



AMERICAN **BAR** ASSOCIATION

Center for Human Rights

Uganda
v.
Moses Bwayo

January 2021

TRIALWATCH FAIRNESS REPORT
A CLOONEY FOUNDATION FOR JUSTICE INITIATIVE

ABOUT THE AUTHOR:

Staff at the American Bar Association Center for Human Rights helped draft this report. The **American Bar Association** (ABA) is the largest voluntary association of lawyers and legal professionals in the world. As the national voice of the legal profession, the ABA works to improve the administration of justice, promotes programs that assist lawyers and judges in their work, accredits law schools, provides continuing legal education, and works to build public understanding around the world of the importance of the rule of law. The **ABA Center for Human Rights** has monitored trials and provided pro bono assistance to at-risk human rights defenders in over 60 countries. The Center is an implementing partner in the Clooney Foundation for Justice's TrialWatch initiative. The Center thanks Harvard Law School students Madison Ferris, Jack Blaisdell, and Kendall Krumme for their contributions to this report.

ABOUT THE CLOONEY FOUNDATION FOR JUSTICE'S TRIALWATCH INITIATIVE:

TrialWatch is an initiative of the **Clooney Foundation for Justice** focused on monitoring and responding to trials around the world that pose a high risk of human rights violations. TrialWatch is global in scope and focused on trials targeting journalists, LGBTQ persons, women and girls, minorities, and human rights defenders. It works to expose injustice and rally support to secure justice for defendants whose rights have been violated.

The statements and analysis expressed have not been approved by the House of Delegates or the Board of Governors of the American Bar Association, and do not represent the position or policy of the American Bar Association. Furthermore, nothing in this report should be considered legal advice for specific cases. Additionally, the views expressed in this report are not necessarily those of the Clooney Foundation for Justice.

EXECUTIVE SUMMARY



ABA Center for Human Rights staff who are members of the TrialWatch Experts Panel assigned these proceedings a grade of C:

The proceedings against journalist and filmmaker Moses Bwayo entailed serious violations of his right to freedom of expression, right to peaceful assembly, right to freedom from arbitrary detention, and right to counsel. As these violations did not affect the outcome of the case given that it was dismissed, the proceedings have been assigned a grade of C in accordance with the grading methodology in the annex.

From May to August 2020, the American Bar Association (ABA) Center for Human Rights monitored criminal proceedings against journalist and filmmaker Moses Bwayo in Uganda as part of the Clooney Foundation for Justice's TrialWatch initiative. Mr. Bwayo was charged with unlawful assembly for shooting a scene for a documentary about opposition activist, presidential candidate, and musician Bobi Wine: the authorities alleged that the gathering and filming constituted subversion of the Ugandan government. Mr. Bwayo's arrest, detention, and prosecution for speech that was wholly non-violent and that concerned political matters violated his right to freedom of expression. It likewise violated his right to peaceful assembly. While the case against Mr. Bwayo was dismissed by the court for want of prosecution, it should never have been brought. As Uganda prepares for its presidential and parliamentary elections on January 14, it must ensure that journalists such as Mr. Bwayo are protected from reprisal for their coverage of opposing campaigns.

On February 24, Mr. Bwayo and a group of approximately ten individuals assembled on the rooftop of the Five Horsemen Hotel in Kampala to film a scene for a documentary about Bobi Wine. The scene was a music video for one of Bobi Wine's songs: in addition to starting the opposition People Power movement and running for president against incumbent Yoweri Museveni, Bobi Wine is a popular singer whose music often features political themes. For the music video, the group on the rooftop - which primarily consisted of camera crew - was filming shots of Bobi Wine and his entourage, mostly in the street below but also on the rooftop. Those in the video had donned People Power hats and clothing and were singing a song about the struggle to rid Uganda of economic inequality, corruption, land grabbing, discrimination, and police brutality. As Bobi Wine and his entourage performed in the street, a number of bystanders joined, chanting People Power slogans. A military officer in the neighboring Nsambya barracks noticed the filming and called the landlord of the hotel, who was unaware of the events at hand: an assistant hotel manager had given Mr. Bwayo permission to film on the rooftop.

Police and military officers arrived at the hotel. Those on the rooftop, including Mr. Bwayo, were arrested and transported to the Makindye police station. Those in the street scattered. The rooftop group was held in custody until February 26 and thereafter released on bond. On March 4, the accused reported to the police station in line with their bond conditions, at which point they were rearrested and brought to the Makindye Chief Magistrate's Court for a bail hearing. At the hearing, the accused were formally charged with unlawful assembly and remanded to detention. On March 6, the accused were released on bail. Pretrial proceedings began before the Makindye court in May. When the prosecution failed to produce any witnesses on August 10, the day the trial was due to start, the court dismissed the case for want of prosecution. While nine individuals were charged in the case, this report is focused on Moses Bwayo.

The proceedings violated the right to freedom of expression enshrined in the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples' Rights (African Charter). As mentioned above, Mr. Bwayo was filming a scene for a documentary about Bobi Wine: specifically, a music video for the purposes of which participants had donned People Power paraphernalia and were singing a Bobi Wine song. This speech, covered by the right to freedom of expression, warranted heightened protection because it concerned political matters: as noted above, the song was about reforming Ugandan society and government. In order to impose restrictions on the speech - i.e. arrest, detention, and criminal charges - the State had to both possess a legitimate objective and respond in a manner necessary and proportional to the supposed threat.

As a baseline, it appears that the authorities did not possess a legitimate objective for the restrictions but were instead motivated by the perceived political affiliation of those in attendance: in concluding that a crime had been perpetrated, police officer statements, the investigation report, and the charge sheet all reference the fact that the group was donning People Power attire and/or singing what is characterized as anti-government music.

Crucially, *even if* a State "invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and ... a direct and immediate connection between the expression and the threat."¹ In the present case, while the authorities referred vaguely to the specter of subversion, indicating that they acted on public order or security grounds, they failed to explain the "precise nature" of the alleged subversion, what the potential effects of such subversion might be, and why the police considered the filming of a music video to be a "global threat" - as stated in a police report. Moreover, the authorities failed to establish a direct and immediate connection between the filming and the supposed threat. In light of the above, Mr. Bwayo's right to freedom of expression was violated.

¹ Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 35.

The ICCPR and African Charter also protect the right to peaceful assembly. Under these treaties, restrictions on peaceful assembly - like restrictions on protected speech - must possess a legitimate objective and must be necessary and proportional. As noted above, there are grounds to conclude that the authorities interfered due to the accused's perceived political affiliation, without a legitimate objective. Even assuming a legitimate objective, there were less intrusive options that the authorities could have pursued to assuage any concerns about potential subversion. They could have verified with the hotel manager or the film crew, for example, that the gathering was for the purpose of a documentary and was not a prelude to violence. If the officers were concerned about the filming of the barracks, as stated in the charge sheet and other documents, they could have requested that the crew film the scene from a different angle or make other adjustments. The authorities' unnecessary and disproportionate actions in arresting, detaining, and charging Mr. Bwayo and others thus violated the guarantee of peaceful assembly enshrined in the ICCPR and African Charter.

As the Ugandan election approaches, the authorities have intensified attacks - including physical assaults and baseless arrests and charges - on individuals affiliated with opposition parties. Journalists covering opposition campaigns have been vulnerable to such harassment. The case against Mr. Bwayo thus reflects a broader pattern. In line with recommendations from United Nations Special Procedures² and organizations such as the Human Rights Network for Journalists-Uganda,³ the government should take steps to protect the right to freedom of expression and, in particular, press freedom, at this crucial juncture, ensuring that journalists covering the opposition are able to operate freely, ensuring that any individuals or institutions that target such journalists are investigated and sanctioned where appropriate, and ensuring that the populace is freely able to access media across the political spectrum.

² United Nations Office of the High Commissioner for Human Rights, "Uganda: UN Experts Gravely Concerned by Election Clampdown", December 29, 2020. Available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26632&LangID=E>.

³ Human Rights Network for Journalists-Uganda, "Press Statement on the Continuous Attacks on Journalists Covering Political Campaigns", December 28, 2020. Available at <https://www.hrnjuganda.org/download/press-release/Press-statement-on-the-continuous-attack-on-journalists-covering-political-campaigns.pdf>.

BACKGROUND INFORMATION



A. POLITICAL AND LEGAL CONTEXT

Crackdown on Freedom of Expression and Freedom of Peaceful Assembly in Leadup to Elections

The proceedings against Moses Bwayo reflect a pattern of government curtailment of freedom of expression and civic engagement in Uganda, particularly in the leadup to general elections.

In 2020, for its annual assessment of countries' respect for civil liberties and political rights, Freedom House ranked Uganda "Not Free," stating: the government "retain[ed] power through the manipulation of state resources, intimidation by security forces, and politicized prosecutions of opposition leaders. Uganda's civil society and independent media sectors suffer from legal and extralegal harassment and state violence."⁴ The U.S. State Department's 2020 report on Uganda's human rights practices similarly noted that the government had imposed "the worst forms of restrictions on free expression, the press, and the internet, including violence, threats of violence, and unjustified arrests or prosecutions of journalists, censorship, and site blocking; substantial interference with the rights of peaceful assembly and freedom of association; [and] restrictions on political participation."⁵ Journalists have been particularly affected. Reporters Without Borders recently ranked Uganda 125 out of 180 countries in terms of respect for press freedom.⁶ Notably, at a press conference in 2018, President Yoweri Museveni, head of the ruling National Resistance Movement party (NRM), called members of the media "parasites."⁷

Crackdowns on freedom of expression have long been a feature of the political landscape under President Museveni, who came to power in 1986. In 2011, for example, the NRM dominated legislature passed the "Computer Misuse Act," which criminalizes a range of online speech.⁸ The government has leveraged the ambiguous language of the Act to harass critics, including prominent women's rights activist Stella Nyanzi: Nyanzi was sentenced to 18 months in prison in 2019 after denouncing Museveni on Facebook, a trial that was monitored as part of TrialWatch.⁹

⁴ Freedom House, "Freedom in the World 2020: Uganda", 2020. Available at <https://freedomhouse.org/country/uganda/freedom-world/2020>.

⁵ Bureau of Democracy, Human Rights, and Labor, "2019 Country Human Rights Practices Report: Uganda", 2020, pg. 1. Available at <https://www.state.gov/wp-content/uploads/2020/02/UGANDA-2019-HUMAN-RIGHTS-REPORT.pdf>.

⁶ Reporters Without Borders, "Uganda", 2020. Available at <https://rsf.org/en/uganda>.

⁷ Id.

⁸ Human Rights Network for Journalists, "Analysis of the Computer Misuse Act", 2011. Available at https://hrnjuganda.org/?wpfb_dl=38.

⁹ The New York Times, "Ugandan Academic Jailed for Insulting President on Facebook", August 3, 2019. Available at <https://www.nytimes.com/2019/08/03/world/africa/uganda-stella-nyanzi-jail.html>; American Bar Association, *Uganda v. Stella Nyanzi*, February 2020. Available at

Also in 2019, the government introduced new regulations requiring blogs and websites to apply for official authorization or risk being shut down, and directed 13 radio and television stations to suspend their staff after they aired news reports covering opposition parties.¹⁰ Critics have noted that a “social media tax,” which requires users of social media - including WhatsApp and Facebook - to pay a daily fee in order to access the platforms, has stifled the free exchange of views and excluded vulnerable populations from the civic space.¹¹

Freedom of assembly is similarly restricted by the state. Police, for example, have regularly invoked the 2013 Public Order Management Act to shut down peaceful assemblies and demonstrations by opposition groups, “often with excessive force.”¹² As described by Amnesty International, Section 8 of the Act provided “the Inspector General of Police sweeping powers to arbitrarily prevent or stop public gatherings organised by opposition politicians, and to crack down on protests.”¹³ The authorities have also used charges of unlawful assembly (the offense with which Moses Bwayo was charged) to disrupt peaceful protests and convenings. In 2017, for example, 56 members of the opposition Forum for Democratic Change (FDC) party were arrested for unlawful assembly while meeting in a private home.¹⁴

And while the Ugandan Constitutional Court declared Section 8 of the Public Order Act unconstitutional in March 2020,¹⁵ crackdowns on freedom of assembly have persisted.¹⁶ Security forces have increasingly used COVID-19 restrictions to ban rallies held by opposition parties.¹⁷ Rallies in favor of the ruling party have not faced the same sanctions and restrictions.¹⁸

https://www.americanbar.org/content/dam/aba/administrative/human_rights/fairnessreport-uganda-stellan-nyanzi.pdf.

¹⁰ Human Rights Watch, “Uganda: Events of 2019”, 2020. Available at <https://www.hrw.org/world-report/2020/country-chapters/uganda>.

¹¹ Al Jazeera, “Uganda introduces social media tax despite criticism”, July 1 2018. Available at <https://www.aljazeera.com/economy/2018/07/01/uganda-introduces-social-media-tax-despite-criticism/?gb=true>.

¹² See Human Rights Watch, “Uganda: Events of 2019”, 2020.

¹³ Amnesty International, “Uganda: Constitutional Court nullifies law used to prohibit protests”, March 27, 2020. Available at <https://www.amnesty.org/en/latest/news/2020/03/uganda-constitutional-court-nullifies-law-used-to-prohibit-protests/>.

¹⁴ Human Rights Watch, “Uganda: Events of 2017”, 2018. Available at <https://www.hrw.org/world-report/2018/country-chapters/uganda>.

¹⁵ Amnesty International, “Uganda: Constitutional Court nullifies law used to prohibit protests”, March 27, 2020.

¹⁶ Global Voices, “The future of protest in Uganda”, June 6, 2020. Available at <https://globalvoices.org/2020/06/06/the-future-of-protest-in-uganda/>.

¹⁷ See The Economist, “Covid-19 will help unscrupulous incumbents in African elections”, November 17, 2020. Available at <https://www.economist.com/the-world-ahead/2020/11/17/covid-19-will-help-unscrupulous-incumbents-in-african-elections>.

¹⁸ See id.

To note, rights violations in Uganda have historically increased in the leadup to elections.¹⁹ President Yoweri Museveni is up for re-election in two days. The period preceding the 2011 election featured severe human rights abuses, with Amnesty International reporting, for example, physical attacks against journalists and the “arbitrary block[ing]” of “media coverage of the campaigns of key opposition leaders, in particular radio talk shows.”²⁰ In the leadup to the 2016 election, supporters of opposition candidates were harassed and beaten by the authorities and the primary presidential challenger was placed under house arrest for several months.²¹ During this time the government also blocked Ugandans’ access to social media sites, such as Facebook and Twitter.²²

This election cycle, Robert Kyagulanyi, more popularly known as “Bobi Wine,” has been one of the primary opposition candidates. A singer who won a seat in Parliament in 2017, he formed the political movement “People Power, Our Power,” and leads the political party National Unity Platform (NUP). Advocating against corruption, human rights abuses, and economic inequality, Wine has amassed a large following: in particular, younger voters, who make up a significant part of Uganda’s voting population.²³

The State has responded with force to Bobi Wine’s ascendance. Security forces, for example, have dispersed People Power and NUP rallies with arrests, tear gas, and beatings.²⁴ NUP’s offices are regularly raided by police and soldiers.²⁵ At the beginning

¹⁹ See Human Rights Watch, “Uganda Elections 2016.” Available at <https://www.hrw.org/tag/ugandaelections-2016>; Amnesty International, “Uganda: Arbitrary Arrests and Excessive Use of Force in Run-Up to Elections”, December 7, 2015. Available at <https://www.amnesty.org/en/latest/news/2015/12/uganda-arbitrary-arrests-and-excessive-use-of-force-hindering-debate-in-run-up-to-elections/>; Civicus, “Addressing Civic Space Restrictions in Uganda: What Role for the Universal Periodic Review?”, February 2017, pg. 2. Available at http://www.civicus.org/images/Addressing_Civic_Space_Restrictions_in_Uganda_PolicyBrief_Feb2017rfd.pdf; Civicus, “Continued Rights Violations Reported Throughout COVID-19 Lockdown and Run-Up to National Elections”, August 31, 2020. Available at <https://monitor.civicus.org/updates/2020/08/31/continued-rights-violations-reported-throughout-covid-19-lockdown-and-run-national-elections/>.

²⁰ Amnesty International, “Stifling Dissent: Restrictions on the Rights to Freedom of Expression and Peaceful Assembly in Uganda”, November 11, 2011. Available at <https://www.amnesty.org/download/Documents/28000/afr590162011en.pdf>.

²¹ See Voice of America, “Study: Many Uganda Voters Fear Violence in Next Elections”, August 29, 2019. Available at <https://www.voanews.com/africa/study-many-uganda-voters-fear-violence-next-elections>; Amnesty International, “Uganda: Arbitrary Arrests and Excessive Use of Force in Run-Up to Elections”, December 7, 2015.

²² NPR, “National Elections in Uganda Turn Violent”, February 19, 2016. Available at <https://www.npr.org/sections/thetwo-way/2016/02/19/467389307/national-elections-in-uganda-turn-violent>.

²³ The Observer, “Can ‘People Power’ change Uganda’s political fortune?”, October 1, 2018. Available at <https://observer.ug/news/headlines/58803-can-people-power-change-uganda-s-political-fortune>.

²⁴ See Reuters, “Uganda jails filmmaker doing documentary on opposition hopeful”, March 4, 2020. Available at <https://www.reuters.com/article/us-uganda-judiciary/uganda-jails-filmmaker-doing-documentary-on-opposition-hopeful-idUSKBN20R2CG>.

²⁵ The Economist, “Bobi Wine, the pop star who would be president of Uganda”, November 7, 2020. Available at <https://www.economist.com/middle-east-and-africa/2020/11/07/bobi-wine-the-pop-star-who-would-be-president-of-uganda>.

of November 2020, the “police smashed the window of [Bobi Wine’s] car, arrested him and pepper-sprayed his face before driving him home.”²⁶ On November 19, Wine was arrested for allegedly ignoring COVID-19 assembly limits, setting off protests at which the police used “teargas, rubber bullets and live rounds.”²⁷ The clashes left approximately 55 individuals dead and resulted in hundreds of arrests.²⁸ Although Bobi Wine briefly suspended his campaign in December in response to the violence,²⁹ he resumed campaigning shortly thereafter.

The discord and violence have persisted. At a recent protest, Bobi Wine’s bodyguard was allegedly run over by a military vehicle (he later died) and three journalists were injured.³⁰ On January 7, 2021, Bobi Wine was accosted by police during an online press conference: he later stated that 23 members of his team were arrested that same day.³¹

Meanwhile, as documented by Al Jazeera, the authorities have “suspended all campaigning for January’s presidential polls in the capital and 10 highly-populated districts, citing coronavirus risks,” although “critics said the real reason was the opposition’s popularity in these areas.”³² The government has also arrested key opposition actors. In late December, for example, prominent human rights lawyer Nicholas Opiyo was arrested and detained on money laundering charges.³³ International and domestic organizations have characterized the case as reprisal for his human rights work.³⁴

Journalists covering Bobi Wine have been targeted as well, in line with documented patterns over the last several years. In 2018, for example, eight journalists were

²⁶ Id.

²⁷ France 24, “28 die in violent start to Uganda’s election season”, November 20, 2020. Available at <https://www.france24.com/en/live-news/20201120-28-die-in-violent-start-to-uganda-s-election-season>; The Economist, “The Ugandan state shoots scores of citizens dead”, November 28, 2020. Available at <https://www.economist.com/middle-east-and-africa/2020/11/28/the-ugandan-state-shoots-scores-of-citizens-dead>.

²⁸ Id.; UN News, “Uganda: ‘Deteriorating’ human rights situation in run-up to elections next week”, January 8, 2021. Available at <https://news.un.org/en/story/2021/01/1081662>.

²⁹ Al Jazeera, “Uganda: Bobi Wine Suspends Election Campaign over Violence”, December 2, 2020. Available at <https://www.aljazeera.com/news/2020/12/2/uganda-bobi-wine-suspends-election-campaign-over-violence>.

³⁰ Reuters, “Uganda’s Bobi Wine Says Bodyguard Killed by Police Who Deny Charge; Three Reporters Hurt”, December 27, 2020. Available at <https://www.reuters.com/article/us-uganda-politics-idUSKBN2910KY>.

³¹ The Guardian, “Bobi Wine Confronted by Ugandan Police During Appeal for ICC Inquiry”, January 7, 2021. Available at <https://www.theguardian.com/world/2021/jan/07/bobi-wine-confronted-by-ugandan-police-during-appeal-for-icc-inquiry>.

³² Al Jazeera, “Uganda Halts Campaigning for January 4 Vote in Several Districts”, December 26, 2020. Available at <https://www.aljazeera.com/news/2020/12/26/uganda-suspends-campaigning-in-several-districts-ahead-of-polls>.

³³ Deutsche Welle, “Nicholas Opiyo: Uganda’s Rebellious Rights Lawyer”, December 24, 2020. Available at <https://www.dw.com/en/nicholas-opiyo-ugandas-rebellious-rights-lawyer/a-56047233>.

³⁴ The Guardian, “Uganda Charges Leading Lawyer for LGBT Rights with Money Laundering”, December 24, 2020. Available at <https://www.theguardian.com/global-development/2020/dec/24/uganda-charges-leading-lawyer-for-lgbt-rights-with-money-laundering-nicholas-opiyo>.

arrested for covering Bobi Wine;³⁵ in 2019, the country's media regulator ordered thirteen outlets to suspend staff members in connection with their reporting on Wine;³⁶ and in early 2020, police detained journalists covering a political rally featuring Wine.³⁷ The Committee to Protect Journalists found that between early November and mid-December "police officers and members of the public ... harassed and attacked at least seven journalists covering campaigns for the country's upcoming presidential elections."³⁸ In November 2020, journalist Moses Bwayo, whose criminal case is the subject of this report, was shot in the face by a police officer while reporting on a convoy transporting Bobi Wine.³⁹

Correspondingly, state institutions have taken steps to curtail access to media, imposing restrictions on online data communication and broadcasting service providers⁴⁰ and requiring foreign and local journalists to reapply for their accreditations.⁴¹ On December 29, 2020, a group of United Nations Special Rapporteurs expressed grave concern about the abuses that have characterized the lead-up to the elections, calling on the Ugandan government to "put an immediate end to judicial intimidation of human rights defenders, journalists, civil society leaders, peaceful protesters, political parties and those who express dissent" and "take all necessary measures to ensure an environment conducive to peaceful and transparent elections."⁴² On January 12, 2021, the Ugandan Communications Commission "ordered internet service providers to block all social media platforms and messaging apps ... until further notice."⁴³

³⁵ Committee to Protect Journalists, "Ugandan police arrest at least 8 journalists covering opposition MP Bobi Wine", September 20, 2018. Available at <https://cpj.org/2018/09/ugandan-police-arrest-at-least-8-journalists-cover/>.

³⁶ Committee to Protect Journalists, "Ugandan regulator suspends staff from 13 outlets that covered Bobi Wine", May 2, 2019. Available at <https://cpj.org/2019/05/ugandan-regulator-suspends-staff-from-13-outlets-t/>.

³⁷ Committee to Protect Journalists, "Ugandan police harass and detain journalists covering opposition politician Bobi Wine", January 14, 2020. Available at <https://cpj.org/2020/01/ugandan-police-harass-and-detain-journalists-cover/>.

³⁸ Committee to Protect Journalists, "Journalists Attacked, Deported Ahead of January Elections in Uganda", December 11, 2020. Available at <https://cpj.org/2020/12/journalists-attacked-deported-ahead-of-january-elections-in-uganda/>.

³⁹ *Id.*

⁴⁰ Article 19, "Uganda: Online media should not be restricted prior to 2021 elections", September 21, 2020. Available at <https://www.article19.org/resources/uganda-online-media-restricted/>.

⁴¹ Committee to Protect Journalists, "Journalists Attacked, Deported Ahead of January Elections in Uganda", December 11, 2020; Voice of America, "Uganda Issues New Directives for Foreign Journalists", December 11, 2020. Available at <https://www.voanews.com/africa/uganda-issues-new-directives-foreign-journalists>.

⁴² United Nations Office of the High Commissioner for Human Rights, "Uganda: UN Experts Gravely Concerned by Election Clampdown", December 29, 2020.

⁴³ Reuters, "Uganda Orders All Social Media To Be Blocked - Letter", January 12, 2021. Available at <https://www.reuters.com/article/uk-uganda-election-social-media/uganda-orders-all-social-media-to-be-blocked-letter-idUSKBN29H1EB>.

Fair Trial Concerns in the Ugandan Criminal Justice System

Violations of due process and fair trial rights are not uncommon in the Ugandan criminal justice system. At the pretrial stage, arbitrary arrest and detention and denial of access to counsel have been documented by Freedom House and the U.S. State Department.⁴⁴ Defendants are not always notified of the reasons for their arrests or the underlying charges.⁴⁵ After being charged, defendants face the prospect of delayed court proceedings, in violation of their right to a speedy trial.⁴⁶

As part of the TrialWatch initiative, the American Bar Association Center for Human Rights has observed various cases in which the government has used the criminal justice system as a tool of harassment. In some of these cases, the authorities brought baseless charges that were ultimately dismissed before trial: among others, the case against residents of the Children of the Sun homeless shelter, who were charged with violating COVID-restrictions despite being lawfully present in the shelter,⁴⁷ and five cases against 67 individuals charged with common nuisance following a raid of the LGBT-friendly Ram Bar, two of which have been dismissed and three of which are ongoing although the prosecution has yet to present any evidence of criminal conduct.⁴⁸

B. CASE HISTORY

Moses Bwayo, a Ugandan national, is a freelance journalist and documentary filmmaker based in Kampala. At the time of his arrest, he was attached to Southern Films, a UK based production company.⁴⁹ On February 24, 2020, using camera equipment rented from a local shop, Mr. Bwayo was filming a scene for a documentary about Bobi Wine on the rooftop of the Five Horsemen Hotel in Nsambya;⁵⁰ according to Mr. Bwayo, he had chosen the hotel so as to capture the city's skyline.⁵¹ An assistant manager at the

⁴⁴ Freedom House, "Freedom in the World 2020: Uganda", 2020; Bureau of Democracy, Human Rights, and Labor, "2019 Country Human Rights Practices Report: Uganda", 2020, pgs. 4-8.

⁴⁵ See Bureau of Democracy, Human Rights, and Labor, "2019 Country Human Rights Practices Report: Uganda", 2020, pg. 7.

⁴⁶ Freedom House, "Freedom in the World 2020: Uganda", 2020; Bureau of Democracy, Human Rights, and Labor, "2019 Country Human Rights Practices Report: Uganda", 2020, pg. 9; HRAPF, "HRAPF Newsletter: January-March 2013", pg. 2. Available at <https://hrapf.org/index.php/news-events/newsletters/59-newsletter/file>.

⁴⁷ Human Rights Watch, "Court Awards Damages to 20 LGBT Youth in Uganda", July 10, 2020. Available at <https://www.hrw.org/news/2020/07/10/court-awards-damages-20-lgbt-youth-uganda>. TrialWatch observed these proceedings but did not issue a final report.

⁴⁸ American Bar Association Center for Human Rights, "Uganda v. the 67", November 2020. Available at https://www.americanbar.org/content/dam/aba/administrative/human_rights/trialwatch/fair_trial_report_uganda_the_67.pdf.

⁴⁹ Committee to Protect Journalists, "Ugandan journalist Moses Bwayo charged with illegal assembly, held in prison", March 4, 2020. Available at <https://cpj.org/2020/03/ugandan-journalist-moses-bwayo-charged-with-illegal/>.

⁵⁰ See Daniel Mbabazi Statement, February 25, 2020; Maureen Katongola Statement, February 25, 2020; Moses Bwayo Statement, February 25, 2020.

⁵¹ Moses Bwayo Statement, February 25, 2020.

Five Horsemen Hotel (as she explained to the police) had given Mr. Bwayo permission to film on the rooftop: she stated that the rooftop was frequently booked for filming by different individuals.⁵²

The documentary scene being filmed that day was a music video for a Bobi Wine song about the struggle to rid Uganda of economic inequality, corruption, land grabbing, discrimination, and police brutality. For the shoot, the group on the rooftop - which primarily consisted of camera crew⁵³ - was filming shots of Bobi Wine and his entourage, mostly in the street below but also on the rooftop. Those in the video had donned People Power hats and clothing, were waving flags of different African countries, and were singing. As Bobi Wine and his entourage performed in the street, a number of bystanders joined, chanting People Power slogans.

A military officer from the neighboring Nsambya police barracks noticed the filming.⁵⁴ Police and military officers went to the hotel. They arrested those who had not fled, taking them into custody at the Kabalagala police station and confiscating the People Power attire and camera equipment.

The charge sheet produced by the Kabalagala police station on February 25 stated that Mr. Bwayo and eight others had illegally filmed the Nsambya barracks while “singing song[s] subverting or promoting subversion of the Government of Uganda.”⁵⁵ They were charged with unlawful assembly pursuant to Section 65 of the Penal Code of Uganda,⁵⁶ the punishment for which is up to one year’s imprisonment.⁵⁷ The text of the statute reads:

When three or more persons assemble with intent to commit an offence, or being assembled with intent to carry out some common purpose, conduct themselves in such a manner as to cause persons in the neighbourhood reasonably to fear that the persons so assembled will commit a breach of the peace or will by such assembly needlessly and without any reasonable occasion provoke other persons to commit a breach of the peace, they are an unlawful assembly.⁵⁸

⁵² Angella Nabunya Statement, February 25, 2020. She noted that she had tried to explain this to the police on the rooftop.

⁵³ According to credible sources on the ground, some of the camera crew was also donning People Power clothing and paraphernalia.

⁵⁴ Captain Francis Agaba Statement, February 25, 2020.

⁵⁵ Charge Sheet, Uganda vs. Moses Bwayo et al, Kabalagala Police Station. February 25, 2020.

⁵⁶ Id.

⁵⁷ Ugandan Penal Code, 1950, Section 66.

⁵⁸ Id. at Section 65(1).

Mr. Bwayo and the rest of the group were held for two days (until February 26), at which point they were released on police bond.⁵⁹ They were instructed to report back to the police station a week later, on March 4.⁶⁰ Having complied with these instructions, they were re-arrested and taken to the Chief Magistrate's Court in Makindye,⁶¹ where they appeared before a judge, were formally charged, and made a bail application through their attorneys.⁶² The group was remanded to Luzira Prison until March 6, when the court granted bail.⁶³

Despite delays occasioned by the COVID-19 pandemic, pre-trial hearings commenced in early May.⁶⁴ At a hearing on May 6, the accused pled not guilty.⁶⁵ On June 5, the prosecution introduced into evidence witness statements and footage from the accused's video camera.⁶⁶ On July 17, the prosecution confirmed that it was ready to proceed with the case and that a list of witnesses for the prosecution had been prepared.⁶⁷

Mr. Bwayo and the rest of the accused appeared in court on August 10 for trial.⁶⁸ However, no witnesses for the prosecution appeared.⁶⁹ The court declined the state attorney's request for an adjournment, dismissing the case for lack of evidence.⁷⁰ The court noted that the State appeared to lack sufficient interest in the matter and was imposing unnecessary costs on the accused.⁷¹

⁵⁹ Committee to Protect Journalists, "Ugandan journalist Moses Bwayo charged with illegal assembly, held in prison", March 4, 2020.

⁶⁰ Foreign Correspondents Association Uganda, "Moses Bwayo Case Update", March 4, 2020. Available at <https://twitter.com/fcauganda/status/1235225929615540225?s=20>.

⁶¹ *Id.*

⁶² Committee to Protect Journalists, "Ugandan journalist Moses Bwayo charged with illegal assembly, held in prison", March 4, 2020.

⁶³ The Independent, "Makindye Court Grants Journalist Moses Bwayo Bail", March 6, 2020. Available at <https://www.independent.co.ug/makindye-court-grants-journalist-moses-bwayo-bail/>.

⁶⁴ On May 11, Bwayo and the others appeared at court as ordered, but were turned away as capacity was limited due to COVID-19 and other developments. Monitor's Notes, May 11, 2020.

⁶⁵ Monitor's Notes, May 6, 2020.

⁶⁶ Monitor's Notes, June 5, 2020.

⁶⁷ Monitor's Notes, July 17, 2020.

⁶⁸ Monitor's Notes, August 10, 2020.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Chief Magistrate's Court of Makindye, Case Dismissal, August 10, 2020.

METHODOLOGY



A. THE MONITORING PHASE

As part of the Clooney Foundation for Justice's TrialWatch initiative, the ABA Center for Human Rights deployed monitors to proceedings against Moses Bwayo and others before the Makindye Chief Magistrate Court in Kampala. The trial was in English and the monitors were able to follow the proceedings.

The monitors did not experience any impediments in entering the courtroom and were present for all proceedings prior to dismissal. The monitors used the CFJ TrialWatch App to record and track what transpired in court and the degree to which the defendant's fair trial rights were respected.

B. THE ASSESSMENT PHASE

To evaluate the trial's fairness and arrive at a grade, staff at the ABA Center for Human Rights reviewed responses to the standardized questionnaire (collected via the CFJ TrialWatch App), notes taken during the proceedings, and documents from the case file.

Center staff found that the proceedings against Mr. Bwayo constituted a severe violation of his right to freedom of assembly and right to freedom of expression. The charges should never have been brought.

ANALYSIS



A. APPLICABLE LAW

This report draws upon the International Covenant on Civil and Political Rights (the “ICCPR”); jurisprudence from the United Nations Human Rights Committee, tasked with monitoring implementation of the ICCPR; the African Charter on Human and Peoples’ Rights (the “African Charter”); jurisprudence from the African Commission on Human and Peoples’ Rights (the “African Commission”), tasked with interpreting the Charter and considering individual complaints of Charter violations; jurisprudence from the African Court on Human and Peoples’ Rights (the “African Court”), which - complementing the African Commission’s work - is tasked with interpreting and applying the African Charter; the African Commission’s Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (the “Fair Trial Guidelines”); the African Commission’s Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (the “Luanda Guidelines”); the African Commission’s Guidelines on Freedom of Association and Assembly in Africa; and the African Commission’s Declaration of Principles on Freedom of Expression and Access to Information in Africa.

The African Court has “jurisdiction over all cases and disputes submitted to it concerning the interpretation and application of the African Charter on Human and Peoples’ Rights (the Charter), the Protocol [on the Court’s establishment] and any other relevant human rights instrument ratified by the States concerned.”⁷² Uganda ratified the African Charter in 1986 and the Protocol in 2001.⁷³ The African Court has frequently relied on jurisprudence from both the European Court of Human Rights and the Inter-American Court of Human Rights, noting that the two bodies have analogous jurisdiction and are guided by instruments similar to the African Charter.⁷⁴ The Court has also stated that where the ICCPR provides for broader rights than those of the Charter, it can apply the ICCPR if the country under consideration has already acceded to or ratified it.⁷⁵ Uganda acceded to the ICCPR in 1995.⁷⁶

⁷² African Court on Human and Peoples’ Rights, “Welcome to the African Court”. Available at <https://en.african-court.org/>.

⁷³ African Union, “List of Countries which have signed, ratified/acceded to the Protocol of the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights”. Available at https://au.int/sites/default/files/treaties/36393-sl-protocol_to_the_african_charter_on_human_and_peoplesrights_on_the_estab.pdf.

⁷⁴ See Jamil Ddamulira Mujuzi, “The African Court on Human and Peoples’ Rights and Its Protection of the Right to a Fair Trial”, *The Law and Practice of International Courts and Tribunals*, December 5, 2017, pg. 193. Available at https://brill.com/abstract/journals/lape/16/2/article-p187_187.xml.

⁷⁵ African Court on Human and Peoples’ Rights, *Alex Thomas v. Tanzania*, App. No. 005/2013, November 20, 2015, paras. 88-89; African Court on Human and Peoples’ Rights, *Wilfred Onyango Nganyi et al v. Tanzania*, App. No. 006/2013, March 18, 2016, paras. 165-166.

⁷⁶ United Nations Treaty Collection, “ICCPR Status as of January 11, 2021.” Available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en.

B. INVESTIGATION AND PRETRIAL STAGE VIOLATIONS

Right to Counsel

Article 14(3)(b) of the ICCPR guarantees accused persons the right to “communicate with counsel of [their] own choosing.” Defendants must be granted “prompt access to counsel”⁷⁷ at all stages of criminal proceedings, including during the initial detention period. In *Kelly v. Jamaica*, for example, the United Nations Human Rights Committee found a violation of Article 14(3)(b) where police officers ignored the complainant’s request to speak to a lawyer for the first five days he was in custody.⁷⁸ A violation of Article 14(3)(b) was also found in *Lyashkevich v Uzbekistan*, where the complainant was interrogated without “access to the legal counsel of his choice.”⁷⁹

Like the ICCPR, Article 7(1)(c) of the African Charter provides for the right to defense, including the right “to be defended by counsel of [one’s] choice.” The African Commission’s Fair Trial Guidelines affirm the right to counsel at all stages of a criminal prosecution: according to the African Commission, “[t]his right begins when the accused is first detained or charged.”⁸⁰

In the present case, Mr. Bwayo was detained for two days without access to counsel - from February 24 to February 26 - before being released on bond.⁸¹ During this time, he was interrogated: his witness statement, part of the case file introduced by the prosecution on June 5, was taken on February 25.⁸² According to credible sources on the ground, Mr. Bwayo requested a lawyer. As noted above, accused persons are entitled to counsel during the initial detention period, including during interrogation, when the assistance of a lawyer may be particularly crucial. As such, the authorities’ conduct violated the guarantees enshrined in Article 14(3)(b) of the ICCPR and Article 7(1)(c) of the African Charter.

Arbitrary Detention

Under Article 9(1) of the ICCPR, “[e]veryone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention.” Article 6 of the

⁷⁷ Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, Aug. 23, 2017, para. 34.

⁷⁸ Human Rights Committee, *Kelly v. Jamaica*, U.N. Doc. CCPR/C/57/D/537/1993, July 17, 1996, para. 9.2.

⁷⁹ Human Rights Committee, *Lyashkevich v Uzbekistan*, U.N. Doc. CCPR/C/98/D/1552/2007, May 11, 2010, para. 9.4.

⁸⁰ African Commission on Human and Peoples’ Rights, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, 2003, Principle N(2)(c-d).

⁸¹ International Documentary Association, “Charges Must Be Dropped Against Ugandan Filmmaker & Journalist, Bwayo Moses”, March 16, 2020. Available at <https://www.documentary.org/press-release/charges-must-be-dropped-against-ugandan-filmmaker-journalist-bwayo-moses>.

⁸² Moses Bwayo Statement, February 25, 2020.

African Charter contains parallel guarantees. The United Nations Human Rights Committee has noted that the concept of “arbitrariness” must be “interpreted broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality.”⁸³ Not only should pretrial detention be the exception and as short as possible, but detention must be “lawful” (in accordance with domestic law) and “reasonable and necessary in all circumstances.”⁸⁴ This means that pretrial detention is appropriate for only a limited number of purposes - namely, to prevent flight, interference with evidence, and the recurrence of crime.⁸⁵ Furthermore, pretrial detention must be based on an individualized determination that takes into account all the circumstances of the case.⁸⁶

Article 6 of the African Charter imposes similar requirements. According to the African Commission, detention must be a “last resort and should only be used where necessary and where no other alternatives are available.”⁸⁷ The Commission’s Luanda Guidelines require that there be “reasonable grounds to believe that the accused has been involved in the commission of a criminal offence that carries a custodial sentence,” and a showing that “there is a danger that he or she will abscond, commit further serious offences or if there is a danger that the release of the accused will not be in the interests of justice.”⁸⁸

In the present case, Mr. Bwayo was arrested on February 24, detained for 2 days, then released on bond. When he reported to the Kabalagala Police Station on March 4 in accordance with his bond conditions, the police rearrested him and brought him to the Makindye court, which remanded him to Luzira prison. Mr. Bwayo was granted bail on March 6 and released. According to credible sources on the ground and as corroborated by media reports,⁸⁹ Mr. Bwayo was remanded because the prosecution and magistrate stated that they required more time to respond to Mr. Bwayo’s bail application. As noted above, detention must be a measure of last resort. If imposed, it

⁸³ Human Rights Committee, *Ismet Ozcelik et. al. v. Turkey*, U.N. Doc. CCPR/C/125/D/2980/2017, May 28, 2019, para. 9.3.

⁸⁴ Human Rights Committee, *Cedeno v. Bolivarian Republic of Venezuela*, U.N. Doc. CCPR/C/106/D/1940/2010, December 4, 2012, para. 7.10.

⁸⁵ Human Rights Committee, *Mikhail Marinich v. Belarus*, U.N. Doc. CCPR/C/99/D/1502/2006, August 19, 2010, para. 10.4; Human Rights Committee. See also *M. and B. Hill v. Spain*, April 2, 1997, U.N. Doc. CCPR/C/59/D/526/1993, para. 12.3; *Torobekov v. Kyrgyzstan*, U.N. Doc. CCPR/C/103/D/1547/2007, November 21, 2011, para. 6.3; Human Rights Committee, *Cedeno v. Bolivarian Republic of Venezuela*, U.N. Doc. CCPR/C/106/D/1940/2010, December 4, 2012, para. 7.10.

⁸⁶ Human Rights Committee, General Comment No. 35, U.N. Doc. CCPR/C/GC/35, December 16, 2014, para. 38. See also Human Rights Committee, *M. and B. Hill v. Spain*, April 2, 1997, U.N. Doc. CCPR/C/59/D/526/1993, para. 12.3; Human Rights Committee, *Torobekov v. Kyrgyzstan*, U.N. Doc. CCPR/C/103/D/1547/2007, November 21, 2011, para. 6.3; Human Rights Committee, *Cedeno v. Bolivarian Republic of Venezuela*, U.N. Doc. CCPR/C/106/D/1940/2010, December 4, 2012, para. 7.10.

⁸⁷ African Commission on Human and Peoples’ Rights, *Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (Luanda Guidelines)*, 55th Ordinary Session, April 28–May 12, 2014, para. 10(b).

⁸⁸ *Id.* at para. 11(a)(ii).

⁸⁹ Jurist, “Uganda Journalist and Filmmaker Moses Bwayo Held in Prison”, March 6, 2020. Available at <https://www.jurist.org/news/2020/03/uganda-journalist-and-filmmaker-moses-bwayo-held-in-prison/>.

must be necessary to either prevent flight, prevent recurrence of crime, or prevent interference with the proceedings: by contrast, additional time to process a bail application is not a permissible justification. As such, Mr. Bwayo's detention for two days violated the prohibition on arbitrary detention set forth in Article 9(1) of the ICCPR and Article 6 of the African Charter. Detention was especially egregious given that Mr. Bwayo had previously been released on bond, during which time he had demonstrated that he posed no risk of flight, of interference with the proceedings, or of recurrence of crime. His subsequent remand to jail was therefore without cause.

C. OTHER FAIRNESS CONCERNS

Right to Freedom of Expression

The right to freedom of expression is guaranteed by Article 19 of the ICCPR and Article 9 of the African Charter on Human and Peoples' Rights. Under Article 19(2) of the ICCPR, the right to freedom of expression is recognized to include the "freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media." The United Nations Human Rights Committee places a high value on "uninhibited expression," particularly in "circumstances of public debate concerning public figures in the political domain and public institutions."⁹⁰ Any restriction on freedom of expression must (i) be provided by law, such that individuals are able to regulate their conduct accordingly, (ii) pursue a legitimate aim, and (iii) be necessary and proportional.⁹¹ The only legitimate grounds for restricting freedom of expression are to preserve respect for the rights or reputation of others, to protect national security, to protect public order, to protect public health, and to protect public morals.⁹²

When invoking one of these grounds to justify a restriction on freedom of expression, the State "must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat."⁹³ The UN Human Rights Committee has warned that restrictions in the name of national security or other ostensibly legitimate aims "may never be invoked as a justification for the muzzling of any advocacy of multi-party democracy, democratic tenets and human rights."⁹⁴

⁹⁰ Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 38.

⁹¹ *Id.* at para 22.

⁹² ICCPR, Article 19(3). See also Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, paras. 28-29.

⁹³ Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 35.

⁹⁴ *Id.* at para. 23.

The African Charter imposes similar standards. In 2019, the African Commission on Human and Peoples' Rights adopted the Declaration of Principles on Freedom of Expression and Access to Information in Africa (Declaration), reaffirming the fundamental importance of the right to freedom of expression guaranteed by Article 9 of the African Charter.⁹⁵ The Declaration sets forth a test identical to that established by the UN Human Rights Committee: that any limitation on speech must be "prescribed by law; serve[] a legitimate aim; and [be] a necessary and proportionate means to achieve the stated aim in a democratic society."⁹⁶ Legitimate aims are "to preserve respect for the rights or reputations of others; or to protect national security, public order or public health."⁹⁷ With respect to necessity and proportionality requirements, the Declaration asserts that any limitation on freedom of expression must "originate from a pressing and substantial need that is relevant and sufficient; [must] have a direct and immediate connection to the expression [...], and be the least restrictive means of achieving the stated aim; and [must] be such that the benefit of protecting the stated interest outweighs the harm to the expression."⁹⁸ In line with the legality principle outlined by the UN Human Rights Committee, laws that limit freedom of expression must be "clear, precise, accessible and foreseeable."⁹⁹

Notably, the Commission has asserted that "[s]peech addressing matters of public concern, public interest or political or policy affairs, including criticism of the state or state officials, including as exercised in the context of an assembly, [must be] given maximum protection under the right to freedom of expression."¹⁰⁰ The Commission has further specified that the use of symbols and other paraphernalia in assemblies is protected by the right to freedom of expression.¹⁰¹

Lastly, the European Court of Human Rights - to which the African Court has noted it may refer in interpreting the Charter - has concluded that artistic expression should be afforded heightened protection, even in instances where the speech therein could otherwise be restricted.¹⁰²

In the present case, Mr. Bwayo's conduct on the rooftop was protected by his right to freedom of expression - and indeed merited the highest form of protection. The

⁹⁵ African Commission on Human and Peoples' Rights, Declaration of Principles on Freedom of Expression and Access to Information in Africa, Adopted at the 65th Ordinary Session, October 21 to November 10, 2019. Available at <https://www.achpr.org/legalinstruments/detail?id=69>.

⁹⁶ Id. at Principle 9.1.

⁹⁷ Id. at Principle 9.3.

⁹⁸ Id. at Principle 9.4.

⁹⁹ Id. at Principle 9.2.

¹⁰⁰ African Commission on Human and Peoples' Rights, Guidelines on Freedom of Association and Assembly in Africa, Adopted at the 60th Ordinary Session, May 8-22, 2017, para. 79. Available at https://www.achpr.org/public/Document/file/English/guidelines_on_freedom_of_association_and_assembly_in_africa_eng.pdf.

¹⁰¹ Id. at para. 81.

¹⁰² See European Court of Human Rights, *Karatas v. Turkey*, App. No. 23168/94, July 8, 1999, para. 52; European Court of Human Rights, *Alinak v. Turkey*, App. No. 40287/98, March 29, 2005, paras. 41-45.

authorities violated his right to freedom of expression by arresting, detaining, and charging him on the basis of protected speech.

As a baseline, Mr. Bwayo's acts in filming documentary participants donning People Power paraphernalia and singing a Bobi Wine song constituted speech covered by the right to freedom of expression. The right to freedom of expression encompasses the "freedom to seek, receive and impart information and ideas of all kinds" and "through any ... media,"¹⁰³ including symbols and song. The speech at issue warranted "maximum protection under the right to freedom of expression" because it concerned political matters: as described above, People Power is an opposition party and the Bobi Wine song featured in the documentary was advocating against corruption, police brutality, economic inequality, and discrimination. The speech - in that it was part of the filming of a music video for a documentary - was also a form of artistic expression, warranting even greater protection.

In order to comply with the standards set forth above, the restrictions on Mr. Bwayo's speech - i.e. the arrest, detention, and criminal charges - would have had to have possessed a legitimate objective and would have had to have been necessary and proportional. There are significant indicia, however, that the objective of the authorities' actions was to crack down on dissent. The officers' statements, the preliminary crime report, and the charge sheet repeatedly mention of the use of People Power symbols on hats and clothing and/or the singing of songs deemed to be anti-government.¹⁰⁴ Suppression of opposing voices is not a legitimate objective under the ICCPR or African Charter.

Even assuming that the goal of the restriction was to protect public order or national security, the State failed to clarify what the threat was: as established by the UN Human Rights Committee and African Commission, "when a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat."

The police report on Mr. Bwayo's case, for example, states that the filming was being "used to subvert or promote subversion to the government of the Republic of Uganda or its officials."¹⁰⁵ The report goes on to note that the participants in the documentary waited to change into their People Power clothes until after they had arrived, implying that they had made "earlier preparations" and "had their objectives of sending their messages."¹⁰⁶ The report concludes that "it's a global threat that such acts cannot be

¹⁰³ ICCPR, Article 19(2).

¹⁰⁴ See Charge Sheet, Uganda vs. Moses Bwayo et al, Kabalagala Police Station. February 25, 2020; Captain Francis Agaba Statement, February 25, 2020; Mohammed Ssentonjo Statement, February 25, 2020; Ocen Bosco Statement, February 25, 2020; Arresting Officer Statement, February 25, 2020; Preliminary Crime Report, Kabalagala Police Station, March 6, 2020.

¹⁰⁵ Preliminary Crime Report, Kabalagala Police Station, March 6, 2020.

¹⁰⁶ Id.

taken slightly.”¹⁰⁷ Nowhere, however, does the report state what exact type of subversion was at issue, what the potential effects might be, what the intended “messages” were and why they were dangerous, and why the department had deemed the filming of a music video for a documentary to be a “global threat.” The charge sheet is similarly opaque, referring to acts that “subvert[ed] or promot[ed] subversion of the Government of Uganda.”¹⁰⁸

With regard to “the necessity and proportionality of the specific action taken,” the prosecution likewise failed to establish any “direct and immediate connection between the expression and the threat”: namely, the prosecution presented no evidence as to the “connection” between the filming of the documentary and imminent social unrest. As such, the authorities’ actions fell short of necessity and proportionality standards and violated Mr. Bwayo’s right to freedom of expression, protected by Article 19 of the ICCPR and Article 9 of the African Charter.

Right to Freedom of Peaceful Assembly

Article 21 of the ICCPR and Article 11 of the African Charter protect the right to peaceful assembly. As stated by the United Nations Human Rights Committee, the right to peaceful assembly is a “fundamental human right,” which “entails the possibility of organizing and participating in a peaceful assembly ... in a public location.”¹⁰⁹ No restriction of this right is permissible “unless it is (a) imposed in conformity with the law; and (b) necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.”¹¹⁰

According to the Committee, Article 21 requires States to abstain from “unwarranted interference with peaceful assemblies.”¹¹¹ States are prohibited from treating assemblies in a discriminatory manner, including where they break up or otherwise restrict assembly on the basis of political opinion.¹¹²

¹⁰⁷ Id.

¹⁰⁸ Charge Sheet, *Uganda v. Moses Bwayo et al, Kabalagala Police Station*, February 25, 2020.

¹⁰⁹ Human Rights Committee, *Strizhak v. Belarus*, U.N. Doc. CCPR/C/124/D/2260/2013, November 1, 2018, para. 6.5. See also Human Rights Committee, *Giménez v. Paraguay*, U.N. Doc. CCPR/C/123/D/2372/2014, September 26, 2018, para. 8.3.

¹¹⁰ Human Rights Committee, *Giménez v. Paraguay*, U.N. Doc. CCPR/C/123/D/2372/2014, September 26, 2018, para. 8.3. See also Human Rights Committee, *Strizhak v. Belarus*, U.N. Doc. CCPR/C/124/D/2260/2013, November 1, 2018, para. 6.5.

¹¹¹ Human Rights Committee, General Comment No. 37, U.N. Doc. CCPR/C/GC/37, July 23, 2020, para. 23.

¹¹² Human Rights Council, Joint report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies, U.N. Doc. A/HRC/31/66, February 4, 2016, paras. 15–16. See also Human Rights Committee, Concluding Observations on the Fourth Periodic Report of Georgia, U.N. Doc. CCPR/C/GEO/CO/4, August 19, 2014, para. 8; Human Rights Committee, Concluding Observations on the Sixth Periodic Report of Mongolia, U.N. Doc. CCPR/C/MNG/CO/6, August 22, 2017, para. 11.

The African Charter likewise prohibits restrictions of assembly on discriminatory grounds. The African Commission’s Guidelines on Freedom of Association and Assembly in Africa assert: “[t]he state shall not discriminate against assemblies on the basis of other illegitimate grounds, including sex, race, color, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, migration status, property, socio-economic status, birth, disability, age, sexual orientation or gender identity.”¹¹³ As noted by the Commission, “any limitations imposed shall be in accordance with the principle of legality, have a legitimate public purpose, and be necessary and proportionate means of achieving that purpose within a democratic society.”¹¹⁴ As mentioned above, the right to freedom of expression protects the use of symbols and other political paraphernalia in the “context of assemblies.”¹¹⁵

The Commission has also emphasized that “an assembly should be deemed peaceful if its organizers have expressed peaceful intentions, and if the conduct of the assembly participants is generally peaceful.”¹¹⁶ Notably, conduct that “annoys or gives offence as well as conduct that temporarily hinders, impedes or obstructs the activities of third parties” is considered peaceful.¹¹⁷

In the present case, Mr. Bwayo’s arrest, detention, and criminal charges violated his right to freedom of peaceful assembly. Mr. Bwayo and his associates had assembled with the peaceful motive of creating a documentary. An assistant manager at the Five Horsemen Hotel (as she explained to the police) had given Mr. Bwayo permission to film from the rooftop: she stated that the rooftop was in fact frequently booked for filming by different individuals.¹¹⁸ Witness statements in the case file indicated no sign of violence, or, more specifically, no sign that the group was “inten[ding] to commit an offence,” or that the group’s acts would reasonably give rise to fear that the “persons so assembled w[ould] commit a breach of the peace”: the language of the Ugandan Penal Code’s provision on unlawful assembly.

As noted above, given the lack of apparent danger, it appears that the officers arrested Mr. Bwayo and his associates due to their perceived political affiliation with Bobi Wine. The officers’ statements, the preliminary crime report, and the charge sheet repeatedly mention of the use of People Power symbols on hats and clothing and/or the singing of what is deemed anti-government music.¹¹⁹ This type of interference with a gathering

¹¹³ African Commission on Human and Peoples’ Rights, Guidelines on Freedom of Association and Assembly in Africa, Adopted at the 60th Ordinary Session, May 8-22, 2017, para. 80.

¹¹⁴ *Id.* at para. 85.

¹¹⁵ *Id.* at para. 81.

¹¹⁶ *Id.* at para. 70.

¹¹⁷ *Id.*

¹¹⁸ Angella Nabunya Statement, February 25, 2020. She noted that she had tried to explain this to the police on the rooftop.

¹¹⁹ See Charge Sheet, Uganda vs. Moses Bwayo et al, Kabalagala Police Station. February 25, 2020; Captain Francis Agaba Statement, February 25, 2020; Mohammed Ssentonjo Statement, February 25,

associated with the opposition falls in line with patterns discussed above, particularly with respect to the intimidation of Bobi Wine supporters and journalists covering the Bobi Wine campaign in the leadup to the elections. Under the ICCPR and African Charter, however, States are prohibited from interfering with peaceful assemblies on the basis of political affiliation. As such, the State's discriminatory intervention violated this guarantee.

Even if the police had initially discerned some form of danger, such concerns should have been quickly assuaged by verification with the hotel manager or members of the crew that the group was making a documentary. The presence of the film equipment likewise indicated as much. Further, if the issue was the filming of the police barracks, the officers could have requested that the group film from a different angle or make other adjustments. And although the police claimed that Mr. Bwayo should have been able to produce a document from "lawful authorities" authorizing the gathering,¹²⁰ it is unclear why he was bound to secure the permission of the State, not the hotel, to use a public street and private property: as noted above, Mr. Bwayo had secured the permission of an assistant hotel manager, in line with regular business practices.

Finally, if the conduct of the film crew annoyed or temporarily hindered guests at the hotel, people in the street, or officers at the neighboring barracks, the right to peaceful assembly would still prohibit restrictions. Annoyance and inconvenience are not permissible grounds to interfere with the right to public assembly. In light of the above, the arrest and detention of Mr. Bwayo was disproportionate and unnecessary, in contravention of the ICCPR and African Charter.

2020; Ocen Bosco Statement, February 25, 2020; Arresting Officer Statement, February 25, 2020; Preliminary Crime Report, Kabalagala Police Station, March 6, 2020.

¹²⁰ See Arresting Officer Statement, February 25, 2020.

CONCLUSION AND GRADE



The arrest and prosecution of Moses Bwayo reflects a broader pattern of the harassment of journalists reporting on opposition campaigns in the leadup to the presidential elections. Indeed, not three months after his criminal case was dismissed, Moses Bwayo was shot in the face by a police officer while covering the Bobi Wine campaign. Though in this case the charges were dismissed, such proceedings have a chilling effect on all those committed to free and transparent elections. Uganda must commit to protecting - not obstructing - journalists reporting on the elections, in line with international and regional standards on freedom of expression and press freedom.

GRADE:

C



GRADING METHODOLOGY

Experts should assign a grade of A, B, C, D, or F to the trial reflecting their view of whether and the extent to which the trial complied with relevant international human rights law, taking into account, *inter alia*:

- The severity of the violation(s) that occurred;
- Whether the violation(s) affected the outcome of the trial;
- Whether the charges were brought in whole or in part for improper motives, including political motives, economic motives, discrimination, such as on the basis of “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,”¹²¹ and retaliation for human rights advocacy (even if the defendant was ultimately acquitted);
- The extent of the harm related to the charges (including but not limited to whether the defendant was unjustly convicted and, if so, the sentence imposed; whether the defendant was kept in unjustified pretrial detention, even if the defendant was ultimately acquitted at trial; whether the defendant was mistreated in connection with the charges or trial; and/or the extent to which the defendant’s reputation was harmed by virtue of the bringing of charges); and
- The compatibility of the law and procedure pursuant to which the defendant was prosecuted with international human rights law.

Grading Levels

- A: A trial that, based on the monitoring, appeared to comply with international standards.
- B: A trial that appeared to generally comply with relevant human rights standards excepting minor violations, and where the violation(s) had no effect on the outcome and did not result in significant harm.
- C: A trial that did not meet international standards, but where the violation(s) had no effect on the outcome and did not result in significant harm.
- D: A trial characterized by one or more violations of international standards that affected the outcome and/or resulted in significant harm.
- F: A trial that entailed a gross violation of international standards that affected the outcome and/or resulted in significant harm.

¹²¹ ICCPR, Article 26.