

25TH AFRICAN HUMAN RIGHTS MOOT COURT COMPETITION

UNIVERSITY OF PRETORIA

3 – 8 OCTOBER 2016, PRETORIA, SOUTH AFRICA

THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

IN THE MATTER BETWEEN

THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

AND

THE STATE OF THE REPUBLIC OF KUNTAKINTE

MEMORIAL FOR THE APPLICANT

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LIST OF ABBREVIATIONS

1. ACHPR African Commission on Human and People's Rights.
2. ACtHPR African Court on Human and Peoples' Rights
3. African Charter African Charter on Human and Peoples Rights
4. AHRLJ African Human Rights Law Journal
5. AHRLR African Human Rights Law Reports
6. Art. Article
7. Commission African Commission on Human and People's Rights
8. Doc Document
9. ECJ European Court of Justice
10. ECtHR European Court of Human Rights
11. HRC Human Rights Commission
12. IACHR Inter-American Commission on Human Rights
13. ICC International Criminal Court
14. ICCPR International Covenant on Civil and Political Rights
15. ICESCR International Covenant on Economic, Social and Cultural Rights
16. ICJ International Court of Justice
17. ICTY International Criminal Tribunal for the former Yugoslavia.
18. MAF Malinke Armed Forces
19. NUGAL National Union of Gay and Lesbians of Kuntakinte
20. N Note
21. Para Paragraph
22. PCIJ Permanent Court of International Justice
23. PDF Paradise Detention Facility
24. Protocol African Protocol on the Establishment of the African Court

25. RWB	Rights Without Borders.
26. USD	United States Dollars
27. UN	United Nations
28. UNGA	United Nations General Assembly.
29. VCLT	Vienna Convention on the Law of Treaties

LIST OF AUTHORITIES

TREATIES AND CONVENTIONS

1. *African Charter on Human and Peoples Rights (Banjul Charter)*, 27 June 1981, CAB/LEG/67/3. Rev. 5, 21 I.L.M 58 (1982), Adopted in Banjul, the Gambia.
2. *African Charter on the Rights and Welfare of the Child*, OAU Doc. CAB/LEG/24.9/49 (1990), entered into force Nov. 29, 1999.
3. *Convention on the Rights of the Child adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990.*
4. *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families. Adopted by General Assembly resolution 45/158 of 18 December 1990.*
5. *International Covenant on Civil and Political Rights (adopted 16 December, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).*
6. *International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 November 1976).*
7. *International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1.*
8. *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, AHG Res. 230(XXX) Res. 44/25, (1989/1990).*
9. *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.*
10. *Rome Statue of the International Criminal Court of 17 July 1998; 2187 UNTS 90.*

11. *Slavery Convention, Signed at Geneva on 25 September 1926. Entry into force: 9 March 1927.*
12. *United Nations Charter, 1 UNTS XVI*
13. *Vienna Convention on the Law of Treaties opened for signature 23 May 1969, 115 UNTS 331 (entered into force 27 January 1980).*

UN DOCUMENTS

1. *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment General Assembly Resolution 43/173 (9 December 1988).*
2. *Human Rights Committee, General Comment 18, Non-discrimination(Thirty-seventh session, 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev. 1 at 26 (1994).*
3. *Resolution 21/16 on the Rights to Freedom of Peaceful Assembly and of Association Adopted by the Human Rights Council on September 27 2012.*
4. *UN Human Rights Committee (HRC), CCPR General Comment No. 13: Article 14 (Administration of Justice), Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law, 13 April 1984.*
5. *United Nations Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental*
6. *United Nations, Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, U.N. Doc. E/CN.4/1985/4, Annex (1985).*

RESOLUTIONS AND DECLARATIONS

1. *Beijing Declaration Platform for Action, adopted at the Fourth World Conference on Women 4-15 September 1995.*
2. *Resolution on the Right to Freedom of Association, The African Commission on Human and Peoples' Rights, meeting in its Eleventh Ordinary Session, in Tunis Tunisia, from 2 to 9 March 1992.*
3. *Resolution on the Right to Recourse and Fair Trial, The African Commission on Human and Peoples' Rights, meeting in its Eleventh Ordinary Session, in Tunis Tunisia, from 2 to 9 March 1992.*
4. *Freedoms Adopted and proclaimed by General Assembly Resolution 53/144 on December 9 1998.*

DOMESTIC LEGISLATION

1. Societies Act.
2. Criminal and Other Offences Act of Kuntakinte (1969).
3. African Court Protocol Renunciation Act (2016)

CASELAW

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

1. *Article 19 v Eritrea* (2007) AHRLR 73 (ACHPR 2007).
2. *Boursal v Algeria* (2006) AHRLR 3 (HRC 2006).
3. *Civil Liberties Organisation v Nigeria* (2000) AHRLR 243 (ACHPR 1999).
4. *Free Legal Assistance Group and Others v Zaire* (2000) AHRLR 74 (ACHPR 1995).
5. *Huri-Laws v Nigeria* (2000) AHRLR 273 (ACHPR 2000).
6. *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000).
7. *Law Office of Ghazi Suleiman v Sudan (I)* (2003) AHRLR 134 (ACHPR 2003).
8. *Legal Resources Foundation v Zambia* (2001) AHRLR 84 (ACHPR 2001).

9. *Malawi African Association and Others v Mauritania* (2000) AHRLR 149 (ACHPR 2000).
10. *Ouko v Kenya* (2000) AHRLR 135 (ACHPR 2000).
11. *Scanlen and Holderness v Zimbabwe* (2009) AHRLR 289 (ACHPR 2009).
12. *Sudan Human Rights Organization and Another v Sudan* (2009) AHRLR 153 (ACHPR 2009).

HUMAN RIGHTS COMMITTEE

13. *Toonen v. Australia*, Communication No. 488/1992, UN Doc CCPR/C/50/D/488, (1994).
14. *Mr. Edward Young v. Australia*, Communication No. 941/2000, U.N. Doc. CCPR/C/78/D/941/2000 (2003).
15. *C v Australia*, Communication No 900/00, Un Doc CCPR/C/76/D/900/1999 (2002).
16. *Adolfo Drescher Caldas v Uruguay*, Communication No 43/1979, U.N. Doc CCPR/C/OP/2(1990).

EUROPEAN COURT OF JUSTICE

17. *P v S and Cornwall County Council*, Case C-13/94, (1996) IRLR 347.

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

18. *Juridical Condition and Rights of the Undocumented Migrants, Mexico*, Advisory Opinion OC-18/03, IACHR Series A no. 18, IHRL 3237 (IACHR 2003).
19. *Velasquez Rodriguez v Honduras* IACHR Series C no. 4 (1998).
20. *Ireland v United Kingdom*, IACHR Series A no. 25 (1978) ECHR 1.

INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

21. *Prosecutor v Dragoljub Kunarac*, Case No IT-96-23-T & IT-96-23/1-T (2002) ICTY.

INTERNATIONAL COURT OF JUSTICE

22. Barcelona Traction Light and Power Company, Ltd (*Belgium v Spain*), (1970) ICJ 3.
23. Armed Activities on the Territory of the Congo case (Congo v Rwanda) Judgement on jurisdiction and admissibility, I.C.J GL No.126 of 2006.
24. Nuclear Tests Case (New Zealand v France) I.C.J 1974

PERMANENT COURT OF INTERNATIONAL JUSTICE

25. Exchange of Greek and Turkish Populations, *Greece v Turkey*, Advisory Opinion, PCIJ Series B No 10, ICGJ 277 (1925).
26. Free Zones of Upper Savoy and the District of Gex, France v Switzerland, PCIJ Series A/B No 46, ICGJ 293 (1932).
27. Finnish Vessels in Great Britain During the War (*Finland v Great Britain*), (1934) 3 RIAA 1479.

NATIONAL COURTS

KENYA

28. *Eric Gitare v Non-Governmental Organisations Coordination Board & 4 others* (2015) Petition 440 of 2013.

SOUTH AFRICA

29. *S v Makwanyane and another* (CCT3/94) [1995] ZACC 3.
30. *Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6.
31. *Shilubana and others v Nwamitwa* (CCT 03/07) [2008] ZACC 9.
32. *Bhe v Magistrate Khayelitsha* (2005) 1 BCLR 1 (CC).

NIGERIA

33. *Muojekwu v Ejikeme* [2000] 5 NWLR 402.

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1. Manfred Nowak, U.N. Covenant ON Civil and Political Rights: CCPR Commentary (1993).
2. P. Van Dijk & G.J.H. Van Hoof, "Theory and Practice of the European Convention on Human Rights" (1990).
3. Anne Gallagher, "Using International Human Rights Law to Better Protect Victims of Trafficking: The Prohibitions on Slavery, Servitude, Forced Labour and Debt Bondage" (2008).
4. E Ankumah, The African Commission on Human and Peoples' Rights (1996).
5. JY Asomah, 'Cultural rights versus human rights: A critical analysis of the trokosi practice in Ghana and the role of civil society.' (2015).
6. J Crawford, Brownlie's Principles of Public International Law, (8th edition, Oxford University Press 2012).
7. M Dixon, R McCorquodale & S. Williams, Cases and Materials on International Law, (5th edition, Oxford University Press 2011).
8. Michael Akehurst, Withdrawal from International Organisations, 32 Current Legal Prob. (1979).
9. John O'Connor, Good Faith in International Law (Dartmouth 1991).
10. György Haraszti, Some Fundamental Problems of the Law of Treaties (Budapest: Akademiai Kiado, 1973).
11. David M. Galligan, Wrapping Up the UNCLOS III "Package": At Long Last the Final Clauses, 20 Virginia Journal of International Law. 347, 382 (1980).
12. A Aust, Modern Treaty Law and Practice (2nd edition, Cambridge 2007).

STATEMENT OF RELEVANT FACTS

1. Kuntakinte is a sovereign developing country in West Africa which gained independence in 1967 from Busia. It is bordered by Malinke in the West. While Kuntakinte is ranked as the biggest economy in West Africa, Malinke on the other hand has the highest population living below a dollar a day.
2. The Bamileke are also known for traditional practices such as ritual servitude (*trokosi*). It dictates that where it is determined that a crime has been committed within the community that angers the gods, a virgin girl within the family of the offender must be pledged in life-long servitude to the gods. A 2014 study by the Kuntakinte Human Rights Observatory (KHRO), a local NGO, estimates that there are about 7 000 women and girls pledged as *trokosis* in the Bamileke region.
3. Section 80 of the Constitution provides for four levels of courts; District Courts, High Court, Court of Appeal and Supreme Court. It also provides for a Court Martial to prosecute matters involving the military.. Apart from the Constitution, customary and sharia laws are applicable to members of those communities. Section 246 of the *Criminal and Other Offences Act* penalises consensual same-sex relations.
4. On 3rd February, Mananseh Bobo, Malinke's announced a proposal to amend the constitutional two-term limit to allow him a third term. On 10th February 2014, a major newspaper revealed that President Mananseh had used taxpayers' money worth 14 million to improve his home. These events enraged Malinkese youths who incited others on social media leading to a political upheaval in Malinke. The President has branded the Young Panthers who incited the upheaval as a terrorist group which his government will hunt down.
5. In February 2015, Kuntakinte in solidarity with the government of Malinke, began arresting a number of young Malinkese believed to have links with Young Panthers and most of them were detained at Paradise Detention Facility commonly known as

'hell on earth'. Kuntakinte will not give evidence to support the reasons for detention due to national security reasons. The High Court has been renewing the warrant to remand the detainees on the application of the Attorney General pending further investigations. Only 150 of the detainees have been tried in the General Military Court while the rest are yet to be tried.

6. An application to the High Court by RWB to challenge the constitutionality of the treatment of prisoners at PDF to petition the Court to close PDF and to order the government to investigate the human rights violations that are taking place in the detention facility was dismissed based on a 2005 Supreme Court decision.
7. Abiba, was charged with conduct against the order of nature under section 246 of the 1969 *Criminal and Other Offences Act* due to some intimate messages that were found on her phone between her and Salema. Upon her release, the police informed the chief of the community of the reason for her arrest, and the matter was referred to the Fetish Priest in accordance with the customs of the Bamelike who determined that the youngest daughter of Ratif, Marena, must be pledged as a *trokosi*.
8. NUGAL's application of February 2012 for registration was rejected by the registrar despite the fact that its aim was to provide gays, lesbians and bisexuals in Kuntakinte with information on human rights, and to advocate for their rights to non-discrimination among other rights.
9. RWB approached the High Court, to challenge the constitutionality of the refusal to register the union. The application is pending before the High Court, with no trial date set. The judges in all court levels have indicated that they will not be used in the immoral objects of RWB and NUGAL.
10. On 17 May 2016, Kuntakinte ratified the African Court Renunciation Act in order to withdraw from the Protocol establishing the African Court.

ISSUES FOR DETERMINATION

- I. Whether:
 - A. the African Court has jurisdiction to determine the issues in spite of the enactment on the African Court Protocol Renunciation Act by Kuntakinte.
 - B. the issues are admissible before the court pursuant to Article 56 of the African Charter.
- II. Whether Kuntakinte violated the African Charter and relevant treaties with respect to:
 - A. The circumstances and conditions of detention at PDF.
 - B. Refusal to register NUGAL
 - C. Failure to provide for the abolition of the *trokosi* custom

SUMMARY OF ARGUMENTS

11. The African Court has jurisdiction since the withdrawal from a perpetual treaty by Kuntakinte is invalid. The admissibility requirements under Article 56 of the *African Charter* have been met given that the local remedies need not be exhausted as they are ineffective, are unduly prolonged and the *trokosi* custom involves massive human rights violations.
12. In detaining the suspected members of Young Panthers group under inhumane conditions, Kuntakinte violated their right to liberty and security of person pursuant to Articles 6 and 5 of the *African Charter* and Article 9 of *ICCPR* respectively.
13. The refusal of Kuntakinte to register NUGAL is a violation of Article 2 of the *ICCPR* and Article 19 of the *African Charter* which provide for equality of all persons. Finally, Kuntakinte has failed to provide for legislations prohibiting the *trokosi* custom and is therefore is in violation of its human rights treaty obligations.

MERITS

I. THE AFRICAN COURT HAS JURISDICTION OVER THE CASE AND ALL ELEMENTS OF ADMISSIBILITY ARE MET.

Jurisdiction

A. The African Protocol is a perpetual treaty

14. The *Protocol to the Establishment of the African Court*¹ does not contain a withdrawal procedure and is therefore not subject to withdrawal. This rule is provided for under Article 56 of the *VCLT*² which is the most authoritative convention on the law of treaties.³ The *VCLT* is partly reflective of customary law and its provisions which are not declaratory of customary international law constitute evidence of emerging rules of international law.⁴ The only exception to this rule is where it can be implied from the nature of the treaty or it is established that the parties intended to withdraw.⁵ However most scholars disfavour implied withdrawals⁶ since it contradicts the principle of *pacta sunt servanda*.⁷ In light of the above reasons, Kuntakinte is still a signatory to the Protocol since it is a perpetual treaty from which a party cannot withdraw from.

B. The withdrawal is not yet effective pursuant to Article 56 of VCLT

15. The withdrawal is not yet effective until 17 May 2017. Even if there was legal room for withdrawal under the Protocol implicitly, the state has an obligation to give a

¹ Protocol establishing the African Human Rights Court, AHG Res. 230(XXX) (1998/2004).

² Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) Article 56. See also; Michael Akehurst, *Withdrawal from International Organisations*, 32 *Current Legal Prob.* (1979) pg149-50.

³ A. Aust, *Modern Treaty Law and Practice* (2nd edn, Cambridge 2007). (Whether a particular rule of VCLT reflects customary law is only an issue if the matter is litigated and even then the Court will take the convention as a starting point and normally also its finishing point)

⁴ M. Dixon, R. McCorquodale & S. Williams, *Cases and Materials on International Law* (5th edn, Oxford University Press, 2011) pg.62.

⁵ *Supra* n2.

⁶ David M. Galligan, *Wrapping Up the UNCLOS III "Package": At Long Last the Final Clauses*, 20 *Virginia Journal of International Law*. 347, 382 (1980); see also György Haraszti, *Some Fundamental Problems of the Law of Treaties* 264 (Budapest: Akademiai Kiado, 1973) at 268 (summarizing the views of scholars opposed to implied unilateral withdrawal).

⁷ United Nations Charter 1 UNTS XVI, Article 2(2); *supra* n2 Article 26.

notice of not less than twelve months' of its intention before effectively withdrawing from the treaty.⁸The *African Court Renunciation Act* was passed on 17 May 2016 while this application was filed in June 2016.⁹Only one month has lapsed since the notice of withdrawal was issued and the court still has jurisdiction until the twelve months duration is over.

C. The Renunciation Act is legally invalid because it is in breach of the good faith doctrine

16. The respondent acted in bad faith in enacting the African Court Renunciation Act. In determining the legal effect of a unilateral declaration of a state, its actual content as well as the circumstances in which it was made must be considered.¹⁰ The Act was passed after months of international appeal and condemnation of the events taking place in Kuntakinte.¹¹ Moreover, several local and international NGOs had expressed their desire to bring human rights violations cases before the African Commission.¹²
17. The ICJ explained that the principle of good faith, which refers to honesty, fairness and reasonableness,¹³ governs the creation and performance of legal obligations whatever their source.¹⁴ The respondent's decision to withdraw from the Protocol was aimed at preventing cases of human rights violations from being brought before the African Commission. Hence it is legally invalid since it was enacted in bad faith.
18. In light of the above, the African Court has jurisdiction to adjudicate this matter and in the event of dispute as to whether the court has jurisdiction the court shall decide pursuant to article 3(2) of the *Protocol*. The dispute submitted concerns

⁸Supra n5.

⁹Facts sheet, para.24.

¹⁰ Armed Activities on the Territory of the Congo case (Congo v Rwanda)Judgement on jurisdiction and admissibility, I.C.J GL No.126 of 2006 [49].

¹¹ Facts sheet para.23.

¹² Facts Sheet, para.17

¹³ John O'Connor, Good Faith in International Law (Aldershot, Dartmouth 1991) 118-19

¹⁴ Nuclear Tests Case (*New Zealand v France*)I.C.J 1974 253, 45 [46].

interpretation of the *African Charter* and other relevant treaties ratified by the respondent upon which this court has jurisdiction.¹⁵

Admissibility

19. The applicant submits that all elements of the issues raised are admissible pursuant to the requirements of Article 56 of the *African Charter*¹⁶ and Article 6 of the *Protocol*.¹⁷ A matter is admissible if local remedies are exhausted. The local remedies must be sufficient, available and effective.¹⁸ A remedy is considered available if the petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success, and it is found sufficient if it is capable of redressing the complaint.¹⁹

A. The local remedies have been exhausted

20. The exceptions to the exhaustion of local remedies rule are stated in *Article 19 v Eritrea*.²⁰ Local remedies will be held to be unavailable when there is a strong precedence against the applicant's case.²¹ The application by RWB on behalf of the PDF inmates was unsuccessful. On appeal, it was held, on the basis of a Supreme Court decision of 2005, that issues of national security are the exclusive reserve of the executive. Issues relating to national security are outside the scope of judicial powers. Hence the remedy is unavailable and the exhaustion of local remedies rule is inapplicable to this extent.

¹⁵ Protocol, Article 3(1).

¹⁶ African Charter of Human and Peoples' Rights (Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986) Article 56.

¹⁷ Supra n1, Article 6.

¹⁸ *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000) [31].

¹⁹ Ibid, [32].

²⁰ *Article 19 v Eritrea* (2007) AHRLR 73 (ACHPR 2007) [48].

²¹ *Scanlen and Holderness v Zimbabwe* (2009) AHRLR 289 (ACHPR 2009) [39].

B. The communication is not based exclusively on media reports.

21. The issue on detention at PDF is not based exclusively on news disseminated by media. A communication that is based exclusively on media reports is inadmissible.²² However, the Commission elaborated on this admissibility requirement by stating that it would be detrimental for a communication to be rejected because some of its aspects are based on information disseminated by mass media.²³ If it is supported by reports and press releases by international human rights organisations, the communication shall be deemed admissible.²⁴

22. Although the inhumane conditions at PDF were reported by an undercover journalist, Detention Watch, an international NGO issued a report confirming the same allegations and thus verifying the journalist's report.²⁵ Therefore the issue on conditions of detention at PDF is admissible.

C. The local remedies have been unduly prolonged and there are no chances of success.

23. Local remedies need not be exhausted where the remedy is unduly prolonged and there is no chance of success.²⁶ The Commission has held that a domestic remedy which was still under consideration since 1996 to 2006 was unduly prolonged.²⁷ The application challenging the refusal to register NUGAL was filed on 1st September 2012 and is still pending before the High Court and no trial date has been set.²⁸ This renders the domestic remedy to be unduly prolonged and the applicant need not exhaust it.

²² Supra n17, Article 56(4) .

²³ Supra n18 [26-27].

²⁴ Sudan Human Rights Organization and Another v Sudan (2009) AHRLR 153 (ACHPR 2009) [92].

²⁵ Facts sheet, para 17.

²⁶ Supra n21.

²⁷ *Boursal v Algeria* (2006) AHRLR 3 (HRC 2006) [8.3].

²⁸ Facts, sheet, para.22.

24. There must be reasonable prospects for success. The rules of natural justice dictate that justice should not only be done, but should manifestly and undoubtedly be seen to be done.²⁹ The judiciary has clearly stated that it will not be used in the immoral pursuit of NUGAL and RWB.³⁰ Since it is already biased against the applicants, there is no prospect for success in exhausting the local remedy.

D. The rule on exhaustion of local remedies does not apply to mass and serious violations of human rights.

25. In light of its duty to ensure the protection of human and peoples' rights, the Commission will not apply the requirement of exhaustion of local remedies literally in cases where it is impractical for the complainant to seize the domestic courts in the case of each individual complaint.³¹ This is the case where there are a large number of individual victims.

26. Considering the seriousness of human rights violations as well as the great number of people involved, remedies in the domestic courts are as a practical matter unavailable.³² There are over 7000 victims of *trokosi* custom in Kuntakinte as reported by a 2014 study by KHRO.³³ The large number of victims and the serious nature of human rights violation involved with the custom renders domestic remedies unavailable.³⁴

²⁹ *R v Sussex Justices, Ex parte McCarthy* [1924] 1 KB 256, [1923] All ER Rep 233.

³⁰ *Supra* n28.

³¹ *Malawi African Association and Others v Mauritania* (2000) AHRLR 149 (ACHPR 2000) [81-83].

³² *Free Legal Assistance Group and Others v Zaire* (2000) AHRLR 74 (ACHPR 1995) [37].

³³ Facts sheet, paragraph 5

³⁴ *Sudan Human Rights Organization and Another v Sudan* (2009) AHRLR 153 (ACHPR 2009) [100].

II. KUNTAKINTE VIOLATED THE AFRICAN CHARTER AND OTHER RELEVANT TREATIES IN RESPECT OF THE CIRCUMSTANCES LEADING TO THE DETENTION OF INMATES OF PDF, AND THE CONDITIONS UNDER WHICH THEY WERE DETAINED.

A. Kuntakinte violated the detainees' rights to liberty.

27. Every person the right to liberty and security of person and no one shall be deprived of his liberty except on such circumstance that is in accordance with the law.³⁵ Moreover, an arrested person has the right to be informed of a charge in a language that he understands.³⁶ It is not sufficient "simply to inform" the author of the complaint "that he was being arrested under the prompt security measures without any indication of the substance of the complaint against him."³⁷ The applicant submits that the respondent violated this right by failing to avail evidence upon which they are relying on and not charging some detainees with a specific crime yet the warrant of detention was periodically renewed.³⁸

B. The right to fair trial of the detainees was violated.

28. The right to fair trial constitutes of the right to be tried within reasonable time, the right to be presumed innocent until proven guilty before a competent court and the right to be defended by a counsel of your choice.³⁹ This right is also provided for in the *ICCPR*.⁴⁰

29. First, the accused person has a right to be brought before an independent and impartial court within a reasonable time. What constitutes reasonable time is to be adjudicated on a case by case basis. However, the fact that the criminal procedure

³⁵ International Covenant on Civil and Political Rights (adopted 16 December, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), Article 9; African Charter, Article 6.

³⁶ Resolution on the Right to Recourse and Fair Trial, The African Commission on Human and Peoples' Rights, meeting in its Eleventh Ordinary Session, in Tunis Tunisia, from 2 to 9 March 1992; [2] (b).

³⁷ *Adolfo Drescher Caldas v Uruguay*, Communication No 43/79 (11 January 1979) [13.2].

³⁸ Facts sheet, para 16.

³⁹ African Charter, Article 7.

⁴⁰ ICCPR, Article 14.

allows remand to be renewed indefinitely renders the provision meaningless and hence is a violation.⁴¹The Human Rights Committee clarified on the requirement of trial within reasonable time to not only include the time when the trial starts but also the time by which it should end.⁴² Kuntakinte has been renewing the warrant to remand after every three months pending an investigation which has prolonged the detention of the arrested. Only 150 detainees out of the 700 who were arrested have been tried and sentenced. The rest are yet to appear before a court.⁴³

30. The trial of civilians before military courts is prohibited since such courts enable exceptional procedures to be applied which do not comply with normal standards of justice.⁴⁴ The Commission held that a panel consisting of military or law enforcement officers violated the right to fair trial of civilians.⁴⁵ In another instance the Commission held that Military courts should handle crimes of a purely military nature committed by military personnel.⁴⁶ The 150 detainees' right to fair trial before a competent court was violated since they were tried by the General military Court in Kuntakinte.

C. The conditions of detention at PDF are inhumane.

31. Every person has a right to the respect and dignity inherent to a human being and all forms of degradation are prohibited.⁴⁷ What constitutes cruel, inhuman or degrading treatment should be given the widest possible interpretation to offer protection against abuses whether physical or mental.⁴⁸ The prohibited act must

⁴¹ Supra n18 [61].

⁴² UN Human Rights Committee (HRC), CCPR General Comment No. 13: Article 14 (Administration of Justice), Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law, 13 April 1984, [10].

⁴³ Supra n38.

⁴⁴ African Charter, Article 7(4).

⁴⁵ *Civil Liberties Organisation v Nigeria* (2000) AHRLR 243 (ACHPR 1999) [21].

⁴⁶ *Law Office of Ghazi Suleiman v Sudan (I)* (2003) AHRLR 134 (ACHPR 2003) [53].

⁴⁷ African Charter, Article 5; ICCPR, Article 9.

⁴⁸ Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 9.

General Assembly Resolution 43/173 (9 December 1988) Principle 6.

meet the minimum severity threshold considering factors such as age, sex of the victim and duration of detention.⁴⁹

32. The detainees of PDF were detained without being informed of the charges against them and duration for their detention.⁵⁰ Such conditions of detention were held to be tantamount to mental trauma and a violation of Article 5 of the *African Charter*.⁵¹ Similarly the detainees suffer mental trauma of not knowing their fate especially considering their young age.

33. It is prohibited to take advantage of the situation of a detained person for the purpose of compelling him to confess or to incriminate himself using violence or threats.⁵² An army officer at PDF was reported saying that the detainees are strapped on boards and tortured during interrogations.⁵³ These acts amount to both physical and mental torture of the detainees and consequently a violation of the *African Charter*.

⁴⁹ *Ireland v United Kingdom*, Judgment of 18 January 1987, series A no 25 ECtHR [162].

⁵⁰ Facts sheet, para. 16.

⁵¹ *Huri-Laws v Nigeria* (2000) AHRLR 273 (ACHPR 2000) [40].

⁵² *Supra* n48, principle 21.

⁵³ *Supra* n25.

III. KUNTAKINTE VIOLATED THE AFRICAN CHARTER AND OTHER RELEVANT TREATIES BY REFUSING TO REGISTER NUGAL

A. The refusal amounts to a violation on the right to equality and non discrimination.

34. Equality before the law and freedom from discrimination are entitlements guaranteed to all persons.⁵⁴ This right is so intrinsic that article 26 of the *ICCPR* and article 3 of the *African Charter* establish free standing rights to equality; their application is not confined to the rights contained in the Conventions.⁵⁵ Furthermore, the whole structure of national and international public order rests on this right.⁵⁶

35. In as much as a state has the prerogative of limiting rights, the margin of discretion does not apply to the rule on non-discrimination.⁵⁷ The Commission in *Legal Resources Foundation v. Zambia*⁵⁸ noted the importance of equality of all persons and lack of it affects the enjoyment of other rights.⁵⁹ Therefore, the respondent cannot plead margin of appreciation as a defence for limiting the right to freedom of association of NUGAL members.

36. The reference to "sex" in Articles 2(1), and 26 of the *ICCPR* is to be taken as to include sexual orientation.⁶⁰ The Human Rights Committee found Australia in violation of the right to equal treatment before the law by refusing to provide

⁵⁴ African Charter, Article 19; Article 2 (All people are equal before the law and shall enjoy the same respect and rights as well as the entitlement to enjoy rights and freedoms without distinction of any kind respectively); see also *ICCPR*, Article 26; International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 November 1976), Article 2(2).

⁵⁵ [and-non-discrimination](http://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/substantive-human-rights/the-right-to-equality) <http://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/substantive-human-rights/the-right-to-equality>

⁵⁶ *Juridical Condition and Rights of the Undocumented Migrants, Mexico*, Advisory Opinion OC-18/03, IACHR Series A no.18, IHRL 3237 (IACHR 2003) [101].

⁵⁷ United Nations, Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, U.N. Doc. E/CN.4/1985/4, Annex (1985), Principle 28.

⁵⁸ (2001) AHRLR 84 (ACHPR 2001).

⁵⁹ *Ibid*, [63].

⁶⁰ *Toonen v. Australia*, Communication No. 488/1992, UN Doc CCPR/C/50/D/488, (1994), [8.7].

pension benefit based on sexual orientation.⁶¹ Similarly, the respondent has violated the right to equality of NUGAL members by refusing to register the union based on their sexual orientation.

B. The citizens of Kuntakinte are entitled to the freedom of association.

37. All persons are entitled to freely associate with others and no restrictions shall be placed except those that are prescribed by law.⁶² States have an obligation to fully protect and promote this right⁶³ and state parties to the *African Charter* should not enact provisions that would limit the exercise of the freedom of association.⁶⁴ The Respondent has violated this right by having in place a legislation that curtails this fundamental right.

38. It also includes the right to form associations for the purpose of promoting and protecting human rights and fundamental freedoms.⁶⁵ Therefore, it should be enjoyed without state interference.⁶⁶

39. The right to freedom of association applies regardless of the objects of the association.⁶⁷ Therefore the refusal to register NUGAL based on its object to protect homosexuals is unlawful. The essence of a court is to protect such rights of minorities who are not adequately protected by democratic processes.⁶⁸ It is necessary that a state remains impartial in its dealings with people and groups and

⁶¹ *Mr. Edward Young v. Australia*, Communication No. 941/2000, U.N. Doc. CCPR/C/78/D/941/2000 (2003), [12].

⁶² ICCPR, Article 22; African Charter, Article 10; Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, adopted by General Assembly resolution 45/158 of 18 December 1990, Article 26.

⁶³ Resolution 21/16 on the Rights to Freedom of Peaceful Assembly and of Association Adopted by the Human Rights Council on September 27 2012.

⁶⁴ Resolution on the Right to Freedom of Association, The African Commission on Human and Peoples' Rights, meeting in its Eleventh Ordinary Session, in Tunis Tunisia, from 2 to 9 March 1992.

⁶⁵ United Nations Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (1998), Article 5.

⁶⁶ *Supra* n45 [15].

⁶⁷ *Eric Gitare v Non-Governmental Organisations Coordination Board & 4 others*, (2015) Petition 440 of 2013, [88].

⁶⁸ *S v Makwanyane & another* (CCT3/94) [1995] ZACC 3.

recognising such difference doesn't make a state immoral or one without a point of view.⁶⁹

C. Kuntakinte cannot plead municipal legislation as a defence for failing to carry out its international obligations.

40. The refusal to register NUGAL pursuant to the Societies Act is inconsistent with international law obligations of the respondent. A state may not invoke the provisions of internal law as a justification for its failures to perform a treaty.⁷⁰ The characterization of an act of a state as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.⁷¹ Such has been the rule in international law and this principle has been described as 'self-evident'.⁷²

41. A municipal court which defers to municipal law notwithstanding an inconsistent rule of international law will as an organ of the state engage in international responsibility.⁷³ Therefore, the respondent is liable for breaching its international obligations regardless of its domestic legislation's provisions.

⁶⁹ *Coalition for Gay and Lesbian Equality v. Minister of Justice* 1999 (1) SA 6, [136].

⁷⁰ VCLT, Article 27; Draft Articles on the Rights and Duties of States, Article 13.

⁷¹ J Crawford, *Brownlie's Principles of International Law* (8th edition Oxford University Press 2012) pg 51

⁷² *Exchange of Greek and Turkish Populations, Greece v Turkey*, Advisory Opinion, PCIJ Series B no 10, ICGJ 277 (1925).

⁷³ *Finnish Vessels in Great Britain During the War (Finland v Great Britain)*, (1934) 3 RIAA 1479. see also *Free Zones of Upper Savoy and the District of Gex, France v Switzerland*, PCIJ Series A/B No 46, ICGJ 293 (1932), [167].

IV. KUNTAKINTE VIOLATED THE AFRICAN CHARTER AND OTHER RELEVANT TREATIES BY FAILING TO ABOLISH OF THE TROKOSI CUSTOM OF THE BAMILEKE PEOPLE.

A. The right to culture is not absolute

42. Every individual is entitled to freely take part in the cultural life of their community.⁷⁴

This right is of significance in every society as was stated in *Shilubana v. Nwamitwa*.⁷⁵ However it is not absolute and must be exercised with due regard to rights of others, collective security, morality, common interest and public order.⁷⁶ Kuntakinte has an obligation to particular;y limit the *trokosi* custom since it constitutes a harmful cultural practice against women.

B. It is discriminatory and harmful against women and children.

43. The custom is a harmful practice which Kuntakinte is obligated to eradicate.

Harmful social and cultural practices refer to all behaviour, attitudes and/or practices which negatively affect the fundamental right of women and girls.⁷⁷ The *Protocol to the African Charter on the Human and Peoples Rights on the Rights of Women in Africa*⁷⁸ requires state parties to prohibit and eradicate all forms of harmful practices which negatively affect the human rights of women.⁷⁹ The same is a requirement with regards to harmful practices against children.⁸⁰

44. Discrimination against women conveys a message that women are not equal to men and this offends their dignity.⁸¹ The *trokosi* cultural practice reflects gender

⁷⁴ Article 15 of the *ICESCR*; Article 17 of the *African Charter*.

⁷⁵ CCT 03/07 [2008] ZACC 9 [43].

⁷⁶ African Charter, Article 27(2).

⁷⁷ Protocol to the African Charter on the Human and Peoples Rights on the Rights of Women in Africa, Article 1.

⁷⁸ Ibid.

⁷⁹ Ibid, Article 5. See also Beijing Declaration Platform for Action, adopted at the Fourth World Conference on Women 4-15 September 1995.

⁸⁰ African Charter on the Rights and Welfare of the Child, Article 21: state parties to the present Charter shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child.

⁸¹ *Bhe v Magistrate Khayelitsha* (2005) 1 BCLR 1 (CC), [187].

discrimination and serves the sole interest of the patriarchy.⁸² Such a practice that facilitates gross discrimination should be done away with.⁸³

45. A custom shall be viewed to be discriminatory if it particularly targets women as the main victims.⁸⁴ By allowing for the existence and continuation of the *trokosi* custom, young girls endure a harmful practice in which they are bound for life. The custom is discriminatory and harmful to women's mental, physical health. It is also discriminatory against women and therefore a violation on the right to equality and human dignity.

C. It contravenes the right to freedom from slavery and servitude.

46. The *trokosi* custom violates the freedom from slavery and servitude⁸⁵ of the young girls in Kuntakinte as well as their right to human dignity. Slavery is defined as the condition of a person over whom any or all of the powers attaching to the right of ownership is exercised.⁸⁶ Servitude refers to all conceivable forms of domination and degradation of human beings by human beings.⁸⁷ It has also been defined as labour conditions and/or the obligations to work from which the person in question cannot escape and which he cannot change.⁸⁸

47. The prohibition on slavery is now recognized as a rule of customary international law, a legal obligation *erga omnes*, and part of *jus cogens*.⁸⁹ The *trokosi* custom fits

⁸² United Nations Population Fund Ghana, 'Liberating slaves and changing minds: Starting at grassroots'

⁸³ JY Asomah 'Cultural rights versus human rights: A critical analysis of the *trokosi* practice in Ghana and the role of civil society' (2015) 15 AHRLJ pg.129-149.

⁸⁴ *Muojekwu v Ejikeme* [2000] 5 NWLR 402.

⁸⁵ Article 8 of ICCPR, Article 5 of the *African Charter* and Article 11 of *International Convention on the Protection of the rights of all Migrant Workers and Members of Their Families*, adopted by General Assembly resolution 45/158 of 18 December 1990.

⁸⁶ Slavery Convention, Article 1; Rome Statute, Article 7(1)(c); *Prosecutor v Kunarac*, Case No IT-96-23/1-T(ICTY 12 June 2002), [124]

⁸⁷ Manfred Nowak, U.N. Covenant ON Civil and Political Rights: CCPR Commentary (1993) pg. 148

⁸⁸ P. Van Dijk & G.J.H. Van Hoof, *Theory and Practice of the European Convention On Human Rights* (1990) pg.242.

⁸⁹ In *Barcelona Traction*, the International Court of Justice indicated that the prohibition on slavery is a *jus cogens* norm and that such norms give rise to obligations *erga omnes*.; See *Barcelona Traction*, id. at [33-34]; Anne Gallagher, "Using International Human Rights Law to Better Protect Victims of Trafficking: The Prohibitions on Slavery, Servitude, Forced Labour and Debt Bondage"(2008) pg.10.

the definition of slavery as it involves ownership of girls by the fetish priests for life.⁹⁰

D. The state has not taken all appropriate measures to abolish the custom.

48. In the case of *Velasquez Rodriguez v. Honduras* it was noted that, "An illegal act which violates human rights and which is initially not directly imputable to a State . . . can lead to international responsibility of the State, not because of the act itself, but because it failed to prevent the violations when it could have done so."⁹¹ A state failing to legislate on a particular matter can by implication be said to condone the harmful ideas and attitudes.⁹² By failing to take any steps to legislate laws prohibiting the custom the government is responsible for these human rights violations.

49. Moreover, the government is propagating the continuance of the custom since after releasing Abiba, the police and the chief of the community referred the issue to the Fetish Priest who in turn determined that the crime committed required Marena to be pledged as a *trokosi*.⁹³ The government has not only failed to expressly abolish the practice but it is also encouraging its persistence.

⁹⁰ Facts sheet, para.5.

⁹¹ *Velasquez Rodriguez v. Honduras*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4 161 (July 29, 1988), 166.

⁹² *Smt Seema v. Ashwani Kumar T.P.* Civil. No. 291 of 2005 (Supreme Court of India 14 February 2006).

⁹³ Facts sheet, paragraph 20.

RELIEFS SOUGHT

50. The Commission requests the court to grant the following prayers and order Kuntakinte to:

- I. Shutdown PDF and investigate the instances of torture in order to ensure accountability of those responsible.
- II. Guarantee all the detainees in PDF free and fair trial immediately, order the retrial of those whose cases were adjudicated by the Martial court in civil courts, release those detained without any charge and pay adequate compensation for moral damages. The compensation of those who suffered torture should be 8,000 USD each while for those who were arbitrarily detained should be 10,000 USD each.
- III. Order for the review of the application brought forward by Marena and her colleagues to register NUGAL.
- IV. Criminalize the practice of *trokosi*, emancipate all the girls pledged under the practice and pay a compensation of 10,000 USD each for victims.