

10th World Human Rights Moot

Court Competition

15-20 July 2018

Geneva, Switzerland

IN THE MATTER BETWEEN

HUMANITY FIRST

AND

THE STATE OF ST. PRIYAH AND MIYAH

MEMORIAL FOR THE APPLICANT

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LIST OF ABBREVIATIONS

[]	Paragraph
ACHPR	African Commission on Human and Peoples' Rights
ACHR	American Convention on Human Rights
AfCtHPR	African Court on Human and Peoples Rights
AHRLR	African Human Rights Law Report
CAAF	Court of Appeals for the Armed Forces
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Commission on the Elimination of Discrimination against Women
CC	Constitutional Court
CJ	Chief Justice
CR	Continent of Racoons
ECHR	European Convention on Human Rights
ICCPR	international Covenant on Civil and Political Rights
GANGS	Generals Against Narcotics and Gangs
HF	Humanity First
MP	Military Police
NGO	Non-Governmental Organisation

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PM	St Priyah and Miyah
RAMINE	Racoonian Mission in Nehiko
RC	Racoons Convention
RU	Racoons Union
RCEW	Racoons Convention on Empowerment of Women
RHRC	Racoons Human Rights Court
SC	Supreme Court

TABLE OF AUTHORITIES

Treaties, Conventions & Charters

ACHR	<i>American Convention on Human Rights,</i> <i>“Pact of San José, Costa Rica”,</i> opened for signature 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978).
ACHPR	<i>African Charter on Human and Peoples</i> <i>Rights,</i> Adopted in Nairobi 27 June 1981, (entered into force 21 October 1986)
CEDAW	<i>Convention on the Elimination of all forms</i> <i>of Discrimination against Women,</i> opened for signature 18 December 1979, 1249 UNTS 13, (entered into force 3 September 1981)
ICCPR	<i>International Convention on Civil and</i> <i>Political Rights,</i> opened for signature 16 December 1966, 999 UNTS 171, (entered into force 23 March 1976)
ECHR	<i>European Convention on Human Rights,</i>

(entered into force on 21 September 1970)

RHRC	<i>Raccoons Human Rights Convention of 1985</i>
SADC	Southern African Development Committee Protocol on Gender and Development
VCCR	<i>United Nations, Vienna Convention on Consular Relations, 24 April 1963,</i>
VCLT	<i>Vienna Convention on the Law of Treaties,</i> opened for signature 23 May 1969, 115 UNTS 331, (entered into force 27 January 1980)

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Anti-Corruption Act	<i>Anti-Corruption Act of 2003</i>
Armed Forces Pension Act	<i>Armed Forces Pension Act</i>
Uniform Code	<i>St Priyah and Miyah Uniform Code of Military Justice of 1987</i>

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SUMMARY OF FACTS

St Priyah and Miyah (PM) is a federal state on the east of the Continent of Racoons and is a member of the United Nations as well as a state party to the Racoons Convention and all major international human rights law treaties except for the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment (hereinafter referred to as (CAT)).

In 2017, Robin Martinez was sentenced to death by lethal injection for the crime of desertion. The sentence was upheld on appeal by the Court of Appeal for the Armed Forces. Dr Arturo Moto was sentenced to death for the crime of grand corruption under the Anti-Corruption Act of 2003. He duly appealed to the Supreme Court of PM which upheld the sentence. Dr Arturo Moto sent an urgent letter to the UN Special Rapporteur which led to a stay of execution, by PM.

Geraldo del Junko was convicted of drug and human trafficking committed in PM and was sentenced to death. Geraldo's lawyer argued before the Constitutional Court that the extradition was in violation of his human rights. Geraldo Del Junko was also tortured whilst in Nehiko at an outpost stationed by the Racoonian Mission in Nehiko (RAMINE). Humanity First is local Non-Governmental Organisation with observer status in the Racoons Human rights system. Humanity First, subsequently published reports since 2014 in which General Sanchez was accused of torturing drug and human trafficking suspects.

Sonya Diaz and Colonel Robin Martinez married in terms of the Sokotah religion. This marriage was held by the Constitutional Court to be a legal nullity under the Anti-Child Marriages Act of 2015, as Sonya Diaz was below the requisite minimum age.

Humanity First duly resolved to approach the Racoons Human Rights Court, claiming that PM violated the right to life, right to freedom from torture and the right to found a family and other related rights.

SUMMARY OF ARGUMENTS

1. Applicant submits that PM's imposition of death penalty on Robin Martinez, Dr Arturo Moto and Garaldo del Junko is arbitrary and in violation of the right to life as provided for in Article 6 of ICCPR and other human rights instruments signed and ratified by PM. To prove arbitrariness, Applicant will – for each victim – either show that the charges were inappropriate; that the trial court was impartial or an inappropriate forum; that there was reliance on illegally obtained evidence; that PM failed to respect the rights of accused person before extradition; that the sentence imposed was disproportionate or impermissible in terms of international human rights law.
2. Applicant submits the right to freedom from torture is a peremptory norm of *jus cogens*. It is an absolute right and there can never be justification for subjecting any person to torture regardless of the conduct of the victim in question. The torture of Junko by PM agents is inexcusable and a violation of freedom from torture.
3. PM's blanket prohibition of marriage for those aged above 16 years but under 18 years is arbitrary, unreasonable and disproportionate to the extent of violating the right to found a family. In the present case, the right to found a family is linked to other important rights like religion and inheritance.

PRELIMINARY ISSUES

a. Jurisdiction of the Court

Applicant submits that PM has jurisdiction to adjudicate over human rights treaties ratified by PM. As regards the claim on the prohibition against torture, it is part of customary international law and as such it does not matter that PM has not ratified CAT. In any event, this honourable court has the competence to determine questions as to its jurisdictional competence under the *competence de la competence* principle.¹

b. *Locus standi* of Applicant

Legal standing in the RHRC is governed by rules similar to those of the African Court on Human and Peoples Rights (ACHPR). Article 5(3) of the Protocol² gives Non-Governmental Organisations (NGOs) with observer status³ legal standing before the Court. Applicant fulfils the *locus standi* requirements.

c. Admissibility of claims

Applicant notes that Article 46 of the ACHR requires that before a claim is admissible before an international or regional tribunal, the remedies under domestic law should have been pursued and exhausted.⁴ The application should also be lodged within six months⁵ from the day of exhaustion of domestic remedies and should not be pending before any other international tribunal for determination.⁶

¹ Benjamin [81]

² Article 5(3) of the Protocol

³ Facts [11]

⁴ Art 46, ACHR

⁵ Ibid

⁶ Ibid

The exhaustion of domestic remedies rule is fundamental. It is, however, not absolute. Domestic remedies should only be exhausted if they are available, sufficient⁷ and effective.⁸ Furthermore, domestic remedies must not be unduly prolonged.

First, regarding the claim on violations of the right to life, local remedies were exhausted. In the case of Robin Martinez, after having been convicted of the crime of desertion and sentenced to death by the Military Court,⁹ Martinez appealed to the CAAF which upheld the conviction and sentence.¹⁰

In the case of Arturo Moto, after having been convicted of grand corruption with aggravating circumstances¹¹ and sentenced to death,¹² an appeal was lodged to the Supreme Court,¹³ which appeal failed to offer any prospects of success. Domestic remedies were unavailable.

In the case of Junko, the CC of PM did not provide an adequate remedy to redress the alleged violation.¹⁴ There exists no further appeal after the CC. Hence, domestic remedies were exhausted.

Second, regarding the violation of the right to freedom from torture, the CC dismissed the application on the basis that counsel had used foul language. The right to freedom from torture is a jus cogens norm, the Court ought to have heard the case on merits regardless of the technicality. In any event, the Court went ahead to admit evidence that was obtained as a result of torture. Thus, even if the victim had tried to lodge his application again, there was no prospect of success. The local remedies are unavailable. The Government of PM has been aware of the torture practices of GANGs but nothing has been done. The

⁷ Las Palmeras [58]

⁸ Velásquez-Rodríguez [66]; Judicial Guarantees [24], Jawara [32],

⁹ Facts [19]

¹⁰ Ibid

¹¹ Facts [21]

¹² ibid

¹³ ibid

¹⁴ Facts [20]

Government, in a way, acquiesce to the conduct of torture. As such, there were no prospects of success as far as local remedies are concerned.

Third, regarding the violation of the right to found a family, the CC dismissed the application which was lodged by Diaz and Martinez concerning their marriage stating that it was no longer possible for the court to take into account the specific circumstances of the case as Martinez was now deceased.¹⁵ The Chief Justice made a pronouncement on the merits and his statement was indicative of the general attitude of the bench. Hence, remedies were exhausted.¹⁶ There was no prospect of success.

¹⁵ Facts [23]

¹⁶ *ibid*

ARGUMENTS ON MERITS

1. VIOLATIONS OF THE RIGHT TO LIFE

Applicant submits that PM is in violation of the right to life of Robin Martinez, Garaldo de Junko and Dr Arturo Moto. Before advancing the specific arguments on these three victims, Applicant seeks to first note the importance of the right to life as provided for in Article 6 of ICCPR and other human rights instruments.

The right to life is one of the most fundamental and basic human rights.¹⁷ It is a primordial right which inspires and informs all other rights.¹⁸ Its sanctity is reflected both in its ubiquitous recognition in international treaties.¹⁹ Without the right to life, one cannot enjoy all the other rights. It is foundational.

Applicant notes that the right to life is not absolute. What is prohibited is the arbitrary deprivation of the right to life. The UN Human Rights Committee has noted that “the notion of “arbitrariness” is not to be equated with “against the law”, but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability, and due process of law as well as elements of reasonableness, necessity, and proportionality”²⁰.

a. Robin Martinez

In relation to the death penalty imposed on Martinez and subsequently carried out, Applicant submits six reasons why the death penalty is an arbitrary deprivation of the right to life.

First, the charge of desertion levelled against Martinez does not fall under “the most serious crimes” for which states are allowed to impose a death penalty. It has been emphasised

¹⁷ McCann [147], Bugdaycay [531G.]

¹⁸ Bertrand, pg. xi, Makwanyane [217]

¹⁹ Bertrand pg. xii; See also Article 2 of the ECHR, Article 3 of the UDHR and Article 6 of the ICCPR providing for the protection of the right to life.

²⁰ General Comment 36, para 18.

numerous times in case law and UN human rights bodies that the term “most serious crimes” ought to be interpreted restrictively to cover *only* crimes of extreme gravity that involves intentional killing.²¹ No matter how serious in nature, if a crime does not *result directly and intentionally in death* – as is the case with Martinez’s case – a State cannot, within the framework of article 6 of ICCPR, impose the death penalty.²²

Second, assuming without agreeing that desertion falls under the category of “the most serious crimes”, Applicant submits that Martinez did not commit the crime of desertion. In this case, the charge itself was wrong and inappropriate. Army officers and law enforcement officials can only desert from lawful duties or orders. It is trite law – both domestically and internationally – that superior orders are not a defence to committing war crimes or violating law enforcement rules.

Army officers and law enforcement officials have a legal responsibility to refuse to carry out illegal orders. Martinez was being ordered to participate in the torturing of Junko in violation of the *jus cogens* norm on the prohibition of torture. His walking away from this illegality with a clear intention to report his superior was not desertion, it was, in fact, respect of the law that ought to have gotten him promotion. Instead, it got him an unlawful death.

Third, in the unlikely event that this honourable court concludes that there was desertion, still, Applicant argues that PM failed to apply its own domestic laws in imposing a death penalty on Martinez. Section 18 of PM’s Uniform Code of Military Justice of 1987 provides that in cases of desertion, death penalty can *only* be imposed if “a soldier commits the crime of desertion during an armed conflict to which PM is a party”. Applicant argues that the capture and torture of Junko was not a military operation that was part of the armed conflict

²¹ *Judge v Canada*, para. 10.6; *Yin Fong v Australia*, para. 9.7; *Chisanga v. Zambia*, para. 7.4; *Luboto v Zambia*, para. 7.2; *Johnson v Ghana*, para. 7.3; *Kindler v. Canada*, para. 14.3; ECOSOC Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, 25 May 1984, para. 1; UN Report of Special Rapporteur on extrajudicial, summary or arbitrary executions, 9 Aug. 2012, para. 35.

²² See para 39 of UN General Comment 36.

in Nehiko. It was a covert GANGs policing operation as clearly stated in the facts. As such, death penalty in terms of PM was inapplicable to the facts. General Comment 36 on the right to life makes it clear that a death penalty that is imposed after a State fails to follow its own laws is arbitrary and a violation of the right to life.

Fourth, Applicant submits that the trial of Martinez in a military court for an offence that carries death penalty was inconsistent with the recommendations of the UN Human Rights Committee. In terms of General Comment 36 on the right to life, “military personnel should not, as a rule, be tried for offences carrying the death penalty before a tribunal other than a civilian court affording all fair trial guarantees”.²³ That was not the case for Martinez.

Fifth, Applicant further submits that there is reason to believe that both the trial court and the court of appeal that dealt with Martinez’s case were impartial. The complainant and First Husband of PM, General Sanchez, has an overbearing influence in the army and reasonably, over military courts.²⁴ Before the sentencing of Martinez, General Sanchez publicly said Martinez “deserves the noose”.²⁵ For an appeal to be effective, the appellate court must not be unduly influenced.²⁶ Yet, appeal judges of CAAF, are appointed by the complainant’s wife – Lady Ladonya – the President of PM.²⁷ With respect, everything stinks of an injustice.

Sixth and finally, Applicant argues that before Martinez, PM had not executed anyone in 28 years. Effectively, before the recent execution of Martinez, PM was a *de facto* abolitionist state as far as death penalty is concerned. PM’s revival of death penalty in unwarranted circumstances was retrogressive and unfortunate.

²³ General Comment 36, para 49.

²⁴ Written Submissions p. 2

²⁵ Facts [19].

²⁶ Malawi African Association [94]

²⁷ Facts [19]

For the foregoing reasons, the death penalty imposed on Martinez came about when he was wrongly charged of desertion, subjected to a wrong and impartial forum that meted on him a disproportionate sentence given the circumstances. Such was an arbitrary deprivation of the right to life.

b. Dr Arturo Moto

In relation to Moto, Applicant submits three arguments that shows that the death penalty imposed upon him is arbitrary. Nevertheless, before articulating those reasons, Applicant notes that Moto has been on death row for the past five months. Unlike the case of Martinez and Junko, this honourable court can be able to save Moto's life for the following reasons:

First, Moto has been charged of an economic crime which does not fall under “the most serious crimes”²⁸ as explained above. Embezzlement by state officials cannot justify imposition of death penalty under article 6 of the ICCPR.²⁹

Second, as has been explained by the UN Human Rights Committee, State parties to the ICCPR “may not transform an offence, which upon ratification of the Covenant [the ICCPR], or at any time thereafter, did not entail the death penalty, into a capital offence”.³⁰ PM ratified the ICCPR in 1970 and only sought to transform corruption into a capital offense in 2003. This is untenable and the resulting death penalty that was imposed in terms of a 2003 Act is a violation of the right to life.

Third and finally, Applicant submits that the death penalty that was imposed on Moto stemmed from an unfair trial and cannot be justified. Moto's right to be tried within a

²⁸ Ibid [7.2]

²⁹ CCPR/C/79/Add.85, [8]

³⁰ Para 39, General Comment 36.

reasonable time was violated. The four-year period between his dismissal and the subsequent prosecution is unreasonable.

For the above reasons, Applicant submits that the death penalty imposed on Moto is arbitrary and should be set aside.

c. Garaldo del Junko

In relation to the death penalty that was imposed on Junko, Applicant submits four arguments.

First, the extradition of Junko was in violation of the non-refoulement principle. For the past 36 years, Nehiko has not carried out the death penalty for any crime. As such, Nehiko is *de facto* an abolitionist state on death penalty. While Applicant notes that PM had also not carried death penalty for considerable years, the President of PM had – around the same time that Junko was arrested – noted the intention to carry out death penalty. As such, it was certain that if Junko was to be extradited, a death penalty would be imposed and carried out. Ignoring all these facts, Junko was extradited and subsequently executed.

Second, Applicant submits that there is a potential case that PM failed to observe Junko's consular notice rights. Article 36 of the Vienna Convention on Consular Relations requires that foreign nationals arrested on criminal charges be granted access to their home-state consul and notified by the detaining authorities of their right to such access.³¹ The nationality of Junko is unknown, PM should have sought to ascertain his nationality before transferring him. Failure to do so potentially violates consular notification obligations.³²

Third, Applicant submits that PM relied on illegally obtained evidence to convict Junko and subsequently impose a death penalty. Junko was tortured for more than 11 hours and as

³¹ Art. 36, VCCR; OC-16/99

³² Davison pg. 307; Avena, [153]

such evidence obtained thereof is a product of a poisonous tree.³³ In *Gafgen v Germany*, evidence obtained through interrogations which amounted to torture was declared inadmissible at trial.³⁴ For the discouragement of torture, the law prohibits the use of statements or confessions obtained through torture in judicial proceedings.³⁵ The UN Human Rights Committee has observed that “a death sentence issued following a trial conducted in violation of domestic laws of criminal procedure or evidence will generally be both arbitrary and unlawful”.³⁶ This was the case in the trial of Junko.

Fourth and finally, PM’s failure to allow Junko sufficient time to exhaust remedies available before execution makes his execution arbitrary. The carrying out of the death penalty upon conclusion of a trial did not accord sufficient time to seek an effective remedy.³⁷ A person sentenced to death should be afforded enough time to appeal and exhaust other possible remedies.³⁸

2. VIOLATIONS OF THE RIGHT TO FREEDOM FROM TORTURE

Applicant submits that in the case of Junko, PM violated its obligation not to subject anyone to torture. To explain this violation, Applicant will discuss four issues: a) the issue that PM is not a state party to CAT b) the absolute nature of the prohibition on torture c) the torture of Junko and d) State responsibility for the torture of Junko.

a. The issue that PM is not State party to CAT

³³ Facts [15]

³⁴ *Gafgen* [31]

³⁵ GC No. 20 [12]

³⁶ General Comment 36, para 17.

³⁷ Facts [20]

³⁸ Written Submissions p. 9

Applicant submits that although PM did not ratify CAT, prohibition of torture is customary international law binding on all states.³⁹ As such, it is immaterial that the PM is not party to CAT because obligations on the prohibition of torture are applicable.

b. Absolute nature of the prohibition of torture

Applicant anticipates that Respondent may try to justify the torture of Junko on the basis that he was involved in a very serious crime that needed an immediate solution. However, while noting the seriousness of drug and human trafficking, Applicant reminds this honourable court of the absolute nature of the prohibition on torture.

There is an *erga omnes* obligation to prohibit torture.⁴⁰ The *jus cogens* nature of the prohibition of torture means that the prohibition is now one of the most fundamental standards of the international community.⁴¹ Even in times of emergency, states cannot torture.⁴² PM has an obligation to ensure that its agents do not torture people.⁴³ This obligation was violated.

c. The torture of Junko

By subjecting Junko to torture so as to elicit information about the victims of human trafficking,⁴⁴ PM – through GANGS – violated Junko’s right to freedom from torture.⁴⁵ In the *Greek case*, the defining characteristic of torture was not necessarily the nature and severity of the act but rather the purpose for which the act was perpetrated.⁴⁶

³⁹ Mthembu [31]; Furundzija, [144]

⁴⁰ Barcelona Traction [33]-[34].

⁴¹ Furundzija [144]

⁴² *ibid*

⁴³ GC No. 20, [2]

⁴⁴ Facts [11]

⁴⁵ RC, Art. 3

⁴⁶ Greek case

While Applicant is aware of the difficulties that states face in curbing human and drug-trafficking, torture is inexcusable.⁴⁷ In the *Gafgen case*, the Court rejected the defence of “necessity” because the method in question violated human dignity whose protection is absolute.⁴⁸

d. State responsibility for torture of Junko

Acts carried out by the GANGS against Junko and other victims are attributable to PM on the basis of state responsibility. For the conduct of a state agent to be attributed to the state, the agent must be acting in that capacity.⁴⁹ GANGs acted in furtherance of official duties delegated to them by the Government of PM.⁵⁰

Furthermore, although the torture of Junko may have occurred outside the territorial jurisdiction of PM and partly done by soldiers from other nations, PM is still responsible for the following reasons: First, human rights apply extraterritorially. Second, the nationals of PM were involved. Third, the General who was in charge of men who tortured Junko is a national of PM.

3. VIOLATION OF THE RIGHT TO FOUND A FAMILY

Applicant submits that PM violated Diaz and Martinez’s right to found a family.⁵¹ A blanket prohibition on marriage for 17 year olds is arbitrary, unreasonable and disproportionate since it cannot be justified in the circumstances.

a. Arbitrariness of the blanket prohibition

Applicant appreciates that PM is fighting the scourge of child marriages. Nevertheless, imposing a blanket prohibition on marriage for all 17 year olds is arbitrary. State practice

⁴⁷ Chahal [46]; Ireland; GC No. 20, [3].

⁴⁸ Gafgen [48]

⁴⁹ ILC [70]

⁵⁰ Cayara; Brownlie, 145; Facts [7].

⁵¹ Article 12, RC

supports that persons aged 17 can validly enter into valid marriages. If PM is concerned about this age group, it can at least put a condition that those aged 17 can only get married before a court of law. At least that way, PM can monitor if there is any coercion. Diaz was 17 years at the time that Martinez proposed. The fact that PM laws prohibits her from getting married without ascertaining her maturity and will is arbitrary.

b. Unreasonableness of the blanket prohibition

The blanket prohibition on 17 year olds not to get married becomes more unreasonable if other facts are examined. In many jurisdictions, any person above the age of 16 can consent to sex. It makes no sense to hold that a person is mature enough to consent to sex yet they cannot consent to a marriage proposal at the age of 17. Furthermore, PM recruits 16 year olds into the army – holding the view that at the age of 16, they are old enough to make the decision to take a human life in battle. Yet, the same Government is of the view that a 17 year old person who falls in love cannot consent or enter a valid marriage. In these circumstances, Applicant submits that limiting marriage to those who are above 18 years is unreasonable.

c. Disproportionality of the blanket prohibition

Furthermore, Applicant submits that the blanket prohibition on marriage for 17 year olds had a disproportionate impact. It is understandable that rights can be limited. However, the limitation must be proportionate.

The Sokotah religious practices allows anyone who is above the age of 16 to marry.⁵² In terms of their religion, Diaz and Martinez were married. When PM refused Diaz to bury her husband in terms of their Sokotah religion, such was a violation of the right to freedom of religion as provided for in Article 9 of the RC.

⁵² Facts [12]

Furthermore, for the purposes of inheritance of Martinez's estate, PM ought to have invoked the putative spouse doctrine which allows the courts to find a union valid where finding otherwise or strictly applying law would result in an injustice.⁵³ Diaz's case is such a case. PM's failure to do so violated Diaz's right to an equitable share in the inheritance of Colonel Robin Martinez's pension fund.⁵⁴

4. PRAYER

Applicant requests this Court to declare that:

- a. The Applicant possesses the *locus standi* to bring the present application.
- b. All three claims are admissible.
- c. That PM violated the right to life of Martinez, Moto and Junko.
- d. That PM violated the right to freedom from torture of Junko and other victims.
- e. That PM violated Diaz and Martinez's right to found a family and other related rights.

5. REMEDIES AND REPARATION

- a. PM should compensate victims of torture and those whose right to life was violated.
- b. PM should overturn the death sentence imposed on Moto.
- c. PM should compensate Diaz, allow her to rebury her husband and inherit his estate.

Respectfully submitted,

Counsel for the Applicant

⁵³ Blakesley [43]

⁵⁴ Facts (23); See also Art 10(1) (e) SADC Protocol on Gender and Development.