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Case No: 189

The Truth, Reconciliation and National Unity Commission

In the Complaint of Muhammad Issa Khudabin

31 December 2022

Determination on the Complaint of Muhammad Issa Khudabin

Complainant:

Muhammad Issa Khudabin

The Truth, Reconciliation and National Unity Commission ("Commission"), seized of the complaint of Mr. Muhammad Issa Khudabin,

OBSERVING that the complaint of Mr. Khudabin, who brings his complaint as a victim, was filed on 9 October 2019, in conformity with Sections 3(4) and 3(5) of the Truth Reconciliation and National Unity Act, 2018 ("TRNUC Act");

NOTING that pursuant to Section 2(8) of the TRNUC Act, the complaint must allege an abuse of human rights that was committed during or in relation to the Coup d'état of 1977,[1] and that the complainant alleged torture,[2] unlawful imprisonment or other deprivation of physical liberty,[3] and forced exile,[4] all of which occurred in 1998 by military and police authorities, a time period that falls outside the primary temporal mandate of the Commission but nonetheless falls within the Commission's thematic mandate as the Commission finds that the violations alleged were committed by Government authorities fully aligned to

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[1] "[...] (a) unlawful killing; (b) unlawful imprisonment or other deprivations of physical liberty; (c) torture; (d) rape; (e) enforced disappearance of persons; (f) kidnapping; (g) forceful eviction from legally owned building or land; (h) unjustified acquisition or loss of property or business; (i) wrongful denial of the right to employment; (j) wrongful termination of employment; (k) forced exile; (l) abuse of office by a Government official, including the executive, judiciary or legislature; or (m) other acts of a similar character causing suffering or injury to body or to mental or physical health". Truth, Reconciliation and National Unity Commission Act, 2018, Act 9 of 2018 (14 September), sec. 2(8) [hereinafter "TRNUC Act"].

[2] TRNUC Act, sec. 2(8)(c). The Commission considers the violation of torture as (1) the intentional infliction (2) of severe pain and suffering (3) in a cruel, inhuman, and degrading manner (4) by a perpetrator. The Commission notes that in the Declaration on the Protection of All Persons from Being Subjected to Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted by the United Nations General Assembly, the consensus definition of torture requires the act of torture to be "intentionally inflicted... for such purposes as obtaining from him or a third person information or a confession". U.N. General Assembly, *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, art. 1, 9 December 1975, U.N. Doc. A/RES/3452(XXX). This definition is reflected in and expanded upon in the Convention against Torture, ratified in Seychelles in 1992. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [CAT], art. 1(1), 1465 U.N.T.S. 85 (1984), *ratified* 5 May 1992. The prohibition of torture is also a *jus cogens* norm of international law. *See* Universal Declaration of Human Rights [UDHR], art. 5, G.A. Res. 217 (III), 10 December 1948.

[3] TRNUC Act, sec. 2(8)(b). The Commission considers that the violation of unlawful imprisonment or other deprivation of physical liberty consists of 1) an arrest, detention, imprisonment, or other deprivation of one's physical liberty 2) executed unlawfully, arbitrarily, or without due process 3) by a perpetrator. The Commission notes that the term "detention" corresponds to the state of being under police or State custody for any amount of time, whereas "imprisonment" references being detained specifically as the result of a conviction. Hence, the "detention" prong falls into the broader "other deprivation of physical liberty" provision of Section 2(8)(b) of the TRNUC Act. This violation stems from a violation of the fundamental rights to personal liberty and to due process of law, among others. *See* International Covenant on Civil and Political Rights [ICCPR], 16 December 1966, 999 U.N.T.S. 171, arts. 9, 14. These rights are also at the status of customary international law. *See* UDHR, arts. 3 (right to liberty and security of person), 7 (equal protection of the law), 9 (freedom from arbitrary arrest, detention, or exile), 10 (right to fair and public hearing by impartial tribunal).

[4] TRNUC Act, sec. 2(8)(k). The Commission considers that forced exile involves 1) the expulsion, deprivation of access to re-enter, or removal of a national from his or her country 2) unlawfully or arbitrarily through either direct deportation or expulsion or by making living conditions unbearable for the national to stay in the country due to ongoing or potential persecution, victimisation, violence, or other difficulties, 3) by a perpetrator. The violation of forced exile is fundamentally a violation of the customary rights to freedom of movement and to re-enter one's country. *See* ICCPR, art. 11 (liberty of movement, right against arbitrary deprivation of the right to enter one's own country; UDHR, arts. 9 (freedom from arbitrary exile), 13 (freedom of movement and right to return to one's country).

the protection of the Government and party that had taken power with the Coup d'état of 1977 and are admissible on that basis;

RECALLING that pursuant to Rule 25 of the Rules of Procedure and Evidence of the Commission, the test for admissibility is low but a "complaint will be deemed inadmissible where the information contained within the complaint falls manifestly outside the mandate of the Commission", and in this case the Commission rendered the complaint of Mr. Khudabin prima facie admissible on 15 June 2019;

RECALLING FURTHER that the Commission, having rendered the complaint prima facie admissible pursuant to Section 3(3) of the TRNUC Act, heard the complaint of Mr. Khudabin on Monday 19 May 2021,[5] and investigated the veracity of the complaint as evidenced by the hearing record and the file in this case;

CONSIDERING the evidence heard by the Commission, coupled with the Commission's consideration of similar cases;

HEREBY determines, pursuant to Section 11 of the Truth, Reconciliation and National Unity Commission Act, 2018 ("TRNUC Act"), as follows:

1. The Commission finds it established to a balance of probabilities that in 1998, Mr. Khudabin was at his home in Beoliere when two army jeeps full of soldiers arrived at his home and surrounded his house, and then called for him to come out of the house. When he left the house, he was handcuffed, placed in the back of the army jeep, and transported to Grande Police, where he was placed in a cell and left there overnight;

2. The Commission finds it established that the next day, Mr. Khudabin was taken to see Robert Ernesta, who was at that time in charge of operations and was stationed at Grande Police. Mr. Khudabin was also known at that time as Franky Domingue and Mr. Ernesta knew him well, as Mr. Khudabin used to be in the army. Mr. Khudabin claimed that Mr. Ernesta asked whether Mr. Khudabin remembered when he used to make Mr. Ernesta get up early, and Mr. Khudabin responded that it was not Mr. Khudabin's fault, and that he had been ordered to wake the recruits up;

3. The Commission notes that the army file of Mr. Khudabin (Franky Domingue) evidenced that he joined the Seychelles People's Defence Forces (SPDF) on 4 November 1977 and that he purported to have resigned on 10 February 1979 on medical grounds; he was released on 2 April 1979, it being noted that he had been under medical treatment for a very long time in the camp's clinic, and that after being paid his monthly salary, he had gone AWOL to date;

4. The Commission finds it established that on the day that Mr. Khudabin was detained and brought to see Mr. Ernesta in 1998, Mr. Ernesta told Mr. Khudabin that he heard that he had a gun, which Mr. Khudabin denied, and then Mr. Ernesta told him that if he wanted a gun, he should have stayed in the army, and Mr. Ernesta then instructed his soldiers to tie Mr. Khudabin to a pole in the yard. The Commission recalls Mr. Khudabin's evidence that the soldiers pushed him around and hit him with hose pipes until they got out into the yard, and that once there, they made Mr. Khudabin stand

[5] Commission Hearing No. 156 of 19 May 2021.

at the pole with his hand behind his back and tied him to the pole; they then took plastic bags and put one over his head and tied it up;

5. The Commission notes that the police provided two reports on the police record of Mr. Khudabin; one dated 16 October 2019, which referenced "During 1997 to 2000" concerning possession of a firearm on 30 October 1996; and one dated 27 December 2021, which noted a possession of a firearm without licence charge with the date specified as 1997/1998;

6. The Commission finds it established that once tied to the pole on that day in 1998, Mr. Khudabin was beaten with pipes and kicked until he fell on his bottom, and that the soldier then stepped on his stomach. The Commission finds it established that as they were beating Mr. Khudabin, the soldiers told him that if he did not give back the guns, they would kill him;

7. The Commission recalls the evidence of Mr. Khudabin that at that time, he had a wife and they had cows and goats that they were keeping, and that one day when he was cutting the grass with one of his friends, he saw some blood out in the woods, which he believed was human blood, and there was a bag with a pistol and an AK-47 in it but there were no bullets in the bag;

8. The Commission finds it established that as a result of the beating he endured, Mr. Khudabin told the soldiers that he did have a gun and a revolver that he had found when he was collecting food for the animals, and that he would give them back the weapons;

9. The Commission finds it established that Mr. Khudabin was then put in handcuffs and placed in the back of the army jeep, and taken to his home, where he gave them the weapons; he claimed that he was then taken back to Grande Police. The Commission finds it established that once back at Grande Police, Mr. Ernesta told Mr. Khudabin, "you told me you had no guns", and that Mr. Khudabin told Mr. Ernesta that he was scared that he would be tortured to death, so he thought it was best to give the guns back to Mr. Ernesta. The Commission recalls Mr. Khudabin's evidence that Mr. Ernesta told him that there was "more torture to come", and that the soldiers were ordered to beat Mr. Khudabin again. The Commission recalls Mr. Khudabin's evidence that again the soldiers placed a bag over his head and tied him to the pole and beat him, and then afterwards took him back to a cell;

10. The Commission recalls Mr. Khudabin's evidence that he was later removed from the cell and taken back to Mr. Ernesta, who questioned him again about having guns and revolvers, and that Mr. Khudabin denied that he had any more guns, and explained to Mr. Ernesta that he had found the ones he had already given up when cutting the grass, and that Mr. Ernesta told the soldiers to put Mr. Khudabin back in the cell again. According to Mr. Khudabin, that night he was taken out of the cell and beaten again;

11. The Commission recalls the evidence of Mr. Khudabin that he was subjected to beatings at Grande Police for three days, and on the fourth day, he was taken by soldiers back to his home, where they searched his property but found nothing. Mr. Khudabin stated that he told Mr. Ernesta that he did not deal in arms, but Mr. Ernesta insisted that he had more guns. Mr. Ernesta told Mr. Khudabin that they would let him go "for now", but that they would be coming back for him;

12. The Commission recalls that in response to the suspect notification served on him, Mr. Ernesta stated as follows:

> I can confirm that he was arrested, a plastic bag was indeed placed over his head; he was coerced. However he was not detained for the duration he alleges as he was released immediately after he brought back the cache of weapons which was much more than he admitted before the TRNUC. When I joined the SPDF he had already left. We never served together and his reference to us serving together in the force is a lie. I remain committed to assisting the commission but he (sic) also aware that there is a lot of cooked stories being thrown at the commission.

13. The Commission notes that the original statement of Mr. Khudabin given prior to the hearing claimed that he was released the following day after being picked up and tortured, but that once he had arrived home, he heard army jeeps coming back to his property and he hid in the forest while his wife was questioned as to his whereabouts. In that statement, Mr. Khudabin claimed that the soldiers came back to his house in the days following and that he hid in the forest, and then after a few days he fled to Madagascar;

14. The Commission considers that the passage of time renders it likely that there will be discrepancies in the evidence, and finds based on Mr. Khudabin's original statement and the evidence of Mr. Ernesta that Mr. Khudabin was more likely than not released after one night in a cell at Grande Police;

15. The Commission finds it established that following his release, Mr. Khudabin went into exile in Madagascar, where he applied for residency and was granted a resident's permit. Mr. Khudabin left his wife and children behind, and he did not return to Seychelles until 2000; the Commission accepts that he did so because he was afraid of further mistreatment by the army;

16. The Commission finds to a balance of probabilities that Mr. Khudabin was detained at Grande Police on suspicion of being in possession of firearms for approximately 24 hours, and finds that while there may have been reasonable basis to detain and question Mr. Khudabin, it was not reasonable to take him to the army base at Grande Police and not the police station for that purpose; the Commission further finds that holding Mr. Khudabin, a civilian, in detention at an army base, without any respect for his due process rights,[6] rendered that detention unlawful, thus amounting to a violation under Section 2(8)(b) of the TRNUC Act;

17. The Commission finds that as the Chief of Operations and the most senior officer present, Mr. Ernesta bears responsibility for the unlawful detention of Mr. Khudabin and the Commission accordingly grants him perpetrator status; further, as Mr. Ernesta was a senior officer of a State organ and exercising control over other agents of the State, his actions give rise to State responsibility for that violation;

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[6] In this regard, the Commission recalls that Mr. Khudabin was apparently never accorded or even advised of his basic rights to remain silent and to be given the reasons for his arrest, his right to counsel, and his right to an appearance before a judge within 24 hours of his arrest, among others. *See* Constitution of the Republic of Seychelles, Constitution of the Republic of Seychelles (Preparation and Promulgation) Act, 1992, Act 2 of 1992 (21 June 1993), art. 18 [hereinafter "Constitution of 1993"]. *See also* ICCPR, art. 14; UDHR, art. 11.

18. The Commission also finds to a balance of probabilities that Mr. Khudabin was taken to Grande Police for the purpose of obtaining information from him concerning weapons, and that he was subjected to gross mistreatment with a plastic bag over his head, in the form of beatings by a number of soldiers; the Commission finds that the treatment meted upon Mr. Khudabin was sufficient to meet the standard of severity to constitute torture pursuant to Section 2(8)(c) of the TRNUC Act;

19. The Commission finds that Mr. Ernesta and the unidentified soldiers under his command bear perpetrator status for the torture of Mr. Khudabin at Grande Police; the Commission further finds that as these perpetrators were members of the SPDF, a core State organ, the State also bears responsibility for the torture of Mr. Khudabin and for breaching its duty to investigate after the event and ensure the protection of human rights;

20. The Commission is satisfied that Mr. Khudabin fled Seychelles for Madagascar from 1998 until 2000, based on his fear of the return of the SPDF soldiers and further unlawful detention and torture; in that regard, the Commission notes that Mr. Khudabin then obtained residency status in Madagascar and stayed outside Seychelles for two years; the Commission is thus satisfied that Mr. Khudabin fled the Seychelles with a reasonable fear of torture, in contravention of his constitutional and human rights, and as such suffered the violation of forced exile, under section 2(8)(k) of the TRNUC Act;

21. The Commission finds that Mr. Ernesta bears perpetrator status for the violation of forced exile as well, as it recalls Mr. Khudabin's evidence that he heard from Mr. Ernesta that the SPDF would be coming back for him and that he believed that the SPDF would likely continue to violate his rights if he did not leave the country. The Commission further finds that the SPDF as an institution bears responsibility for this violation, and further that President René, who was the ultimate authority over the SPDF as Commander-in-Chief and often offered individuals the ultimatum of leaving or staying without any assurance that their safety would be guaranteed, also bears some responsibility for the exile Mr. Khudabin was forced to endure;

22. As the President, Mr. Ernesta, and the SPDF members were acting in their official capacities as core organs of the State, responsibility for this violation can also be attributed to the State;

23. Therefore, the Commission determines on the evidence adduced that Mr. Khudabin suffered the following violations: unlawful imprisonment or other deprivation of physical liberty pursuant to Section 2(8)(b) of the TRNUC Act; torture pursuant to Section 2(8)(c); and forced exile pursuant to Section 2(8)(k), in severe violation of his human rights;

24. The Commission recalls that it is mandated pursuant to Section 3(7) of its Act to make recommendations for reparations for victims for human rights violation it has determined to have been established as a result of its investigations;

25. The Commission finds therefore that the complainant in this case should be awarded monetary and symbolic reparations in accordance with the recommendations set out in the Commission's Reparations Policy, which reflects the views of the victims and international human rights principles as to appropriate recommendations due for the human rights violations established above.

Each of the undersigned Commissioners swears or affirms that he or she has comprehensively familiarised him or herself with the record in Case 189.

On this 31 December 2022

The Commission

Gabrielle McIntyre, Chairperson

Michael Green, Vice Chairperson

Marie-Therese Purvis, Commissioner

Jacques Koui Gbilimou, Commissioner

Archbishop James Wong, Commissioner