

## Jurisdiction *ratione materiae* of the Uganda Human Rights Commission: Making sense of the ambiguity in the jurisprudence

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### Summary

*In the first decade of its existence (1998-2008), the Uganda Human Rights Commission has dealt with a significant number of complaints and, in doing so, has invariably had to bear in mind its competence in terms of – although this terminology has never been employed – its jurisdiction *ratione materiae*. The jurisdiction *ratione materiae* of the Commission as a tribunal is primarily to deal with complaints alleging violations of human rights. This should not have been contentious since the bulk of complaints lodged with the Commission since 1998 *prima facie* concern human rights. However, from 2006, the uncertainty regarding the Commission's jurisdiction *ratione materiae* has been manifested in several decisions, especially in respect of complaints alleging violations of the rights to life and property. The Commission's jurisdiction *ratione materiae* has been contested in such complaints through preliminary objections raised on the part of the state and, although rejected in the early decisions up to 2005, the Commission has since 2006 exhibited a willingness to uphold the objections. The discourse over the Commission's jurisdiction *ratione materiae* has had implications for other aspects of the Commission's mandate (including its jurisdiction *ratione personae* and the limitation period for presentation of complaints). Ultimately, the ambiguity over the Commission's jurisdiction *ratione materiae* is essentially a conceptual one pertaining to the nature (and content) of claims presented before the Commission and its quasi-judicial character.*

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## 1 Introduction

The Uganda Human Rights Commission (Commission) is established under article 51 of the 1995 Constitution of Uganda,<sup>1</sup> and its mandate and functions are spelt out under article 52(1) of the Constitution as including, *inter alia*, 'to investigate at its own initiative or on a complaint made by any person a group of persons against the violation of any human right'.<sup>2</sup> This is the primary function of the Commission as a tribunal and is essentially a protectionist one. This function is further reaffirmed in the Uganda Human Rights Commission Act<sup>3</sup> and under the Commission's Rules of Procedure<sup>4</sup> and operational guidelines.<sup>5</sup>

The Uganda Human Rights Commission came into existence in 1998 and although its first decisions were rendered in 1999-2000, the majority of its decisions have been handed down after 2004. During the first decade of its existence, the Commission has dealt with many complaints – totalling more than 350 – and, in doing so, it has invariably had to bear in mind its competence in terms of jurisdiction *ratione materiae*. With the exception of a number of cases during the period between 1998 and 2004, the Commission has been able easily to identify and render a determination that complaints involve 'human rights' claims. However, as from 2006, the decisions of the Commission have been underscored by contentions, raised as preliminary objections on the part of the state, to essentially – even if they were not so couched – the Commission's jurisdiction *ratione materiae*. The contentions have particularly been manifested with respect to claims alleging violations of the rights to life and property. The complaints alleging a violation of these rights have been regarded as *tortious* rather than human rights claims. Additionally, the contentions have been underpinned by objections regarding the

<sup>1</sup> Constitution of the Republic of Uganda, 1995, art 51(1). The Commission is the result of recommendations of two commissions set up in the early 1990s. A commission of inquiry established to inquire into the violations of human rights in Uganda from 1962 to 1986 presented as one of its key recommendations the need for the establishment of a permanent institution on human rights to act as a 'watchdog' over human rights in Uganda: *Report of the Commission of Inquiry into Violations of Human Rights in Uganda from 1962 to 1986*, UPPC, Entebbe, 1993, 582, recommendation 13.1(II). Subsequently, a constitutional commission recommended a permanent and independent human rights body to be enshrined in a prospective new constitution: *Report of the Uganda Constitutional Commission: Analysis and Recommendations*, UPPC, Entebbe, 1993, 185-188, paras 7.175-7.181, a recommendation that was acted upon by a Constituent Assembly debating the constitutional proposals in 1994, and a permanent Human Rights Commission was provided for under the 1995 Constitution.

<sup>2</sup> Art 52(1)(a).

<sup>3</sup> Cap 24 (Laws of Uganda 2000), sec 8(1)(a). The Act enacted in 1997 set out the legal framework for the formal establishment of the Commission in 1998.

<sup>4</sup> Uganda Human Rights Commission (Procedure) Rules, SI 16/1998, rule 4.

<sup>5</sup> Operational Guidelines of the Uganda Human Rights Commission, 1998, guidelines 3-4. The Rules and Guidelines are adopted in light of the powers conferred upon the Commission to 'establish its operational guidelines and rules of procedure'. 1995 Constitution, art 52(3)(a).

appropriate legal regime under which the complaints are to be presented as well as the question as to the period within which complaints should be presented before the Commission. Although the objections were rejected in the early decisions up to 2005, the Commission has since 2006 exhibited a willingness to uphold the objections, as underscored by the decisions of particular commissioners.

The article examines the ambiguity that has defined decisions of the Commission as regards its jurisdiction *ratione materiae*. It seeks to address the manner in which that jurisdiction has been conceptualised in the jurisprudence of the Commission, highlighting the ambiguities that have defined that jurisprudence and to appraise the implications the conceptualisation has borne upon other aspects of the Commission's mandate.

## 2 Construing the jurisdiction *ratione materiae* of the Uganda Human Rights Commission

The *ratione materiae* of the jurisdiction of a judicial or quasi-judicial body is concerned largely with the nature of the subject matter handled by the body in question. Under the Constitution, the Act, the Rules of Procedure and Guidelines, the Commission's protectionist function and, invariably, jurisdiction *ratione materiae* are primarily to deal with complaints alleging violations of human rights. The Guidelines detail the Commission's jurisdiction *ratione materiae* as dealing with 'complaints about violation[s] of *human rights*', with human rights as 'all rights guaranteed by [the] Constitution and [the] international human rights instruments to which Uganda is a signatory'.<sup>6</sup> The rights listed under the Guidelines are essentially those under the Bill of Rights in chapter IV of the 1995 Constitution. The Guidelines state:<sup>7</sup>

Examples of these rights are

- (i) the right to life and personal liberty and equality;
- (ii) freedom from slavery;
- (iii) freedom from discrimination on account of racial or ethnic origin, religion or sex, or disability or any other similar ground;
- (iv) freedom from arbitrary arrest and detention;
- (v) the right to a fair trial and speedy trial on arrest;
- (vi) the right to hold opinion and express one's views;
- (vii) freedom of thought, conscience and religion;
- (viii) freedom of association and peaceful assembly;
- (ix) the right to education;
- (x) the right to own property;
- (xi) economic, social and cultural rights;
- (xii) the rights of the family, children, women, workers, prisoners, etc.

<sup>6</sup> Operational Guidelines (n 5 above) Guideline 3(a).

<sup>7</sup> As above. The Commission also regards its jurisdiction *ratione materiae* to include 'a complaint about detention under emergency laws (art 48(1) of the Constitution)'. Operational Guidelines (n 5 above) Guideline 3(b).

The corollary is that complaints that do not involve human rights should be excluded. The Guidelines provide:<sup>8</sup>

Legal claims of a civil nature which do not directly touch on human rights may not be brought therefore the UHRC. Examples are matters relating to breach of contract, defamation, divorce, land disputes, claims based on the tort of negligence and any such ordinary civil disputes, between private individuals. Complaints based on or arising from crimes committed as a result of purely private disputes will not be accepted by the UHRC.

The jurisdiction *ratione materiae* of the Commission has been largely uncontentious, given that the bulk of the complaints lodged with the Commission since 1998 have *prima facie* concerned human rights. The majority of the complaints have involved allegations of violations of human rights guaranteed under the 1995 Constitution – from the right to life, the right to personal liberty, freedom from torture, the right to property, the right to education, to children’s rights. Notably, in the instances where the question was whether a particular complaint constituted a ‘human rights’ claim, this was determined to be the case. The uncertainty that has stemmed from the Commission declining to entertain certain complaints (and which has been manifest since 2006) has essentially arisen in respect of specific complaints where the subject matter falls within other legal regimes (and causes of action).

### 3 Ambiguity in the jurisprudence of the Uganda Human Rights Commission as regards its jurisdiction *ratione materiae*

#### 3.1 Deciphering the subject matter: Human rights versus claim of a civil nature

The subject matter jurisdiction of the Commission are violations of human rights. As has been noted, this has not been problematic in the majority of complaints during the first decade of the Commission’s existence. In fact, in a number of instances where the question was raised as to whether a claim in a complaint concerned human rights, this was resolved in favour of a finding of a human rights issue. Thus, in *Kalyango Mutesasira and Another (on behalf of 15 Others) v Kunsu Kiwanuka and 3 Others*,<sup>9</sup> where the complainants alleged a failure to pay their pensions and sought the enforcement of its payment, Commissioner Aliro-Omara felt it necessary to consider whether the facts as presented in the complaint – that is, the ‘failure or refusal to pay due pension’ – did ‘constitute a violation of the human rights of the beneficiaries’.<sup>10</sup> In the end, the commissioner held that there had been

<sup>8</sup> Operational Guidelines (n 5 above) Guidelines 4(e)-(f).

<sup>9</sup> Complaint UHRC 501/ 2001 (decision of 21 September 2001).

<sup>10</sup> n 9 above, 3 8-9.

a violation of the complainants' rights to property and social security.<sup>11</sup> In *Martha Aluku and 10 Others v Attorney-General*,<sup>12</sup> on whether the 'failure to pay wages constituted a violation of human rights', the commissioner regarded such wages 'earned income' at each month's end, and therefore an enforceable claim as a 'right to property'.<sup>13</sup> It is to be noted that, as long as the Commission has determined that a complaint *prima facie* evidences a violation of a human right, it is immaterial that the complaint does not mention the elements of the right nor refer to specific constitutional provisions guaranteeing the right.<sup>14</sup>

The major controversy over the Commission's jurisdiction *ratione materiae* has arisen, especially from 2006, with respect to complaints filed before the Commission alleging a violation of specific rights. There are two strands to the discourse as regards the Commission's jurisdiction. Firstly, there is the contention that the subject matter of the complaints is tortious (rather than a violation of human rights) and, secondly, in light of the nature of the subject matter, the claims should be presented as civil suits under the appropriate legal regime. The specific rights affected by the controversy over the Commission's jurisdiction *ratione materiae* are two-fold. On the one hand, the right to life in the context of unlawful death at the hands of agents of government and, on the other hand, the right to property in the context of the entry upon and occupation of lands on the part of the army (particularly in conflict-afflicted Northern Uganda). As regards the complaints founded on unlawful death resulting at the hands of agents of government, the early approach until 2005 was to treat the claims as violations of the right to life guaranteed under article 22(1) of the Constitution.<sup>15</sup> However, in subsequent decisions (from 2006),

<sup>11</sup> n 9 above, 4-9.

<sup>12</sup> Complaint UHRC G/263/ 2000 (decision of 24 February 2004).

<sup>13</sup> n 12 above, 4-5.

<sup>14</sup> See eg *Stephen Okwalinga v Attorney-General*, Complaint UHRC 24/2004 (decision of 26 August 2006). Commissioner Wangadya held that a complaint founded on discrimination 'need not mention the grounds under article 21 of the [1995] Constitution'.

<sup>15</sup> See eg *Lydia Nabuwembo v ACP Bakesiima & 2 Others*, Complaint UHRC 219/1998 (decision of 23 January 2001); *Edward Kamana Wesonga (Legal Representative of late Patrick Pongo) v Attorney-General*, Complaint UHRC 197/1998 (decision in 2002); *Mariam Rajab Tugume v Attorney-General*, Complaint UHRC 776/1998 (decision of 23 November 2003); *Hajji Ali Mutumba v Attorney-General*, Complaint UHRC 225/1998 (decision of 12 December 2003); *Sgt Eriya Keisire v Attorney-General*, Complaint UHRC FP57/2003 (decision in January 2004); *Omong Juk v Attorney-General*, Complaint UHRC G167/1998 (decision of 23 February 2004); *Juma Abukoji v Attorney-General*, Complaint UHRC G/326/1999 (decision of 24 February 2004); *Margaret Atoo v Attorney-General*, Complaint UHRC G/88/2002 (decision of 28 July 2004); *John Baptist Oryem v Attorney-General*, Complaint UHRC G/32/1999 (decision of 27 July 2004); *James Bwango v Attorney-General & Another*, Complaint UHRC FP75/2003 (decision of 1 September 2004); *Leo Rusoke v Attorney-General*, Complaint UHRC FP/44/2003 (decision in 2005); *Peace Nshemereirwe v Attorney-General*, Complaint UHRC 249/2002 (decision of 30 August 2005).

the Commission has had to deal with contentions to consider claims in this regard as claims under the law of torts and, in effect, not within its competence. In *Joseph Oryem v Attorney-General*,<sup>16</sup> this contention, which was raised indirectly, was rejected by Commissioner Waliggo, who noted that the complaint filed by Joseph Oryem was ‘about the violation of Thomas Kilama’s right to life’ and was therefore within the Commission’s mandate to ‘investigate violations of human rights’.<sup>17</sup> Similarly, in *Saverio Oola v Attorney-General*,<sup>18</sup> where the complainant was seeking compensation for a violation of his son’s right to life, and in which the state raised several objections to the complaint, including the character of the claim as a ‘tort’ (and the manner of (and legal regime for) its presentation), the Commissioner stated:<sup>19</sup>

[C]omplaints brought before the Commission are not based on the *law of tort* but on alleged *violation of human rights*. The suits based under the Law Reform (Miscellaneous Provisions) Act are based on *tort* whereas complaints anticipated under Article 52 of the Constitution of the Republic of Uganda 1995 and Uganda Human Rights Commission Act 1997 ... are based on violations of *human rights*.

The commissioner further noted that a claim founded on loss of life was, in the wake of the 1995 Constitution, capable of being brought *either* as a ‘tort’ or a ‘human rights’ violation and, in effect, took cognisance of the hybrid character of the claim.<sup>20</sup> However, in *Collins Oribi v Attorney-General*,<sup>21</sup> the preliminary objection to a complaint alleging a violation of the right to life was upheld, with Commissioner Wangadya criticising what she considered an attempt by the complainant to baptise a tort (in a claim initially filed before the courts) as a human rights violation (in the complaint subsequently filed before the Commission):<sup>22</sup>

[W]hat was originally a *tort of negligence* resulting in death for purposes of the High Court is conveniently renamed ‘violation of the deceased’s constitutional right to life’ to bring it within the jurisdiction of the Commission. I believe the complaint in issue is a *tort* for which the actual culprit was convicted of man-slaughter. If it was a deliberate killing he would have been convicted of murder ... This complaint should therefore have been filed in [the] High Court as a *tort*.

As regards the complaints founded on entry upon and occupation of lands on the part of the army, the early approach until 2005 was to regard the claims as violations of the right to property guaranteed

<sup>16</sup> Complaint UHRC G/144/2003 (decision of 1 December 2004).

<sup>17</sup> n 16 above, 4.

<sup>18</sup> Complaint UHRC G/206/2000 (decision in 2005).

<sup>19</sup> n 18 above, 4 (my emphasis).

<sup>20</sup> As above.

<sup>21</sup> Complaint UHRC 1163/2000 (decision of 12 September 2007).

<sup>22</sup> n 21 above, 5 14 (my emphasis).

under article 26 of the Constitution.<sup>23</sup> However, in the wake of preliminary objections to treat such claims as ‘land disputes’ or as ‘torts for trespass’, in decisions rendered from 2006, the Commission gradually gave in to the objections and determined that cases of occupation of lands on part of the army were not properly claims of human rights violations within its jurisdictional competence. In *Julius Caesar Okot Gwara v Attorney-General*,<sup>24</sup> Commissioner Wangadya held as follows:<sup>25</sup>

It is ... my considered view that this is a *land dispute* which the complainant has conveniently baptised a *human rights complaint*. It is a civil case of *trespass to land* and *trespass to property* – pure and simple. The complainant is aggrieved by the alleged invasion and illegal occupation of his land by the army and seeks a declaration to that effect. He also seeks an order for vacant possession which he refers to as ‘any relief deemed appropriate’. He further seeks compensation. The nature of the first two remedies sought leaves me in no doubt that this is a *land case* and not a *human rights complaint*.

The ambiguity over the Commission’s jurisdiction *ratione materiae* is further manifested in the additional contention as regards the manner in which claims are presented before the Commission. The contention is essentially a facet of the problem of conceptualising the nature of claims filed before the Commission as tortious rather than human rights in character. To that end, firstly, the contention has been that the claims should be presented by way of a *plaint*. Secondly, by virtue of their tortious nature, claims in respect of the loss of life (and deaths) at the hands of agents of the government should have been presented under the law on loss of dependency (that is, the Law Reform (Miscellaneous Provisions) Act).<sup>26</sup> Notably, this objection raised in several of the early complaints had been largely rejected by the Commission which at the time reiterated that claims regarding human rights violations are brought before the Commission by a *complaint* rather than by *plaint* in light of the legal framework establishing the Commission and noted that claims by *plaint* were only presentable in civil matters in *tort* before *courts of law*. In the *Joseph Oryem* case, Commissioner Waliggo stated:<sup>27</sup>

<sup>23</sup> See eg *Thomas Ocheing v Attorney-General*, Complaint UHRC G/26/1999 (decision of 12 May 2004); *Yusuf B Mayu v Bumbo Sub-County*, Complaint UHRC S/46/2002 (decision of 20 June 2004); *Peter Amone v Attorney-General & Another*, Complaint UHRC 227/1997 (decision in 2006); *Julius Peter Okot v Attorney-General*, Complaint UHRC G/149/2000 (date of decision not indicated).

<sup>24</sup> Complaint UHRC G/144/2000 (decision in 2006).

<sup>25</sup> n 24 above, 2-3 (my emphasis). In subsequent decisions involving similar claims of occupation of land by the armed forces, the Commissioner took the same stance. See eg *John Olong & 7 Others v Attorney-General*, Complaint UHRC G/176/2003 (decision of 23 October 2006) 4-5; *Nyero Santo Akoli v Attorney-General*, Complaint UHRC G/268/2003 (decision of 24 October 2006) 3. See also *John Kilara & 2 Others v Attorney-General*, Complaint UHRC G/74/2003 (decision of 23 October 2006).

<sup>26</sup> Cap 79 (Laws of Uganda 2000).

<sup>27</sup> n 16, 4 (my emphasis).

[T]he Uganda Human Rights Commission (Procedure) Rules ... provide for the mode of lodging complaints. It is by way of filling a *complaint* form under Rule 31 and not by filing a *plaint*. This has been a system since the inception of the Commission. The Law Reform (Miscellaneous Provision) Act is only applicable in the *ordinary courts* but not in matters before the Uganda Human Rights Commission Tribunal.

In the *Saverio Oola* case, the commissioner reiterated this legal position in depth as follows:<sup>28</sup>

In this complaint, based on alleged loss of life the complainant has options – since the promulgation of the Uganda Constitution 1995 and the Human Rights Commission Act 1997, a claim based on *loss of life* can either be brought in the *courts of law* under the *Law Reform (Miscellaneous Provisions Act)* or an aggrieved party may base a claim on the violation of the *right to life* under Article 52 of the *Constitution* [and] Section 7(1) of the *UHRC Act*. Where one chooses to go to court under the *Law Reform (Miscellaneous Provisions) Act*, one would have to proceed by way of *plaint* as required by the *Civil Procedure Rules*. On the other hand, where one chooses to file a complaint before the Commission based on a violation of the right to life, the procedure is by way of *complaint* as stipulated in Rule 4 of the Uganda Human Rights Commission (Procedure) Rules 1998. In this instant case the complainant chose to lodge his complaint under the UHRC Act and the procedures are well laid out in the Uganda Human Rights Commission (Procedure) Rules 1998.

However, in construing later complaints regarding occupation of land as primarily civil in nature, Commissioner Wangadya has felt that such claims ‘ought to have been filed in a court of law under the tort of trespass to property’.<sup>29</sup>

Ultimately, the ambiguity in the jurisprudence of the Commission with regard to its jurisdiction *ratione materiae* reflects the differences with which the commissioners regard the nature of the claims (and manner in which they are to be) presented *vis-à-vis* their jurisdictional mandate. More critically, the differences and the attendant ambiguity demonstrate several aspects of a conceptual problem. Firstly, it emanates from a failure to distinguish between ‘human rights’ and the ‘causes of action’ in other spheres of the law. The ambiguity has been defined by a dichotomy between human rights and torts, and has underscored much of the Commission’s jurisprudence after 2006 – for although the dichotomy has been resisted by Commissioners Waliggo and Aliro-Omara, it has shaped the decisions of Commissioner Wangadya. Notably, in one of her early decisions – in *Faddy Mutenderwa*

<sup>28</sup> n 18, 4 (my emphasis). See also the *Kamana Wesonga* case (n 15 above) 13. Commissioner Aliro-Omara remarked: ‘In this complaint [the State Attorney] is under the impression that this complaint is brought under the Law Reform (Miscellaneous Provisions) Act. That however is not the case. Complaints about human rights violations are brought before the Commission under article 52(1)(a) of the Constitution and under the Human Rights Commission Act 1998 and regulations made under it. It would therefore be wrong to [contend] ... that the complaint as filed does not conform to section 10 of the Law Reform (Miscellaneous Provisions) Act.’

<sup>29</sup> See the *John Olong* case (n 25 above) 5.



*v Attorney-General*,<sup>30</sup> where the complainant alleged a violation of his rights to personal liberty and property under articles 23 and 26 of the Constitution (and in which the state contended that these claims were tortious in nature) – Commissioner Wangadya endeavoured to distinguish between a ‘human right’ and a ‘tort’ as follows:<sup>31</sup>

A tort is ... a civil wrong independent of contract ... [L]iability in tort arises from breach of a duty primarily fixed by law which is towards others generally, breach of which is redressable by an action for unliquidated damages, affording some measure of compensation. Human rights are ... those rights and freedoms to which every human being is entitled. On the basis of the above two definitions it is clear that although both disciplines of ‘human rights’ and ‘torts’ create rights that confer an entitlement, human rights are possessed by human beings simply by virtue of their being human whereas the entitlements under the law of tort only arise where there has been a breach of a duty or obligation. Hence, human rights violations cannot be equated to torts. The present matter is an alleged violation of human rights and not a tort.

However, in a subsequent decision, in the *Collins Oribi* case, the commissioner discounted any distinction between human rights and torts, observing:<sup>32</sup>

The argument that human rights complaints at the Commission are not bound by the [Civil Procedure and Limitation (Miscellaneous Provisions) Act and the Law Reform (Miscellaneous Provisions) Act] because they are not ‘torts’ is not acceptable to me. There is no practical difference between torts in the courts of judicature and human rights complaints before the Commission. They are the same save that they are named differently depending on the forum where they are placed.

Nonetheless, Commissioner Wangadya’s viewpoint does not settle the conceptual issue or, in fact, resolve the human rights-torts dichotomy. By taking a human rights claim to be essentially a tortious claim – more so in the context of the law on loss of dependency (Law Reform (Miscellaneous Provisions) Act) – this fails to draw a distinction between a human right that inheres in the victim and the question of loss of dependency as a legal construct for the provision for the deceased’s surviving members as beneficiaries. The corollary in that respect is that compensation should be payable for the violation of the right as distinct from that payable to the dependants. It is only in this regard that the human rights claim (in respect of the right to life) is distinguishable from the tortious claim under the law on loss of dependency. This distinction has in fact been sounded out in a number of decisions by Commissioner Aliro-Omara. In the *Juma Abukoji* case, while reflecting on compensation payable for unlawful death in the context of a violation of the right to life, he observed:<sup>33</sup>

<sup>30</sup> Complaint UHRC 222/2003 (decision in 2005).

<sup>31</sup> n 30 above, 3.

<sup>32</sup> n 21 above, 4.

<sup>33</sup> n 15 above, 9 (my emphasis).

The ... compensation payable is *not primarily for the loss of dependency* but for the *violation of the right to life*. Any proof of loss of dependency would be additional consideration. It is clear from article 53(2) of the Constitution that *compensation should be paid for infringement of a human right*. Such compensation would be for the benefit of the estates of the deceased persons as represented by the complainant in this case. I want to emphasise this because there is ... a difference in *claiming for dependency* and pursuing *compensation for the violation of the right to life*.

Secondly, the ambiguity underscores the failure to recognise that a set of facts or instances can give rise to claims in 'human rights' as well as in 'tort' – in effect, there is a hybrid character to claims presentable as human rights violations. For, as Commissioner Waliggo has pointed out, a complainant has, in the wake of the 1995 Constitution, the option to file a claim with regard to loss of life either as a 'tort' before the courts of law under the Law Reform (Miscellaneous Provisions) Act, or as a 'human right' before the Commission under the Uganda Human Rights Commission Act.<sup>34</sup> Therefore, although the state may be correct in raising objections regarding the tortious nature of the complaints before the Commission, the fact is that complaints for violations of the right to personal liberty, freedom from torture or the right to property easily translate as claims for torts in respect of trespass against the person, trespass to goods, trespass to land, negligence, and so on. To that end, the claims in the *Kalyango Mutesasira*, *Martha Aluku* and *Stephen Okwalinga* cases would also obtain as claims in pension law, employment law and administrative law respectively.<sup>35</sup>

There is therefore a need to de-link a human rights claim from any underlying tortious elements. This is more pertinent in a situation where the victim of unlawful deprivation of life has no surviving dependants – in such a situation, the right to life is manifestly detached from the tortious elements that belie the loss of dependency.<sup>36</sup> The de-linking is in fact envisaged in the Commission's Guidelines. The irreceivable nature of a 'legal claim of a civil nature' is qualified where such claim does not directly touch on human rights. In that regard, a claim for loss of life is in a particular context inherently a claim for a violation of the right to life. Similarly, an occupation of land may raise tortious elements of trespass on land but is manifestly a violation of the right to property. Thus, a claim that manifests other civil elements should nonetheless be receivable if it similarly manifests human rights issues. The de-linking of a human rights claim from its tortious elements can be achieved as follows: The Commission should ascertain that the facts of the complaint present *prima facie* a violation of human rights. It

<sup>34</sup> See n 28 above and accompanying text.

<sup>35</sup> See nn 9, 12 & 14 above and accompanying text.

<sup>36</sup> See in this regard the decisions of Commissioner Aliro-Omara in cases where the victims had no surviving dependants (and in which he underscored the distinction between a claim for the violation of the right to life and a claim for dependency): *John Baptist Oryem* case (n 15 above) 21-22; *Omong Juk* case (n 15 above) 11-3.

should then regard as irrelevant that it also inures as a claim in other spheres of law. In effect, the Commission should regard the complainant as the *dominus litis*.

Additionally, a complainant should have a right to choose whether to present a claim before the courts of law or the Commission. In effect, a complainant has autonomy of choice as to the forum to which to present his or her claim. The Commission therefore ought to recognise and uphold that autonomy in dealing with complaints that are, in respect of the majority of the rights guaranteed under the Constitution, also capable of being presented as claims in tort. In that regard, autonomy of choice ought to have been upheld in the *Charles Oribi* case. With his claim in tort before the High Court time-barred, the complainant had the option to file a complaint in respect of the victim's human rights before the Commission, where such a complaint was still well in time. The decision of Commissioner Wangadya was a constraint on the complainant's autonomy of choice as to forum.

### 3.2 Defining the character of the Uganda Human Rights Commission as a quasi-judicial body

The Constitution provides that, in the exercise of its functions as a tribunal, the Commission is enjoined with the powers of a court.<sup>37</sup> However, although it has remarked that, in its quasi-judicial capacity, it is 'enjoined to follow the ... procedures of the High Court in instances where there are no specific statutory provisions',<sup>38</sup> the Commission has been hesitant to overextend this capacity. In fact, it does not regard itself as a court, and rightly so. The Commission's conceptualisation of its quasi-judicial character as a tribunal has, however, occasioned certain perceptions regarding its jurisdiction *ratione materiae*. The Commission has considered its quasi-judicial character in a number of decisions, especially as regards the extent of its capacity and powers to act as a 'court'. The Commission considered the question of its jurisdictional mandate in the case of *In the Matter of The Free Movement*,<sup>39</sup> where the complainant alleged that the monopolisation of political space by the Movement political system infringed 'upon the rights and freedoms of individuals and groups' and created a 'situation of increased political repression'.<sup>40</sup> The Commission questioned whether

<sup>37</sup> n 2 above, art 53(1). This is reaffirmed under the Uganda Human Rights Commission Act (n 3 above) sec 7(2).

<sup>38</sup> *Betty Nakiyingi v Major Kakooza Mutale & 2 Others*, Complaint UHRC 337/1998 (decision in 2000).

<sup>39</sup> Complaint UHRC 671/1998 (decided in 1999).

<sup>40</sup> For an overview of the controversy over the 'movement' political system under the 1995 Constitution, see eg N Kasfir 'No-party democracy in Uganda' (1998) 9 *Journal of Democracy* 49; J Mugajuj & J Oloka-Onyango (eds) *No-party democracy in Uganda* (2000).

it was 'seized with the jurisdiction to entertain [the complaint]'.<sup>41</sup> The complaint was deemed to raise questions of interpretation of certain provisions of the Constitution (and the competence of the Commission, as a tribunal, to refer a matter requiring the interpretation of the Constitution to the Constitutional Court). The Commission examined the provisions of articles 53, 129 and 137 of the Constitution, and concluded that although, as a tribunal, it was clothed with the powers of a court, it was not a 'court of judicature' with the powers to refer matters of constitutional interpretation to the Constitutional Court:<sup>42</sup>

[The Commission] as a tribunal cannot in any way be described as a Court of Judicature [in terms of the provisions of article 129(1) of the Constitution]. This means that the Commission cannot refer any matter to the Constitutional Court nor can it exercise any original jurisdiction in interpreting the Constitution. *The Commission has powers of a court for purposes of what is contained in article 53 of the Constitution only.*

In spelling out its mandate as specific to the enforcement of human rights and not the interpretation of the Constitution, the Commission further stated:<sup>43</sup>

[T]he contention by the Petitioners' counsel [is] that the provisions of articles 70, 71, 73, 269 and 273(1) of the Constitution have given rise to contradictions which ultimately violate the rights and freedoms of the petitioners and other groups of persons in Uganda ... The main issue here is whether the aforementioned articles of the Constitution imply that they are violating the rights of the people of Uganda. From our considered view, the grounds as set out in the petition show that the petitioners are seeking the *interpretation of the Constitution* but not a *redress for the violation of their human rights and freedoms*.

The more emphatic resolution of the Commission's status as not being that of a court has been made in respect of the competence of the Commission to entertain claims regarding certain rights. Thus, in several decisions rendered from 2006, Commissioner Wangadya has held that, even if 'land disputes' were to be treated as violations of 'right to property', the proper fora for the enforcement of those rights were 'courts of law' rather than the Commission. In the *John Olong* case, she remarked:<sup>44</sup>

It is my considered view that this nature of complaint ought to be handled by courts of judicature and not the Uganda Human Rights Commission. I recognise that the right to property is one of those rights falling under the Bill of Rights, ie, Chapter 4 of the Constitution and therefore generally within the brief of the UHRC. But it appears to me that the lawmakers intended that property-related disputes be specifically dealt with by courts of law. Indeed,

<sup>41</sup> n 39 above, 6 (my emphasis).

<sup>42</sup> n 39 above, 7-8. Under arts 137(1) and (5) of the 1995 Constitution, a court to which a matter had been presented was required to refer the matter to the Constitutional Court as the court competent to interpret the Constitution.

<sup>43</sup> n 39 above, 9.

<sup>44</sup> n 25 above, 4.

article 26(2)(b)(ii) of the Constitution provides for the aggrieved person to have 'a right of access to a court of law'.

As the Commission had done in the *Free Movement* case, the commissioner deferred to the provisions of article 129 of the 1995 Constitution as to what constitutes a 'court', and went on to hold that 'the [Commission] is not a court of law'.<sup>45</sup> Notably, in the *Stephen Okwalinga* case, the Commissioner adopted a similar position with regards to the complainant's claim regarding unfair and discriminatory dismissal from the police force. Although she determined that as the complaint was in respect of the right to non-discrimination and that the Commission 'would have been competent' to hear it, the commissioner held that the Commission had no jurisdiction given the fact that the complainant was, in her view, seeking a 'review of administrative decision of the police authority'.<sup>46</sup> She held that a right to such a review, as stipulated under article 42 of the Constitution, could only be handled by the 'courts' as the proper forum and, in that regard, given that the Tribunal was 'not a court of law', it was by 'implication not legally competent to handle complaints arising from decisions taken by administrative bodies'.<sup>47</sup>

Although it is empowered to adopt procedures of a court in the performance of its function (including the *protectionist* one), the Commission is right to qualify that its quasi-judicial character does not equate it to a court. The reluctance of the Commission to address the complaint in the *Free Movement* case can be understood in that context.<sup>48</sup> However, the Commission's conceptualisation of its jurisdiction *ratione materiae* with regard to complaints on a violation of the right to property on the basis of its quasi-judicial character as a 'court' is grounded on an erroneous interpretation. Therefore, although correct that the quasi-judicial character of the Commission is not that of a 'court', the decisions of Commissioner Wangadya on the enforceability of property rights before the Commission are premised on an erroneous interpretation of the provisions of the Constitution. The commissioner's rejection of the

<sup>45</sup> As above. See also the *John Kilara* case (n 25 above) 10-11; *Nyero Santo Akoli* case (n 25 above) 5-7.

<sup>46</sup> n 14 above, 6 (my emphasis).

<sup>47</sup> n 14 above, 8. See also the *John Olong* case, where the Commissioner, reflecting on the limits of the Commission to deal with the rights guaranteed under art 26 (property) and art 42 (administrative justice), stated: 'Although article 52(1)(a) enjoins the Commission to investigate any human right, where certain specific rights are infringed upon, redress, for example compensation, can only be sought from the courts of law. Such rights include (but are not limited to) the right to property under article 26 and the right to just and fair treatment under article 42 of the Constitution. Both articles provide for petitioning courts of law by the aggrieved persons' (n 25 above) 5.

<sup>48</sup> For a critique of the Commission's conceptualisation of its quasi-judicial character in the case, see, however, R Sengendo & J Katalikawe 'Revisiting the question of application or interpretation of the 1995 Constitution: A critical examination' (2001) 7 *East African Journal of Peace and Human Rights* 307.

Commission's jurisdiction over property claims under article 26 of the Constitution<sup>49</sup> is in fact the result of the failure to distinguish between the question of 'access to a court' as an aspect of the *content* of the right to property and the status of the Commission, in its quasi-judicial capacity, as a court. The 'access to a court of law' in article 26(2) of the Constitution is not a reference to the forum for the enforcement of the right; rather it is a condition *sine qua non* in a law for the compulsory acquisition of property. In effect, the absence of a law making provision for compensation and right of access to a court of law makes any compulsory acquisition of property unlawful<sup>50</sup> and, as has indeed been the position in a number of complaints, such an acquisition of property is enforceable before the Commission.<sup>51</sup> On the other hand, the right to apply to a court of law with regard to an unfair treatment claim under article 42 of the Constitution is in respect of the courts as the forum for addressing grievances arising from administrative decisions. The decision to decline jurisdiction in the *Stephen Okwalinga* case was therefore correct.<sup>52</sup>

#### 4 Implications of ambiguity upon other aspects of the Uganda Human Rights Commission's jurisdictional competence

The ambiguity over the Commission's *ratione materiae* jurisdiction has had implications with regard to the other aspects of the Commission's jurisdiction. This has particularly been the case as regards the legal capacity of persons to present complaints on human rights violations and the limitation period within which complaints are to be presented.

##### 4.1 *Ratione personae* jurisdiction – the issue of *locus standi*

The contentions as regards the manner of (and legal regime for) presentation of complaints has had a direct bearing to the Commission's jurisdiction *ratione personae*, that is, as regards who can present claims before the Commission and, in effect, the question of *locus standi*. To that end, with the preliminary objections founded on the nature of the claim as *tortious* and the manner of (and legal regime for) its

<sup>49</sup> See nn 24 & 25 and accompanying text.

<sup>50</sup> Art 26(2)(b)(ii) of the Constitution states: 'No person shall be compulsorily deprived of property or any interest in or right over property of any description except where the following conditions are satisfied: ... (b) the compulsory taking of possession or acquisition of property is made under a law which makes provision for – .... (ii) a right of access to a court of law by any person who has an interest or right over the property.'

<sup>51</sup> See the *Thomas Ochieng* case (n 23 above) 5.

<sup>52</sup> See nn 46 & 47 and accompanying text.

presentation as a *plaint* in light of the provisions of the law on loss of dependency (Law Reform (Miscellaneous Provisions) Act), it has been the contention that, in the context of claims for unlawful death or loss of life, the *authors* of such claims should have obtained (and be holders of) letters of administration. The objections in this regard, raised in respect of claims for a violation of the right to life, were rejected and dismissed by the Commission in its early decisions right up to 2005. In both the *Saverio Oola*<sup>53</sup> and *Joseph Oryem*<sup>54</sup> cases, Commissioner Waliggo deferred to article 50(2) of the Constitution to uphold the *locus standi* of the complainants. In reality, the decisions from 1998-2005 are underscored by the liberal 'open-door' principle to *locus standi* in so far as the presentation and lodging of human rights complaints before the Commission are concerned. The Commission deferred to the principle as embodied under the Constitution and its legal framework (in particular its guidelines). In *Jervasio Atunya Onok v UPDF 4th Division Gulu*,<sup>55</sup> in which the complainant filed a complaint on behalf of his son-in-law, Thomas Orach Otim, who had been arrested by the armed forces, Commissioner Aliro-Omara acknowledged the propriety of the complainant's action:<sup>56</sup>

This was appropriate by virtue of the Uganda Human Rights Commission Operational Guidelines made under article 52(3) of the which allows *any person* to complain to the Commission about a human right violation notwithstanding the fact that the *complainant is not directly a victim* of the violation complained of.

In subsequent cases, apart from deferring to the 'open-door' principle, the Commission has also underscored the 'sufficient interest' of the complainant in the complaint filed, in light of the close relationship to the victim of the human rights violation. In the *Hajji Ali Mutumba* case, Commissioner Aliro-Omara deferred not only to the fact that '[a]rticle 50(2) of the Constitution entitles anybody to file a human rights claim seeking for redress', but also to the fact that 'Mutumba [had] sufficient interest in this case', in light of the fact that he claimed to be the father of the victim, Muhammad Busulwa, who had died in late 1996 while in custody at a government prison.<sup>57</sup> In fact, over the years, the commissioners have deferred to article 50(2) of the Constitution or simply taken for granted the close relation principle to uphold the *locus*

<sup>53</sup> n 18 above, 2 (complainant as the father of deceased son, Robert Okullo).

<sup>54</sup> n 16 above, 2-3.

<sup>55</sup> Complaint UHRC G/172/2001 (decision of 23 February 2004).

<sup>56</sup> n 55 above, 1.

<sup>57</sup> n 15 above, 11.

*standi* of complainants.<sup>58</sup> Notably, in all the cases, the commissioners were cognisant of the fact that the claims were in respect of violations of human rights.<sup>59</sup>

However, in the *Collins Oribi* case, Commissioner Wangadya upheld the objection raised regarding the *locus standi* of the complainant, a brother to the deceased, to present the complaint. Approaching the issue from the premise that the claim was essentially a ‘tort’ of negligence,<sup>60</sup> she rejected the reliance on article 50(2) of the Constitution and held that *locus standi* under that provision was nonetheless still subject to other laws (including the laws on succession and loss of dependency).

These provisions (article 50(2) of the Constitution) are operationalised by other laws which provide for specific rights and freedoms, specific remedies available in the event of violation, the manner or procedure for seeking such remedies, where to seek them, the powers to enforce them, etc. Such are so many, for instance the Uganda Human Rights Commission Act Cap 24, the Law Reform (Misc Provisions) Act Cap 79, the Succession Act Cap 162, the Civil Procedure Act Cap 71, the Civil Procedure and Limitation (Miscellaneous Provisions) Act Cap 72, the Limitation Act Cap 80, and such.<sup>61</sup>

As regards the necessity to obtain letters of administration to present claims for loss of life, she explained:<sup>62</sup>

I also want to emphasise that the legal requirement for acquisition of Letters of Administration before anyone can bring a death cause was well-intentioned – to safeguard the interests and rights of the beneficiaries. Letters of administration, apart from identifying the deceased’s legal representative, provide the names, and other particulars eg ages of the beneficiaries and guide court/tribunal on how to distribute the estate or part thereof. They also provide information on the status of the beneficiaries, ie their relationship with the deceased. Particulars of the administrator and his relationship with the deceased are also made known early enough. Letters of administration too are evidence that the beneficiaries approve of and have confidence in their holder as administrator of their dead relative’s estate. This way we can avoid situations where damages are awarded to a wrong party who in the end appropriates them to his own personal advantage to the exclusion of the rightful beneficiaries.

<sup>58</sup> See eg the *Margaret Atoo* case (n 15 above) (wife to Philip Odong); the *Peace Nshemereirwe* case (n 15 above) (sister to Patrick Mamenero); the *Lydia Nabuwembo* case (n 15 above) (sister to John Lubega); the *James Bwango* case (n 15 above) (husband to Margaret Barungi); the *Leo Rusoke* case (n 15 above) (son to Gabriel Byaruhanga); the *John Baptist Oryem* case (n 15 above) (father to Walter Ocen).

<sup>59</sup> See eg the *Joseph Oryem* case (n 15 above). Commissioner Waliggo alludes to the allegation in the complaint in respect of ‘Thomas Kilama’s right to life’ as ‘violated by the respondent’s security agents’.

<sup>60</sup> n 21 above, 4 15.

<sup>61</sup> n 21 above, 16.

<sup>62</sup> n 21 above, 17-18.



In subsequent decisions involving death (and, in effect, the right to life), Commissioner Wangadya has at the outset underscored the fact that the complainants were close relations and administrators of the estates of the deceased family members.<sup>63</sup>

Invariably, the de-linking of human rights from related tortious elements is pertinent to addressing the implications the ambiguity over the Commission's jurisdiction *ratione materiae* has had upon its jurisdiction *ratione personae*. When the right (to life) is de-linked from the question of loss of dependency, it follows that the *locus standi* of a complainant should not be tied to the holding of letters of administration. In any event, the *locus standi* should be premised solely on the 'open-door' principle that underpins the Constitution and the Commission's legal framework. The underlying premise for *locus standi* is that a complainant exercises the right to petition on behalf of a victim of a human rights violation on account of either inability or legal incapacity, with the former manifest where the victim is dead or is in custody<sup>64</sup> and the latter where the victim is, for instance, a minor.<sup>65</sup> The practice of the Commission in situations of inability, particularly where the victim of the human rights violation is in custody, underscores the fact that *locus standi* in a complaint is in fact exercisable only in respect of what is fundamentally the rights of the victim. In the instances where the victim is released prior to the hearing of the complaint, the Commission has, in light of its rules,<sup>66</sup> substituted the victim as complainant in place of the author of the complaint.<sup>67</sup>

In any event, the disagreement over whether holding of letters of administration is a crucial *locus standi* requirement with regard to loss of life complaints misses an important point. A loss of life situation

<sup>63</sup> See eg *Leonard Mugerwa v Attorney-General*, Complaint UHRC 41/2003 (decision of 8 December 2006); *Sulaiman Kakomo v Attorney-General*, Complaint UHRC 388/2002 (decision of 5 September 2007); *Sam Opio Etimu v Attorney-General*, Complaint UHRC S/438/2004 (decision of 1 November 2007); *Edison Oluka v Attorney-General*, Complaint UHRC S/61/2005 (decision of 2 November 2007).

<sup>64</sup> See eg the *Jervasio Atunya Onek* case (n 55 above) 1-2 (son-in-law Thomas Orach Otim was arrested and detained by armed forces). See also n 84 below and accompanying text.

<sup>65</sup> See eg *Daudi Kauta (as a friend of George Kauta) v Ishaka Magemeso & Others*, Complaint UHRC 180/1998 (decision of 19 April 1999).

<sup>66</sup> UHRC Rules (n 4 above), Rule 11(2).

<sup>67</sup> In the *Jervasio Atunya Onek* case, Commissioner Aliro-Omara observed, in substituting the author of the complaint with his son-in-law: 'Procedurally the tribunal felt it appropriate to replace Onek Atunya with Orach Otim Thomas as the complainant as *in the case of success of the complaint any remedies applicable would go to Mr Orach Otim*. Such substitution is allowed by Rule 11(2) of the Uganda Human Rights Commission (Procedure) Rules 1998' (n 55 above) 46 1-2 (my emphasis). Although in that case the complaint remained in the names of Jervasio Atunya Onek (the father-in-law), in other cases the Commission has in fact replaced the name of the author of the complaint with that of the victim. See eg *Sgt Jackson Cherop v Attorney-General*, Complaint UHRC G/288/2000 (decision of 14 April 2004) (complaint originally filed by Jimmy Kipsiwa on behalf of his brother, Jackson Cherop);

engenders interests in respect of the violation of the right to life as well as the loss of dependency. The interests in both instances – the right and loss of dependency – co-exist (in the overall hybrid nature of claims as human rights and torts) and enjoin different capacities for the enforcement of those interests. The capacities for enforcement – that is, *locus standi* – are premised upon the legal framework that defines those interests. The Constitution and Commission’s legal framework provide for the *locus standi* for the enforcement of interests arising from a violation of the right to life, by which any person is entitled to present a complaint in respect of the violation. On the other hand, the laws on loss of dependency and succession provide for the *locus standi* for the enforcement of interests of the beneficiaries of the deceased’s estate and require a claimant to have been granted letters of administration. In effect, the crucial distinction is that, as regards human rights, *locus standi* under article 50 of the Constitution and the Commission’s legal framework is one of entitlement, while as regards a loss of dependency claim in tort, the *locus standi* is one of legal authorisation. In essence, any person is entitled to present a human rights complaint while only the holder of letters of administration is authorised to lodge a claim for loss of dependency (and the overall administration of a deceased’s estate). However, given the hybrid nature of claims as human rights and torts, it is necessary to de-link *locus standi* in respect of the human right from that in respect of the tortious elements underlying loss of dependency. Although not sufficiently set out or elaborated upon, the elements of this de-linking are evident by Commissioner Aliro-Omara’s decision in the *Hajji Ali Mutumba* case, in which he noted:<sup>68</sup>

Article 50(1) of the Constitution entitles anybody to file a human rights claim seeking for redress. I find that Mutumba could have sufficient interest in this case but so does the general estate of the late Busulwa. In the circumstances my order is that the estate of the late Busulwa is entitled to compensation. Those with interest in the estate can have access to the amount awarded in the complaint upon presentation of valid letters of administration.

The fallacy of requiring letters of administration as the basis of *locus standi* to present a complaint on the violation of the right to life before

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*Peter Isabirye Kiwule v Attorney-General*, Complaint UHRC J/35/2003 (decision of 3 December 2004) (complaint originally filed by Rev Grace Kayiso on behalf of his brother, Peter Isabirye Kiwule); *Paul Waiswa v Kamuli District Local Administration*, Complaint UHRC J/34/2002 (decision of 21 April 2006) (complaint originally filed by Jackson Muganza on behalf of his son, Paul Waiswa). All these cases were handled by Commissioner Aliro-Omara.

<sup>68</sup> n 15 above, 11-12. In the *Kamana Wesonga* case, the Commissioner similarly endeavoured to de-link the complainant’s presentation of the complaint from the question of proof of dependency, in stating that: ‘[I]t is necessary to adduce evidence before the Commission proving the existence and status of the dependants of Pongo. This in my view may be at any stage of resolving the complaint because there is no strict legal requirement that they must be produced at the time a complainant testifies.’

the Commission is evident in *Charles Odong v Attorney-General*.<sup>69</sup> In a rare deferment to human rights in her decisions after 2006, Commissioner Wangadya expressed doubt of the necessity for letters of administration as the basis for *locus standi* in respect of a complaint for a violation of the right to life of a 17 year-old, remarking that requiring letters of administration in respect of ‘a possibly non-existence estate’ would ‘defeat the purpose of the provisions of article 50 ... [of the Constitution]’.<sup>70</sup>

In essence, any person has an entitlement to present a complaint regarding human rights violations. The existence, as is the situation in most of the complaints, of a legal relation – although this is not essential – simply bestows upon the author of the complaint sufficient legal interest in the subject matter. Otherwise, the complainant in a human rights claim could be a disinterested bystander. On the contrary, in a tortious claim for the loss of dependency, a sufficient legal interest in the deceased’s affairs is pertinent, and any claimant should obtain letters of administration. In treating letters of administration as merely a legal authorisation to the holder to lodge claims in the interests of the deceased’s estate, the letters would be no different from a representative action, in which certain claimants are authorised to claim on behalf of a multitude of the other claimants. Notably, the Commission’s guidelines enjoin a multi-faceted approach to *locus standi* as regards who can present a complaint.<sup>71</sup>

#### 4.2 Limitation periods for presentation of complaints

The conceptualisation of the nature (and manner of presentation of) complaints has had additional implications with regard to the period in which complaints are to be filed before the Commission. The human rights-torts dichotomy has underpinned the manner in which the commissioners have addressed the question of the period of limitation for complaints to be filed before the Commission. Ordinarily, torts that are presented against the state must be filed within two years of the act or omission resulting in the tort.<sup>72</sup> On the other hand, the Uganda Human

<sup>69</sup> Complaint UHRC G/283/2003 (decision in 2007).

<sup>70</sup> n 69 above, 3.

<sup>71</sup> n 5 above, Guideline 4, ‘Who can make a complaint?’ provides: ‘(a) the victim of an alleged human rights violation; (b) a relative, friend, legal representative, any organisation or person may make a complaint on behalf of the alleged victim. This should particularly be so if, for some reason, the victim cannot personally make the complaint; (c) an individual or organisation alleging with facts a series of massive violation of human rights or peoples’ rights; (d) any person may complain before the UHRC not only on his/her own behalf, but also on behalf of others who are also similarly affected by the act he/she is complaining about. This will be known as “representative complaint”.’ As of 2008, the only instance of a ‘representative complaint’ is the complaint presented in the *Kalyango Mutesasira* case (n 9 above).

<sup>72</sup> Civil Procedure and Limitation (Miscellaneous Provisions) Act, Cap 72 (Laws of Uganda 2000), sec 3.

Rights Commission Act stipulates a limitation period of five years from the act or omission constituting a violation of human rights.<sup>73</sup>

In the early decisions, the Commission adhered to the five-year limitation period as provided under the 1997 Act.<sup>74</sup> In the *Faddy Mutenderwa* case, after pointing out that the complaint was ‘founded not on tort but on a violation of human rights’ and that ‘the Commission has jurisdiction to entertain this matter’, Commissioner Wangadya rejected the state’s attempt to subject the complaint to the limitation period under the Civil Procedure and Limitation (Miscellaneous Provisions) Act.<sup>75</sup> Similarly, in the *Saverio Oola* case, Commissioner Waliggo rejected attempts to subject the complaints on human rights violations (brought against the government) to the limitation period under the Civil Procedure and Limitation (Miscellaneous Provisions) Act, explaining in depth as follows:<sup>76</sup>

I do not agree with counsel for the respondent that the complaint before the tribunal is time-barred under the ... cited law. This law of civil procedure and limitation is formulated to prescribe time for suits against government based on torts. It envisages a situation where a tort cannot be brought against the Government after the expiration of [24] months from the date of which the cause of action arose – unless there are mitigating circumstances. The instant complaint is based on a claim of human rights violation. [The] limitation period for bringing complaints before the Commission is governed by section 25 of the Uganda Human Rights Commission Act, 1997 which allows the complainants to lodge before the Commission complaints for the violation of human right within five years from the date of the occurrence of the event complained of. The event complained of in this complaint occurred in 1997 and the complainant lodged his complaint with the Commission in 2000. The legislature, in passing section 25 of the UHRC Act clearly referred to human rights violations and prescribed the five-year limitation period. The UHRC Act itself is a special enactment dealing with human rights while the Civil Procedure and Limitation ... Act is a special Act dealing with suits filed in courts against the government.

As with the other aspects of the Commission’s jurisdiction *ratione materiae* and *personae* – and in light of the greater emphasis being placed on the tortious nature of claims – subsequent decisions, as from 2006, witness a gradual subjection of claims before the Commission to the period of limitation provided under the Civil Procedure and Limitation (Miscellaneous Provisions) Act, especially on the part of Commissioner

<sup>73</sup> n 3 above, sec 24.

<sup>74</sup> *Margaret Atoo* case (n 15 above) 1. Commissioner Aliro-Omara noted that the complaint filed on 7 April 2000 (almost four years after the human rights violation) was ‘within the limitation period of five years prescribed by the UHRC Act’. See also the *Peter Amone* case (n 23 above) 7-9 (although in this case, there was a ‘continuing violation’ in respect of occupation of land dating back to 1989).

<sup>75</sup> n 30 above, 4. In the end, the Commissioner held: ‘The alleged violation of the complainant’s rights occurred between June 17, 2002 and July 9, 2002. His complaint is therefore not time-barred.’

<sup>76</sup> n 18 above, 5 (my emphasis).

Wangadya. In *Titia Eratus v Attorney-General*,<sup>77</sup> the Commissioner reflected upon the apparent duality in the periods of limitation under the laws:<sup>78</sup>

It is unfortunate that the time limit allowed by the Uganda Human Rights Commission Act, ie five years, differs with that permitted by the Civil Procedure (Miscellaneous Provisions) Act, ie two years within which to sue the Attorney-General. The general policy of the Uganda Human Rights Commission is that this tribunal is bound by the five-year limit provided by the Uganda Human Rights Commission Act and not by the Civil Procedure (Miscellaneous Provisions) Act.

The Commissioner expressed her disagreement with what she regarded as a ‘policy’ of the Commission on the five-year limitation period,<sup>79</sup> and went on to uphold the objection raised by the state as to the time-barred nature of the complaint.<sup>80</sup> The commissioner further expressed a concern that the reliance on the provisions of the Uganda Human Rights Commission Act would create an injustice to the state in respect of a claim presented four years after the unlawful act or omission.<sup>81</sup> In the *Collins Oribi* case, the commissioner took the application of the limitation period under the Civil Procedure and Limitation (Miscellaneous Provisions) Act to complaints before the Commission a step further. In fact, she abandons the human rights-torts dichotomy altogether in observing that in respect of a limitation period for claims against the government, it was irrelevant if a claim is founded on tort or human rights.<sup>82</sup> In the end, she was very critical of the complainant’s attempt to recast a claim he had originally presented before the High Court as ‘a tort of negligence’ as a violation of the deceased’s ‘right to life’ so as to bring the claim ‘within the jurisdiction of the Commission’ and, in filing it four years after the death, ‘defeat the law on limitation’.<sup>83</sup> More critically, the commissioner felt that the laws on limitation, including the Law Reform (Miscellaneous Provisions) Act, were binding upon the Commission.<sup>84</sup> She further considered the limitation provisions under the 1997 Act as general provisions subject to the more specific limitation provisions of the Civil Procedure and Limitation (Miscellaneous Provisions) Act and the Law Reform (Miscellaneous Provisions) Act.<sup>85</sup>

<sup>77</sup> Complaint UHRC G/205/2001 (decision in 2006).

<sup>78</sup> n 77 above, 1.

<sup>79</sup> As above.

<sup>80</sup> n 77 above, 14.

<sup>81</sup> n 77 above, 3.

<sup>82</sup> n 21 above, 4. The Commissioner stated: ‘[E]ven if the instant complaint involved any human rights violation other than death, it would still be statute-barred as against the Attorney-General.’

<sup>83</sup> n 21 above, 4. The deceased, Tom Owenykeu, was shot dead by a member of the local defence forces, a paramilitary force, on 7 December 1996 and the complaint was filed before the Commission on 4 December 2000.

<sup>84</sup> n 21 above, 3.

<sup>85</sup> As above.

Finally, she has regarded the Civil Procedure and Limitation (Miscellaneous Provisions) Act as providing a ‘special privilege or immunity enjoyed by the Attorney-General’ with regard to the claims filed against the government and that this was a privilege or immunity that could not be taken away simply by the 1997 Commission Act.<sup>86</sup> Notably, in the *Titia Eratus* case, the commissioner had already stated her view of the ‘special privilege’ accorded to the government under limitation law *vis-à-vis* the 1997 Act, as:<sup>87</sup>

[M]y interpretation thereof is that the five-year period provided under [section] 24 of the Uganda Human Rights Commission Act is a general provision which applies to all manner of respondents. But the Civil Procedure (Miscellaneous Provisions) Act is specific in its application. It specifically singles out the Attorney-General as a special respondent whose liability can only be raised within a special period of time, ie two years. Beyond that the suit/complaint is no more. The Uganda Human Rights Commission cannot invoke human rights to defeat such a law. The two-year period is kind of special privilege enjoyed by government and which privilege can only be taken away by legislation expressly stating so. It cannot be taken away by the Uganda Human Rights Commission.

Ultimately, the commissioner felt that the Commission was bound by the limitation period stipulated under the Civil Procedure and Limitation (Miscellaneous Provisions) Act in respect of the complaints presented before it alleging violations of human rights.<sup>88</sup>

The discourse on the timeline for presentation of complaints before the Commission is partly a result of the conceptual ambiguities that have shaped the jurisprudence on the Commission’s jurisdiction *ratione materiae*. It was inevitable that the conceptualisation of claims as tortious that has engendered the subjection of complaints to the limitation periods prescribed under the laws on the loss of dependency and generally with regard to claims brought against the government. As with all the other facets of the discourse that has defined the confusion over the Commission’s jurisdiction *ratione materiae*, the stances adapted with respect to limitation is faulty on a conceptual footing. Firstly, the two-year limitation period is, as Commissioner Waliggo in the *Saverio Oola* case said, in respect of suits filed before the courts against the government, whilst the five-year limitation period is unique to complaints presented before the Commission.<sup>89</sup> In any event, although the Commission is enjoined to adopt procedures of the High Court, this is only the case in instances where there are no specific statutory provisions. The Commission’s legal instruments provide express provisions on limitation of complaints and, therefore, since it is not a ‘court’ *par excellence*, the Commission does not need to bother itself with rules

<sup>86</sup> n 21 above, 13.

<sup>87</sup> n 77 above, 2.

<sup>88</sup> *Collins Oribi* case (n 21 above) 6-13.

<sup>89</sup> See n 76 above and accompanying text.

or provisions of laws on suits before the traditional courts. Secondly, the view that the two-year limitation period under the laws is a special privilege granted to the government as a defendant (and is not displaceable except by express statutory enactment) does not offer insight into judicial inroads over the years with respect to statutory immunities to the government. The five-year limitation period as regards complaints presented before the Commission is not unique or peculiar to human rights protection in Uganda. Although the limitation period is one that is statutorily stipulated under statute law, in other aspects of the law, the judicial bodies (in this case, the courts) have been at the forefront of fostering human rights protection against the so-called privileges or immunities granted to the government. A good example is the 45-day statutory notice accorded to the government with respect of intended civil suits under the Civil Procedure and Limitation (Miscellaneous Provisions) Act.<sup>90</sup> The courts have held that such notice is not required or necessary in causes filed alleging violations of human rights.<sup>91</sup> In effect, the statutory notice the complainant in the *Collins Oribi* case served upon the Attorney-General was only relevant in that the intended suit before the High Court was in tort;<sup>92</sup> for had the claim before the court been for a violation of human rights, it would have been unnecessary and inconsequential.

Finally, the legislature cannot have been unaware of the Civil Procedure and Limitation (Miscellaneous Provisions) Act when it debated and enacted the 1997 Act. In fact, the five-year limitation period was a recognition of the peculiar character (and often circumstances) of human rights claims, especially with regard to complaints presented before the Commission. Given a history of depravity in so far as violations of human rights are concerned, the limitation period under the 1997 Act is a reflection of the attendant difficulties (owing to, for instance, illiteracy, ignorance, intimidation or lack of awareness of a violation) that might bedevil the presentation of complaints before the Commission.

## 5 Some concluding observations

The ambiguity and controversy in the jurisprudence of the Commission as regards its jurisdiction *ratione materiae* have largely been conceptual, premised in recent years on whether, in light of the Commission's

<sup>90</sup> n 72 above, sec 2.

<sup>91</sup> See eg *Dr James Rwanyarare & Others v Attorney-General*, Miscellaneous Application 85/1993; *Oketcho v Attorney-General*, Miscellaneous Application 124/1999; *The Environmental Action Network Ltd v Attorney-General & Another*, Miscellaneous Application 39/2001; *Greenwatch v Attorney-General*, Miscellaneous Application 92/2004. All the applications were filed and presented before the High Court.

<sup>92</sup> n 21 above, 4-5.

Guidelines, a complaint is concerned with the violation of human rights or a legal claim of a civil nature. It is the human rights-torts dichotomy that has underpinned the ambiguity and divergence in the Commission's conceptualisation of its subject matter jurisdiction with regard to loss of life and occupation of land complaints filed before it. The Commission must de-link or detach the human rights aspects in a complaint from any underlying tortious (or other civil) obligations given the oft inevitability of a wrongful act on the part of the state (or a non-state actor) presenting obligations in both human rights and civil claims. In fact, in such situations, the Commission should entertain the claims as a means of encouraging litigants to lodge complaints before the Commission. There are advantages of presenting claims before the Commission, including the ease in proving a human rights claim (as opposed to a tort-based claim) as well as the timely procedures and inexpensiveness of litigating complaints before the Commission. The simplicity in terms of form and manner of presenting complaints before the Commission is, given the prevailing jurisprudence, likely to be jeopardised by time-consuming processes of complainants seeking, in the case of loss of life complaints, the grant of letters of administration. The processing of such letters would likely foster delays in getting complaints before the Commission in a timely manner.

The ambiguity in the conceptualisation of the Commission's jurisdiction *ratione materiae* has invariably had implications in the approaches adapted by commissioners in respect of *locus standi* and the period of limitation for presentation of complaints before the Commission. The Commission must likewise de-link *locus standi* requirements in respect of human rights (as underscored by the 'open-door' policy in the provisions of the Constitution and the Commission's guidelines) from those requirements with regard to civil suits before courts. It should similarly regard the limitation periods under its legal framework as concerned with complaints regarding human rights presented to the Commission and disregard the periods under other civil procedure rules. Ultimately, the provisions of the Constitution and legal instruments establishing the Commission should be interpreted and applied in favour of affirming and enlarging (rather than constraining) the Commission's jurisdiction *ratione materiae*. Additionally, given that the Commission is not a 'court', it should not (and it is not required to) apply the rules or provisions of laws with respect to civil suits before the traditional courts.

Finally, ambiguity and divergence in the views of commissioners have resulted in an inconsistent jurisprudence on the Commission's jurisdiction *ratione materiae* (and other aspects of its competence). Although the effect on confidence of the end users of the Commission's complaint system cannot be ascertained, inconsistent decisions may not augur well for future confidence in the Commission if the problem continues unaddressed. Notably, given that the divergence has in part not been helped by the position adopted by the Commission after its



first teething years to have complaints heard before single commissioners, abandoning the early attempts at having a *coram* of at least three commissioners,<sup>93</sup> it may be necessary for the Commission to evolve standards, as in, say, practice directions, to clarify on the issues of its jurisdictional competence. Further, the Directorate of Complaints, Investigation and Legal Services that oversees the execution of the Commission's protectionist mandate (in the receipt and investigation of complaints alleging human rights violations) should give guidance and advice to the complainants on the presentation of complaints.

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<sup>93</sup> A good number of the early complaints were heard before two or more commissioners. See eg the *Free Movement* case (n 39 above); the *Betty Nakiyingi* case (n 38 above); *Emmanuel Mpondi v Chairman, Board of Governors, Nganwa High School & 2 Others*, Complaint UHRC 210/1998; *James Hafasha v D/SP John Bwango*, Complaint UHRC 335/1998.