



AMERICAN **BAR** ASSOCIATION

Center for Human Rights

Uganda v. The 67

November 2020

A stylized illustration in shades of brown and tan. It depicts a hand holding a book. The book is wrapped in barbed wire, symbolizing restriction or oppression. Above the hand is a stylized plant with several leaves. The background is a solid light brown color.

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. It is an implementing partner in the Clooney Foundation for Justice's TrialWatch initiative.

ABOUT THE CLOONEY FOUNDATION FOR JUSTICE'S TRIALWATCH INITIATIVE

The **Clooney Foundation for Justice's TrialWatch initiative** monitors and grades the fairness of trials of vulnerable people around the world, including journalists, women and girls, religious minorities, LGBTQ persons and human rights defenders. Using this data, TrialWatch advocates for victims and is developing a Global Justice Ranking measuring national courts' compliance with international human rights standards.

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 D:

The criminal proceedings against the 67 defendants arrested during a raid of Ram Bar in Kampala violated international and regional non-discrimination guarantees. There are significant indicia that the Ugandan authorities weaponized a vague law forbidding common nuisance to target perceived members of the LGBTQ community. Further, the accused were denied several key fair trial rights.

Because these violations have resulted in significant harm to the 67 defendants, the proceedings have been assigned a “D” under the grading methodology described in the Annex.

From December 2019 to November 2020, the American Bar Association (ABA) Center for Human Rights monitored criminal proceedings against 67 individuals in Uganda as part of the Clooney Foundation for Justice’s Trial Watch initiative. The 67 defendants were part of a group of 125 individuals arrested during a raid of Ram Bar, one of the only safe spaces for LGBTQ individuals in Kampala. Although the raid was purportedly carried out to enforce the Tobacco Control Act, the 67 defendants were subsequently charged with common nuisance. This shift in charges, along with comments made during the raid, the treatment of the defendants in prison, and the lack of evidence put forth by the prosecution, indicate that the accused were targeted based on their perceived sexual orientation, in violation of the right to equality before the law and non-discrimination. Their rights to be informed of the charges, to adequate facilities to prepare a defense, and to an impartial tribunal have likewise been violated. Overall, the pursuit of the case has been characterized by severe prosecutorial misconduct.

In the late hours of November 10, 2019, the police conducted a mass raid of Ram Bar, a known gathering spot for Kampala’s LGBTQ community, ultimately arresting 125 individuals. A spokesperson for the Ugandan police told the media that the purpose of the raid was to enforce the Tobacco Control Act, which prohibits the use of shisha. Witnesses, however, reported that police indiscriminately arrested people found inside the bar and made homophobic remarks during the raid and at the police station.

On November 12, 67 of the arrested individuals were charged with a different offense: common nuisance under Article 160(1) of the Ugandan Penal Code, which carries a

punishment of up to one-year imprisonment. The court subsequently remanded the entire group to prison to await bail hearings. Review of bail applications started in mid-November and lasted until mid-December, meaning that defendants remained in jail for days to over a month (for those unable to produce the requisite sureties at their bail hearings).

The 67 accused were divided into five groups for prosecution before the Buganda Road Chief Magistrate Court, with hearings starting at the beginning of December 2019 and continuing into November 2020. There are no significant factual differences between the cases and no justification for assigning accused to one or another group was proffered. As of the writing of this report in November 2020, two of the five cases, covering 24 defendants, have been dismissed by the court for want of prosecution.

Article 9(1) of the International Covenant on Civil and Political Rights (ICCPR) and Article 6 of the African Charter on Human and Peoples' Rights (African Charter) prohibit arbitrary arrest and detention, which includes arrest and detention on discriminatory grounds. The United Nations Human Rights Committee has ruled that "discrimination" encompasses targeting on the basis of actual or perceived sexual orientation. African bodies have indicated the same with respect to the African Charter.

As noted above, the conduct of the raid - indiscriminate arrests and homophobic comments - and the mismatch between the initial reason provided for the operation and the subsequent charges strongly suggest that the arrest and detention of the accused were motivated not by actual suspicion of criminal activity but by their perceived sexual orientation. The dearth of evidence put forth by the state - including the lack of individualized detail in the charge sheets and the prosecution's failure to produce any witnesses or evidence over the course of almost a year of proceedings - are further indicia of such. Consequently, the arrests and detention of the accused were arbitrary.

In addition, when the 67 defendants were charged on November 12, the authorities failed to bring the entire group to appear in person before the Buganda court. This violated their right under Article 9(3) of the ICCPR and Article 6 of the African Charter to be physically presented to a judicial authority in the immediate aftermath of arrest. One objective of the guarantee is to permit an inquiry into mistreatment in detention.

In this case defense counsel reported that the accused were subjected to treatment that would violate the prohibition on cruel, inhuman, or degrading treatment reflected in Article 7 of the ICCPR and Article 5 of the African Charter. As stated by defense counsel, the accused were held in overcrowded and unsanitary conditions and denied access to adequate food and clean water. As a result, many reportedly suffered from diarrhea and/or contracted malaria.

Meanwhile, defense counsel asserted that defendants were targeted by officials and other inmates - with impunity - because of their perceived sexual orientation and gender identity. Several defendants were reportedly subjected to prolonged body searches by the authorities as well as bullying by other inmates based on guards spreading the word that the new arrivals were LGBTQ individuals. At least one of the accused was reportedly raped in detention. No investigations into the alleged incidents have been launched to date.

Once the trial started, violations persisted. Article 14(3)(a) of the ICCPR and Article 7 of the African Charter entitle individuals facing criminal prosecution to be informed of the alleged facts on which charges are based. The information must be sufficient to enable the preparation of a defense. In the proceedings against the 67 accused, the charge sheets lacked specifics as to the facts of the case, merely stating that the accused as a group had obstructed and inconvenienced the public. This was patently insufficient for counsel to construct a defense.

The challenges facing defense counsel were exacerbated by the prosecution's failure to disclose key materials, such as relevant parts of the case file. Article 14(3)(b) of the ICCPR and Article 7 of the African Charter guarantee criminal defendants adequate time and facilities for the preparation of a defense, including access to documents and other evidence the prosecution plans to offer in court. The prosecution's behavior was particularly egregious as the Buganda court had continuously ordered the disclosure of the missing materials.

This refusal to comply with court orders reflected serious misconduct on the part of the prosecution. As noted above, over the course of almost a year following the arrests, with between three and six hearings in each of the five cases, the state has failed to present any evidence or witnesses, instead repeatedly requesting the adjournment of proceedings. Under international standards on prosecutorial ethics, the state should not initiate or continue proceedings if there is insufficient evidence to support the charges. In the cases against the 67, the totality of the facts suggests that the state has pursued prosecutions without sufficient proof.

Moreover, the proceedings against the 67 accused have violated the non-discrimination and equality guarantees enshrined in Articles 2 and 26 of the ICCPR and Article 6 of the African Charter. As referenced above, the United Nations Human Rights Committee has clarified that the ICCPR prohibits discrimination on the basis of real or perceived sexual orientation and gender identity. The African Commission and Court have yet to explicitly so hold with respect to the African Charter but have signified as much in their jurisprudence.

In the present case, the conduct of the raid, the accused's treatment in detention, the shifting of charges, and the lack of evidence strongly suggest that the accused were

targeted on the basis of their actual or perceived sexual orientation. Further indicia of such include a judge's comment in one case that the proceedings concerned "the misuse of bums" and the fact that that many months into the proceedings in two cases, state attorneys raised allegations regarding - respectively - gay sex and the promotion of homosexuality, with no explanation as to how these allegations related to the charges of common nuisance.

Notably, although cases against two of the five groups have been dismissed and the remaining cases may yield the same outcome, for some accused the proceedings have already resulted in forcible outings and the loss of jobs, family, and friends. Meanwhile, for those whose cases have yet to be dismissed nearly one year after the raid, the ongoing hearings have created a state of uncertainty. The harm caused to date suggests that convictions may not have been the goal. Instead, the proceedings send a clear message to the LGBTQ community: evidence or not, conviction or not, the state can reach you.

Finally, these proceedings highlight flaws in Article 160(1) of the Ugandan Penal Code as drafted, which make the provision particularly susceptible to misuse. Under Article 9(1) of the ICCPR and Article 6 of the African Charter, laws must define criminal conduct with sufficient precision to enable individuals to regulate their conduct accordingly. Article 160(1), however, criminalizes "any act not authorised by law" that "thereby causes any common injury, or danger or annoyance, or obstructs or causes inconvenience to the public in the exercise of common rights." Consequently, individuals may face Article 160(1) charges for a range of otherwise protected activities based on the vague standard of public annoyance and convenience. Article 160(1) thus violates Article 9(1) of the ICCPR and Article 6 of the African Charter.

It should also be noted that the African Commission has raised specific concerns about petty offense laws like Article 160(1), so called because they criminalize minor crimes and therefore do not provide for serious penalties. The Commission has emphasized that the broadness of such laws facilitates the targeting of vulnerable populations. In line with these concerns, the case against the 67 demonstrates how Article 160(1)'s expansiveness can facilitate the targeting of actual or perceived LGBTQ individuals.

In light of the above, in order to comply with its international and regional treaty obligations, Uganda should dismiss the remaining cases against the three groups and revise Article 160(1).

BACKGROUND INFORMATION



A. POLITICAL AND LEGAL CONTEXT

President Yoweri Museveni and his party, the National Resistance Movement (NRM), have maintained power in Uganda for over three decades.¹ In its 2020 annual assessment of countries' respect for political rights and civil liberties, Freedom House rated Uganda as "not free"; Uganda's status was downgraded from "partly free" in 2018 to "not free" in 2019, with its civil liberties score dropping even further in 2020 as government and police crackdowns against political opposition, activists, and the press intensified.² While civil society and independent media remain active, they face "legal and extralegal harassment and state violence."³

LGTBQ Rights and Discrimination

Discrimination against LGBTQ individuals is embedded in Uganda's legal system. In a 2019 survey by UCLA's School of Law, Uganda ranked 113 out of 174 countries with respect to acceptance of LGBTQ individuals and their rights.⁴ Article 145 of the Penal Code criminalizes same-sex activity (carnal knowledge of any person against the order of nature), making it punishable with life imprisonment.⁵ Article 148 establishes a sentence of up to seven years for "any act of gross indecency with another person."

Over the past decade, members of the legislature have repeatedly attempted to pass an "Anti-Homosexuality Bill" that would expand the scope of institutionalized discrimination against LGBTQ individuals, including by potentially imposing the death penalty as punishment for certain types of same-sex activity.⁶ A version of the bill - which introduced life sentences for both "aggravated homosexuality"⁷ and same-sex marriage,

¹ Reuters, "Uganda's Museveni Seeks Re-election to Extend Rule to Four Decades", July 21, 2020. Available at <https://www.reuters.com/article/us-uganda-politics/ugandas-museveni-seeks-re-election-to-extend-rule-to-four-decades-idUSKCN24M0YH>.

² Freedom House, "Freedom in the World 2020 Report on Uganda", 2020. Available at <https://freedomhouse.org/country/uganda/freedom-world/2020>; Freedom House, "Freedom in the World 2019 Report on Uganda", 2019. Available at <https://freedomhouse.org/country/uganda/freedom-world/2019>. See also Amnesty International, "Uganda 2019." Available at <https://www.amnesty.org/en/countries/africa/uganda/report-uganda/>.

³ Freedom House, "Freedom in the World 2020 Report on Uganda", 2020.

⁴ UCLA School of Law Williams Institute, "Social Acceptance of LGBT People in 174 Countries", October 2019. Available at <https://williamsinstitute.law.ucla.edu/publications/global-acceptance-index-lgbt/>.

⁵ Uganda Legal Information Institute, Penal Code Act, Article 145, 1950. "Any person who: (a) has carnal knowledge of any person against the order of nature; (b) has carnal knowledge of an animal; or (c) permits a male person to have carnal knowledge of him or her against the order of nature commits an offense and is liable to imprisonment for life." Available at <https://ulii.org/ug/legislation/consolidated-act/120>.

⁶ Amnesty International, "Uganda: Anti-Homosexuality Bill Must be Scrapped", December 20, 2013. Available at <https://www.amnesty.org/en/latest/news/2013/12/uganda-anti-homosexuality-bill-must-be-scrapped/>; BBC News, "Ugandan President Yoweri Museveni Signs Anti-Gay Bill", February 24, 2014. Available at <https://www.bbc.com/news/world-africa-26320102>.

⁷ The Bill defined "aggravated homosexuality" as where one of the individuals engaging in same-sex activity was HIV-positive, a minor, or disabled.

and criminalized the “promotion” of homosexuality - was passed in a surprise vote in December 2013 and signed into law by President Museveni.⁸ Human rights groups reported a “surge of human rights violations” following passage of the Bill, including the killing of at least one transgender person.⁹ As stated at the time by local organization Sexual Minorities Uganda (SMUG), “the full force of the State, particularly the legislative and executive branches of government, is being used to hunt down, expose, demean and suppress Uganda’s LGBTQ people.”¹⁰

While Uganda’s Constitutional Court struck down the Bill in 2014 on the basis of narrow technical issues,¹¹ there have been recent attempts to revive it. In October 2019, Uganda’s Ethics and Integrity Minister stated that parliament was planning on introducing similar legislation. The proposed law purportedly criminalized “promotion and recruitment” by LGBTQ individuals and included a death sentence for “grave acts” of homosexuality.¹²

In practice, LGBTQ individuals are regularly targeted by Ugandan government authorities. According to the U.S. State Department’s 2019 report on Uganda’s human rights practices, the security forces are known to harass and detain “lesbian, gay, bisexual, transgender, and intersex persons.”¹³ In May 2019, for example, the Ugandan Police Force (UPF) shut down an event planned by LGBTQ activists to commemorate the International Day Against Homophobia and Transphobia,¹⁴ as they had also done the previous year.¹⁵ In October 2019, the UPF arrested 16 activists affiliated with Let’s Walk Uganda, a non-profit organization that empowers LGBTQ youth.¹⁶ The activists were “taken into ‘protective custody’ after a crowd yelling homophobic slogans surrounded their office.”¹⁷ Although the activists had called the police for help, the police began interrogating them, “searched the house, confiscat[ing] condoms, lubricant, and

⁸ Id.

⁹ Human Rights Watch, “Uganda: Anti-Homosexuality Act’s Heavy Toll”, May 14, 2014. Available at <https://www.hrw.org/news/2014/05/14/uganda-anti-homosexuality-acts-heavy-toll>.

¹⁰ SMUG, “Enhanced Persecution in Uganda Following the Passage of the Anti-homosexuality Act 2014”, 2014.

¹¹ The New York Times, “Uganda Anti-Gay Law Struck Down by Court”, August 1, 2014. Available at <https://www.nytimes.com/2014/08/02/world/africa/uganda-anti-gay-law-struck-down-by-court.html>.

¹² Human Rights Watch, “Uganda: Stop Police Harassment of LGBT People”, November 17, 2019. Available at <https://www.hrw.org/news/2019/11/17/uganda-stop-police-harassment-lgbt-people>.

¹³ U.S. State Department, “Uganda 2019 Human Rights Report”, 2020, pgs. 1, 35. Available at <https://www.state.gov/wp-content/uploads/2019/01/Uganda.pdf>. See also Council on Foreign Relations, “Uganda Renews Clampdown on the LGBT Community”, December 4, 2019. Available at <https://www.cfr.org/blog/uganda-renews-clampdown-lgbt-community>.

¹⁴ Chapter Four, “Uganda police disrupts, shuts down 2019 IDAHOT event”, May 17, 2019. Available at <https://chapterfouruganda.org/articles/2019/05/18/uganda-police-disrupts-shuts-down-2019-idahot-event>.

¹⁵ SMUG, “Statement on Closure of Event to Mark International Day Against Homophobia, Biphobia, and Transphobia”, May 17, 2018. Available at <https://sexualminoritiesuganda.com/statement-on-closure-of-event-to-mark-international-day-against-homophobia-biphobia-and-transphobia/>

¹⁶ Let’s Walk Uganda, “Let’s Walk Uganda – Facebook Page.” Available at https://www.facebook.com/LWUGANDA/?tn-str=k*F.

¹⁷ Reuters, “Uganda Arrests 16 LGBT+ Activists for Gay Sex”, October 24, 2019. Available at <https://in.reuters.com/article/uganda-lgbt-arrests-idAFL3N2792K0>.

anti-retroviral medicines,” and charged them with same-sex activity under the Ugandan Penal Code.¹⁸ While in custody, the 16 activists were subjected to forced anal examinations.¹⁹ They were released on bail soon thereafter,²⁰ with the case ultimately dropped by the state.

Recently, experts from the United Nations Office of the High Commissioner for Human Rights raised concerns that “Uganda [was] using COVID-19 emergency powers to target LGBT people.”²¹ On March 29, 2020, the UPF arrested 23 people at a shelter for LGBTQ homeless youth near Kampala for alleged violations of quarantine restrictions,²² charging them with “negligent act[s] likely to spread infection of disease” and “disobedience of lawful orders.”²³ As noted by Human Rights Watch, however, “no order limit[ed] the number of residents in a private home or shelter.”²⁴ 20 of the 23 suspects were moved to prison, where there were reports of torture.²⁵ The 20 individuals remained in prison for almost two months, after which they were released by a court order, and charges were dropped.²⁶ On June 15, the High Court of Uganda ruled that the authorities had violated the activists’ right to a fair hearing and right to liberty, as they were unable to access lawyers for over 40 days after their arrests.²⁷ The Court awarded each individual UGX 5,000,000 (approximately USD 1340) in damages.²⁸

Violent attacks on LGBTQ individuals have also occurred. On August 1, 2019, a transgender woman named Fahad Ssemugoma Kawere was beaten to death by a group of motorcycle taxi drivers.²⁹ In October 2019, an openly gay and gender-nonconforming activist named Brian Wasswa was killed. Wasswa had worked as a paralegal for the Human Rights Awareness and Promotion Forum (HRAPF), and served as a peer educator with TASO, an organization providing HIV/AIDS prevention,

¹⁸ Human Rights Watch, “Uganda: Stop Police Harassment of LGBT People”, November 17, 2019; Reuters, “Uganda Arrests 16 LGBT+ Activists for Gay Sex”, October 24, 2019.

¹⁹ Id.

²⁰ Human Rights Watch, “Uganda: Stop Police Harassment of LGBT People”, November 17, 2019.

²¹ United Nations Office of the High Commissioner for Human Rights, “UN Rights Experts Fear Uganda is Using COVID-19 Emergency Powers to Target LGBT People”, April 27, 2020. Available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25832&LangID=E>.

²² Id.

²³ Human Rights Watch, “Uganda LGBT Shelter Residents Arrested on COVID-19 Pretext”, April 3, 2020. Available at <https://www.hrw.org/news/2020/04/03/uganda-lgbt-shelter-residents-arrested-covid-19-pretext>.

²⁴ Id.

²⁵ Human Rights Watch, “Uganda: Drop Charges Against 19 Homeless Youth”, May 11, 2020. Available at <https://www.hrw.org/news/2020/05/11/uganda-drop-charges-against-19-homeless-youth>.

²⁶ Id.

²⁷ Human Rights Awareness and Promotion Forum, “High Court Declares Denial of Detained LGBT Persons Access to Their Lawyers During COVID-19 A Violation of Human Rights”, June 16, 2020. Available at <https://www.hrapf.org/index.php/resources/other-publications/154-20-06-16-hrapf-and-cosf-press-statement-on-judgement-in-the-cosf-19-case-final-1/file>.

²⁸ Id.

²⁹ Human Rights Watch, “Uganda: Stop Police Harassment of LGBT People”, November 17, 2019; Kuchu Times Uganda, Facebook Post, August 2, 2019. Available at <https://www.facebook.com/KuchuTimes/photos/a.739385106117144/2404346462954325/?type=1&theater>

treatment, and care.³⁰ That same month, a gay Rwandan refugee was assaulted outside his Kampala office, and two transgender women were attacked when leaving a nightclub.³¹

To note, rights violations in Uganda have historically increased in the lead-up to elections.³² President Yoweri Museveni is up for re-election in early 2021.

Human Rights Violations in Criminal Proceedings

Human rights violations are common in the Ugandan criminal justice system. At the pretrial stage, excessive force during arrest, arbitrary detention, and maltreatment in detention have been well-documented.³³ Defendants are not always notified of the reasons for their arrests or the underlying charges.³⁴ After being charged, defendants face the prospect of prolonged and delayed court proceedings, in violation of their right to a speedy trial.³⁵

Judicial independence is likewise of concern. The U.S. State Department has noted that “corruption, understaffing, inefficiency, and executive-branch interference with judicial rulings” undermine the independence and impartiality of the courts.³⁶ The judiciary is particularly susceptible to executive influence, as the president appoints judges to the Supreme Court, High Court, and other prominent judicial structures, subject to parliamentary approval.³⁷

³⁰ Human Rights Watch, “Uganda: Brutal Killing of Gay Activist”, October 15, 2019. Available at <https://www.hrw.org/news/2019/10/15/uganda-brutal-killing-gay-activist>; TASO, “TASO – About Us.” Available at <https://tasouganda.org/about-taso>.

³¹ Reuters, “Attacks on LGBT+ Ugandans Seen Rising After Minister Proposes Death for Gay Sex”, October 22, 2019. Available at <https://www.reuters.com/article/us-uganda-lgbt-crime/attacks-on-lgbt-ugandans-seen-rising-after-minister-proposes-death-for-gay-sex-idUSKBN1X127D>.

³² See Human Rights Watch, “Uganda Elections 2016.” Available at <https://www.hrw.org/tag/uganda-elections-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_Feb2017rf.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/>.

³³ Freedom House, “Freedom in the World 2020 Report on Uganda”, 2020; U.S. State Department, “Uganda 2019 Human Rights Report”, 2020” pgs. 5-8.

³⁴ See U.S. State Department, “Uganda 2019 Human Rights Report”, 2020, pg. 7.

³⁵ Freedom House, “Freedom in the World 2020 Report on Uganda”, 2020; U.S. State Department, “Uganda 2019 Human Rights Report”, 2020, pg. 9; HRAPF, “HRAPF Newsletter: January-March 2013”, pg. 2. Available at <https://hrapf.org/index.php/news-events/newsletters/59-newsletter/file>.

³⁶ U.S. State Department, “Uganda 2019 Human Rights Report”, 2020, pg. 8.

³⁷ Freedom House, “Freedom in the World 2020 Report on Uganda”, 2020; U.S. State Department, “Uganda 2019 Human Rights Report”, 2020, pgs. 8-9.

International watchdogs and domestic civil society organizations have tracked human rights violations in cases involving LGBTQ individuals. In examining police and court files involving sexual minorities between 2012 and 2015, Chapter Four Uganda found that the rights of suspected LGBTQ individuals had been violated through “intrusive non-consensual and inhumane anal examinations,” “inhumane medical examinations without prior counseling and consent,” “refusal to investigate cases reported by persons of different sexual orientation and gender identity,” “in-cell abuse of sexual minorities,” “media parading of LGBTI victims in the face of increased risks in society,” “difficulty to access court bail and police bond,” “use of criminal charges for extortions and blackmail,” “institutionalized homophobia in the criminal justice system,” and “unfair trials of sexual minorities.”³⁸ The aforementioned case against the 23 individuals arrested at the homeless shelter entailed violations such as the denial of access to counsel and arbitrary detention.

The case against those arrested at the Ram Bar on November 10, 2019 reflects the above patterns of the suppression of the rights of LGBTQ individuals and due process abuses.

B. CASE HISTORY

In the late evening of November 10, 2019, the police raided Ram Bar, known as one of the only safe spaces for LGBTQ individuals in Kampala, Uganda.³⁹ Witnesses told local media that people were listening to music inside the bar when the police arrived.⁴⁰ After entering the bar and reportedly beating up patrons, the police arrested 125 individuals and took them to the Central Police Station.⁴¹ According to an individual arrested, the police “rounded [patrons] up” indiscriminately.⁴²

Notably, one woman who was arrested told Human Rights Watch that police “made homophobic comments during the raid and at the police station.”⁴³ Another reported to

³⁸ Chapter Four Uganda, “Uganda: Where Do We Go for Justice? The Abuse of the Rights of Sexual Minorities in Uganda’s Criminal Justice System”, February 27, 2015. Available at <https://chapterfouruganda.org/articles/2015/04/14/uganda-where-do-we-go-justice-abuse-rights-sexual-minorities-uganda%e2%80%99s-criminal>.

³⁹ Reuters, “Uganda charges 67 after raid on gay bar”, November 12, 2019. Available at <https://www.reuters.com/article/us-uganda-lgbt-court-trfn/uganda-charges-67-after-raid-on-gay-bar-idUSKBN1XM2I8>; The Independent, “Uganda charges 67 after raid on gay bar”, November 13, 2019. Available at <https://www.independent.co.uk/news/world/africa/uganda-lgbt-rights-arrest-crime-punishment-death-penalty-activism-a9201426.html>.

⁴⁰ Id.

⁴¹ Kuchu Times, “#RAM125: 67 Remanded to Luzira Prison”, November 13, 2019. Available at <https://www.kuchutimes.com/2019/11/ram125-67-remanded-to-luzira-prison/>; Human Rights Watch, “Uganda: Stop Police Harassment of LGBT People”, November 17, 2019. Some news outlets reported that 127 individuals had been arrested.

⁴² Id.

⁴³ Human Rights Watch, “Uganda: Stop Police Harassment of LGBT People,” November 17, 2019.

Human Rights Watch that a woman in her cell “was able to phone her brother, a police officer, who told her the bar had been targeted to arrest homosexuals.”⁴⁴

As stated by the Ugandan police, the purpose of the raid was to enforce the Tobacco Control Act, which outlaws smoking with a shisha water pipe.⁴⁵ However, on November 12, 67 of the individuals arrested on November 10 were charged with a different offense: causing “common nuisance” contrary to Article 160(1) of the Ugandan Penal Code, which states:

Any person who does an act not authorised by law or omits to discharge a legal duty and thereby causes any common injury, or danger or annoyance, or obstructs or causes inconvenience to the public in the exercise of common rights, commits the misdemeanour termed a common nuisance and is liable to imprisonment for one year.

The 67 accused were divided into five groups of approximately 9 to 15 individuals each for trial before the Buganda Road Chief Magistrate Court:

1. Uganda v. Asuman Serubiri and others
2. Uganda v. Ibrahim Katongole and others
3. Uganda v. Male Marvin and others
4. Uganda v. Ntare Farida and others
5. Uganda v. Sematimba Titus and others

After being charged, the accused were remanded to Luzira Maximum Security Prison to await their bail hearings.⁴⁶ Local media reported that some individuals obtained bail on November 15 and 18, 2019, while others had bail hearings scheduled on November 26, November 27,⁴⁷ and December 11, 2019.⁴⁸ According to defense counsel, the last bail application was heard and granted on December 19, 2020.⁴⁹ One individual who was reportedly unable to secure the necessary sureties to make bail⁵⁰ remained in detention at Luzira prison until late January.⁵¹

Trial hearings began in December 2019 and have stretched into 2020 (as of November 2020). Each case, as described in more detail below, has entailed multiple short hearings, typically ending with adjournment and rescheduling. The continual

⁴⁴ Id.

⁴⁵ Reuters, “Uganda charges 67 after raid on gay bar”, November 12, 2019.

⁴⁶ Media reported that some of those charged were released on bond on November 11.

⁴⁷ Kuchu Times, “#RAM125: 67 Remanded to Luzira Prison”, November 13, 2019; Human Rights Watch, “Uganda: Stop Police Harassment of LGBT People”, November 17, 2019.

⁴⁸ Monitor’s Notes, December 11, 2019.

⁴⁹ Monitor’s Interview with Defense Counsel, July 25, 2020.

⁵⁰ The sureties required include both money and people who know the charged individual and are willing to vouch for them.

⁵¹ Monitor’s Interview with Defense Counsel, July 25, 2020.

rescheduling of hearings has occurred for a variety of reasons: the state attorney or magistrate did not show up, the accused did not show up, the state attorney requested an adjournment because witnesses were not available, the state attorney requested additional time for preparation, and the state attorney had not disclosed necessary information to defense counsel. Throughout the proceedings, defense counsel repeatedly requested disclosure of charge sheets, police documents, and witness lists, which the presiding magistrates - usually to no avail - ordered the prosecution to provide.

There were, for example, five hearings in the case of *Ibrahim Katongole and Others* between December and March. On December 6, the state attorney asked the magistrate for more time for police investigations to be completed.⁵² At the next hearing on January 22, the magistrate was not present.⁵³ At the subsequent hearing on February 3, defense counsel objected as the state attorney began his presentation, arguing that the state had never disclosed the charge sheet or other relevant information to defense counsel.⁵⁴ The magistrate ordered the state attorney to disclose the materials and rescheduled the hearing.⁵⁵ At the next hearing on February 27, however, the state attorney was not present in court and no reason was given for his absence.⁵⁶ On March 13, the magistrate dismissed the case for want of prosecution because the state attorney had no witnesses to present.⁵⁷ Similarly, there were four hearings in *Male Marvin and Others* before the magistrate dismissed the case for want of prosecution on February 26, 2020.⁵⁸

The following are summaries of hearings monitored by the Center for Human Rights. All information comes from the monitor's notes. To note, court proceedings scheduled for March 2020 were suspended due to the COVID-19 pandemic and resumed between June and August 2020.

Group 1: Uganda v. Asuman Serubiri and others

December 5, 2019: The state attorney assigned to the case did not appear in court, and no explanation was given for his absence. Defense counsel noted that the state had not provided the charge sheet or any police files to the defense. The magistrate ruled that the documents should be disclosed before the next hearing.

January 17, 2020: Stating that his witnesses were absent from court, the state attorney requested an adjournment. Defense counsel asked the court to dismiss the matter for

⁵² Monitor's Notes, December 6, 2019.

⁵³ Monitor's Notes, January 22, 2020.

⁵⁴ Monitor's Notes, February 3, 2020.

⁵⁵ Id.

⁵⁶ Monitor's Notes, February 27, 2020.

⁵⁷ Monitor's Notes, March 13, 2020.

⁵⁸ Monitor's Notes, February 26, 2020.

want of prosecution, arguing that adjournment was a delaying tactic meant only to embarrass the accused persons and subject them to ridicule.

February 17, 2020: The state attorney began to call witnesses, but defense counsel objected that despite the magistrate's earlier ruling on the matter of disclosure, the state attorney's office had yet to share any documents that it intended to use at trial. The magistrate ordered immediate disclosure before the next hearing.

Group 2: Uganda v. Ibrahim Katongole and others

December 6, 2019: The state attorney asked the magistrate for more time to prepare, explaining that police investigations were in the final stages.

January 22, 2020: The state attorney requested an adjournment, stating that prosecution witnesses were absent from court.

February 3, 2020: The state attorney began presenting evidence against the accused. The magistrate intervened when defense counsel objected that the defense had yet to receive the charge sheet or any evidence against the accused. The magistrate ordered full disclosure to the defense before the next court hearing.

February 27, 2020: The state attorney was not present in court and no reason was given for this absence. The magistrate indicated that if the state attorney did not present evidence at the next hearing the matter would be dismissed.

March 13, 2020: When it became apparent that the state attorney had no witnesses to present, the magistrate dismissed the file for want of prosecution and told the accused persons that they no longer had a case to answer.

Group 3: Uganda v. Male Marvin and others

December 6, 2019: The state attorney noted that he was ready to proceed against the accused. The state's witnesses, however, were not present.

January 21, 2020: None of the parties showed up for the hearing. No explanation was given.

January 27, 2020: The state attorney alleged that the accused together with others who escaped had been reported by locals for engaging in gay sex, using drugs, and vandalizing property. The state attorney was unable to produce witnesses and asked for additional time so as to summon witnesses at the next hearing. Defense counsel noted that the state had yet to disclose relevant documents from the case file.

February 26, 2020: The magistrate asked the defense if the state had put forth any witnesses thus far, to which the defense responded that no witness had been presented by the prosecution in the several hearings since the beginning of the trial. The magistrate denied the state attorney's request for more time to call witnesses. The magistrate dismissed the case for want of prosecution, telling the accused they should not return to court.

Group 4: Uganda v. Ntare Farida and others

December 11, 2019: Defense counsel requested disclosure of the charge sheet and police files. The magistrate ordered the state to so comply before the next hearing.

January 14, 2020: When the file was called, the magistrate asked the clerk if it was "for the gay people misusing their bums." The state attorney said prosecution witnesses were unavailable and asked for an adjournment. Defense counsel noted that the state had still not disclosed the charge sheet.

June 16, 2020: The state attorney appeared at the hearing late. The magistrate who had previously heard the case was not present. Instead, the file was read by a senior clerk. The clerk stated that by the next hearing the state would have to start presenting witnesses and provide defense counsel with the list of witnesses or the case would be dismissed for want of prosecution.

August 28, 2020: The magistrate asked the state attorney if the state was still interested in the case and to show cause for continuing proceedings. The state attorney began to present new evidence that the accused had been sharing material with young people that promoted homosexuality and had been "conscripting" youth into the LGBT community. Because the state had not previously disclosed this evidence to the defense, defense counsel asked the magistrate to rule on whether the evidence could be introduced.

September 21, 2020: The magistrate was not present. The parties were informed that the magistrate was completing her ruling on the introduction of new evidence and charges.

October 20, 2020: The magistrate stated that she had yet to finalize her ruling on the introduction of new evidence and would deliver it shortly.

Group 5: Uganda v. Sematimba Titus and others

December 11, 2019: The court granted bail to three of the accused who were still detained in Luzira Prison.

January 22, 2020: When the file was called, the state attorney failed to produce any witnesses against the accused. The state attorney asked for more time to enable the state to convince witnesses to testify. The matter was adjourned.

February 24, 2020: The state attorney, defense counsel, and the accused were not present for the hearing. Around midday, protesters from an unrelated case stormed the court. The clerk hurriedly read the file and assigned the case a new date in March. All court-related matters were adjourned due to the ensuing scuffle between protesters and security personnel.

August 26, 2020: The state attorney had yet to produce the list of prosecution witnesses. The magistrate instructed the state attorney to do so by the next hearing. The magistrate stated that the court would rule on the sufficiency of evidence thereafter.

October 27, 2020: Neither the state prosecutor nor the accused were present. The magistrate adjourned the hearing to November 16, 2020.

As of November 2020, nearly one year after the initial arrests, two of the five cases have been dismissed for want of prosecution. Three cases - *Ntare Farida and Others*, *Asuman Serubiri and Others*, and *Sematimba Titus and Others* - are still pending. While there have already been three to six hearings in each case, no substantive evidence has been presented.

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 the criminal proceedings against “the 67” before the Buganda Road Chief Magistrate Court in Kampala from December 2019 to November 2020. The monitors did not experience any impediments in entering the courtroom. The monitors used the CFJ TrialWatch App to record and track what transpired in court and the degree to which the defendants’ fair trial rights were respected.

B. THE ASSESSMENT PHASE

To evaluate the fairness of the proceedings and arrive at a grade, ABA Center staff who are members of the TrialWatch Experts Panel reviewed court documents, monitor notes, and CFJ TrialWatch App responses. Center staff found that the proceedings have failed to conform to numerous international and regional human rights standards.

The proceedings have entailed severe prosecutorial misconduct, with state attorneys refusing court orders to disclose key documents and continuing to try the cases despite a lack of evidence. Taken as a whole, from the arrests to the charges to the trials, the proceedings have violated the accused’s right to non-discrimination and equality before the law. Homophobic comments from the police, court, and state attorneys have evinced intent to discriminate against actual or perceived LGBTQ individuals, as have the shifting charges and dearth of evidence. The state appears to have used the proceedings as a tool of harassment.

Although the cases may all be dismissed, this is not a victory. The defendants have suffered serious harm, including time in detention; cruel, inhuman, and degrading treatment; forced outings; severed family relationships; loss of jobs; and loss of homes. Uganda must take steps to ensure that this type of abuse of process does not occur again.

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 Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (the “Luanda Guidelines”); the African Commission’s Resolution on the Right to Recourse and Fair Trial (the “Fair Trial Resolution”); 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 Principles on the Decriminalisation of Petty Offences in Africa (the “Principles on Decriminalisation”); and jurisprudence from UN Special Procedures.

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.”⁵⁹ Uganda ratified the African Charter in 1986 and the Protocol in 2001.⁶⁰ Notably, the African Court has frequently relied on jurisprudence from both the European Court of Human Rights and the Inter-American Court of Human Rights, finding that the two bodies have analogous jurisdiction and are guided by instruments similar to the African Charter.⁶¹ 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.⁶² Uganda acceded to the ICCPR in 1995.

⁵⁹ African Court on Human and Peoples’ Rights, “Welcome to the African Court.” Available at <https://en.african-court.org/>

⁶⁰ 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.

⁶¹ 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.

⁶² 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 Nganyani et al v. Tanzania*, App. No. 006/2013, March 18, 2016, paras. 165-166.

B. INVESTIGATION AND PRETRIAL STAGE VIOLATIONS

Arbitrary Arrest and Detention on the Basis of Sexual Orientation

Article 9(1) of the ICCPR stipulates: “[e]veryone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.” The United Nations Human Rights Committee has advised 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.”⁶³

Article 6 of the African Charter on Human and Peoples’ Rights mirrors Article 9(1) of the ICCPR, stating: “[e]very individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.”

Articles 2(1), 3, and 26 of the ICCPR guarantee equality before the law and prohibit discrimination. Article 2(1), for example, provides: “[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” As stated by the UN Human Rights Committee, “[a]rrest or detention on discriminatory grounds in violation of article 2, paragraph 1, article 3 or article 26 is ... in principle arbitrary.”⁶⁴

The Human Rights Committee has specifically confirmed that discrimination based on sex includes discrimination based on sexual orientation.⁶⁵ In line with this jurisprudence, the UN Working Group on Arbitrary Detention has held on multiple occasions that detention based on sexual orientation constitutes arbitrary detention and a breach of Article 9 of the ICCPR.⁶⁶ In an Egyptian case, for example, at least 55 men were arrested after the police raided a discotheque, with the authorities “target[ing] men who appeared to them to be homosexuals or who were not accompanied by women” and subsequently bringing charges of contempt of religion and engaging in immoral

⁶³ United Nations Human Rights Committee, *Ismet Ozcelik et. al. v. Turkey*, U.N. Doc. CCPR/C/125/D/2980/2017, May 28, 2019, para. 9.3.

⁶⁴ Human Rights Committee, General Comment No. 35, U.N. Doc. CCPR/C/GC/35, December 16, 2014, para. 17.

⁶⁵ Human Rights Committee, *Nicholas Toonen v. Australia*, U.N. Doc. CCPR/C/50/D/488/1992, March 31, 1994, para. 8.7.

⁶⁶ See Working Group on Arbitrary Detention, Opinion No. 22/2006: *François Ayissi et al. v. Cameroon*, U.N. Doc. A/HRC/4/40/Add.1, August 31, 2006; Working Group on Arbitrary Detention, Opinion No. 42/2008: *Messrs. A, B, C, and D v. Egypt*, U.N. Doc. A/HRC/13/30/Add.1, November 25, 2008.

acts.⁶⁷ The UN Working Group on Arbitrary Detention found that the group was detained and charged on account of their sexual orientation, violating Articles 2(1) and Article 26 of the ICCPR.⁶⁸ The Working Group thus concluded that the detention of the men was arbitrary.⁶⁹

In the Luanda Guidelines, the African Commission has similarly advised that neither arrests nor detention may be motivated by “discrimination of any kind.”⁷⁰ While the African Commission has yet to hold that discrimination based on sexual orientation is prohibited, it has recognized and denounced human rights violations based on sexual orientation or gender identity in various decisions and soft law instruments. In *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, for example, the Commission stated:

Together with equality before the law and equal protection of the law, the principle of non-discrimination provided under Article 2 of the Charter provides the foundation for the enjoyment of all human rights.... The aim of this principle is to ensure equality of treatment for individuals irrespective of nationality, sex, racial or ethnic origin, political opinion, religion or belief, disability, age *or sexual orientation* (emphasis added).⁷¹

In Resolution 257, passed in 2014, the Commission “[c]ondemn[ed] the increasing incidence of violence and other human rights violations, including murder, rape, assault, arbitrary imprisonment and other forms of persecution of persons on the basis of their imputed or real sexual orientation or gender identity.”⁷² More recently, the African Commission recognized individuals “marginalised on the basis of sexual orientation or gender identity” to be “vulnerable persons” in its Principles on Decriminalisation.⁷³ As such, taken in conjunction with African Court jurisprudence applying broader ICCPR principles in states that have ratified that instrument, arrests and detention based on the grounds of imputed or real sexual orientation are impermissible under the African Charter.

⁶⁷ Working Group on Arbitrary Detention, Opinion No. 7/2002: Yasser Mohamed Salah et al v. Egypt, U.N. Doc. E/CN.4/2003/8/Add.1, June 21, 2002, paras. 5-8.

⁶⁸ Id. at paras. 27-28.

⁶⁹ Id. at para 28.

⁷⁰ 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, paras. 2(b), 11(a)(i), 14(a). Available at <https://www.refworld.org/docid/5799fac04.html>.

⁷¹ African Commission, *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, Communication 245/02, May 15, 2006, para. 169.

⁷² African Commission on Human and Peoples’ Rights, 275 Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity, ACHPR/Res.275(LV)2014, 55th Ordinary Session, April 28-May 12, 2014. Available at <https://www.achpr.org/sessions/resolutions?id=322>.

⁷³ African Commission on Human and Peoples’ Rights, Principles on the Decriminalisation of Petty Offences in Africa, 61st Ordinary Session, November 1-15, 2017, para. 1.

In the present case, the evidence strongly suggests that the accused were arrested and detained on the basis of their imputed or actual sexual orientation. The raid occurred at Ram Bar, a known gathering place for Kampala's LGBTQ community. As noted above, one of the individuals arrested stated that a police officer, the brother of a fellow arrestee, relayed that Ram Bar was targeted in order to "arrest homosexuals."⁷⁴ A separate witness mentioned that police used homophobic language during the raid and at the police station.⁷⁵

In additional indicia of targeting based on sexual orientation, it appears that individuals were arrested regardless of whether they were found to be using shisha or not; one witness told Human Rights Watch that "police arrested everyone in the bar indiscriminately, though only a few clients were using shisha."⁷⁶ Moreover, those eventually criminally charged were alleged to have committed a different offense (common nuisance), for which the authorities failed to provide factual grounds; the charge sheets contain no details in support of the allegations, simply stating that the accused "obstructed and inconvenienced the public in the exercise of their common rights, thus leading to the conclusion that they were common nuisance."⁷⁷ The mismatch between the initial reason given by the police for the arrests and the ensuing charges, coupled with the lack of specificity in the charge sheets, signals that the police never had reasonable suspicion to make the arrests in the first place.

The conduct of the subsequent court proceedings further evinces the discriminatory motivations behind the charges. In *Male Marvin and Others*, for example, the state attorney alleged that the accused had been reported by locals for engaging in gay sex, failing to explain how this related to the charge of common nuisance.⁷⁸ In another case, *Ntare Farida and Others*, the prosecution alleged that the accused had been sharing material with young people that promoted homosexuality and had been "conscripting" youth into the LGBTQ community.⁷⁹ This was the first time the state had made this accusation. More broadly, the raid of Ram Bar occurred less than one month after another police raid and mass arrest of LGBTQ individuals, part of escalating anti-LGBTQ rhetoric and harassment in Uganda.⁸⁰

⁷⁴ Human Rights Watch, "Uganda: Stop Police Harassment of LGBT People", November 17, 2019.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ See *Uganda v. Sematimba Titus and others*, Charge Sheet, Bug-Co-2528-19, November 12, 2019; *Uganda v. Asuman Serubiri and others*, Charge Sheet, Bug-Co-2531-2019, November 12, 2019; *Uganda v. Ibrahim Katongole and others*, Charge Sheet, Bug-Co-2529-19, November 12, 2019; *Uganda v. Male Marvin and others*, Charge Sheet, Bug-Co-2532-19, November 12, 2019; *Uganda v. Ntare Farida and others*, Charge Sheet, Bug-Co-2530-19, November 12, 2019.

⁷⁸ Monitor's Notes, January 27, 2020.

⁷⁹ Monitor's Notes, August 28, 2020.

⁸⁰ *Id.*

The above strongly suggests that the authorities arrested and detained individuals at Ram Bar because of their perceived sexual orientation, rendering both measures arbitrary and in contravention of Uganda's non-discrimination obligations.

Right to Judicial Review of Detention

Article 9(3) of the ICCPR stipulates that “[a]nyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release.” The requirement that an arrested or detained individual be brought before a judge “applies even before formal charges have been asserted, so long as the person is arrested or detained on suspicion of criminal activity.”⁸¹

The United Nations Human Rights Committee has explained that this provision is “intended to bring the detention of a person charged with a criminal offense under judicial control.”⁸² As detailed by the Committee, “[o]nce the individual has been brought before the judge, the judge must decide whether the individual should be released or remanded in custody for additional investigation or to await trial. If there is no lawful basis for continuing the detention, the judge must order release.”⁸³ While the Committee has noted that “the exact meaning of ‘promptly’ may vary depending on objective circumstances,” it has stressed that the time between an arrest and appearance before a judicial authority “should not exceed a few days.”⁸⁴ According to the Committee, “48 hours is ordinarily sufficient to transport the individual and to prepare for the judicial hearing; any delay longer than 48 hours must remain absolutely exceptional and be justified under the circumstances.”⁸⁵ The Committee has emphasized that the individual “must be brought to appear *physically*” before the designated judicial body, particularly for the purposes of an inquiry into whether the accused has suffered mistreatment in detention.⁸⁶

A detained person is likewise entitled to prompt judicial review under Article 6 of the African Charter, which provides that “no one may be arbitrarily arrested or detained.” Principle M(3) of the Fair Trial Guidelines elaborates on this requirement, stating that “[a]nyone who is arrested or detained on a criminal charge shall be brought before a judicial officer authorized by law to exercise judicial power.”⁸⁷ The African Commission

⁸¹ Human Rights Committee, General Comment No. 35, U.N. Doc. CCPR/C/GC/35, December 16, 2014, para. 32.

⁸² Human Rights Committee, Vladimir Kulomin v. Hungary, U.N. Doc. CCPR/C/50/D/521/1992, March 22, 1996, para. 11.2.

⁸³ Human Rights Committee, General Comment No. 35, U.N. Doc. CCPR/C/GC/35, December 16, 2014, para. 36.

⁸⁴ *Id.* at para. 33.

⁸⁵ *Id.*

⁸⁶ *Id.* at para. 34. Emphasis added.

⁸⁷ African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003, Principle M(3)(a). See also African Commission on Human and Peoples' Rights, Resolution on the Right to Recourse and Fair Trial, 1992, Section 2(c); African

has clarified that presentation before a court or judicial officer serves a number of purposes, including assessment of whether there is a sufficient legal reason for the arrest and/or detention; assessment of whether bail should be granted; and safeguarding of the individual's rights and well-being.⁸⁸

In the present case, the accused were arrested in the late hours of November 10 and were brought to court to be charged on November 12, after which they were remanded to Luzira Prison. According to the defense, however, not all 67 accused were brought to court on November 12: two of the trial groups were missing.⁸⁹ As recounted by counsel, the authorities did not explain why they failed to ensure the presence of all 67 accused; as a result, some defendants were not brought before a magistrate until their bail hearings, which mostly happened in mid-to-late November but also stretched into mid-December.⁹⁰ This violated the defendants' right to appear physically before a judicial body in the initial period following arrest, in contravention of the ICCPR and the African Charter. As will be discussed in detail below, delays in the physical presentation of the accused were particularly problematic given reports of ill-treatment in detention.

Cruel, Inhuman, or Degrading Treatment

The prohibition on cruel, inhuman or degrading treatment or punishment enshrined in Article 7 of the ICCPR is a fundamental component of human rights law. The aim of Article 7 is to "protect both the dignity and the physical and mental integrity of the individual."⁹¹ Article 10 of the ICCPR requires States to treat all persons deprived of their liberty "with humanity and with respect for the inherent dignity of the human person." The provision "imposes on States parties a positive obligation towards persons who are particularly vulnerable because of their status as persons deprived of liberty, and complements for them the ban on torture or other cruel, inhuman or degrading treatment or punishment contained in article 7 of the Covenant."⁹² The United Nations Human Rights Committee has found violations of both articles in cases involving small cells, lack of natural light, poor sleeping conditions, the deprivation of food/water, and limitations on bathroom access.⁹³

Article 5 of the African Charter prohibits "[a]ll forms of exploitation and degradation of man, particularly ... cruel, inhuman or degrading treatment or punishment." The Luanda

Commission on Human and Peoples' Rights, *Huri-Laws v. Nigeria*, Communication No. 225/98, Decision adopted during the 28th Ordinary session, October 23 - November 6 2000, para. 45.

⁸⁸ *Id.* at Principle M(3)(b).

⁸⁹ Monitor's Interview with Defense Counsel, September 1, 2020.

⁹⁰ *Id.*

⁹¹ Human Rights Committee, General Comment No. 20, March 10, 1992, paras. 2, 5.

⁹² Human Rights Committee, General Comment No. 21, U.N. Doc. HRI/GEN/1/Rev.1, April 10, 1992, para. 3.

⁹³ See Human Rights Committee, *Barkovsky v. Belarus*, U.N. Doc. CCPR/C/123/D/2247/2013, July 13, 2018, paras. 6.2-6.3; Human Rights Committee, *Xavier Evans v. Trinidad and Tobago*, U.N. Doc. CCPR/C/77/D/908/2000, May 5, 2003, paras. 2.3, 6.4.

Guidelines further advise that detention conditions should: “conform with all applicable international law and standards. They sh[ould] guarantee the right of detainees in police custody and pre-trial detention to be treated with respect for their inherent dignity, and to be protected from torture and other cruel, inhumane or degrading treatment or punishment.”⁹⁴ The Guidelines also recommend that authorities “hold pre-trial detainees separately from the convicted prison population” and “ensure that detaining authorities take the necessary measures to provide for the special needs of vulnerable groups/persons.”⁹⁵

While awaiting their bail hearings, the 67 defendants were detained in Luzira Prison, a maximum-security prison in Kampala. The following information on conditions in the prison comes from defense counsel. According to counsel, the defendants were held in overcrowded cells, with over 180 detainees packed in each ward; there was so little space that detainees could only sleep on their sides, with no room to turn over or change positions.⁹⁶ Unsanitary conditions caused by overcrowding were exacerbated by the lack of basic hygiene measures and facilities.⁹⁷ Defendants reported that toilet paper was not made available, so they were forced to use their hands to clean themselves.⁹⁸ Meanwhile, drinking water was only available through sinks in the bathroom. No mosquito nets were provided, despite the prevalence of malaria-carrying mosquitos.⁹⁹ Detainees were issued only one prison uniform, which meant that the uniforms had to be washed while detainees bathed and re-worn while still wet. In addition to the lack of access to clean water, detainees received limited sustenance: a breakfast of porridge and a midday meal of posho and beans that was half-cooked and filled with weevils.¹⁰⁰ As a result of the abysmal hygiene conditions, many of the defendants became sick, suffered from diarrhea, and/or contracted malaria.¹⁰¹

As relayed by defense counsel, the accused were also subjected to humiliating and degrading treatment by the authorities on the basis of their perceived sexual orientation and gender identity. During the intake procedure, arriving detainees were reportedly forced to remove all of their clothes and undergo a full body search.¹⁰² According to defense counsel, transgender individuals endured longer searches, with prison authorities seeking to “prove” their gender; one transgender woman, for example, was ordered to kneel and touch her genitals, ostensibly to confirm her gender.¹⁰³ As stated by defense counsel, prison authorities informed other detainees that the defendants

⁹⁴ 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 to May 12, 2014, para. 24.

⁹⁵ *Id.* at para. 26.

⁹⁶ Monitor’s Interview with Defense Counsel, September 3, 2020.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

were LGBTQ individuals, thus tacitly encouraging inmates to marginalize the new arrivals.¹⁰⁴ Defendants reported being taunted by other detainees as *abasiyazi* (sodomizers), and one transgender woman reported being raped by other inmates.¹⁰⁵

The conduct alleged - accounts of overcrowded and unsanitary conditions, insufficient access to clean water and food, and invasive and prolonged searches - violates the prohibition on cruel, inhuman, or degrading treatment reflected in Articles 7 and 10 of the ICCPR and Article 5 of the African Charter. According to defense counsel, the authorities also failed to “hold pre-trial detainees separately from the convicted prison population” and took no action “to provide for the special needs of vulnerable groups/persons,” in contravention of the Luanda Guidelines; instead of protecting the accused, the prison authorities seemingly facilitated their ill-treatment by other prisoners.

C. VIOLATIONS AT TRIAL

Right to Be Informed of Criminal Charges

Article 14(3)(a) of the ICCPR entitles every person charged with a criminal offense “to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him.”¹⁰⁶ As stated by the United Nations Human Rights Committee, the accused must be informed of “both the law and the alleged general facts on which the charge is based.”¹⁰⁷

Article 7 of the African Charter guarantees individuals the right to a fair trial. In its Fair Trial Guidelines, the African Commission has elaborated on the subcomponent right to notification of the charges:

(a) Any person charged with a criminal offence shall be informed promptly, as soon as a charge is first made by a competent authority, in detail, and in a language, which he or she understands, of the nature and cause of the charge against him or her.

(b) The information shall include details of the charge or applicable law and the alleged facts on which the charge is based sufficient to indicate the substance of the complaint against the accused.

¹⁰⁴ Id.

¹⁰⁵ Id.

¹⁰⁶ ICCPR, Article 14(3)(a).

¹⁰⁷ Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 31.

(c) The accused must be informed in a manner that would allow him or her to prepare a defence and to take immediate steps to secure his or her release.¹⁰⁸

In the case at hand, the accused were informed of the charges on November 12, 2019. The information provided, however, did not meet the ICCPR and African Charter requirement that defendants be apprised of the “alleged facts” on which charges are based. The five handwritten charge sheets contain only the personal details of each charged person (name, age, profession, residency, telephone number), the alleged offense (“Common Nuisance, Art. 160(1) of the Penal Code Act”), and a statement on the “particulars of offence.” The statement on the “particulars of the offence” lists the names of the charged individuals, asserting that they “in central division of Kampala District without reason obstructed and inconvenienced the public in the exercise of their common rights thereby leading to the conclusion that they were common nuisance.”¹⁰⁹ This description of the allegation is identical across all five groups’ charge sheets. The absence of factual details in the charge sheets, including the lack of any individualized information, falls short of ICCPR and African Charter standards on notification. Further, without any specificity as to the nature of the accusation, the charge sheets do not “allow [the accused] to prepare a defence and to take immediate steps to secure [their] release.”

Right to Adequate Facilities to Prepare a Defense

Under Article 14(3)(b) of the ICCPR, accused persons must have adequate time and facilities for the preparation of their defense. The United Nations Human Rights Committee has explained that “adequate facilities” entails access to documents and other evidence, including “all materials that the prosecution plans to offer in court against the accused or that are exculpatory.”¹¹⁰ The Committee has defined “exculpatory materials” not only as evidence demonstrating an accused’s innocence but also as evidence that “could assist the defense.”¹¹¹ Nondisclosure is only justified in limited circumstances, such as national security.¹¹²

In the case of *Khoroshenko v. Russia*, for example, the Committee found that the complainant “did not receive a copy of the trial’s records immediately after the first instance verdict was issued [and] that despite numerous requests, he was not given some

¹⁰⁸ 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(1).

¹⁰⁹ Uganda v. Sematimba Titus and others, Charge Sheet, Bug-Co-2528-19, November 12, 2019; Uganda v. Asuman Serubiri and others, Charge Sheet, Bug-Co-2531-2019, November 12, 2019; Uganda v. Ibrahim Katongole and others, Charge Sheet, Bug-Co-2529-19, November 12, 2019; Uganda v. Male Marvin and others, Charge Sheet, Bug-Co-2532-19, November 12, 2019; Uganda v. Ntare Farida and others, Charge Sheet, Bug-Co-2530-19, November 12, 2019.

¹¹⁰ Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/35, August 23, 2007, para. 33.

¹¹¹ *Id.*

¹¹² See Human Rights Committee, Mansour Ahani v. Canada. U.N. Doc. CCPR/C/80/D/1051/2002, June 2004, para. 10.5.

documents, he considered relevant for his defence.”¹¹³ The Committee concluded that this conduct violated Article 14(3)(b).

Article 7 of the African Charter guarantees the right to a fair trial. The African Commission has specified that this right includes “adequate time and facilities for the preparation of [an accused’s] defence.”¹¹⁴ The Commission’s Fair Trial Guidelines expand on what constitutes adequate facilities, noting, for example, that the defense must have access to “materials necessary to the preparation of a defence.”¹¹⁵ The Fair Trial Guidelines detail the authorities’ duty to disclose information. Article I(d) states: “It is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients. Such access should be provided at its earliest appropriate time.”¹¹⁶

In all five of the cases against the 67 accused, defendants were continuously denied access to charge sheets and other relevant documents notwithstanding orders from presiding magistrates that the state conduct disclosure. On February 17, 2020 in the case of *Asuman Serubiri and Others*, for example, defense counsel objected that despite the magistrate’s ruling on the issue of disclosure at the previous hearing, the defense had yet to receive the charge sheet or any state evidence, thus impacting the ability to prepare a defense.¹¹⁷ This was more than three months after the defendants were first charged. Similarly, in the case of *Ntare Farida and Others*, defense counsel objected on both December 11, 2019 and January 14, 2020 that the defense had not received the charge sheet or any police files from the state - again despite the magistrate’s previous orders.¹¹⁸ On June 16, the state had still not provided the defense with its list of witnesses.¹¹⁹ In the case of *Ibrahim Katongole and Others*, defense counsel objected on February 3, almost three months after the initial charges, that the defense had yet to receive any documentation that the state intended to use in support of prosecution.¹²⁰

Moreover, in two cases the state surprised the defense with evidence and allegations unrelated to the common nuisance charge without prior disclosure of such. In *Ntare Farida and Others*, almost ten months into the proceedings, the state attorney attempted to introduce new evidence against the accused: namely, that the accused

¹¹³ Human Rights Committee, *Khoroshenko v. Russian Federation*, U.N. Doc. CCPR/C/101/D/1304/2004, April 29, 2011, para. 9.7.

¹¹⁴ African Commission on Human and Peoples’ Rights, Resolution on the Right to Recourse and Fair Trial, Eleventh Ordinary Session, March 2-9, 1992, para. 2(e)(1)

¹¹⁵ African Commission on Human and Peoples’ Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle N(3)(d).

¹¹⁶ *Id.* at Principle I(d).

¹¹⁷ Monitor’s Notes, February 17, 2020.

¹¹⁸ Monitor’s Notes, December 11, 2019; Monitor’s Notes, January 14, 2020.

¹¹⁹ Monitor’s Notes, June 16, 2020.

¹²⁰ Monitor’s Notes, February 3, 2020.

had been sharing material with young people that promoted homosexuality and had been “conscripting” youth into the LGBT community.¹²¹ This was the first time over the course of the criminal proceedings that the prosecution had mentioned these allegations. Similarly, in *Male Marvin and Others*, the prosecution referenced allegations regarding “gay sex” and “drug use” that had never been cited in the charge sheet.¹²²

The state’s repeated failure to provide charge sheets, police files, and other relevant evidence to defense counsel violated the accused’s right to adequate facilities in the preparation of a defense, guaranteed by Article 14(3)(b) of the ICCPR and Article 7 of the African Charter.

Right to an Impartial Tribunal

Under Article 14(1) of the ICCPR, an accused is entitled to a fair and public hearing by a competent, independent, and impartial tribunal established by law. Article 7 of the African Charter likewise establishes an accused’s right to be tried before an impartial tribunal.

As the United Nations Human Rights Committee has clarified, impartiality has two components. First, judges must not allow their decision-making to be influenced by personal bias or prejudice, and second, the tribunal must appear to a reasonable observer to be impartial;¹²³ “judges must not only be impartial, they must also be seen to be impartial.”¹²⁴ In assessing whether there are grounds to doubt a judge’s impartiality, the decisive factor is “whether the fear can be objectively justified.”¹²⁵

At the second hearing in the case of *Ntare Farida and Others*, the magistrate made comments indicative of personal bias against LGBTQ individuals. When the file for the case was called, the magistrate asked the clerk “if it was for the gay people misusing their bums.”¹²⁶ The phrase “misusing” implies that same-sex conduct is wrong, casting doubt on the judge’s impartiality in fact but in any event undermining the judge’s impartiality in appearance. The remark was particularly problematic given that the defendants were charged with common nuisance and not with any violation of domestic law relating to their perceived or actual sexual orientation, further indication that they had been targeted as part of an anti-LGBTQ campaign. The “fear” that the judge might not be able to fairly adjudicate the case was thus “objectively justified,” in contravention of Article 14(1) of the ICCPR and Article 7 of the African Charter.

¹²¹ Monitor’s Notes, August 28, 2020.

¹²² Monitor’s Notes, January 27, 2020.

¹²³ Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/35, August 23, 2007, para. 21.

¹²⁴ Human Rights Committee, *Maria Cristina Lagunas Castedo v. Spain*, U.N. Doc. CCPR/C/94/D/1122/2002, October 20, 2008, para 9.7.

¹²⁵ *Id.*

¹²⁶ Monitor’s Notes, January 14, 2020.

D. OTHER FAIRNESS CONCERNS

Prosecutorial Misconduct

The actions of the state attorneys who pursued the five cases against the 67 breached best practices on prosecutorial ethics. Under the United Nations Guidelines on the Role of Prosecutors, prosecutors in criminal proceedings must “not initiate or continue prosecution,” or should “make every effort to stay proceedings, when an impartial investigation shows the charges to be unfounded.”¹²⁷ Guidelines produced by the International Association of Prosecutors (IAP Guidelines), which complement the UN Guidelines on the Role of Prosecutors, require prosecutors to proceed in criminal cases “only when a case is well-founded upon evidence reasonably believed to be reliable and admissible,” and to “not continue with a prosecution in the absence of such evidence.”¹²⁸

Over the course of almost a year, state attorneys have failed to put forth a single witness or piece of evidence in the five cases against the 67, indicating that they likely never had reliable and admissible evidence upon which to predicate the proceedings. Indeed, two of the cases - *Male Marvin and Others* and *Ibrahim Katongole and Others* - were dismissed in February and March 2020 for want of prosecution after four and five hearings, respectively. At the final hearings in both cases, state attorneys yet again asked magistrates for more time to call witnesses. According to international guidelines on prosecutorial ethics, the state should have dropped charges as soon as it became apparent that there was not enough evidence to support prosecution. Instead, state attorneys continuously have requested that hearings be rescheduled, resulting in the proceedings dragging on for months (until February and March 2020, for the two cases that were dismissed, and at until at least November 2020 for the remaining cases).

Right to Freedom from Discrimination

The right to equality and freedom from discrimination based on sexual orientation is protected under Articles 2(1) and 26 of the ICCPR. As noted above, Article 2(1) requires State Parties to “respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” Article 26 reads: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In

¹²⁷ United Nations Office of the High Commissioner for Human Rights, United Nations Guidelines on the Role of Prosecutors, 1990, para. 14. Available at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfProsecutors.aspx>.

¹²⁸ International Association of Prosecutors, Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors, 1999, Principle 4.2(d). Available at [https://www.iap-association.org/getattachment/Resources-Dokumentation/IAP-Standards-\(1\)/IAP_Standards_Oktober-2018_FINAL_20180210.pdf.aspx](https://www.iap-association.org/getattachment/Resources-Dokumentation/IAP-Standards-(1)/IAP_Standards_Oktober-2018_FINAL_20180210.pdf.aspx).

this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” The Committee has established that discrimination relating to actual or perceived sexual orientation is prohibited under Articles 2 and 26.¹²⁹

The Committee has further stated that the term ‘discrimination’ in the Covenant should be understood “to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose of or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.”¹³⁰ According to the Committee, Article 26 “prohibits discrimination in law or *in fact* in any field regulated and protected by public authorities,” even beyond “those rights which are provided for in the Covenant.”¹³¹

Article 2 of the African Charter entitles every individual “to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.” Article 3 provides for equality before the law and equal protection of the law. While the African Court and Commission have yet to hold that sexual orientation is either encompassed by the term “sex” or falls under the “other status” umbrella, the Commission has recognized and condemned human rights violations based on sexual orientation and gender identity.¹³² Additionally, the African Court has stated that 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.

In the present case, the totality of facts indicate that the proceedings initiated against the 67 accused constituted discrimination “in fact” - in application of the law - based on sexual orientation. The 67 defendants were arrested during a raid of a bar known as a safe space for Kampala’s LGBTQ community. One arrestee reported that police made homophobic comments during both the raid and at the police station, while another reported that a

¹²⁹ See Human Rights Committee, *Nicholas Toonen v. Australia*, U.N. Doc. CCPR/C/50/D/488/1992, March 31, 1994, para. 8.7; Human Rights Committee, *Young v. Australia*, U.N. Doc. CCPR/C/78/D/941/2000, September 18, 2003; Human Rights Committee, *X (represented by counsel) v. Australia*, U.N. Doc. CCPR/C/89/D/1361/2005, May 14, 2007.

¹³⁰ Human Rights Committee, General Comment No. 18, 1989, para. 7.

¹³¹ Human Rights Committee, General Comment No. 18, 1989, para. 12. Emphasis added.

¹³² For example, in Resolution 257, passed in 2014, the African Commission “[c]ondemns the increasing incidence of violence and other human rights violations, including murder, rape, assault, arbitrary imprisonment and other forms of persecution of persons on the basis of their imputed or real sexual orientation or gender identity.” African Commission on Human and Peoples’ Rights, 275 Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity, ACHPR/Res.275(LV)2014, 55th Ordinary Session, April 28-May 12, 2014. See also African Commission, *Zimbabwe Human Rights NGO Forum v Zimbabwe*, Communication No. 245/02, May 15, 2006, para. 169.

police officer admitted that the raid was “targeted to arrest homosexuals.”¹³³ When the defendants were brought to prison, the authorities reportedly singled them out for their actual or perceived sexual orientation and gender identity: as discussed above, defense counsel relayed that the authorities informed other detainees that the new arrivals were homosexual and subjected transgender individuals to longer and more humiliating searches.

Further, as also discussed above, the formal charges levied against the 67 were different from the initial reasons given for their arrest: enforcement of the Tobacco Control Act was transformed into common nuisance. This pattern of shifting allegations continued throughout the proceedings. In *Ntare Farida and Others*, the state suddenly introduced evidence relating to the dissemination of “gay propaganda.” In *Male Marvin and Others*, the state likewise raised vague allegations regarding “gay sex.” Meanwhile, in every single case, state attorneys have been unable to produce either witnesses or evidence over many months of proceedings. The fluctuating charges and the lack of substantiating evidence strongly suggest that the cases against the 67 were motivated by their perceived sexual orientation rather than actual violations of law. At one hearing, the magistrate even asked the clerk if the case file “was for the gay people misusing their bums” - an explicit indicator that the underlying reason for the prosecution was the perceived sexual orientation of the defendants.

Given the above, there are significant grounds for concluding that the state applied the law in a discriminatory manner, failing to ensure that the defendants were able to exercise their right to liberty and security of person and right to a fair trial on an “equal footing with others.” The accused’s right not to be discriminated against was therefore violated.

Criminalization of Petty Offenses: Article 160 of the Ugandan Penal Code

Under international standards, offenses must be sufficiently delineated to allow individuals to regulate their conduct accordingly. As noted above, Article 9(1) of the ICCPR provides that “[n]o one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.” The United Nations Human Rights Committee has emphasized that “any substantive grounds for arrest or detention ... should be defined with sufficient precision to avoid overly broad or arbitrary interpretation or application.”¹³⁴ Article 6 of the African Charter similarly protects the right to liberty and security of person, prohibits arbitrary arrest and detention, and guarantees that “[n]o one may be deprived of his freedom except for reasons and conditions previously laid down by law.” Like the UN Human Rights Committee, the African

¹³³ Human Rights Watch, “Uganda: Stop Police Harassment of LGBT People”, November 17, 2019.

¹³⁴ Human Rights Committee, General Comment No. 35, U.N. Doc. CCPR/C/GC/35, December 16, 2014, para. 22.

Commission has stated that the grounds for deprivation of liberty must “be clear, accessible and precise.”¹³⁵

In this regard, the Commission has expressed particular misgivings about petty offenses. Petty offenses, which include common nuisance, are defined as “minor offences for which the punishment is prescribed by law to carry a warning, community service, a low-value fine or short term of imprisonment, often for failure to pay the fine.”¹³⁶ In 2017, “in response to concerns about the extent to which the enactment, interpretation and enforcement by State Parties of [petty offenses] comply with Articles 2, 3, 5 and 6 of the African Charter,” the Commission promulgated the Principles on the Decriminalisation of Petty Offences in Africa.¹³⁷ The Principles require that “laws defining criminal conduct ... be clear, precise and accessible, and clearly establish the elements of the offence, as well as the grounds upon which a person can be arrested and detained.”¹³⁸

Article 160(1) of the Ugandan Penal Code, under which the 67 defendants in the present case were prosecuted, fails to define the proscribed conduct with sufficient precision. It provides:

Any person who does an act not authorised by law or omits to discharge a legal duty and thereby causes any common injury, or danger or annoyance, or obstructs or causes inconvenience to the public in the exercise of common rights, commits the misdemeanour termed a common nuisance and is liable to imprisonment for one year.

In broadly criminalizing any “act not authorized by law” and vaguely referencing “injury” and “annoyance,” Article 160(1) is far from “clear, precise and accessible” and does not “clearly establish the elements of the offence” or “the grounds upon which a person can be arrested and detained.” Due to its lack of specificity, it would be difficult for individuals to regulate their behavior according to the law, in violation of Article 9(1) of the ICCPR and Article 6 of the African Charter.

As discussed above, Articles 2 and 26 of the ICCPR and Articles 2 and 3 of the African Charter protect against discrimination and ensure equality before the law. With respect to petty offenses, the African Commission has advised that the vagueness of such legislation “give[s] [the authorities] wide discretion to determine which activities constitute criminal behavior in a particular context, which often results in the law being applied in an

¹³⁵ 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. 2(a).

¹³⁶ African Commission on Human and Peoples’ Rights, Principles on the Decriminalisation of Petty Offences in Africa, 61st Ordinary Session, November 1-15, 2017, para. 1.

¹³⁷ *Id.* at preface.

¹³⁸ *Id.* at para. 13.1.1.

arbitrary and/or discriminatory manner.”¹³⁹ As stated by the Commission, “laws that create petty offenses are inconsistent with the principles of equality before the law and non-discrimination on the basis that they either target, or have a disproportionate impact on, the poor, vulnerable persons, key populations or on the basis of gender,”¹⁴⁰ with the term “vulnerable persons” defined to include “persons marginalised on the basis of sexual orientation or gender identity.”¹⁴¹

In affording the authorities “wide discretion” to conduct arrests, bring charges, and initiate prosecutions, Article 160(1) lends itself to application in “an arbitrary and/or discriminatory manner.” The case of the 67 demonstrates how the vagueness of Article 160(1) facilitates the targeting of vulnerable populations, in contravention of Articles 2 and 26 of the ICCPR and Articles 2 and 3 of the African Charter (see above sections on Arbitrary Arrest and Detention and Right to Freedom from Discrimination).

Impact of the Proceedings on the 67

It is worth noting that although none of the 67 defendants have been found guilty thus far and although all five cases may ultimately be dismissed for want of prosecution, the criminal proceedings have already negatively impacted the lives of the accused. According to the defense, the ordeal forcibly outed many of the defendants to their family, friends, and colleagues. When Ram Bar was raided, for example, media personnel accompanied police and took photos of the arrested bar patrons.¹⁴² Consequently, the identities of the accused were publicized across various media platforms. As recounted by defense counsel, a number of the accused were ostracized by their communities, rejected by their families, and forced to leave their family homes.¹⁴³ One young woman reported that her family told her they would never allow her to return home. Others were reportedly evicted by landlords who believed that their homes “would be cursed” if they rented to LGBTQ individuals.¹⁴⁴ Some defendants moved into shelters for LGBTQ individuals.¹⁴⁵

In addition to compromised privacy and corresponding ramifications, the 67 defendants spent time in detention (ranging from days to months) while awaiting bail hearings. According to defense counsel, a number of defendants lost their jobs during this period.¹⁴⁶ For some, this loss of income resulted in loss of housing.¹⁴⁷ Defense counsel

¹³⁹ Id. at para. 13.1.2.

¹⁴⁰ Id. at para. 6.

¹⁴¹ Id. at para. 1.

¹⁴² Monitor’s Interview with Defense Counsel, August 17, 2020. See also Kuchu Times, “#RAM125: 67 Remanded to Luzira Prison”, November 13, 2019.

¹⁴³ Id.

¹⁴⁴ Monitor’s Interview with Defense Counsel, August 17, 2020.

¹⁴⁵ Id.

¹⁴⁶ Id.

¹⁴⁷ Id.

further relayed that the inhumane treatment inflicted at Luzira Prison has had physical and psychological effects.¹⁴⁸

Lastly, the protracted nature of the hearings, which have been repeatedly delayed and rescheduled over the course of a year, continue to hinder defendants' daily lives. As a practical matter, the accused cannot travel or maintain normal routines: as long as their cases continue, they must show up to court whenever a hearing is scheduled, the timing of which is unpredictable.¹⁴⁹ In any event, the prolonged proceedings have left defendants in a state of uncertainty, with criminal charges hanging over their heads.

¹⁴⁸ Id.

¹⁴⁹ Id.

CONCLUSION AND GRADE



The proceedings against the 67 accused reflect a pattern of targeted state harassment of LGBTQ individuals in Uganda. The totality of the facts indicates that the accused were arrested and prosecuted based on their actual or perceived sexual orientation. During the pretrial and trial phases, their rights have continually been violated in a manner that contravenes non-discrimination guarantees: the accused were arbitrarily arrested and detained; they were subjected to humiliating and degrading treatment; they were not informed of the basis of the charges against them; they were denied access to the materials necessary to prepare a defense; and they were confronted with serious prosecutorial misconduct. While two of the five cases have been dismissed, the lives of the 67 have been irrevocably impacted. The remaining cases should be dismissed to prevent further harm. More broadly, in order to prevent a repeat of such proceedings, Uganda should review Article 160(1)'s compliance with its regional and international treaty obligations.

GRADE:

D



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,”¹⁵⁰ 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.

¹⁵⁰ ICCPR, Article 26.