

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 RESPONDENT

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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. UDHR Universal Declaration on Human
Rights
- 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, adopted on 11 July 1990, entered into force on 29 November 1999.
3. *International Covenant on Civil and Political Rights (adopted 16 December, entered into force 23 March 1976)* 999 UNTS 171 (ICCPR).
4. *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 November 1976).
5. *Protocol to the African Charter of Human and Peoples' Rights on the Rights of Women in Africa*, ratified on 11 July 2003, entry into force 25 November 2005.
6. *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).
7. *Universal Declaration of Human Rights*, G.A. Res. 217A (iii), U.N. Doc. A/811 (1948)
8. *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

UNITED NATIONS 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. *CCPR General Comment No. 8: Article 9 (Right to Liberty and Security of Persons)* Adopted at the Sixteenth Session of the Human Rights Committee, on 30 June 1982.
3. *CESCR, General Comment 14, the Right to the Highest Attainable Standard of Health*, UN Doc E/C.12/2000/4 (2000).

4. *CESCR, General Comment 3: the Nature of States Parties' Obligations, UN Doc E/1991/23, Annex III.*
5. *Human Rights Committee General Comment No.34 on Article 19 Freedom of Opinion and Expression, 102nd Session Geneva 11-29 July 2011.*
6. *Human Rights Committee, General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc CCPR/C/21/Rev.1/Add13 (2004).*
7. *Office of the United Nations High Commissioner for Human Rights, Fact Sheet No 16 (Rev 1): The Committee on Economic, Social and Cultural Rights (1991).*
8. *Resolution on the Right to Freedom of Association by The African Commission on Human and Peoples' Rights in its Eleventh Ordinary Session, in Tunis Tunisia, from 2 to 9 March 1992.*
9. *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, UN Doc E/CN.4/1987/17, annex (1987).*
10. *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).*

DOMESTIC LEGISLATION

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

CASES

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

1. *Anuak Justice Council v Ethiopia* (2006) AHRLR 97 (ACHPR 2006).
2. *Association Que Choisir Benin v Benin* (2005) AHRLR 43 (ACHPR 2005).
3. *Bakweri Land Claims Committee v Cameroon* (2004) AHRLR 43 (ACHPR 2004).

4. *Ceesay v The Gambia*, (2000) AHRLR 101 (ACHPR 1995).
5. *Civil Liberties Organisation v Nigeria* (2000) AHRLR 188 (ACHPR 1995).
6. *Dumbuya v The Gambia* (2000) AHRLR 103 (ACHPR 1995).
7. *Free Legal Assistance Group and others v Zaire*, (2000) AHRLR 74 (ACHPR 1995)
8. *Kenya Human Rights Commission v Kenya* (2000) AHRLR 133 (ACHPR 1995).
9. *Kenyan Section of the International Commission of Jurists and Others v Kenya* (2004) AHRLR 71 (ACHPR 2004).
10. *Ouko v Kenya* (2000) AHRLR 135 (ACHPR 2000).
11. *Paul Hays v The Gambia*, (2000) AHRLR 102 (ACHPR 1995).
12. *Prince v South Africa* (2004) AHRLR 105 (ACHPR 2004).
13. *Rencontre africaine pour la défense des droits de l'Homme v Zambia*, (2000) AHRLR 321 (ACHPR 1996).

EUROPEAN COURT OF HUMAN RIGHTS

14. *Ambruszkiewicz v Poland*, Application No. 38797/03, Judgement, 23 October 2006.
15. *Amuur v France*, Application no.19776/92, Judgement, 25 June 1996.
16. *Brogan v United Kingdom*, Application No. 11266/84, Judgement, 29 November 1988.
17. *Golder v United Kingdom*, Application No. 4451/70, Judgement, 21 February 1975.
18. *Hatton And Others V. The United Kingdom*, Application No. 36022/97, Judgment, 8 July 2003.
19. *Labita v Italy*, Application No. 26772/95, Judgement, 6 April 2000.
20. *Ladent v Poland*, Application No. 11036/03, Judgement, 18 March 2008.
21. *Lithgow and Others v United Kingdom*, Application No. 9006/80, Judgement, 8 July 1986.
22. *N.F v Italy*, Application no.37119/97, Judgement, 2 August 2001.
23. *Ostendorf v Germany*, Application No. 15598/08, Judgement, 7 March 2013.

24. *Petkov and Profirov v Bulgaria*, Application No. 50027/08, Judgement, 24 June 2014.

INTERNATIONAL COURT OF JUSTICE

25. Case concerning the Frontier Dispute (*Burkina Faso v. Republic of Mali*), (1986) ICJ 554.

26. Fisheries Jurisdiction Cases (*United Kingdom v Iceland; Federal Republic of Germany v Iceland*) (1973) ICJ 3.

27. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, ICJ Rep 16.

28. Nuclear Test Cases (*Australia v France; New Zealand v France*) (1974) ICJ 457.

29. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (1951), Advisory Opinion, ICJ Rep 15.

HUMAN RIGHTS COMMITTEE

30. *A v. Australia*, Communication 560/1993, U.N. Doc. CCPR/C/59/D/560/1993(1997).

31. *D. A. Cámpora Schweizer v. Uruguay*, Communication No. 66/1980, U. N. Doc CCPR/C/OP/2 (1990).

32. *Irene Bleier Lewenhoff & Rosa Valino de Bleier v. Uruguay*, Communication 30/1978, U.N. Doc. CCPR/C/OP/1 (1985).

INTER-AMERICAN COURT OF HUMAN RIGHTS

33. *Castañeda Gutman v. México* Judgment of August 6 2008, Series C no184, IHRL 3057 (IACHR 2008).

NATIONAL COURTS DECISIONS

ENGLAND

34. *O'Hara v United Kingdom* (1996) UKHL 6.

35. *R v Halliday* (1917) AC 216.

INDIA

36. *Union of India v Paul Nanickan and Another*, (2003) INSC 516.

AUSTRALIA

37. *Coco v R* (1994) HCA 15.

38. *Tajjour v State of New South Wales* [2014] HCA 35

BOOKS AND ARTICLES

1. Claire Macken, "Preventive detention and the Right of Personal Liberty and Security under the International Covenant on Civil and Political Rights, 1966" (Adelaide Law Review 2005).
2. Eva Brems, The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights 56 ZA ORV (Heidelberg J. International Law 1996).
3. Howard C. Yourow, The Margin Of Appreciation Doctrine In The Dynamics Of European Human Rights Jurisprudence (1996).
4. M Dixon, Textbook on International Law (6th edition Oxford University Press 2007).
5. M Shaw, International Law (7th edition Cambridge University Press 2014).
6. R.M.D'Sa, African Charter of Human and Peoples' Rights: Problems and Prospects for Regional Action, Australian Yearbook of International Law, 1987.

MISCELLANEOUS

1. United Nations Economic and Social Council, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 'Report on the Practice of Administrative Detention, submitted by Mr Louis Joinet', E/CN.4/Sub.2/1989/27 (6 July 1989).

2. International Commission of Jurists, States of Emergency: Their Impact on Human Rights (1983).
3. H Waldock, 'Second Report on the Law of Treaties.' Year Book of the International Law Commission, (1963) Volume II.
4. Economic, Social and Cultural Rights Handbook for National Human Rights Institutions, Professional Training Series no.12, United Nations New York and Geneva, 2005.
5. Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, with commentaries thereto. Yearbook of the International Law Commission, 2006, vol. II, Part Two.

STATEMENT OF FACTS

1. Kuntakinte is a sovereign developing country in West Africa which gained independence in 1967 from Busia. It consists of three regions: Bamileke which is predominantly traditional, whereas Zinza and Oyo are predominantly Christian and Islamic respectively. 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 region of the country has remained traditional and has resisted any attempt to inculcate Christianity and Islam into the region. A proud traditional people, the Bamileke have continued with their traditional ancestral worship and have a well-developed system of customary law. One of their religious practises is the *trokosi* custom which involves the pledging of a girl whose family member has committed a crime against the gods to the Fetish priest. A 2014 study by the Kuntakinte Human Rights Observatory (KHRO) revealed that there has been a steady decline in the number of *trokosi* cases over the last decade as a result of the government's engagement with the traditional leaders in the Bamileke region regarding this issue.
3. A local youth group in Malinke on 10 November 2014 together with hundreds of young people stormed the local government office in the region, burnt it down and beheaded five senior employees. President Bobo publicly branded the Young Panthers as a terrorist organisation and vowed to hunt them down wherever they may be in the world.
4. In support of the global fight against terrorism and in solidarity with the government of Malinke, the government of Kuntakinte arrested young people believed to have links with the Young Panthers group. A senior army officer was heard talking of various ways of extracting information from the PDF inmates including torture however he was suspended indefinitely from the army, pending investigations.

5. Section 246 of the 1969 Criminal and Other Offences Act of Kuntakinte, which was introduced by the Busia colonial power but retained after independence, criminalises 'conducts against the order of nature'. This provision has served as the legal basis to prosecute adults engaged in consensual same-sex relations. Opinion polls conducted in 2002 by the Kuntakinte Broadcasting Corporation (KBC) showed that about 93 per cent of Kuntakinte's predominantly Christian and Muslim population support the criminalisation of same-sex relations. .
6. Abiba and 14 of her colleagues from the Law School applied to register the National Union of Gay and Lesbians of Kuntakinte (NUGAL). In July 2012, the Companies and Societies Registry rejected their application on the basis that the Constitution of Kuntakinte did not recognise homosexuals and that the objectives of the organisation were contrary to section 17(2)(a) of the Societies Act.

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

7. The African court lacks jurisdiction to adjudicate this matter as Kuntakinte gave a notice of withdrawal from the *Protocol*. Moreover all issues of the case are inadmissible as there has been no exhaustion of local remedies.
8. Kuntakinte did not violate Article 6 of the African Charter in arresting the PDF detainees since it was prescribed by law. Additionally, there is no conclusive evidence to confirm the conditions that the conditions are inhumane.
9. The restriction of Article 10 on freedom of association by refusing to register NUGAL met the requirements set forth in *Castañeda Gutman v. México* since it was prescribed by law, pursued a legitimate interest and was necessary for maintaining moral order in Kuntakinte.
10. Kuntakinte has taken all appropriate steps to eradicate *trokosi* custom under *African Charter on the Welfare of a Child* and the *Protocol to the African Charter of Human and Peoples Rights on the Rights of Women in Africa*.

MERITS

I. THE AFRICAN COURT LACKS JURISDICTION OVER THE CASE AND ALL ISSUES OF THE CASE ARE INADMISSIBLE.

Jurisdiction

A. Kuntakinte has given a valid notice of withdrawal from the Protocol

11. Kuntakinte is no longer a party to the *Protocol* hence the court lacks jurisdiction to adjudicate over the matter. The *Protocol* lacks a denunciation clause thereby leaving a lacuna on how a party may withdraw from the same. A treaty lacking a denunciation or withdrawal clause may permit exit if it is a treaty of arbitration, conciliation or judicial settlement and a treaty which is the constituent instrument of an international organization.¹ Moreover, the Commission noted in *Civil Liberties Organisation v Nigeria* that a party seeking to withdraw from the African Charter only had to give a notice on the same and the withdrawal would be valid.²

12. It is the respondents' submission that the African Protocol is one of a judicial settlement nature and hence permits for its withdrawal in spite of lacking an express denunciation clause. Moreover the government of Kuntakinte gave a notice of its withdrawal as required.³ Such notice amounts to valid withdrawal. This in turn ousts the jurisdiction of the African Court to determine this matter.

B. Article 56 of the *VCLT* has not attained the status of customary international law.

13. Kuntakinte is not bound by the 12 month notice requirement for a withdrawal to be effected under article 56 of the *VCLT*. This is justified by the fundamental principle of treaty law that treaties are only binding upon parties.⁴ The *VCLT* only regulates the

¹ H Waldock, 'Second Report on the Law of Treaties'[1963] YBILC, Vol II, 36 draft Art 17 (3) (a) and (b).

² *Civil Liberties Organisation v Nigeria* (2000) AHRLR 188 (ACHPR 1995) [12].

³ Facts sheet, para 23.

⁴ Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (1951), Advisory Opinion, ICJ Rep 15, [21].

legal relations of those states that are parties to it.⁵ It partly reflects customary international law however this reflection only applies to certain provisions such as rules on interpretation,⁶ material breach,⁷ and fundamental change of circumstances.⁸ Others may not be so regarded, and constitute principles binding only upon state parties.⁹

14. It would be contrary to international law for a treaty to create obligations on a third party state without its consent.¹⁰ Kuntakinte is thus not bound by the requirements of article 56 of the *VCLT* and the withdrawal ought to take effect immediately a formal communication was sent to the Chairperson of the African Union Commission. The court subsequently lacks jurisdiction.

C. Kuntakinte's unilateral declaration on its withdrawal is legally valid.

15. The withdrawal of Kuntakinte based on the declaration made by President Adonai is legally valid. A unilateral declaration shall be valid once it is publicly made and manifests the intention to be bound.¹¹ The effect of a declaration all depends on the intention of the state in question.¹² When it is the intention of the state making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking that is binding.¹³ In such circumstances, no subsequent acceptance of the declaration nor any reply or reaction from other states is required for the declaration to take effect.¹⁴ The declaration by President Adonai clearly expressed the intention of withdrawal from the Protocol. Such

⁵ M Dixon, *Textbook on International Law* (6th edition Oxford University Press 2007), pg 59.

⁶ *Golder v United Kingdom*, Application No. 4451/70, Judgement, 21 February 1975 [14]; *Lithgow and Others v United Kingdom*, Application No. 9006/80, Judgement, 8 July 1986[114].

⁷ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Rep 16, [47].

⁸ *Fisheries Jurisdiction Cases (United Kingdom v Iceland; Federal Republic of Germany v Iceland)* (1973) ICJ 3 [21].

⁹ M Shaw, *International Law* (7th edition Cambridge University Press 2014) pg 655.

¹⁰ *Supra* n4

¹¹ Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, with commentaries thereto, Yearbook of the International Law Commission, 2006, vol. II, part two, Principle 1.

¹² *Case concerning the Frontier Dispute (Burkina Faso v. Republic of Mali)*, (1986) ICJ 554, [39].

¹³ *Nuclear Test Cases (Australia v France; New Zealand v France)* (1974) ICJ 457 [43].

¹⁴ *Ibid.*

intention is further ratified by the enactment of the African Protocol Renunciation Act by the parliament.¹⁵

16. Moreover, the declaration was made by the head of state of Kuntakinte hence binding the state internationally. This is buttressed on the requirement that a declaration must be made by an authority vested with the power to do so.¹⁶ It is a well-established rule of international law that the Head of State, the Head of Government and the Minister for Foreign Affairs are deemed to represent the state and unilateral acts by them have the force of international commitments.¹⁷ In the present case, the declaration was made by the president of Kuntakinte.¹⁸ Based on the foregoing, it is the respondents' contention that the declaration on the decision to withdraw from the Protocol was legally binding thereby the court lacks jurisdiction to adjudicate the matter.

Admissibility

17. The Court shall decide on the admissibility of a case pursuant to article 56 of the *African Charter* which sets exhaustion of local remedies as a prerequisite for admissibility.¹⁹

18. All issues brought forward are inadmissible in their individual capacities pursuant to lack of fulfilment of the requisite conditions:

A. There has been no attempt to seek recourse in the national courts with regards to the *trokosi* custom.

19. RWB failed to seek remedy in the local courts of Kuntakinte hence failing to exhaust the local remedies rule.²⁰ A local remedy has been defined as "any domestic legal action that may lead to the resolution of the complaint at the local or national level."²¹

¹⁵ Facts Sheet, para 23.

¹⁶ *Supra* n11, principle 4.

¹⁷ Case concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Judgment of 3 February 2006, Jurisdiction of the Court and Admissibility of the Application, [46].

¹⁸ *Supra* n13.

¹⁹ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Article 6(2).

20. It was noted by the African commission that an international tribunal should only be available as a court of last resort.²² This is so as to give a government notice of a human rights violation in order to have the opportunity to remedy such violations before being called before an international body.²³ It is a mandatory requirement and failure to do so would amount to non exhaustion of local remedies and in turn inadmissibility.²⁴ The issue on the trokosi custom is inadmissible for lack of satisfaction of the local remedies

B. All appellate procedures have not been exhausted with regards to the issue on the PDF inmates.

21. With regards to the case on the PDF inmates, the local remedies have also not been fully exhausted. It was noted in *Paul Haye v The Gambia* that the exhaustion of local remedies doesn't preclude exhaustion of appellate procedures.²⁵

22. It is not enough for the complainant to cast aspersion on the ability of the domestic remedies of the State due to isolated or past incidences.²⁶ Arguing that local remedies are not likely to be successful without trying to avail oneself of them, will not act as an exemption to the local remedies rule.²⁷ The Human Rights Committee in *A v. Australia* observed that "mere doubts about the effectiveness of local remedies ... did not absolve the author from pursuing such remedies."²⁸

23. The applicants in this case therefore have no basis in failing to have appealed to the supreme court on the grounds that such applications brought before it have been

²⁰ African Charter, Article 56(5).

²¹ *Ceesay v The Gambia*, (2000) AHRLR 101 (ACHPR 1995).

²² *Anuak Justice Council v Ethiopia* (2006) AHRLR 97 (ACHPR 2006) [48]

²³ *Free Legal Assistance Group and others v Zaire*, (2000) AHRLR 74 (ACHPR 1995) para.36, and *Rencontre africaine pour la défense des droits de l'Homme v Zambia*, (2000) AHRLR 321 (ACHPR 1996) [10].

²⁴ *Dumbuya v The Gambia* (2000) AHRLR 103 (ACHPR 1995).

²⁵ *Paul Haye v The Gambia*, (2000) AHRLR 102 (ACHPR 1995) [4].

²⁶ *Supra* n4, para 58.

²⁷ *Ibid.*

²⁸ Communication 560/1993, UN Doc CCPR/C/59/D/560/1993(1997).

struck out.²⁹ Such assumptions lack persuasion as noted above and amount to non exhaustion of local remedies.

C. The case is still pending in the national courts hence remedies are not fully exhausted.

24. On the registration of NUGAL, the local remedies have not been exhausted. A case that is pending before national courts is regarded inadmissible before an international tribunal.³⁰ This is based on the principle that a state should first of all have the means of rectifying through its own means and within the framework of its own national legal system.³¹ Hence there ought to be completion of a case within the national courts before an appeal can be made to an international tribunal.

25. Exhaustion of local remedies is still required in spite of perceived lack of independence by the judiciary. A complainant's apprehension about the perceived lack of independence of a country's domestic institutions did not absolve an author from pursuing such remedies.³² The same was reflected in *Bakweri Land Claims Committee v Cameroon* where it was held that the fact that the complainant strongly feels that it could not obtain justice from the local courts does not amount to saying that the case has been tried in Cameroonian courts.³³ The complainant is not absolved of the duty to exhaust the local courts based on the same.

26. More importantly a declaration should not hinder the applicant from pursuing the available remedies. The Commission noted that in spite of the President of Kenya making declarations notwithstanding the pending case before the Kenyan court, the case was still inadmissible for lack of exhaustion of local remedies.³⁴

²⁹ Facts sheet, para 18.

³⁰ *Association Que Choisir Benin v Benin* (2005) AHRLR 43 (ACHPR 2005).

³¹ *Ibid*, para 32.

³² *Kenyan Section of the International Commission of Jurists and Others v Kenya* (2004) AHRLR 71 (ACHPR 2004) 42.

³³ (2004) AHRLR 43 (ACHPR 2004) 55.

³⁴ *Kenya Human Rights Commission v Kenya* (2000) AHRLR 133 (ACHPR 1995) 7.

27. The applicants failed to fulfil this requirement since the petition on the registration of NUGAL is still pending before the high court and a determination has not yet been made.³⁵

³⁵ Facts sheet, para 22.

II. KUNTAKINTE IS JUSTIFIED IN RESPECT OF THE CIRCUMSTANCES LEADING TO THE DETENTION OF THE INMATES OF PDF AND THE CONDITIONS UNDER WHICH THEY ARE DETAINED.

A. The government of Kuntakinte limited their right to liberty on reasonable grounds.

28. Kuntakinte was justified in limiting the right to liberty of the PDF detainees. The right to liberty may be limited by a state in accordance with the law.³⁶ No limitation on the exercise of human rights shall be made unless provided for by national law.³⁷ Deprivation of liberty is a legitimate form of state control over persons within its jurisdiction.³⁸ Such detention however shall be ordered by, or be subject to the effective control of, a judicial or other authority.³⁹

29. In line with the limitation, the police are allowed to arrest someone when it is considered reasonably necessary to prevent commission of an offence.⁴⁰ The detention ought to be strictly necessary and it must be proven that no less stringent measures could have been sufficient for that purpose.⁴¹ Moreover it was noted by the House of Lords that in the context of terrorism, a state need not establish the reasonableness of the suspicion grounding the arrest of a suspected terrorist by disclosing confidential sources of information.⁴²

30. It is the respondents' contention that the detention of the inmates was based on reasonable suspicion but based on the fear of compromising national security, it cannot disclose such information. Additionally, the inmates have links with Young

³⁶ ICCPR, Article 9; African Charter, Article 6.

³⁷ 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 15.

³⁸ www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/substantive-human-rights/the-right-to-liberty.

³⁹ Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment General Assembly Resolution 43/173 (9 December 1988) principle 4.

⁴⁰ *Ostendorf v Germany*, Application No. 15598/08 (2013) [82].

⁴¹ *Ambruszkiewicz v Poland*, Application No. 38797/03(2006) [29-32].

⁴² *O'Hara v United Kingdom* (1996) UKHL 6 [35].

Panthers group⁴³ which has been declared a terrorist organisation and hence they also stand as a threat to Kuntakinte.

B. The principle of preventive detention allows for the lack of being informed of the charge.

31. The International Commission of Jurists' Study on States of Emergency defines preventive detention as:

“the deprivation of a person’s liberty, whether by order of the Head of State or of any executive authority, civil or military, for the purposes of safeguarding national security or public order, or other similar purposes, without that person being charged or brought to trial.”⁴⁴

32. The purpose of preventive detention is to safeguard national security or public order⁴⁵ and as was noted by Lord Finaly in *R v Halliday*, ‘it is not a punitive but a precautionary measure’.⁴⁶ It serves, not to punish a man for having done something but to intercept him, before he does it, and to prevent him from doing it.⁴⁷ Detention occurs without charge or trial.⁴⁸

33. Preventive detention falls under the exceptions of the right to liberty and freedom from arbitrary arrest as it is not an absolute right.⁴⁹ The Human Rights Committee acknowledged its existence in its General Comment paper⁵⁰ as well conceding that “...administrative detention may not be objectionable in circumstances where the

⁴³ Facts sheet, para 16.

⁴⁴ International Commission of Jurists, *States of Emergency: Their Impact on Human Rights* (1983), 394.

⁴⁵ United Nations Economic and Social Council, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, ‘Report on the Practice of Administrative Detention, submitted by Mr Louis Joinet’, E/CN.4/Sub.2/1989/27 (6 July 1989), 7.

⁴⁶ (1917) AC 216.

⁴⁷ *Union of India v Paul Nanickan and Another*, (2003) INSC 516.

⁴⁸ Claire Macken, “Preventive detention and the Right of Personal Liberty and Security under the International Covenant on Civil and Political Rights, 1966” (2005) *Adelaide Law Review* 1, 3.

⁴⁹ ICCPR, Article 4(2).

⁵⁰ ICCPR General Comment No. 8: Article 9 (Right to Liberty and Security of Persons) Adopted at the Sixteenth Session of the Human Rights Committee, on 30 June 1982.

person concerned constitutes a clear and serious threat to society which cannot be contained in any other manner....”⁵¹

34. It is the respondents’ submission that arresting of the suspected terrorists was justified pursuant to the principle of preventive detention. They have been proven to be a threat based on the vile acts they committed in Malinke⁵² and considering that Kuntakinte has an open arms approach to immigrants,⁵³ it is only prudent that it takes measures to ensure that public order is maintained.

C. The applicant has not furnished any evidence to substantiate the claim of torture or the conditions at PDF.

35. In the deprivation of liberty it is not presupposed that the police have sufficient evidence to bring charges at the time of arrest or while the applicant was in custody.⁵⁴ The object of questioning during detention is to further the criminal investigation by way of confirming or dispelling the suspicion grounding the arrest.⁵⁵

36. It was noted by the African Commission in *Ouko v Kenya* that although the complainant had claimed a violation of his right to freedom from torture, he had to substantiate the claim and in the absence of such information, the Commission could not find a violation as alleged.⁵⁶ Witness testimony would amount to sufficient evidence in such a matter by the aggrieved party.⁵⁷ Uncorroborated hearsay evidence cannot be found sufficient to substantiate the same.⁵⁸

37. The police have the mandate to question the inmates in order to get more evidence and RWB in this case however fails to substantiate its claim with regards to what is

⁵¹ *D.A. Cámpora Schweizer v. Uruguay* Communication No. 66/1980, U. N. Doc CCPR/C/OP/2 (1990) para.18.1.

⁵² Facts sheet, para 12.

⁵³ Facts sheet, para 13.

⁵⁴ *Petkov and Profirov v. Bulgaria*, Application No. 50027/08 (2014) ECHR 24, [52].

⁵⁵ *Brogan v. United Kingdom*, Application No. 11266/84(1988) ECHR 24 [52-53].

⁵⁶ *Ouko v. Kenya* (2000) AHRLR 135 (ACHPR 2000) [26].

⁵⁷ *Irene Bleier Lewenhoff & Rosa Valino de Bleier v. Uruguay*, Communication 30/1978, U.N.Doc. CCPR/C/OP/1(1985) [13.3].

⁵⁸ *Labita v Italy*, Application No. 26772/95 (2000) ECHR 161 [156].

happening in PDF. The information from the journalist is uncorroborated and in spite of inconclusive evidence, the government has already taken steps to investigate the matter and has indefinitely suspended the army officer who made the claim.

III. KUNTAKINTE DID NOT VIOLATE THE AFRICAN CHARTER AND OTHER RELEVANT TREATIES BY REFUSING TO REGISTER NUGAL.

38. The respondent recognises the freedom of association under the *African Charter*⁵⁹ and other treaties to which it is a party to.⁶⁰ The freedom of association is not absolute and may be limited by a state. The regulation of the freedom of association should be consistent with state obligations under the *African Charter*.⁶¹ In assessing the legality of restricting a human right the following factors are considered; lawfulness, purpose and necessity and proportionality of the restrictive measure.⁶²

A. The limitation was prescribed by law.

39. On the first element of legality, the registration of NUGAL was rejected pursuant to section 17(2) (a) of the *Societies Act* on two grounds: for unlawful purposes and for objects incompatible with good order and morality of Kuntakinte.⁶³

40. International law recognises these grounds for limiting freedom of association.⁶⁴ Furthermore the limitation was not arbitrary as it was prescribed by a law that was in force at the time of the restriction and it was sufficiently precise.⁶⁵

41. The requirement that the restricting instrument is foreseeable⁶⁶ is met due to the fact that the applicant bore in mind that homosexuality was criminalised in Kuntakinte and therefore the purpose of the organisation was unlawful. The wording of section 17(2) (a) is also unambiguous and unmistakable⁶⁷ and clearly states the parameters of restriction by the registrar.

⁵⁹ African Charter, Article 10.

⁶⁰ ICCPR, Article 22; ICESCR, Article 8.

⁶¹ African Commission Resolution on the Right to Freedom of Association of 1992.

⁶² *Castañeda Gutman v. México* Judgment of August 6 2008, Series C no.184, IACtHR [175-205].

⁶³ Facts Sheet, para. 21.

⁶⁴ *Supra* n37 [15-27].

⁶⁵ *Amuur v France* Application no.19776/92, Judgement of 25 June 1996, ECHR [50].

⁶⁶ *N.F v Italy*, Application no.37119/97, Judgement of 2 August 2001, ECHR [6].

⁶⁷ *Coco v R* (1994) HCA 15[8-9].

B. The limitation was pursuant to a legitimate interest.

42. On the element of purpose, the applicant reiterates that section 246 of the 1969 of *Criminal and Other Offences Act* criminalises acts against the order of nature. In *Tajjour v New South Wales*,⁶⁸ the Court gave the rationale for limiting freedom of association on grounds of illegality. It stated that an association may expose or lead to involvement in criminal activity.⁶⁹ This reasoning fits perfectly with the aims of not registering NUGAL since its members may influence other members to become homosexuals.

C. The restriction is necessary to preserve moral interests.

43. Human Rights Committee *General Comment Number 34* provides that restrictions meant to protect morals must be based on principles not deriving exclusively from a singly tradition.⁷⁰ According to a survey carried out by Kuntakinte Broadcasting Corporation,⁷¹ 93% of the Muslim and Christian population supported the criminalisation of same-sex relations. This restriction protects morals in two groups of culture as well as the Bamileke people and meets the above criterion.

D. The restriction is of a general character and not discriminatory.

44. For a limitation to be lawful, it must be of general application which does not single out one group but applies across the board.⁷² Once this requirement is met the restriction cannot be said to be discriminatory.⁷³ No words under section 17(2) (a) of the *Societies Act* single out NUGAL for non-registration.⁷⁴

⁶⁸ *Tajjour v State of New South Wales* (2014) HCA 35.

⁶⁹ *Ibid.*

⁷⁰ Human Rights Committee General Comment No.34 on Article 19 Freedom of Opinion and Expression, 102nd Session Geneva 11-29 July 2011 [32].

⁷¹ Facts Sheet, para.8.

⁷² *Prince v South Africa* ((2004) AHRLR 105 (ACHPR 2004)) [44].

⁷³ *Ibid.*

⁷⁴ *Supra* n5.

E. One of the objects of the African Charter is to protect African values.

45. Alternatively, the applicant seeks to rely on the rights provided in the African Charter on freedom of association of all people.⁷⁵ However, the *African Charter* in its preamble and throughout its text aims at promoting African values.⁷⁶ Provisions such as article 61 empower the African Commission to take into consideration African customs which are legally binding as a subsidiary means of determining the law.⁷⁷ Treaties should not only be interpreted literally without taking its objects and purpose into consideration.⁷⁸ It will defeat the object of the African Charter to register NUGAL which seeks to promote activities parallel to African customs.

⁷⁵ African Charter, Articles 2, 10, and 19.

⁷⁶ R.M.D.'Sa, 'African Charter of Human and Peoples' Rights: Problems and Prospects for Regional Action' Australian Yearbook of International Law, 1987, pg.106.

⁷⁷ African Charter, Article 61.

⁷⁸ VCLT, Article 31.

IV. KUNTAKINTE IS NOT IN VIOLATION OF THE AFRICAN CHARTER AND OTHER RELEVANT TREATIES BY NOT PROVIDING FOR THE ABOLITION OF THE TROKOSI CUSTOM OF THE BAMILEKE PEOPLE.

A. Kuntakinte has made positive steps towards eradication of *trokosi* custom.

46. A state has a tripartite obligation to protect, respect and fulfil human rights.⁷⁹ The state acknowledges its obligation under Articles 1(3) and 21(1) of the *African Charter on the Rights and Welfare of the Child*⁸⁰ to discourage and take appropriate measures to eliminate practices harmful to the child such as the *trokosi* custom. Further, Article 5 of the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*⁸¹ requires the state to take measures to eliminate such practice.

47. Progressive realization should not be misinterpreted as depriving the obligation of all meaningful content.⁸² It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights.⁸³ This is a 'specific and continuing' obligation.⁸⁴

48. To this end, Kuntakinte has been engaging with the Bamileke leaders on the *trokosi* custom for the past one decade. This program has led to a steady decline in the practice as it has been reported in a study conducted by Kuntakinte Human Rights Observers in 2014.⁸⁵

⁷⁹ Human Rights Committee, General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc CCPR/C/21/Rev.1/Add13 (2004).

⁸⁰ African Charter on The Rights and Welfare of The Child, OAU Doc.CAB/LEG/24.9/49, adopted on 11 July 1990, entered into force on 29 November 1999, Article 1(3) and 21(1).

⁸¹ Protocol to the African Charter of Human and Peoples' Rights on the Rights of Women in Africa, ratified on 11 July 2003, entry into force 25 November 2005, Article 5.

⁸² CESCR, General Comment 3: The Nature of States Parties' Obligations, UN Doc E/1991/23, annex III, [9].

⁸³ Ibid.

⁸⁴ CESCR, General Comment 14: The Right to the Highest Attainable Standard of Health, UN Doc E/C.12/2000/4 (2000) [31].

⁸⁵ Facts sheet, para 5.

B. Kuntakinte has a margin of appreciation in implementing its human rights obligations.

49. A State has a certain “margin of discretion” to determine the best manner of implementing its obligations relating to economic, social and cultural rights, depending on its local conditions.⁸⁶ The Commission recognised the importance of this doctrine and explained that the state is better placed in adopting national policies aimed at promoting and implementing human rights.⁸⁷

50. Due to its direct continuous knowledge of the society’s needs, resources and the balance needed to be struck between competing and even conflicting forces that shape society, a state has a wide margin of appreciation.⁸⁸ In exercising that discretion, Kuntakinte chose a means of implementing its human rights obligations⁸⁹ through educational awareness since it is better placed to make such decisions.

C. Legislation is not the only means of eradicating *trokosi* custom.

51. ‘All appropriate means’ includes not only legislative steps but also social and educational measures consistent with the state’s obligations.⁹⁰ It is important to note that domestic legislation does not comprehensively provide for effective remedies for every human rights violation. An example being where there are mass systematic

⁸⁶ Howard C. Yourow, *The Margin Of Appreciation Doctrine In The Dynamics Of European Human Rights Jurisprudence* (1996); Eva Brems, *The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights* 56 ZA ORV (Heidelberg J. Int’l L.) 240 (1996).

⁸⁷ *Prince v South Africa* [(2004) AHRLR 105 (ACHPR 2004)] [51].

⁸⁸ *Hatton and others v The United Kingdom* (Application No. 36022/97) Judgment 8 July 2003, 88.

⁸⁹ *supra* n22 and n23.

⁹⁰ The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, UN Doc E/CN.4/1987/17, annex (1987) [17]; Office of the United Nations High Commissioner for Human Rights, Fact Sheet No 16 (Rev 1): The Committee on Economic, Social and Cultural Rights (1991); CESCR, General Comment 14, The Right to the Highest Attainable Standard of Health, UN Doc E/C.12/2000/4 (2000) [33].

violations which require assessment of structural, social and economic factors which permit the violations using a people-centred approach.⁹¹

52. Considering that the Bamileke region has resisted Islam and Christianity and still practices its tradition of which *trokosi* forms part,⁹² Kuntakinte decided to use educational awareness programs to eradicate the custom. The appropriateness of the method is assessed from the unique circumstances of the massive violation and the traditional culture of the Bamileke people.

⁹¹ Economic, Social and Cultural Rights Handbook for National Human Rights Institutions, Professional Training Series no.12, United Nations New York and Geneva, 2005, pg 54.

⁹² *supra* n27.

RELIEFS SOUGHT

53. For the forgoing reasons, the Respondent State requests this honourable court to adjudge and declare that:

- I. The Court does not have jurisdiction to determine this matter and that the case is not admissible before the Court hence dismiss the case;
- II. The Republic of Kuntakinte has not violated the *African Charter* or any other relevant treaties in respect of the circumstances that led to the detention of the inmates of PDF as well as in respect of the conditions of detention in PDF. The state also requests to be given enough time to do investigations with regards to the conditions at PDF to confirm the alleged violations;
- III. The Republic of Kuntakinte has not violated its international obligation by refusing to register NUGAL and that the prohibition on the registration should stand;
- IV. The Republic of Kuntakinte has not violated the African Charter and other treaties concerning the abolishment of the trokosi custom of the Bamileke people and the State should be allowed a margin of discretion to handle the matter as it has been doing to ensure the complete eradication of the custom.