Article 5 of the Charter, jointly and/or as read with Article 4(2)(g) of the Maputo Protocol.

128. Article 5 of the African Charter provides that:

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.

129. Article 4(2)(g) of the Maputo Protocol provides as follows:

2. States parties shall take appropriate and effective measures to:

(g) prevent and condemn trafficking in women, prosecute the perpetrators of such trafficking and protect those women most at risk;

130. The Commission has to determine whether the Respondent State has violated Article 5 of the Charter and Article 4(2)(g) of the Maputo Protocol by failing to exercise its due diligence obligations as alleged by the Complainants. The Complainant argues that the Respondent State failed to exercise its due diligence obligations by not investigating, prosecuting or offering remedy for the victim.

131. The question before the Commission is “did the Respondent State perform its due diligence obligation by investigating, prosecuting and punishing the perpetrators of her alleged human trafficking?”. It is pertinent to revisit the foundations of the due diligence obligation. The Commission recalls that the due diligence obligation derives from Article 1 of the Charter which reads:

The member states of the Organization of African Unity parties to the present Charter shall recognise the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them.

132. The due diligence obligation arises from the duty of states to adopt legislative or other measures to give effect to the rights recognised in the Charter. As the Commission has previously noted in the matter between **Zimbabwe Human Rights NGO Forum v Zimbabwe**,

Human rights standards do not contain merely limitations on state's authority or organs of state. They also impose positive obligations on states to prevent and sanction private violations of human rights. Indeed, human rights law imposes obligations on states to protect citizens or individuals under their jurisdiction from the harmful acts of others.⁵²

⁵² (2005) AHRLR 128 (ACHPR 2005), para 143

133. The Commission also held in **Social and Economic Rights Action Centre (SERAC) and another v Nigeria** that

Governments have a duty to protect their citizens, not only through appropriate legislation and effective enforcement, but also by protecting them from damaging acts that may be perpetrated by private parties (see [Commission Nationale des Droits de l'Homme et des Libertés v Chad (2000) AHRLR 66 (ACHPR 1995)]). This duty calls for positive action on the part of governments in fulfilling their obligation under human rights instruments.⁵³

134. Where Governments fail to perform their positive obligation to protect people from the violations committed by private individuals, they become personally responsible for those violations. The Commission has consistently reaffirmed this principle, holding the following in the aforementioned **Zimbabwe NGO Forum** case:

Thus, an act by a private individual and therefore not directly imputable to a state can generate responsibility of the state, not because of the act itself, but because of the lack of due diligence to prevent the violation or for not taking the necessary steps to provide the victims with reparation.⁵⁴

135. In this decision the Commission drew inspiration from the Inter-American Court of Human Rights' landmark judgement in the case of **Velásquez Rodríguez v Honduras** which concluded that "when a state allows private persons or groups to act freely and with impunity to the detriment of the rights recognised, it would be in clear violation of its obligations to protect the human rights of its citizens."⁵⁵ Similarly, this obligation of the state is further emphasised in the practice of the European Court of Human Rights (ECtHR), in **X and Y v Netherlands**.⁵⁶ In that case, the Court pronounced that there was an obligation on authorities to take steps to make sure that the enjoyment of the rights is not interfered with by any other private person."

136. It must be noted that, for the Respondent State to have fulfilled its due diligence obligation to protect people from the damaging acts of private parties, it must provide access to justice for redress for those violations. This entails investigating, prosecuting, punishing the perpetrators and offering remedy for the

⁵³ Communication 155/96 ACHPR (2001) SERAC decision, Para 57

⁵⁴ Zimbabwe Human Rights NGO Forum v Zimbabwe, para 143

⁵⁵ Judgment of July 29, 1988 (Merits)

⁵⁶ (Application no. 8978/80)

victim. Having established the foundations, the Commission now turns to consider whether the Respondent State fulfilled this duty.

137. The Complainant submit that the Respondent State failed to conduct an effective investigation into allegations of conduct that amounted to cruel, inhumane and degrading treatment.⁵⁷ The Complainants allege that the victim was sexually assaulted, burnt with cigarettes on her breasts, forced to commit sexual acts including bondage and dominance; had her hair pulled; was physically assaulted; forced to fight another woman while her rapists watched and forced to consume drugs and lose consciousness for hours.⁵⁸ They submit that this treatment against the victim was physically and emotionally traumatic and amounts to cruel, inhuman and degrading treatment as prohibited in Article 5 of the Charter.⁵⁹ Moreover, and more specifically, the Complainants aver that the victim was subjected to T.I.P and the Respondent State did not exercise its duty to prevent, investigate, prosecute and punish the perpetrators.⁶⁰

138. The core of the Complainant's case is the failure of the Respondent State to conduct an effective investigation into the case of cruel, inhumane and degrading treatment, as well as T.I.P. The Complainant's indictment of the Respondent State's investigation is premised on several issues. Firstly, the Complainants allege that when the victim reported that she was a victim of T.I.P, the police interrogated and threatened her with criminal sanctions. Secondly, despite noting that the victim was a Kenyan citizen, the police refused to take her to the Kenyan High Commission as she had requested. Thirdly, the Complainants raise issue with the fact that the laptop and cell phone that the victim had handed in as evidence of her T.I.P was surrendered to a person, she alleged to be one of the traffickers under the belief that he was the victim's father. The fifth aspect the Complainants condemn is the premature closure of the investigation by the 14th of June 2018, on the basis of lack of evidence. The sixth issue is that the victim was booked as an illegal immigrant and detained at a pre-deportation facility. Finally, the Complainants submit that the letter from the Prosecutor General giving confirmation to the Police that there were gaps in the investigation, and a *prima facie* case of T.I.P is further evidence of an ineffective investigation.

⁵⁷ Complainant's Submissions, para 17

⁵⁸ Complainant's Submissions, para 8 -11;

⁵⁹ Complainant's Submissions, para 31-70

⁶⁰ Complainant's Submissions, para 71-88

139. In addition to the investigation, the Complainants condemn the failure of the Respondent State to punish the perpetrators of the alleged violations. The Complainants allege that the police only submitted the case file to the Prosecutor General in 2020, after this Complaint had been instituted before the Commission.

140. Before determining whether the Respondent State performed its due diligence obligation, the Commission ought to consider whether the Victim's treatment falls within the scope of Article 5 of the Charter and 4(2)(g) of the Maputo Protocol.

141. The Commission notes and associates with the understanding of cruel, inhumane and degrading treatment submitted by the Complainants in their arguments on the merits. The Commission has previously held in a number of decisions that:

*"Article 5 of the Charter prohibits not only cruel but also inhuman and degrading treatment. This includes not only actions which cause serious physical or psychological suffering, but which humiliate or force the individual against his will or conscience."*⁶¹

*"While ultimately whether an act constitutes inhuman degrading treatment or punishment depends on the circumstances of the case. The African Commission has stated that the prohibition of torture, cruel, inhuman, or degrading treatment or punishment is to be interpreted as widely as possible to encompass the widest possible array of physical and mental abuses. (See communication 225/98 [Huri-Laws v Nigeria (2000) AHRLR 273 (ACHPR 2000)])"*⁶²

*"It is worth noting that the term 'cruel, inhuman or degrading treatment or punishment' is to be interpreted so as to extend to the widest possible protection against abuses, whether physical or mental (see UN Body of Principles)."*⁶³

142. The Commission notes that the victim's allegations fall within the scope of treatment that is cruel, inhumane and degrading. These include physical, sexual and emotional violence. This conclusion obtains authority from the Commission's decision in **Equality Now and Ethiopian Women Lawyers Association (EWLA)**

⁶¹ Doeblbler v Sudan (2003) AHRLR 153 (ACHPR 2003), para 36

⁶² Doeblbler, para 37

⁶³ Huri-Laws v Nigeria (2000) AHRLR 273 (ACHPR 2000)

v. **Federal Republic of Ethiopia**⁶⁴, *Inter alia*, the Commission found that Article 5 of the Charter is violated where “..the victim is treated as a mere object of sexual gratification against his or her will and conscience... the personal volition of the victim is gravely subverted and disregarded, and the victim is reduced from being a human being who has innate worth, value, significance and personal volition, to a mere object by which the perpetrator can meet his or her sadistic sexual urges.”⁶⁵ Similarly, in the same Communication the Commission found that keeping the victim in captivity against her will violates her right to dignity.⁶⁶

143. The Commission also recalls paragraph 57 of **General Comment No. 4 on the African Charter on Human and Peoples’ Rights on the Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5)**⁶⁷ which provides that “Acts of sexual and gender-based violence, or the failure by States to prevent and respond to such acts, may amount to torture and other ill-treatment in violation of Article 5 of the African Charter.” Moreover, General Comment No. 4 explicitly includes “trafficking for sexual exploitation” as other ill-treatment in violation of Article 5.⁶⁸ Similarly, the allegation of the victim’s T.I.P falls within the scope of Article 4(2)(g) of the Maputo Protocol.

144. Having established that the alleged treatment of the victim falls within the scope of and amounts to cruel, inhumane and degrading treatment, the Commission now turns to consider the responsibility of the Respondent State, paying particular attention to the Complainants’ grounds for disputing due diligence.

The investigation

145. The Commission now turns to consider whether the Respondent State conducted an effective investigation into the allegations made by the victim. Before delving into the specifics, the Commission recalls the relevant legal standards in making this determination, which begs the question of what amounts to an effective investigation.

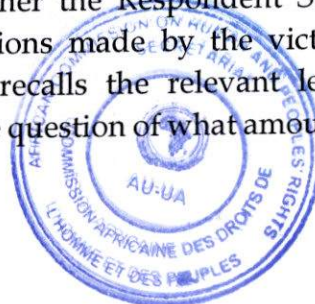
⁶⁴ Communication 341/2007, para 120

⁶⁵ Equality Now and EWLA v Ethiopia (2007), para 120

⁶⁶ Equality Now and EWLA v Ethiopia (2007), para 120

⁶⁷ Adopted at the 21st Extra-Ordinary Session of the African Commission on Human and Peoples’ Rights, held from 23 February to 4 March 2017 in Banjul, The Gambia

⁶⁸ Para 58



146. The Commission in its own jurisprudence and soft law has indicated what constitutes an effective investigation. The Commission's Guidelines on combating Sexual Violence and its consequences in Africa, detail the requirements for the exercise of an effective investigation in cases involving sexual violence.⁶⁹ With regard to the investigation of cases of cruel, inhuman and degrading treatment General Comment No. 4 is instructive. It provides that:

*"25. State Parties shall carry out prompt, impartial, independent and thorough investigations when there are reasonable grounds to believe that torture and other ill-treatment has been committed, prosecute those responsible, and provide adequate, effective and comprehensive reparation to victims. Investigations should be in line with the standards enshrined in the UN Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Istanbul Protocol)."*⁷⁰

147. International Human rights law is also instructive in what constitutes an effective investigation into cases of cruel, inhuman and degrading treatment. **The United Nations Principles on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment** (UN Principles on investigation of torture) provide that

"2. States shall ensure that complaints and reports of torture or ill-treatment are promptly and effectively investigated. Even in the absence of an express complaint, an investigation shall be undertaken if there are other indications that torture or ill-treatment might have occurred. The investigators, who shall be independent of the suspected perpetrators and the agency they serve, shall be competent and impartial. They shall have access to, or be empowered to commission investigations by, impartial medical or other experts. The methods used to carry out such investigations shall meet the highest professional standards and the findings shall be made public.

3. (a) The investigative authority shall have the power and obligation to obtain all the information necessary to the inquiry. (1) The persons conducting the investigation shall have at their disposal all the necessary budgetary and technical resources for effective investigation. They shall also have the authority to oblige all those acting in an official capacity allegedly involved in torture or ill-treatment to

⁶⁹ (2017) Part 4 (<https://achpr.au.int/en/node/848>)

⁷⁰ Paragraph 25 page 8

appear and testify. The same shall apply to any witness. To this end, the investigative authority shall be entitled to issue summonses to witnesses, including any officials allegedly involved, and to demand the production of evidence."

148. The Commission also takes account of the jurisprudence of the European Court on Human Rights in determining what amounts to an effective investigation, specifically for the purposes of pronouncing on whether or not the State conducted its due diligence. Endorsing the reasoning in **Mikheyev v. Russia**, the European Court decided in **Pihoni v Albania** that:

*"... lack of conclusions arising from any given investigation does not, by itself, mean that it was ineffective. Not every investigation should necessarily be successful or come to a conclusion which coincides with the claimant's account of events; however, it should in principle be capable of leading to the establishment of the facts of the case and, if the allegations prove to be true, to the identification and punishment of those responsible."*⁷¹

149. In the present case, there is demonstrated evidence in the record as well as in the submissions of both parties that an investigation by the police of the Respondent State was indeed initiated and undertaken, but the effectiveness of said investigation is under contestation. The Respondent State initiated the investigation on the 12th of October 2017 when the victim appeared at the Police and was processed by Officer Dumeni.⁷² The victim was on the next day (13 October 2017) taken to the Gender-Based Division by one Officer Van Wyk and placed in Safe Haven Shelter, where she met a psychologist. On that same day, it is alleged that the victim ran away from the Shelter and made her way to the Kenyan High Commission, where she was then arrested and taken to Klein detention facility. The Commission now turns to analyse the issues raised by the Complainant against the investigation conducted by the Respondent State

Speed of investigation

150. The Commission notes that the Respondent State's police service did not handle this case with the urgency it required. It is noted that the statement of the victim was only taken on the 17th of October, despite reporting to the Police on the 12th and being brought back to custody on the 13th after she ran away from the

⁷¹ *Pihoni v Albania* 74389/13 Merits ECHR ([https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-180844%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-180844%22]})) para 89

⁷² Respondent State Submissions Annex 9

Shelter.⁷³ There was a 4-day gap between when the statement was finally derived and when the victim came into the custody of the police. In a matter of T.I.P, such as this one, where everything was time sensitive, this appears to the Commission as an undue delay. It is further noted that the INTERPOL's National Central Bureau (NCB) in Windhoek having established that the victim was a Kenyan citizen and seeking to establish the facts relating to her alleged T.I.P, only reached out to the INTERPOL in Nairobi on the 27th of October 2017.⁷⁴ This was 15 days after the booking of the victim and 10 days after she gave her statement in which she indicated the names of the people whom she accused for her T.I.P.

151. The Commission has previously emphasised in its interpretation of Article 5 of the Charter that "Victims of torture and other ill-treatment should access and obtain redress promptly."⁷⁵ Moreover, it recalls the findings of the Court which wisely held that "Due diligence obliges the State concerned to act and react with the dispatch required to ensure the effectiveness of available remedies."⁷⁶ While the Commission commends the Police for visiting the Backpackers Guesthouse on the very day that the victim appeared at the police station, that was the last act of urgency in the conduct of that investigation. Subsequently, there was a lax approach to the establishment of the facts that were necessary to resolve the facts of the case, as required, to ensure redress for the victim. The Commission recalls the guidance of the UN Office of the High Commissioner for Human Rights that "Investigations need to be commenced without any delay, taking place within hours or, at the most, a few days after the suspicion of torture or ill-treatment has arisen, and to be conducted expeditiously throughout."⁷⁷ From the facts presented, the Commission finds an unjustifiable delay in the conduct of the investigation that encumbered the victim's access to justice.

Effectiveness of investigation

152. The Complainants allege that the Respondent State failed to act with due diligence by conducting an ineffective investigation. It is trite that "An impartial investigation must be thorough and include several essential investigatory steps,

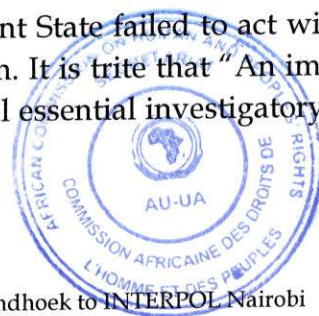
⁷³ Respondent State's submissions Annex 8

⁷⁴ Respondent State Submission Annex 26 Correspondence from the NCB Windhoek to INTERPOL Nairobi

⁷⁵ General Comment 4, para 26, page 8

⁷⁶ Zongo para 152

⁷⁷ Istanbul Protocol, para 193



including a forensic medical investigation.”⁷⁸ There are several anomalies that merit a closer look at the investigation conducted by the Respondent State.

153. The Commission notes specifically that the Respondent State seem to have taken an arm chair approach in investigating Daniel Mwingi and Kennedy Maurice Mativo, who according to the victim was the person responsible for her alleged trafficking. It is noted that Kennedy Maurice Mativo was never once summoned to the police to give a statement despite seemingly being the designated perpetrator according to the evidence of the victim. Instead Kennedy Maurice Mativo purports to have voluntarily approached the police when he saw reports of the victim’s alleged T.I.P on television.⁷⁹

154. Furthermore, the record indicates that on the 10th of November 2017, despite being the victim’s identified perpetrator, the Police still gave back the laptop collected as evidence from the victim to him, because he had identified himself as the victim’s father.⁸⁰ The Complainant also submitted that a forensic examination of the same phone which the Respondent State argued was in the victim’s possession at all times, negating her claims of captivity, was in fact embedded with trackers and spyware.⁸¹ This, they submit is another oversight on the Police’s part. The Commission also notes that the Police seem to have taken it as fact that Maurice could not have been responsible or complicit in the T.I.P of the victim simply because he had identified himself as his father. The Police appear to have taken for granted how the perpetrator identifying himself as the victim’s father. The Police in the Respondent State took for granted the risk of Mr. Kennedy Maurice identifying himself as the victim’s father, simply to deflect suspicion from himself and frustrating the investigation. This is especially concerning given that the feedback received from the Kenyan Government was to the effect that the birth certificate presented by Kennedy Maurice to the Namibian Police did not contain the correct name of the victim.⁸² It is also worth noting that on 31st of October 2017, the Kenyan INTERPOL in Nairobi informed the NCB in Windhoek that they believed the Kennedy Maurice had a case to answer.⁸³

⁷⁸ Istanbul , para 193

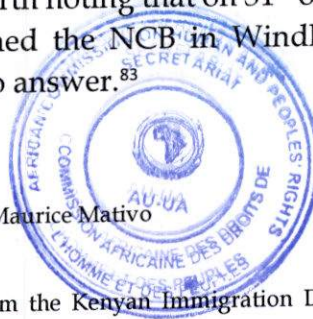
⁷⁹ Respondent State Submissions Annex 19 Statement of Kennedy Maurice Mativo

⁸⁰ Respondent State Submission Annex 2

⁸¹ Complainant’s Submission, Annex 14

⁸² Respondent State Submissions Annex 17, Correspondence from the Kenyan Immigration Department to NCB Windhoek

⁸³ Respondent State Submissions, Annex 6, Correspondence from INTERPOL Nairobi to NCB Windhoek



155. The Commission recalls that in investigating cases of cruel, inhumane and degrading treatment:

Investigations must be carried out in an impartial manner, taking into account potential conflicts of interest, hierarchical relationships with potential suspects and the specific conduct of the investigators.⁸⁴

156. Furthermore, the Istanbul Protocol also provides that

Those potentially implicated in torture or ill-treatment should be removed from any position of control or power, whether direct or indirect, over complainants, witnesses or their families, as well as those conducting the investigation⁸⁵

157. The Commission has also previously stated that:

An individual is a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted or convicted, and regardless of any familial or other relationship between the perpetrator and the victim.⁸⁶

158. What is clear in applying these standards is that the police neglected to tie the loose ends regarding the true role played by Mr. Kennedy Maurice in the case. The police also allowed his testimony to be the sole deciding evidence in the investigation. The Police of the Respondent State did not conduct themselves diligently in this regard and allowed a potential suspect to control the narrative of the investigation, impairing the victim's opportunity for redress through an effective investigation.

159. It is also worth noting that there were many suspicious issues which were integral to the investigation which the Police never looked into or only looked into 2 years later, when the investigation was reopened, following this case being filed before the Commission.⁸⁷ The Commission notes that the vehicles alleged to have ferried the victim, particularly the Mercedes Benz driven by Mr. Kennedy Maurice were never traced or investigated at the material time. The vehicle search was only conducted on the 10th of March 2020.⁸⁸ Similarly, Biotech and Techno-Med, the

⁸⁴ Istanbul Protocol, para 193

⁸⁵ Istanbul Protocol, Para 195

⁸⁶ General Comment No. 4 para 17, page 6

⁸⁷ Respondent State Submissions, Annex 27, Memo of Prosecutor I. Nyoni to the Prosecutor General issued on the 30th of January 2020, with the subject "Complaint brought to the African Commission on Human and Peoples' Rights against Namibia

⁸⁸ Respondent State Submissions, Annex 24, Notice for Vehicle Search for the Mercedes Benz, 10 March 2020

Companies that the victim was supposedly recruited by were never investigated at the material time. According to the evidence, the companies search was also only conducted on the 18th of June 2020, following this case being filled against the Respondent State.⁸⁹ It is also worth noting that Roseda Modise, the alleged girlfriend of Mr. Kennedy Maurice Mativo, who too had been seen with the victim was never questioned or requested for a statement during the material time of the investigation. Her evidence too was only obtained on the 24th of March 2020.⁹⁰ The Commission also does not take for granted that the Prosecutor General upon being given the investigation file, indicated that there were some questions that remained to be answered in the investigation.⁹¹

160. From these facts, it is clear that the Police did not conduct themselves diligently in the investigations, leaving many plausible leads unpursued. This too being on account of overreliance on other sources of evidence which were granted more weight over others and perceived to be the conclusive truth.

161. The Commission recalls the decision of the African Court on Human and Peoples' Rights in *Zongo*, in which the Court ruled that:

*The second area of laxity lies in the fact that the authorities concerned never sought to explore other areas of investigation particularly those mentioned by the Independent Commission of Enquiry in May 1999, such as the conflicts between Norbert Zongo and the poachers and graziers in his ranch or the fact of his poisoning shortly before his assassination. In that regard, the Respondent's explanation that failure on the part of the authorities to explore other areas of investigation due to the fact that the findings of the said Commission had excluded the aforesaid avenues of investigation (supra, paragraph 149), is not convincing.*⁹²

162. The Commission is also of the opinion that the Police in the Respondent State took a lax approach, choosing not to pursue the aforementioned areas of investigation at the material time. These were fundamental inquiries which were central, establishing core aspects of the case before the Respondent State. Such a laxity came at the expense of the victim.

⁸⁹ Respondent State Submissions, Annex 25, Notice for Companies Search for Tecno Med, Biotech and Surgitex Medical System, 18 June 2020

⁹⁰ Respondent State Submissions, Annex 18, Sworn Statement of Roseda Modise, 24 March 2020

⁹¹ Respondent State Submissions, Annex 28, Prosecutor General's Memo (2020) issued on the 4th of April 2020

⁹² Para 153

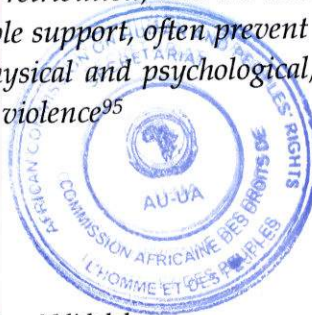
163. The Complainants have also submitted that when the victim reported that she was a victim of T.I.P, the police instead interrogated, threatened her with criminal sanctions and subsequently detained her. They allege that the police accused the Victim of lying about her immigration status.

164. It is worth noting that in paragraph 5 of the Respondent State's Submissions, as well as in the sworn statement of Mr. Ndidalelwa, one of the police officers on the case, there is reference to the victim wearing a sleeveless top and her not having any visible scars or injury marks.⁹³ It is possible to conclude from this that the police had profiled the victim and made their own adverse inferences from the way that she was dressed. The Commission also takes the view that this profiling had the effect of tainting the investigation, as the police had already concluded that the victim was falsifying her allegation. Moreover, their demeanour is almost tantamount to a denial of victim status. In the General Comment No. 4, the Commission stated that:

*State Parties are required to protect the dignity of victims at all times and ensure that victims are at the centre of the redress process. A victim-centred approach to redress requires an analysis and full understanding of the harm suffered and of the victims' wishes. It needs to reflect their experiences and realities, so that the provided redress is responsive to their needs.*⁹⁴

165. The manner in which the victim is described in the Respondent State's submissions and in the evidence of Mr. Ndidalelwa increases the plausibility of the allegation that she was intimidated and threatened. It is also synonymous with the Commission's analysis on investigations that encumber redress for women who are victims of sexual violence in violation of Article 5 of the Charter. In General Comment 4, the Commission opined that:

*Stigma, feelings of guilt or shame, fear of retribution, and the unavailability of support or lack of information about available support, often prevent victims from coming forward. Further, injuries, both physical and psychological, may be less obvious than those caused by other forms of violence*⁹⁵



⁹³ Respondent State Submissions, Annex 7, Sworn Statement of Mr. Joshua Ndidalelwa

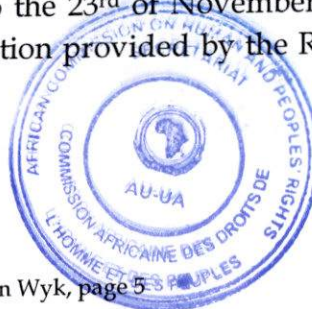
⁹⁴ General Comment No. 4 para 18, page 6

⁹⁵ General Comment 4, para 60

Detention of the Victim

166. The Complainants have also raised issue with the detention of the Victim at Klein Windhoek. It is established in the evidence that the victim was arrested by the City of Windhoek Police on the 13th of October 2017 and taken to Klein Detention Facility after running away from her Social worker interview.⁹⁶ The evidence also shows that she was released on the 23rd of November 2017.⁹⁷ The Respondent State submits that victim was not detained as a criminal as the Complainants have put it. The Respondents propound that the Victim was sent to Klein Windhoek "based on considerations that she was a danger to herself, allegedly in danger of harm by her captors and had an unexplained apprehension to remain at the only shelter available in Windhoek"⁹⁸ The Respondents further averred that housing the victim at the Shelter where she had run away would have put its residents at risk.

167. The Commission notes that in fact and in law, the victim was indeed detained and not merely sheltered at Klein Windhoek, regardless of the reasons provided by the Respondent State. The evidence in the form of a Warrant of detention, by the Ministry of Home Affairs and Immigration of the Respondent State indicates that the victim had been "found in Namibia and suspected on reasonable grounds to be a prohibited/illegal immigrant in terms of the relevant Act.", and would be detained for 14 days pending investigation⁹⁹ There is also another warrant extending the detention for a further 14 days on the 27th of November 2017.¹⁰⁰ In the same vein, there is a corresponding Declaration of Release, issued on the 23rd of November 2017 which is corroborating evidence of detention.¹⁰¹ The Commission considers that these are legal documents whose purpose is clear on the face of it, and indicative of the reasons why the victim was at Klein Windhoek from the 13th of October to the 23rd of November 2017, and those reasons do not coincide with the justification provided by the Respondent State.



⁹⁶ Respondent State Submissions, Annex10 Statement of Jacobus Gert Van Wyk, page 5

⁹⁷ Respondent State Submissions, Annex 14 Release Declaration

⁹⁸ Respondent State Submissions on the Merits, page 24 para 11

⁹⁹ Respondent State Submissions, Annex 14

¹⁰⁰ Respondent State Submissions, Annex 14, Authorization of Further Detention (Sec 42 Act of 1993)

¹⁰¹ Respondent State Submissions, Annex 14

168. Furthermore, without any evidence to that effect presented by the Respondent State, it would be imprudent for the Commission to believe that the victim was a danger to herself and other residents at the Women's Shelter. It is also worth noting that on the 12th of October, the victim had spent the night at the shelter and the Respondent State does not seem to have registered any qualms with her conduct. The Commission also notes that the allegation of the victim's apprehension towards the Shelter falters when stood beside the testimony of one Commissioner Agas. The evidence of Commissioner Agas details that on the evening following her abrupt departure from the Shelter, the victim was found outside the Kenyan High Commission by the City of Windhoek Police.¹⁰² It is unlikely that her fleeing had to do with her apprehension against the Shelter than her mere desire to visit the High Commission of her home country. Accordingly, the Commission takes the view that the Respondent State detained the Victim.

169. The Commission has previously stated that:

*State Parties are required to protect the dignity of victims at all times and ensure that victims are at the centre of the redress process. A victim-centred approach to redress requires an analysis and full understanding of the harm suffered and of the victims' wishes. It needs to reflect their experiences and realities, so that the provided redress is responsive to their needs. States should ensure that victims have ownership of the redress process, and relevant actors providing redress are expected to work with the victims, and not on the victims. Victims should be enabled to play active and participatory roles in the process of obtaining redress, without fear of stigma and reprisals.*¹⁰³

170. Moreover, the **UN Recommended Principles and Guidelines on Human Rights and Human Trafficking** provide that:

*Trafficked persons shall not be detained, charged or prosecuted for the illegality of their entry into or residence in countries of transit and destination, or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons.*¹⁰⁴

171. The Commission also draws inspiration from the European human rights system, particularly the Europe Convention on Action against Trafficking in

¹⁰² Respondent State Submissions, Annex 5, Sworn Statement of Commissioner Agas, page 5

¹⁰³ General Comment 4, Para 18, page 6

¹⁰⁴ (2002) Principle 7 (<https://www.unodc.org/documents/human-trafficking/ICAT/19->

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Human Beings, which is the first Treaty to explicitly reference the principle of non-punishment of victims of T.I.P. Article 26 states that:

*Each Party shall, in accordance with the basic principles of its legal system, provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so.*¹⁰⁵

172. The detention of the victim appears unjustifiable under the Charter and international human rights law. Importantly, it denied the victim her victim status and rather converted her into a perpetrator. Reprisals of this nature have no place in the victim's pursuit for redress.

173. The Commission is of the opinion that the detention of the victim violates its obligation to provide redress for her alleged violation of Article 5 of the Charter.

Denial of consular service

174. The Respondent State argues that the Victim was not taken to the Kenyan High Commission on the day that she appeared at the police station because at the time, the High Commission had already been closed for business. However, it is worth noting that there doesn't seem to be evidence of any attempt to take her to the Kenyan High Commission either on the next day or in the succeeding days. This brings to question the reason proffered by the Respondent State in their submissions. Furthermore, the Respondent State submits that there was no legal obligation to take her to the Kenyan High Commission, as the Vienna Convention on Consular Relations (VCCR) only extends this privilege to people who were either arrested or detained, which she was not. The Commission notes that the Victim was indeed arrested as is more fully elaborated in the Commission's findings on the lawfulness of her detention in Paragraph 166 to 163 of this decision. Moreover, Article 36(1)(a) of the VCCR requires Receiving States to allow communication between Consulates and arrested nationals of sending states, as well as freedom for arrested nationals to gain access to their consuls. The International Court of Justice (ICJ) has previously held in *La Grande* (Germany v U.S.A.)¹⁰⁶ that Article 36(1) of the VCCR establishes an inter-related regime designed to facilitate the implementation of the system of consular protection and created rights for the persons concerned. The ICJ found in *La Grande*, that the USA had breached its obligations by not informing the *La Grande* brothers of their

¹⁰⁵ www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168008371d.

¹⁰⁶ (2001) ICJ Reports para 466-492

Article 36(1) rights, a finding they endorsed later in the *Avena* (Mexico v USA).¹⁰⁷ In line with this approach, the Commission is of the view that the Respondent State has an obligation under the African Charter, and International Law to provide Consular services to foreign nationals who are in state custody. Moreover, another corresponding obligation arises on the basis of the victim having been subjected to cruel, inhumane and degrading treatment. The Istanbul Protocol, which is unequivocally endorsed by the Commission in its General Comment 4 interpreting the right to redress for violations of Article 5 provides that "States must ensure that the right to complain can be exercised effectively. This includes the right: to diplomatic and consular representatives (for foreign nationals)."¹⁰⁸

175. The Commission considers that preventing the Victim from accessing the High Commission of her home country falls short of the due diligence obligations of the Respondent State.

Premature termination of the investigation

176. The Commission is of the view that the investigation was terminated prematurely and that there was indeed need for establishment of more facts prior to closing the investigation. It appears from the record that the investigation into the case of the victim had been closed by the 14th of June 2018, after having commenced in October of 2017.¹⁰⁹ Corrinah Van Wyk of the LAC which assisted the Victim during her detention at Klein met with Commissioner Agas of the Namibian Police to seek updates on the progress, It was then that she was informed that the investigation into her alleged T.I.P had been closed due to lack of evidence.¹¹⁰

177. The Commission observes that at the time of closure, there were still the unanswered questions addressed in the analysis given above on the effectiveness of the investigation. Additionally, the Commission also notes that some members of the Police were of the view that indeed there was a case of T.I.P, it therefore begs the question why the investigation was terminated, despite these existing thoughts. The Commission notes specifically that according to the record, Officer Jacobus Van Wyk who was responsible for placing the victim in Safe Haven

¹⁰⁷ (2004) ICJ Reports, para 12, 43 and 49.

¹⁰⁸ Istanbul Protocol, para 196

¹⁰⁹ Complainant's Submissions Statement of Corrinah Van Wyk

¹¹⁰ Respondent State Submission, Annex 12, Sworn Statement of Corrinah Van Wyk

Shelter, after having met her, was of the view that there was an obvious case of T.I.P to be investigated.¹¹¹ It also worth noting that on the 30th of January 2020, one Mr. IM Nyoni wrote to the Prosecutor General informing him that there was a case of T.I.P and recommended that further investigations be conducted.¹¹²

178. All the evidence suggests that there was a lot more that could have been undertaken by the Police of the Respondent State, and that indeed the investigation was terminated prematurely. The Commission recalls the jurisprudence of the African Court in the *Zongo* case in which it was stated that:

*Due diligence would also have required that the Respondent should not abandon the search for those who murdered Norbert Zongo and his companions.*¹¹³

179. The Commission takes the view that this investigation was not allocated the sufficient time and that it was prematurely terminated.

Non-prosecution of the case

180. The Commission now turns to determine whether the Respondent State violated its due diligence obligation to protect the victim from cruel, inhumane and degrading treatment by failing to prosecute those who are responsible for her harm. The evidence presented indicates that on the 10th of November 2017, a police officer named Nesta Auma submitted a copy of the case file to one Prosecutor I Nyoni.¹¹⁴ It is unclear what the Prosecution did with this file and the Respondent State has not provided any evidence to suggest that any charges were pursued. The Prosecution only resurfaced in 2020 following the present Communication being filed before the Commission.¹¹⁵ Despite the file being abandoned by the Prosecution in 2017, in 2020 the Prosecutor General issued a memo to the Inspector General of police, took the view that there was an obvious case of T.I.P, and called for further investigations to be made.¹¹⁶ It must be recalled that "State Parties are

¹¹¹ Respondent State Submissions Annex 10

¹¹² Respondent State Submissions, Annex 27, Memo of Prosecutor I. Nyoni to the Prosecutor General, 30 January 2020

¹¹³ *Zongo* Para 155

¹¹⁴ Respondent State Submissions, Annex 2, Sworn Statement of Nestor Auma (2021)

¹¹⁵ Respondent State Submissions, Annex 27, Memo of Prosecutor I Nyoni to the Prosecutor general issued on 30th of January 2020

¹¹⁶ Respondent State Submissions, Annex 28, Prosecutor General 's Memo (2020) issued on the 4th of April 2020

obliged to prosecute or extradite alleged perpetrators of torture when they are present in any territory under their jurisdiction and to adopt the necessary legislation to make this possible.”¹¹⁷ The Commission finds that by omitting to prosecute, the Respondent State neglected its Due diligence obligation.

181. In view of the foregoing, and based on the analysis above, the Commission considers that the Respondent State not only failed to conduct an effective investigation, prosecute and punish the victim’s perpetrator, but also through its agents participated in conduct that added to her unfortunate ordeals. As a consequence, the Commission finds that the Respondent State is in violation of Article 5 of the Charter and Article 4(2)(g) of the Maputo Protocol.

Alleged violation of Articles 2 and 18(3) of the Charter and 2 of the Maputo Protocol

182. The Complainants submit that by failing to investigate, prosecute and punish the Victim’s trafficking for sexual exploitation, which amounts to discrimination on the basis of sex, gender and age, the Respondent State is in violation of Articles 2 and 18(3) of the Charter and 2 of the Maputo Protocol.¹¹⁸ Furthermore, the Complainants appeal to the Commission to determine that discrimination occurred not through the comparator test which is premised on formal equality, but rather through a substantive equality test which considers the victim’s context and systemic disadvantage as a woman.¹¹⁹ The Commission notes that in the Respondent State’s submissions, no substantive points were made regarding the allegations on the violation of Articles 2 and 18(3) of the Charter and 2 of the Maputo Protocol respectively. Accordingly, the Commission shall make a finding, using the information that has been presented to it.

183. Article 2 of the Charter states that:

Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind

¹¹⁷ General Comment 4, para 27, page 9

¹¹⁸ Complainants’ submissions, para 110-117

¹¹⁹ Complainants’ submissions, page 118- 124

such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national or social origin, fortune, birth or other status.

184. Article 18(3)

The state shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.

185. Article 2 of the Maputo Protocol provides that:

1. States Parties shall combat all forms of discrimination against women through appropriate legislative, institutional and other measures. In this regard they shall

a) include in their national constitutions and other legislative instruments, if not already done, the principle of equality between women and men and ensure its effective application;

b) enact and effectively implement appropriate legislative or regulatory measures, including those prohibiting and curbing all forms of discrimination particularly those harmful practices which endanger the health and general well-being of women;

c) integrate a gender perspective in their policy decisions, legislation, development plans, programmes and activities and in all other spheres of life;

d) take corrective and positive action in those areas where discrimination against women in law and in fact continues to exist;

e) support the local, national, regional and continental initiatives directed at eradicating all forms of discrimination against women.

186. Article 2, of the Charter prohibits discrimination, while Article 18(3) imposes a positive obligation for the protection of women, in particular, from discrimination. While the Charter does not provide an express definition of discrimination, Article 1(f) of the Maputo Protocol does, which definition the Commission has endorsed in *Egyptian Initiative*.¹²⁰ Article 1(f) of the Maputo Protocol states that:

Discrimination against women means any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise

¹²⁰ *Egyptian Initiative for Personal Rights and INTERIGHTS v Egypt* (2011) para 121

or destroy the recognition, enjoyment or the exercise by women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life.

187. To determine whether a violation of Article 2 and 18(3) of the Charter have occurred, the Commission applies the commonly observed discrimination test. In *Egyptian Initiative*, the Commission applied the discrimination test which enquires if similarly situated men and women were treated differently and if that differential treatment was justifiable. Specifically, the Commission asked

*"Whether the women and male protesters had similar treatment; and whether the treatment was "fair and just", given that all women and men in the scene were under the same circumstances, that is, exercising their political rights."*¹²¹

188. The Commission decided that discrimination had occurred because:

- a. The Victims were exclusively women;*
- b. The Victims were not protected from the perpetrators and other unidentified actors during the demonstrations; and*
- c. The violations were perpetrated on the Victims because of their gender.*¹²²

189. Fundamentally the Commission found that the women had been discriminated against because they had been in a similar situation with men, only they were targeted and the Government of Egypt did not provide a justification for the differential treatment.¹²³

190. This same approach was adopted in *Equality now* where the Commission noted that "...the gravamen of discrimination is the unjustifiable distinction or differential treatment of persons in relevantly analogous situations."¹²⁴ Citing the findings of *Egyptian Initiative* with approval, to establish discrimination in violation of Article 2 of the Charter, the Commission said:

147. The Complainant must identify the comparator and show how the treatment complained of and that of the comparator are comparable.

148. When such a case is made out, the Respondent State has two options. It may demonstrate with cogent evidence that the prima facie case is factually

¹²¹ Para 129

¹²² Para 137

¹²³ Para 138

¹²⁴ Paragraph 144

*misconceived in that the treatment exacted on the victims was also exacted on others in the same situation as the victim or that the circumstances of the victims are relevantly different from those of the comparator. Secondly, the Respondent State may admit the differential treatment was objectively and reasonably justifiable.*¹²⁵

191. The Commission concluded in that Communication that no discrimination had occurred because the Complainant had not identified a male comparator to demonstrate that she had been treated differently from In an unjustifiable manner.¹²⁶

192. From these landmark decisions, it can be discerned that the test applied by the Commission to determine whether discrimination against women has occurred is to enquire whether: (a) There were similarly situated men; (b) the women received differential treatment from the similarly situated men; and (c) that differential treatment was objectively and reasonably justifiable.

193. Turning to the present case, the Commission has already found in its decisions on the first allegation that the Respondent State failed to investigate, prosecute and punish the victim's case. The Commission has to consider if this failure to act with due diligence amounts to discrimination. Before that, it is concomitant for the Commission to make a determination on the prickly matter of the legal test for discrimination.

194. The Complainants rightly point out that the traditional legal test for discrimination which relies on the use of a Male Comparator to establish discrimination is premised on the concept of formal equality. Loosely speaking, formal equality requires similarly situated parties to be treated similarly. It has often been colloquially referred to as "equality as sameness". The Commission has previously pointed this out in **Sudanese Civilians in South Kordofan and Blue Nile (represented Sudan Democracy First Group, REDRESS, Human Rights Watch, INTERIGHTS and Enough Project) v Sudan** where it stated that "The Commission's interpretation of Articles 2 and 18(3) was based on formal equality between the sexes, as opposed to the principle of substantive transformative equality."¹²⁷

¹²⁵ Equality Now (2015) para 148

¹²⁶ Equality Now (2015) para 149-150

¹²⁷ Communication 402/11 & 412/12 (2023) para 220

195. In the aforementioned Sudan case, the Commission noted that any act of sexual and gender-based violence, is an act of gender-based discrimination, irrespective of whether men in the same situation were treated the same way as women or not. The African Women's Protocol by its very nature and tenor guarantees substantive transformative equality not just formal equality. Under it, states have the responsibility to prevent, regulate, control, investigate, punish and provide effective remedies. Reparations under the Protocol including individual reparations and reparations targeted at systematic failures.

196. The core of formal equality as exhibited in the Comparator test is that women and men are similarly situated. This, as the Complainants point out, is a fallacy which fails to account for structural differences between men and women. It is now widely accepted that while formal equality guarantees the same treatment for everyone, there are various intersecting factors such as sex, age, race and disability that make it difficult to attain equality even when people are treated the same way.¹²⁸ The CEDAW Committee has stipulated that "It is not enough to guarantee women treatment that is identical to that of men. Rather, biological as well as socially and culturally constructed differences between women and men must be taken into account."¹²⁹ In addition, it has been propounded that formal equality, an *Aristotlean* formulation¹³⁰ cannot produce social equality under conditions of real social inequality as it was never meant for that, rather it was meant to "eliminate destabilizing conflict among *polis* members who were already structurally a presumptively equal elite: prominent adult Greek male citizens."¹³¹

197. Substantive equality, which emerged as consequence of the criticisms above is itself a stubborn concept, one that has proven hard to tie down to a sole definition. However, at its most basic formulation recognises that men and women

¹²⁸ CEDAW Committee (2004) General recommendation No. 25: Article 4, paragraph 1, of the Convention (temporary special measures) Para 8; (Chekera-Radu (2017) "The relevance of substantive equality in the African regional human rights system's jurisprudence to women's land and property rights" African Human Rights Yearbook (<https://www.ahry.up.ac.za/images/ahry/volume1/Chekera.pdf>) page 49

¹²⁹ (2004) General recommendation No. 25: Article 4, paragraph 1, of the Convention (temporary special measures) para 8

¹³⁰ See Aristotle, *The Politics*, trans. Benjamin Jowett (New York: Modern Library, 1943), 307 ("Equality consists in the same treatment of similar persons"); and Aristotle, *The Nicomachean Ethics*, ed. J. L. Ackrill and J. O. Urmson, trans. David Ross, rev. ed. (Oxford: Oxford University Press, 1980), 1131a-1131b, 112-117.

¹³¹ Mackinnon, C.A (2020) "Equality" *Daedalus* (<https://www.amacad.org/publication/equality>) page 213; See also (2016) "Sex Equality" 3rd ed. (New York: Foundation)

are different and that being treated alike does not guarantee equality. Substantive equality, as opposed to formal equality is concerned with acknowledging gender differences rather than focusing on similar treatment of all genders. The emphasis for substantive equality is recognising and redressing disadvantage which may result from difference, and accommodating such difference to achieve structural change. A substantive approach to equality delves into the individual's context in order to eliminate barriers that impinge on full realisation of equality."¹³²

198. The Complainants' indictment against the comparator test for discrimination is that it underscores the limited formal equality interpretation of Article 2 and 18(3) of the Charter. Their indictment finds merit in the analysis above on the limitations of formal equality. Moreover, it is not a novel appeal, it is one spread across jurisdictions both domestic and international from academia, civil society and most notably the different facets and faces of the women's movement.¹³³ The Commission also notes that the comparator test has been the subject of widespread criticism as Goldberg has noted:

Contemporary discrimination law is in crisis, both methodologically and conceptually. The crisis arises in large part from the judiciary's dependence on comparators – those who are like a discrimination claimant but for the protected characteristic – as a favored heuristic for observing discrimination. The profound mismatch of the comparator methodology with current understandings of identity discrimination has nearly depleted discrimination jurisprudence and theory... Even in run-of-the-mill cases, comparators often cannot be found, particularly in today's mobile, knowledge-based economy. This difficulty is amplified for complex claims, which rest on thicker understandings of discrimination developed in second-generation intersectionality, identity performance, and structural discrimination theories. By treating comparators as an essential element of discrimination, instead of as a heuristic device to help discern whether discrimination has occurred, courts have largely foreclosed these other theories from consideration... The comparator methodology retains its appeal, despite these deficiencies, because its empirical patina permits courts to evaluate discrimination claims without appearing to engage in a subjective analysis of workplace dynamics. Given the complex nature of both identity and discrimination, however, the comparisons produce a false certainty at best... With comparators dislodged from

¹³² Chekera-Radu (2017) page 50

¹³³ Goldberg, S.B (2011) "Discrimination by Comparison" Yale Law Journal Volume 120 No. 4 690-977 (<https://www.yalelawjournal.org/article/discrimination-by-comparison>); Chekera-Radu (2017)

their methodological pedestal, we may yet recover space for the renewed development of discrimination jurisprudence and theory. ¹³⁴

199. The Commission notes that there are several practical limitations of the comparator test which encumber effective interpretation of the non-discrimination principle as enshrined in Article 2 and 18(3). There are instances where there is simply no comparator. In cases of sex discrimination in the workplace, this is rife particularly in cases where women allege discrimination for treatment arising from their pregnancy and breastfeeding. Due to difference in the reproductive capacities of men and women, women would be by the reasoning in *Equality now*, unable to prove discrimination. Another problem arises from intersectionality¹³⁵ where women allege multiple discrimination based on more than one protected ground. A woman is her sex, gender, race, age, nationality all at the same time and maybe discriminated against on those grounds as a complex compound and not singularly at different times. To prove discrimination, she would have to find a comparator who exhibits the same personal traits in a manner that satisfies the “similarly situated” requirement like a glove.

200. The Commission is persuaded by the Complainant’s submissions that, *inter alia*, the Comparator test imposes a male standard to situations where one does not and certainly ought not to exist. This is because there are experiences women face, solely because they are women which are incomparable to men. The male comparator approach does not allow for an effective analysis of equality and non-discrimination when rights violations arise from female-specific circumstances where it is likely that there is no male-comparator.

201. The Commission is of the view that this Communication presents a unique opportunity to adopt a substantive equality approach to discrimination because it is one of those cases in which there is and can be no comparator. This is one such case where it is imprudent if not impossible to identify a comparator because of the intersectionality of her identity. To illustrate this point, in order to apply the comparator test, the Commission would have to find a young man of Kenyan Nationality who was trafficked to Namibia for Sexual exploitation.

¹³⁴ Goldberg, S.B (2011) “Discrimination by Comparison” Yale Law Journal Volume 120 No. 4 690-977 (<https://www.yalelawjournal.org/article/discrimination-by-comparison>)

¹³⁵ See CEDAW Recommendation General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women,

202. The Commission turns to consider how discrimination against women in violation of Article 2 and 18(3) of the Charter may be established, absent the Male comparator test. The Complainants implore the Commission to use a substantive equality approach that is based on the victim's disadvantage, recognizing the systemic way in which women are subjected to sexual violence particularly as a result of multiple discrimination that intersect on the basis of sex, gender and age.¹³⁶ This submission is synonymous with a prevailing call for the Commission¹³⁷ as well as other adjudicators, both domestic and international to adopt a substantive equality approach as postulated by the Complainants.¹³⁸

203. The Commission notes that there is precedent and indeed a rapidly developing jurisprudence on a substantive equality approach to discrimination that has been applied by different International and human rights bodies. The ECtHR in the last two decades has developed a substantive equality jurisprudence, moving beyond the formal conceptions and focusing on how individuals and groups experience the reality of discrimination. Distinctively, the European approach has laid an emphasis on discriminatory effect and not essentially on notions of distinction. In *DH v. Czech Republic*,¹³⁹ the ECtHR addressed the incidence of Roma children in special schools meant for students with learning deficiencies. The Grand Chamber found that there was a disproportionately large representation of the Roma children in the special schools and held that this proved discriminatory effect. The Grand Chamber accepted reports of European Commission against Racism and Intolerance ("ECRI"), and the Advisory Committee of the Framework Convention on National Minorities as well as statistics to prove that the discriminatory effect. Having proven the discriminatory effect, the ECtHR shifted the burden to the Government to justify it under the European Convention. The Grand Chamber rejected the justification of the Czech government that the Roma children had failed psychological tests,

¹³⁶ Complainant's Submissions, para 118-124

¹³⁷ Chekera-Radu (2017) wrote that "Predominantly the jurisprudence of the African Commission has favoured the formal approach to equality....It is against this backdrop that the African human rights system needs to develop jurisprudence on WLPR based on substantive equality. Given that the jurisprudence of the African human rights system that shows recognition of substantive equality has been limited, there is room for the development of African jurisprudence drawing some of the progressive norms and standards developed by the other treaty bodies."¹³⁷

¹³⁸ Durojaye, E and Owoeye, Y (2017) "Equally equal or unequally equal: Adopting a substantive equality approach to gender discrimination in Nigeria" *International Journal of Discrimination and the Law*, 17(2): 70-85 (<https://core.ac.uk/reader/161256040>);

¹³⁹ Application No. 57325/00, Merits, 7 February 2006.

holding that those tests were not objective and made no allowance for Roma cultural context informed by the perspective of non-Roma.

204. In *Jurčić v. Croatia*, the Court held for the first time that a woman had been discriminated against on the basis of her pregnancy. Finding that only women could be treated differently on grounds of pregnancy, the Court held that such a difference in treatment amounted to direct discrimination on grounds of sex if it was not justified.¹⁴⁰

205. In **General Recommendation no.25: Article 4, paragraph 1, of the Convention (temporary special measures)**, the CEDAW Committee stated that “the Convention focuses on discrimination against women , emphasizing that women have suffered and continue to suffer from various forms of discrimination because they are women.”¹⁴¹ In para 6, the Committee went on to say that the obligations in article 1 to 5 of the CEDAW impose obligations which “... should be implemented in an integrated fashion and extend beyond a purely formal legal obligation of equal treatment of women with men.” The Committee went further to say that “The lives of women and men must be considered in a contextual way, and measures adopted towards a real transformation of opportunities, institutions and systems so that they are no longer grounded in historically determined male paradigms of power and life patterns.”¹⁴²

206. Based on the above, the Commission is persuaded that a Substantive equality analysis is in order in the present case. Applying the facts of the case, considering the victims’ circumstances, positionality, background and systematic disadvantage as a woman, the Commission finds that the victim’s experience of violence was inherently discriminatory. The Commission associates with the views of the CEDAW Committee in General recommendation No. 35 on gender-based violence against women, updating general recommendation No.19 that:

“...gender-based violence against women is one of the fundamental social, political and economic means by which the subordinate position of women with respect to men and their stereotyped roles are perpetuated. Throughout its work, the Committee has made clear that such violence is a critical obstacle to the achievement of substantive equality between women and men and to the enjoyment by women

¹⁴⁰ (2021) 54711/15 Judgment 4.2.2021

¹⁴¹ (2004) para 5

¹⁴² General Recommendation no. 25 (2004) Para 10

of their human rights and fundamental freedoms, as enshrined in the Convention."¹⁴³

207. The Commission takes the view that the victim was subjected to T.I.P for sexual violence and exploitation because of her situation, context and positionality as a woman. The victim was a young woman in a foreign country at the mercy of the persons she believed had brought her into the country for purposes of gainful employment. For this reason, the Commission need not compare the victim to any man to establish whether she was a victim of gender-based violence or not. The Commission is persuaded by the view that discrimination against women can occur from a female-specific context. Violence against women happens to women because they are women.

208. In the CEDAW **General recommendation No. 35**, the Committee states that:

The Committee regards gender-based violence against women as being rooted in gender-related factors, such as the ideology of men's entitlement and privilege over women, social norms regarding masculinity, and the need to assert male control or power, enforce gender roles or prevent, discourage or punish what is considered to be unacceptable female behaviour. Those factors also contribute to the explicit or implicit social acceptance of gender-based violence against women, often still considered a private matter, and to the widespread impunity in that regard.¹⁴⁴

209. This view is not novel and is synonymous with the prevailing jurisprudence on the inherent discrimination and discriminatory effect of violence against women. The ECtHR in **Opuz v. Turkey**, considered domestic violence, a form of gender-based violence, which was in turn a form of discrimination against women.¹⁴⁵

210. Moreover, the Commission is convinced that victim's experience of violence against women did not only occur because she is a woman but rather because she was a woman of a particular disadvantage, systemically targeted for her vulnerability and background. As the Committee noted in **General Recommendation No. 28 on the core obligations of States parties under article 2**

¹⁴³ Para 10

¹⁴⁴ Para 19

¹⁴⁵ (2009) para 184-191

of the Convention on the Elimination of All Forms of Discrimination against Women that:

The discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste and sexual orientation and gender identity. Discrimination on the basis of sex or gender may affect women belonging to such groups to a different degree or in different ways to men.¹⁴⁶

211. Accordingly, the Commission finds that the victim's experience of human trafficking for the purposes of sexual violence and exploitation constitutes discrimination. Moreover, the Commission is persuaded that the victim experienced multiple discrimination on the basis of her sex, age, gender and nationality.
212. The Commission turns to determine the responsibility of the Respondent State for the discrimination suffered. The Commission recalls its findings on the due diligence obligations of Parties to the Charter. The Commission further recalls its findings on the due diligence obligations of States regarding acts discrimination against women. State Parties to the Charter bear a positive obligation to investigate, prosecute and punish acts of discrimination against women. Having already found a violation for the Respondent State's failure to investigate, prosecute and punish the Victims' trafficking in persons for purposes of sexual exploitation, it therefore follows that the Respondent State is equally liable for the discrimination inherent in the violence suffered by the victim because she is a woman.
213. The Commission reiterates that this finding represents the prevailing position of comparative international human rights law. The CEDAW Committee in General Recommendation 35 on violence against women of 2017 has reaffirmed that:

Article 2 is not limited to the prohibition of discrimination against women caused directly or indirectly by States parties. Article 2 also imposes a due diligence obligation on States parties to prevent discrimination by private actors. In some cases, a private actor's acts or omission of acts may be attributed to the State under

¹⁴⁶ Para 18

international law. States parties are thus obliged to ensure that private actors do not engage in discrimination against women as defined in the Convention.¹⁴⁷

214. The Committee has stated further in General Recommendation No. 19 that:

*The failure of a State party to take all appropriate measures to prevent acts of gender-based violence against women in cases in which its authorities are aware or should be aware of the risk of such violence, or the failure to investigate, to prosecute and punish perpetrators and to provide reparations to victims/survivors of such acts, provides tacit permission or encouragement to perpetrate acts of gender-based violence against women.*¹⁴⁸

215. The European Court has consolidated in many of its findings (**Talpis v. Italy**, 2017 at 141; **Opuz v. Turkey**, 2009, at 191; **Eremia v. the Republic of Moldova**, 2013, at 85; **T.M. and C.M. v. the Republic of Moldova**, 2014, at 57) that a State's failure to protect women against domestic violence may breach their right to equal protection of the law and this failure does not need to be intentional.

216. In **Maria Da Penha Maia Fernandes v Brazil**, the Inter-American Commission reiterated that:

*"...the international and regional systems have pronounced on the strong link between discrimination, violence and due diligence, emphasizing that a State's failure to act with due diligence to protect women from violence constitutes a form of discrimination, and denies women their right to equality before the law. These principles have also been applied to hold States responsible for failures to protect women from domestic violence acts perpetrated by private actors."*¹⁴⁹

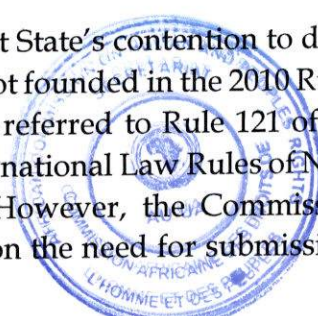
217. The Commission concludes that the Victim was trafficked for sexual exploitation and suffered sexual violence, which is a form of discrimination. The Commission finds multiple discrimination on the basis of her sex, gender, age and nationality. As has already been established in our analysis, the Respondent neglected to undertake its duty to protect the victim from discrimination because its failure to effectively investigate, prevent and punish the victim's perpetrators. The Commission finds that the Respondent State is in violation of Article 2 and 18(3) of the Charter as well as Article 2 of the Maputo Protocol.

¹⁴⁷ Para 13 of CEDAW recommendation No. 18

¹⁴⁸ General recommendation No. 19, para. 9

¹⁴⁹ IACtHR, Report N° 54/01, Case 12.051, April 16, 2001; European Court of Human Rights, *Case of Opuz v. Turkey*, Application No. 33401/02, 9 June 2009.

The Commission's findings on remedy

218. The Complainants submit that the Commission grants remedies that will not only retribute, compensate and rehabilitate the victim, but also satisfy and guarantee non-repetition of the violations. They pray that the Commission grant the victim compensation to the tune of USD\$ 20 000 for violations of the Charter and Maputo Protocol as well as USD\$50 000 to cover her medical, psychological and material assistance. They also pray for the Commission to recommend to the Respondent State investigate, prosecute and punish the perpetrators of the violations.
219. The Respondent State contends that the Complainants did not justify their claim for the victim's compensation. They pray that the Commission defer the inquiry on reparations and invite the parties to make written submissions. They also pray for the Commission to recommend the Complainant to institute a civil claim in the courts of the Respondent State.
220. The Commission notes that it has already decided on the alleged violations of the articles, therefore there is no need to revisit that. Regarding the prayers for compensation and damage, the Commission associates with the views of the Respondent State that the Complainant has made no substantive submissions to merit an award of compensation in the present circumstances. It is the Commission's firm view that it is incumbent upon the Complainants to cogently motivate and justify the victim's claims. However, given that the Commission finds merit in the Complainant's claim, it considers that a financial award for compensation and damage is indeed in order, however the Commission is not in a position to determine the amount to be awarded in the present circumstances.
221. The Commission considers that the Respondent State's contention to defer consideration of the subject of remedies is one that is not founded in the 2010 Rules of Procedure. The Respondent State has erroneously referred to Rule 121 of the 2020 Rules of Procedure, which on account of the International Law Rules of Non-retroactivity, are inapplicable to the present case. However, the Commission acknowledges the validity of the Respondent's State on the need for submissions on to be made on the remedies.
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222. In light of the 2 foregoing paragraphs, the Commission recommends that the Courts in the Respondent State hear arguments of the quantum of Financial compensation to be made in favor of the victim.

Decision of the Commission on the Merits

223. For these reasons, the Commission decides:

- A. That the Respondent State has violated Articles 2, 5 and 18(3) of the Charter as well as 2 and 4(2)(g) of the Maputo Protocol;
- B. That the Respondent State should expeditiously investigate, prosecute and punish the victim's perpetrators;
- C. That the Respondent State's Courts of law hear arguments on and decide on the amount of financial compensation to be awarded to the victim for the violations found in the present Communication;
- D. That the Respondent State adopt Legislative and other measures to address the problem of trafficking in person, especially of women and children for sexual exploitation into its territory;
- E. That the Respondent State abide by its obligations to adopt legislative and other measures to protect women from gender-based violence through investigation, prosecution and punishment of their perpetrators;
- F. That the Respondent State report on the steps it has taken to implement these decisions in accordance with Rule 112 (2) of its Rules of Procedure, within one-hundred and eighty (180) days.

Done during the 78th Ordinary Session, held virtually from 23 February to 8 March 2024.

