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EDITORIAL

The third volume of the *African Human Rights Law Reports* covers the period up to the end of 2002. The series covers cases decided by UN treaty bodies, the African Commission on Human and Peoples' Rights and domestic judgments from different African countries. We include three short domestic judgments from Francophone African countries that were translated into English.

Editorial changes have been kept to a minimum, and are confined to changes that are required to ensure consistency in style (with regard to abbreviations, capitalisation, punctuation and quotes) and to avoid obvious errors. Where possible quotes and references have been checked against the original. Corrections which may affect the meaning are indicated by square brackets.

We wish to thank the following persons who helped us obtain cases published in this volume of the *Reports*: Chacha Bhoke, Sarai Chisala, Thulani Maseko, Michel Ndayikengurukiye, Mwiza Nkhata, Oninye Obiokoye, Opeoluwa Ogundokun, EK Quansah and Gabriel Shumba.

These *Reports*, as well as other material of relevance to human rights law in Africa, may be found on the website of the Centre for Human Rights, University of Pretoria, at www.chr.up.ac.za.

A French version of these Reports is published by the Pretoria University Law Press (PULP) and may be accessed on the same site in electronic form, or may be obtained from the Centre for Human Rights in hard copy.

Domestic cases that would be of interest to include in future issues of the *Reports* may be brought to the attention of the editors at:

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www.chr.up.ac.za

USER GUIDE

The cases and findings in the *Reports* are grouped together according to the jurisdiction concerned, namely the United Nations, the African Commission on Human and Peoples' Rights and domestic courts.

The *Subject index* is divided into two parts, namely general principles or procedure, and substantive rights. Where a particular subject has been dealt with in more than one case, the cases on that subject are listed chronologically.

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The headnotes at the top of each case provide the full original title of the case and keywords dealing with the main issues in the case. These are linked to the keywords in the *Subject index*. The keywords are followed by the paragraph numbers of the case dealing with a specific issue.

The date at the end of a case reference refers to the date when the case was decided. The abbreviation before the date indicates the jurisdiction.

ABBREVIATIONS

ACHPR	African Commission on Human and Peoples' Rights
AHRLR	African Human Rights Law Reports
BnCC	Constitutional Court, Benin
BwHC	High Court, Botswana
BuCA	Court of Appeal, Botswana
CCPR	International Covenant on Civil and Political Rights
GaSC	Supreme Court, The Gambia
HRC	United Nations Human Rights Committee
LeCA	Court of Appeal, Lesotho
MwHC	High Court, Malawi
NaLC	Labour Court, Namibia
NaSC	Supreme Court, Namibia
NgCA	Court of Appeal, Nigeria
NgSC	Supreme Court, Nigeria
SACC	Constitutional Court, South Africa
SeCC	Court of Cassation, Senegal
SwCA	Court of Appeal, Swaziland
TzCA	Court of Appeal, Tanzania
ZaHC	High Court, Zambia
ZwSC	Supreme Court, Zimbabwe

CASE LAW ON THE INTERNET

Case law concerning human rights in African may be found on the following sites:

United Nations High Commissioner for Human Rights
www.ohchr.org

African Commission on Human and Peoples' Rights
www.achpr.org

Interights (summaries of case law from Commonwealth countries and international monitoring bodies)
www.interights.org

Centre for Human Rights, University of Pretoria
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UNITED NATIONS HUMAN RIGHTS TREATY BODIES

DEMOCRATIC REPUBLIC OF THE CONGO

Busyo and Others v Democratic Republic of the Congo

(2003) AHRLR (HRC 2003)

Communication 933/2000, *Adrien Mundyo Busyo, Thomas Osthudi Wongodi, René Sibu Matubuka et al v Democratic Republic of the Congo*
Decided at the 78th session, 31 July 2003, CCPR/C/78/D/933/2000

Admissibility (compatibility, 4.3)
Evidence (failure of state party to respond to allegations, 4.4, 5.1)
Derogation (5.2)
Public service (dismissal of judges, 5.2)
Fair trial (independence of courts, dismissal of judges, 5.2)
Personal liberty and security (arbitrary arrest and detention, 5.3)

1. The authors are Adrien Mundyo Busyo, Thomas Osthudi Wongodi and René Sibu Matubuka, citizens of the Democratic Republic of the Congo, acting on their own behalf and on behalf of 68 judges who were subjected to a dismissal measure. They claim to be the victims of a violation by the Democratic Republic of the Congo of articles 9, 14, 19, 20 and 21 of the International Covenant on Civil and Political Rights. The communication also appears to raise questions under article 25(c) of the Covenant.

The facts as submitted by the authors

2.1. Under Presidential Decree 144 of 6 November 1998, 315 judges and public prosecutors, including the above-mentioned authors, were dismissed on the following grounds:

> The President of the Republic; Having regard to Constitutional Decree-Law no 003 of 27 May 1997 on the organization and exercise of power in the Democratic Republic of Congo, as subsequently amended and completed; Having regard to articles 37, 41 and 42 of Ordinance-Law no 88-056 of 29 September 1988 on the status of judges; Given that the reports by the various commissions which were set up by the Ministry of Justice and covered the whole country show that the above-mentioned judges are immoral, corrupt, deserters or recognized to be incompetent, contrary to their obligations as judges and to the honour and dignity of their functions; Considering that the conduct in question has discredited the judiciary, tarnished the image of the system of justice and

hampered its functioning; Having regard to urgency, necessity and appropriateness; On the proposals of the Minister of Justice; Hereby decrees: Article 1: The following individuals are dismissed from their functions as judges . . .

2.2. Contesting the legality of these dismissals, the authors filed an appeal, following notification and within the three-month period established by law, with the President of the Republic to obtain the withdrawal of the above-mentioned decree. Having received no response, in accordance with Ordinance 82/017 of 31 March 1982 on procedure before the Supreme Court of Justice, the 68 judges all referred their applications to the Supreme Court during the period from April to December 1999. According to the information provided by the authors, it appears, first of all, that the Attorney-General of the Republic, who was required to give his views within one month, deliberately failed to transmit the report[1] by the Public Prosecutor's Office until 19 September 2000, in order to block the appeal. Moreover, the Supreme Court, by a ruling of 26 September 2001, decided that Presidential Decree 144 was an act of government inasmuch as it came within the context of government policy aimed at raising moral standards in the judiciary and improving the functioning of one of the three powers of the state. The Supreme Court consequently decided that the actions taken by the President of the Republic, as the political authority, to execute national policy escaped the control of the administrative court and thus declared inadmissible the applications by the authors.

2.3. On 27 and 29 January 1999, the authors, who formed an organisation called the 'Group of the 315 illegally dismissed judges', known as the 'G315', submitted their application to the Minister for Human Rights, without results.

2.4. The authors also refer to various coercive measures used by the authorities to prevent them from pressing their claims. They mention two warrants for the arrest of Judges René Sibu Matubuka and Ntumba Katshinga.[2] They explain that, following a meeting on the Decree in question which was held between the G315 and the Minister of Justice on 23 November 1998, the Minister withdrew the two warrants. The authors

[1] The authors transmitted a copy of the report by the Public Prosecutor's office. In the report, the office of the Attorney-General of the Republic requests the Supreme Court of Justice to declare, first and foremost, that Presidential Decree 144 is an act of government that is outside its jurisdiction; and, secondly, that this decree is justified because of exceptional circumstances. On the basis of accusations made by both the population and foreigners living in the Democratic Republic of the Congo against allegedly incompetent, irresponsible, immoral and corrupt judges, as well as of the missions carried out by judges in this regard, the Attorney-General of the Republic maintains that the Head of State issued Presidential Decree 144 in response to a crisis situation characterised by war, partial territorial occupation and the need to intervene as a matter of urgency in order to combat impunity. He stressed that it was materially impossible for the authorities to follow the ordinary disciplinary procedure and that the urgency of the situation, the collapse of the judiciary and action to combat impunity were incompatible with any decision to suspend the punishment of the judges concerned.

[2] Dates of arrest warrants not specified.

add that, further to their follow-up letter to the Minister of Justice concerning the lack of action taken following their meeting on the Decree, Judges René Sibu Matubuka and Benoît Malu Malu were arrested and detained from 18 to 22 December 1998 in an illegal detention centre in the GLM (*Groupe Litho Moboti*) building belonging to the Task Force for Presidential Security. They were heard by persons who had neither been sworn in nor authorised by the Attorney-General of the Republic, as required by law.

The complaint

3.1. The authors claim, first of all, to be the victims of dismissal measures that they regard as clearly illegal.

3.2. They maintain that Presidential Decree 144 is contrary to Constitutional Decree-Law 003 of 27 May 1997 on the organisation and exercise of power in the Democratic Republic of the Congo and Ordinance-Law 88-056 of 29 September 1988 on the status of judges.

3.3. According to the authors, while the above-mentioned legislation stipulates that the President of the Republic can dismiss a civilian judge only on the proposal of the Supreme Council of the Judiciary (CSM),[3] the dismissals in question were decided on the proposal of the Minister of Justice, who is a member of the executive and thus took the place of the only body with jurisdiction in this regard, namely, the CSM. According to the authors, the law does not confer discretionary power, despite the circumstances described in Presidential Decree 144, ie urgency, necessity and appropriateness, which cannot be grounds for dismissal.

3.4. The authors also claim that the authorities failed to fulfil their obligation to respect the adversarial principle and its corollaries (which include the presumption of innocence) at all times when dealing with disciplinary matters. In fact, the authors received no warning or notification from any authority, body or commission and were, incidentally, never heard either by the inspecting magistrate or by the CSM, as required by law.

3.5. The authors maintain that, in violation of the obligation to justify any decision to dismiss a government official, Presidential Decree 144 cites only vague, imprecise and impersonal grounds, namely, immorality, desertion and recognized incompetence — and this, in their opinion, amounts in Congolese law to a lack of grounds. With regard to the claims of immorality and incompetence, the authors state that their personal files in the CSM secretariat prove the contrary. As to the claim of desertion, the authors assert that their departure from the places to which they were assigned was the result of war-related insecurity and that their registration with the CSM secretariat in Kinshasa, the city where they took refuge,

[3] The CSM acts as a disciplinary court to enforce a penalty, which may either be disciplinary (dismissal) or criminal (imprisonment for more than three months).

attested to their availability as judges. They say that the CSM secretariat accorded them the treatment enjoyed by persons displaced by war.

3.6. The authors refer to the reports which were submitted to the Commission on Human Rights by the Special Rapporteur on the situation of human rights in the Democratic Republic of the Congo[4] and the Special Rapporteur on the independence of judges and lawyers[5] and in which they express concern about Presidential Decree 144 calling for the dismissal of the 315 judges and demonstrating that the judiciary is under the control of the executive. They also mention a statement by the head of the office of the United Nations High Commissioner for Human Rights in the Democratic Republic of the Congo calling for the reinstatement of the dismissed judges.

3.7. Secondly, the authors are of the view that the illegal arrest, detention and interrogation of three members of their organisation are abuses of power (see paragraph 2.4).

3.8. Lastly, the authors consider that they have exhausted domestic remedies. Recalling the failure of their appeals to the President of the Republic, the Minister for Human Rights and the Minister of Justice, and the ruling of the Supreme Court of Justice, of 26 September 2001, they emphasise that the independence of the judges responsible for making the ruling was not guaranteed inasmuch as the Senior President of the Supreme Court, the Attorney-General of the Republic and other senior members of the judiciary were appointed by the new regime in power, without regard for the law stipulating that such appointments must be made on the proposal of the Supreme Council of the Judiciary. They add that, when these members of the judiciary were sworn in by the President of the Republic, the Senior President of the Supreme Court disregarded his obligation of discretion and made a statement on the lawfulness of the dismissal decree. Moreover, the authors consider that the Supreme Court, in its ruling of 26 September 2001, wrongly decided that their appeal was inadmissible and thus deprived them of any remedy.

3.9. Despite the request and the reminders (*notes verbales* of 7 December 2000, 12 July 2001 and 15 May 2003) the Committee sent to the state party asking for a reply to the authors' allegations, the Committee has received no response.

The Committee's admissibility decision

4.1. Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its Rules of Procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

[4] Doc E/CN4/1999/31 of 8 February 1999.
[5] Doc E/CN4/2000/61 of 21 February 2000.

4.2. In accordance with article 5(2)(a), of the Optional Protocol, the Committee has ascertained that the same question is not being examined under another procedure of international investigation or settlement.

4.3. The Committee considers that the authors' complaint that the facts as they described them constitute a violation of articles 19, 20 and 21 has not been sufficiently substantiated for the purposes of admissibility. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

4.4. The Committee considers that, in the absence of any information from the state party, the complaint submitted in relation to Presidential Decree 144 calling for the dismissal of 315 judges, including the authors of this communication, and to the arrest and detention of Judges René Sibu Matubuka and Benoît Malu Malu may raise questions under article 9, article 14(1), and article 25(c) of the Covenant which should be examined as to the merits.

Examination of the merits

5.1. The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as required under article 5(1), of the Optional Protocol. It notes that the state party has not, despite the reminders sent to it, provided any replies on either the admissibility or the merits of the communication. The Committee notes that, under article 4(2) of the Optional Protocol, a state party is under an obligation to cooperate by submitting to it written explanations or statements clarifying the matter and the measures, if any, that may have been taken to remedy the situation. As the state party has failed to cooperate in that regard, the Committee had no choice but to give the authors' allegations their full weight inasmuch as they were adequately substantiated.

5.2. The Committee notes that the authors have made specific and detailed allegations relating to their dismissal, which was not in conformity with the established legal procedures and safeguards. The Committee notes in this regard that the Minister of Justice, in his statement of June 1999 (see paragraph 3.8), and the Attorney-General of the Republic, in the report by the Public Prosecutor's office of 19 September 2000 (see footnote 1), recognise that the established procedures and safeguards for dismissal were not respected. Furthermore, the Committee considers that the circumstances referred to in Presidential Decree 144 could not be accepted by it in this specific case as grounds justifying the fact that the dismissal measures were in conformity with the law and, in particular, with article 4 of the Covenant. The Presidential Decree merely refers to specific circumstances without, however, specifying the nature and extent of derogations from the rights provided for in domestic legislation and in the Covenant and without demonstrating that these derogations are strictly required and how long they are to last. Moreover, the Committee notes

that the Democratic Republic of the Congo failed to inform the international community that it had availed itself of the right of derogation, as stipulated in article 4(3) of the Covenant. In accordance with its jurisprudence,[6] the Committee recalls, moreover, that the principle of access to public service on general terms of equality implies that the state has a duty to ensure that it does not discriminate against anyone. This principle is all the more applicable to persons employed in the public service and to those who have been dismissed. With regard to article 14(1) of the Covenant, the Committee notes the absence of any reply from the state party and also notes, on the one hand, that the authors did not benefit from the guarantees to which they were entitled in their capacity as judges and by virtue of which they should have been brought before the Supreme Council of the Judiciary in accordance with the law, and on the other hand, that the President of the Supreme Court had publicly, before the case had been heard, supported the dismissals that had taken place (see paragraph 3.8) thus damaging the equitable hearing of the case. Consequently, the Committee considers that those dismissals constitute an attack on the independence of the judiciary protected by article 14(1) of the Covenant. The dismissal of the authors was ordered on grounds that cannot be accepted by the Committee as a justification of the failure to respect the established procedures and guarantees that all citizens must be able to enjoy on general terms of equality. In the absence of a reply from the state party, and inasmuch as the Supreme Court, by its ruling of 26 September 2001, has deprived the authors of all remedies by declaring their appeals inadmissible on the grounds that Presidential Decree 144 constituted an act of government, the Committee considers that, in this specific case, the facts show that there has been a violation of article 25(c), read in conjunction with article 14(1) on the independence of the judiciary, and of article 2(1) of the Covenant.

5.3. Having regard to the complaint of a violation of article 9 of the Covenant, the Committee notes that Judges René Sibu Matubuka and Benoît Malu Malu were arbitrarily arrested and detained from 18 to 22 December 1998 in an illegal detention centre belonging to the Task Force for Presidential Security. In the absence of a reply from the state party, the Committee notes that there has been an arbitrary violation of the right to liberty of the person under article 9 of the Covenant.

6.1. The Human Rights Committee, acting under article 5(4) of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the state party has committed a violation of article 25(c), article 14(1) article 9 and article 2(1) of the Covenant.

6.2. Pursuant to article 2(3)(a) of the Covenant, the Committee is of the view that the authors are entitled to an appropriate remedy, which should

[6] Communication 422/1990 *Adimayo M Aduayom T Diasso and Yawo S Dobou v Togo*; General Comment 25 on art 25 (fiftieth session — 1996).

include, *inter alia*: (a) in the absence of a properly established disciplinary procedure against the authors, reinstatement in the public service and in their posts, with all the consequences that that implies, or, if necessary, in similar posts;[7] and (b) compensation calculated on the basis of an amount equivalent to the salary they would have received during the period of non-reinstatement.[8] The state party is also under an obligation to ensure that similar violations do not occur in future and, in particular, that a dismissal measure can be taken only in accordance with the provisions of the Covenant.

6.3. The Committee recalls that, by becoming a state party to the Optional Protocol, the Democratic Republic of the Congo recognised the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, under article 2 of the Covenant, the state party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established. Consequently, the Committee wishes to receive from the state party, within 90 days of the transmission of these findings, information about the measures taken to give effect to its views. The state party is also requested to make these findings public.

[7] Communications 630/1995 *Abdoulaye Mazou v Cameroon*; 641/1995 *Gedumbe v Democratic Republic of the Congo*; and 906/2000 *Felix Enrique Chira Vargas-Machuca v Peru*.

[8] Communications 422/1990, 423/1990 and 424/1990 *Adimayo M Aduayom, Sofianou T Diasso and Yawo S Dobou v Togo*; 641/1995 *Gedumbe v Democratic Republic of the Congo*; and 906/2000 *Felix Enrique Chira Vargas-Machuca v Peru*.

MAURITIUS

Hussain v Mauritius

(2003) AHRLR (HRC 2003)

Communication 980/2001, *Fazal Hussain v Mauritius*
Decided at the 77th session, 18 March 2003, CCPR/C/77/D/980/2001

Admissibility (compatibility, 6.3, 6.4, 6.5, 6.6, 6.7)
Fair trial (conduct of defence counsel, 6.3)

1. The author of the communication, dated 18 February 1998, is Mr Fazal Hussain, an Indian citizen currently serving a prison term in Mauritius. He claims to be a victim of a violation by Mauritius of article 14, paragraph 3 (b), (c) and (d), paragraph 5 and paragraph 6 of the International Covenant on Civil and Political Rights (the Covenant). He is not represented by counsel.

The facts as submitted by the author

2.1. On 7 July 1995, the author was arrested at Sir Seewoosagur Ramgoolam international airport in Mauritius and charged with 'importation and trafficking' in heroin. Before 15 October 1996, the author was brought twice before the District Court of Mehbourgh.[1]

2.2. On 20 June 1996, the author appeared before the Supreme Court for his trial. After the Chief Justice had read out the charges against him, the author was confused as he was not assisted by counsel and did not understand English properly. He mentioned that he had applied for legal aid and that he wanted to be assisted by an interpreter. The Supreme Court adjourned the trial for these reasons.

2.3. In September 1996, the author personally contacted a lawyer, Mr Oozeerally, who agreed to start working on the case as soon as he received the copies of the author's statement as well as of other evidence related to the case. Mr Oozeerally was later appointed as legal aid counsel. The author claims that his counsel received the documents only five days before the trial.

2.4. The author was advised by his counsel to plead not guilty but after

[1] The author does not give any indication whether anything relevant for the case was raised at the District Court level.

one day of proceedings, the author decided to plead guilty because he was 'shocked to see the court proceedings and the way the trial was going on'. On 17 October 1996, the author was sentenced to life imprisonment. He immediately indicated to the judge that he wanted to appeal.

2.5. On 29 October 1996, the author applied for legal aid for his appeal (*in forma pauperis*) but his request was turned down by the Chief Justice on the basis of his counsel's opinion who considered that there were no grounds for appeal.

The complaint[2]

3.1. The author first alleges that the prosecution had 14 months to prepare its case while his counsel received the necessary information to prepare his defence only five days prior to the trial. The author thus did not have sufficient time to prepare his case.

3.2. The author further alleges that he had been sentenced to life imprisonment by a court composed by a single judge and not by a jury, which is allegedly contrary to the Covenant.

3.3. Finally, the author alleges that he has been denied his right to appeal and legal aid to make such an appeal. He further claims that it is on the basis of his trial counsel's opinion that the application for his appeal *in forma pauperis* was denied.

The state party's observations on the admissibility and merits of the communication

4.1. By submissions of 13 August 2001 and 29 January 2002, the state party made its observations on the admissibility and merits of the communication.

4.2. With regard to the admissibility of the communication, the state party holds that the claim made by the author constitutes an abuse of the right of submission and that the author has failed to exhaust all available domestic remedies to the extent that, if it was his opinion that his constitutional rights of fair trial had been breached, he could have applied to the Supreme Court for redress. Moreover, the author was entitled to apply to the Commission on the Prerogative of Mercy for a review of the punishment imposed by the Supreme Court.

4.3. With regard to the merits of the case, the state party explains that, at the first hearing on 20 June 1996, the author's trial was postponed so that he could be legally represented and assisted by an interpreter. It appeared later that, although proceedings were translated in his mother tongue, as

[2] The author makes a general allegation of a violation of art 14, para 3 (b), (c) and (d), para 5 and para 6 of the Covenant and does not make a legal distinction between his claims.

a matter of fairness, the author was conversant in English and that he had no objections that proceedings be conducted in this language.

4.4. The state party further contends that at no time during the trial did counsel ask for an adjournment on the grounds that he needed more time for preparing the case, which, according to the practice in such cases, would have been granted by the court.

4.5. Moreover, although counsel stated at some stage that a statement by a witness and some photographs were not communicated to him, he made clear that he was not making any objection to the admissibility of most documents brought by the prosecution. Counsel further stated that he did not need time to look at the documents as they were read out in court. Finally, the witnesses who recorded the statement and took photographs were also heard in court and could have been cross-examined by counsel.

4.6. Concerning the right to appeal, the state party's legislation provides for legal aid at the stage of appeal. According to the procedure in such cases, the file is sent to a barrister to see whether there are reasonable grounds to appeal a decision. In the present case, on 17 October 1996, the author gave notice to the judge of his intention to appeal the court's decision. The relevant documents were thus sent to counsel who, on 5 November 1996, wrote an opinion stating that there were no reasonable grounds to make such an appeal. The author was informed of the latter by the Commissioner of Prisons and his request for legal aid was accordingly rejected.

4.7. The state party is of the opinion that due consideration was given to the author's application for legal aid, but that on the basis of his own counsel's advice, the court had no other option but to reject his request. The state party explains that it is a settled matter of its courts to reject applications for legal aid in appeal cases that are deemed frivolous and vexatious. Furthermore, the author could have appealed directly to the Supreme Court, which he chose not to do in the circumstances.

Comments of the author

5.1. By submission of 7 March 2002, the author gave his comments on the state party's submissions.

5.2. With regard to the merits of the case,[3] the author reiterates that his counsel was not given sufficient time to prepare his defence and refers to a document submitted by the state party where counsel mentioned that the brief was submitted to him only a few days prior to the trial. In this regard, the author states that he is not in a position to ask his counsel why he did not ask for the adjournment or postponement of the trial.

[3] The author does not raise any arguments related to the fact that he has not applied to the Supreme Court for violation of his constitutional rights.

5.3. The author also maintains his claim that he was denied his right to appeal and states that he had never asked for his first instance's counsel to take care of the appeal. The author considers that a different counsel should have been appointed for the appeal procedure. The author further states that he has never been informed of his counsel's opinion that there were no reasonable grounds to appeal the Supreme Court's decision.

Issues and proceedings before the Committee

6.1. Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its Rules of Procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2. The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for purposes of article 5(2)(a) of the Optional Protocol.

6.3. Concerning the author's claim that his counsel has not received sufficient time to prepare his defence because the case file was transmitted to him only five days prior to the first hearing, which may raise issue under article 14, paragraph 3 (b) and (d), of the Covenant, the Committee notes from the information brought by both parties that counsel had the opportunity to cross-examine the witness as well as to ask for the adjournment of the trial, which he did not do. In this respect, the Committee refers to its jurisprudence that a state party cannot be held responsible for the conduct of a defence lawyer, unless it was or should have been manifest to the judge that the lawyer's behaviour was incompatible with the interests of justice.[4] In the instant case, there is no reason for the Committee to believe that the author's counsel was not using other than his best judgement. Moreover, the Committee notes that the author eventually decided to plead guilty against the advice of his counsel. The Committee finds therefore that the author has not sufficiently substantiated his claim under article 14, paragraph 3(b) and (d) of the Covenant. This part of the communication should therefore be declared inadmissible under article 2 of the Optional Protocol.

6.4. Concerning the author's claim that he was not tried by a jury but by a single judge, the author has not demonstrated how this could constitute a breach of the Covenant. This part of the communication should therefore be declared inadmissible under article 3 of the Optional Protocol.

6.5. Concerning the author's claim of a violation under article 14(3)(c), the Committee considers that the author has not sufficiently substantiated, in the circumstances of his case, how a period of 11 months between his arrest and the first hearing by the Supreme Court could constitute a viola-

[4] See *inter alia*, the Committee's decision in communication 536/1993, *Perera v Australia*, declared inadmissible on 28 March 1995.

tion of article 14(3)(c). This part of the communication should therefore be declared inadmissible under article 2 of the Optional Protocol.

6.6. Concerning the author's claim of a violation under article 14(6), the Committee notes that the author has not brought before it any element that could raise an issue under these provisions. This part of the communication should therefore be declared inadmissible under article 3 of the Optional Protocol.

6.7. Concerning the author's claim that he has been denied his right to appeal, which may raise an issue under article 14, paragraph 3 (d) and paragraph 5, the Committee, bearing in mind that he pleaded guilty against the advice of his counsel, notes that the author sought legal aid for his appeal without presenting any grounds or supporting reasons for the appeal, and that after his request for legal aid was denied, he failed to apply to the Supreme Court for violation of his constitutional rights. The Committee is of the opinion that the communication is inadmissible for failure to exhaust domestic remedies under article 5, paragraph 2 of the Optional Protocol.

7. The Committee therefore decides:

(a) that the communication is inadmissible under articles 2, 3 and 5 of the Optional Protocol;
(b) that this decision shall be communicated to the state party and to the author.

TOGO

Randolph v Togo

(2003) AHRLR (HRC 2003)

Communication 910/2000, *Mr Ati Antoine Randolph v Togo*
Decided at the 79th session, 27 October 2003, CCPR/C/79/D/910/2000

Admissibility (continuing violation, 8.3; consideration by other international body, 8.4; exhaustion of local remedies, 8.5, 8.6, 17)
Continuing violation (12)
Movement (exile, 25)

1.1. The author of the communication, Mr Ati Antoine Randolph, born 9 May 1942, has Togolese and French nationality. He is in exile in France and alleges that the Togolese Republic has violated his rights and those of his brother, Emile Randolph, under article 2(3)(a); articles 7, 9 and 10; article 12(2); and article 14 of the International Covenant on Civil and Political Rights. The author is represented by counsel.

1.2. The Togolese Republic became a party to the Covenant on 24 August 1984 and to the Optional Protocol on 30 June 1988.

Facts as submitted by the author

2.1. Mr Randolph first relates the circumstances surrounding the death of his brother, Counsellor to the Prime Minister of Togo, which occurred on 22 July 1998. He claims that the death resulted from the fact that the *gendarmerie* did not renew his brother's passport quickly enough so that he could be operated on in France, where he had already undergone two operations in 1997. His diplomatic passport having expired in 1997, the author's brother had requested its renewal; the author claims, however, that the *gendarmerie* confiscated the document. His brother later submitted another application, supported by his medical file. According to the author, no doctor in Togo had the necessary means to undertake such an operation. The *gendarmerie* issued a passport on 21 April 1998, but the applicant did not receive it until June 1998.

2.2. The author believes that the authorities violated his brother's freedom of movement, which was guaranteed under article 12(2) of the International Covenant on Civil and Political Rights, by refusing to renew his passport quickly and by requiring the applicant's physical presence and his signature in a register in order to deliver the passport to him, thereby

exacerbating his illness. The author believes that it was as a result of these events that his brother, in a very weakened condition and unable to fly on a regularly scheduled airline, died on 22 July 1998.

2.3. The author of the communication submits, secondly, facts relating to his arrest on 14 September 1985, together with about 15 others including his sister, and their 1986 trial for possession of subversive literature and insulting the head of state. During the period between his arrest and conviction, the author claims, he was tortured by electric current and other means and suffered degrading, humiliating and inhuman treatment. About ten days after the arrest, the author was reportedly transferred to the detention centre in Lomé, and it was only then, according to the author, that he discovered he had been accused of insulting a public official, a charge that was later changed to insulting the head of state. The author notes in this respect that the head of state had not brought charges against anyone.

2.4. By a judgment on 30 July 1986, the text of which has not been submitted to the Committee, Mr Randolph was sentenced to five years' imprisonment. The trial, he claims, was unfair because it violated the presumption of innocence and other provisions of the International Covenant on Civil and Political Rights. He has attached extracts from the 1986 report of Amnesty International in support of his claims.

2.5. The author claims that he did not have any effective remedy available to him in Togo. Later, he adds that he did not exhaust all domestic remedies because the Togolese justice system would not allow him to obtain, within a reasonable amount of time, fair compensation for injuries sustained. He claims that, even if he or his family had filed a complaint, it would have been in vain, for the State would not have conducted an investigation. He adds that filing a criminal suit against the *gendarmerie* would have exposed him and his whole family to danger. Moreover, when he was arrested and tortured, before being sentenced, he had no possibility of filing a complaint with the authorities, who were the very ones who were violating human rights, nor could he file suit against the court that had unfairly convicted him. Mr Randolph believes that, in these conditions, no compensation for injury suffered would be obtainable through the Togolese justice system.

2.6. After the death of the author's brother in the conditions described above, no one lodged a complaint, according to the author, for the same reasons as he had given before.

2.7. Mr Randolph believes that, since his release, the injuries caused by the violations of his fundamental rights persist because he has been forced into exile and to live far from his family and loved ones, and also because of his brother's death, which was due to the failure on the part of the Togolese Republic to respect his brother's freedom of movement.

The complaint

3. The author invokes the violation of article 2(3); articles 7, 9 and 10; article 12(2); and article 14 of the Covenant. He requests fair compensation for the injuries suffered by him and his family as a result of the state's action, and an internationally monitored review of his trial.

The state party's observations

4.1. In its observations of 2 March 2000, the state party considers the substance of the communication without addressing the question of its admissibility. The state party rejects all the author's accusations, in particular those relating to torture, contending that during the trial the accused did not lodge any complaint of torture or ill-treatment. The state party cited the statements made following the trial by the author's counsel, Mr Domenach, to the effect that the hearing had been a good one and that all parties, including Mr Randolph, had been able to express their views on what had happened.

4.2. As for calling the trial unfair and alleging a violation of the presumption of innocence, the state party again cites an extract from a statement by Mr Randolph's counsel, in which he declares that over the 10 months that he has been defending his clients in Togo, he has been able to do so in a satisfactory manner, with the assistance and encouragement of the authorities. He adds that the hearing was held in accordance with the rules of form and substance and in the framework of a free debate in conformity with international law.

4.3. With regard to the violation of freedom of movement, the state party contends that it cannot be reproached for having prevented the author's brother from leaving the country by holding up his diplomatic passport, since the authorities had issued him a new passport. As to the formalities for picking up his passport, it is considered normal to require the physical presence of the interested party, as well as his or her signature on the passport and in the register of receipts; this procedure is in the interest of passport-holders because it is intended to prevent documents from being delivered to a person other than the passport-holder.

4.4. The state party contends that no legal or administrative body has received a claim for compensation for injury suffered by Mr Ati Randolph.

The author's comments on the observations of the state party

5.1. In his comments of 22 August 2000, the author accuses Togo of having presented 'a tissue of lies'. He reaffirms the facts as already submitted and insists that he was detained in police custody from 14 to 25 September 1985, while the legally permissible length of such confinement is a maximum of 48 hours. During that period, the author was subjected to cruel, degrading and inhuman treatment, torture and death threats. In his view, the presumption of his innocence was not respected — he was

removed from the civil service list, and he was called to appear before the head of state and of the Central Committee of the only political party, the one in power. His eyeglasses had been confiscated for three months and had been returned to him only after the intervention of Amnesty International. The author's vehicles had also been confiscated. He claims, in that regard, that one of the vehicles, which was returned to him upon his release, had been tampered with so that he could have died when trying to drive it. Lastly, he comments on various government officials in order to illustrate the undemocratic nature of the current regime, although this is not directly related to his communication.

5.2. From 25 September 1985 to 12 January 1987, the author was detained in the Lomé detention centre, where he was subjected to cruel, inhuman and degrading treatment and death threats. In a statement addressed to the Committee, the author's sister testifies that, in that connection, and under pressure from international humanitarian organisations, the regime was forced to have the prisoner examined by a doctor. Ms Randolph claims that the lawyers and doctors chosen were loyal to the regime and did not acknowledge that the results — indicating there had been no torture — had been falsified.

5.3. The author's trial began only in July 1986. On 30 July 1986, the author was sentenced to five years in prison for insulting the head of state. On 12 January 1987, he was pardoned by the latter.

5.4. Mr Randolph insists that he was tortured by electric shock on 15 September 1985 in the evening and on the following morning. He claims that he was then threatened with death on several occasions. He states that he told his lawyers about this, and that he lodged complaints of torture with the court on two occasions: once in October 1985, but his complaint had been diluted by replacing 'torture' by 'ill-treatment'. The second time, in January 1986, he lodged his complaint in writing. In response to this action, the author claims, his right to a weekly family visit was suspended. The author also states that during the trial he had reported the torture and ill-treatment. This had been the reason, according to him, for the postponement of his trial from 16 to 30 July, supposedly for further information; he does not, however, offer any proof of these allegations.

5.5. The author also describes the conditions of his detention, for example, being forced to stay virtually naked in a mosquito-filled room, lying directly on the concrete, with the possibility of showering every two weeks at the start and spending only three minutes a day outside his cell, and having to shower in the prison courtyard under armed guard.

5.6. As for the trial, the author states that the President of the court — Ms Nana — had close ties to the head of state. She had even participated in a demonstration demanding the execution of the author and the others charged in the case, and the confiscation of their property. Only the

Association of African Jurists, represented by a friend of the head of state, had been authorised to attend the trial, while a representative of Amnesty International had been turned away at the airport.

5.7. The author maintains that no incriminating evidence or witnesses had been produced during the course of the trial. The case involved the distribution of leaflets to defame the head of state. Yet, according to the author, no leaflet was submitted in evidence and the head of state had not entered a defamation complaint.

5.8. The author claims that during the trial his attorneys had demonstrated that his rights had been violated. He states that he himself had shown the court the still-visible scars from having been burnt with electricity. But in his view the attorneys were under pressure and had therefore not pursued that argument.

5.9. Regarding his brother, the author contests the state party's observations, stating that his diplomatic passport had not been extended but that it had taken nine months to issue a new ordinary passport.

The State party's further observations on the author's comments

6.1. In its note of 27 November 2000, the state party contests the admissibility of the communication. It requests the Committee to declare the communication inadmissible for three reasons: failure to exhaust domestic remedies, use of insulting and defamatory terms and examination of the case by an international instance.

6.2. The state party contends that in Togo any person considering himself or herself to be the victim of human rights violations can have recourse to the courts, to the National Human Rights Commission and to the non-governmental institutions for the defence of human rights. In that connection, the state party states that the author did not submit an appeal to the courts, did not ask for a review of his trial and did not claim compensation for damage of any kind. As for the possible recourse to the National Human Rights Commission, the state party states that the author had not applied to it even though he acknowledged the Commission's importance in his communication.

6.3. The state party insists, without further elaboration, that the author used insulting and defamatory terms in framing his allegations.

6.4. Concerning examination of the case under another international procedure, the state party submits that the United Nations Commission on Human Rights, in its resolution 1993/75 of 10 March 1993, had decided to monitor the situation of human rights in Togo, which it did until 1996. The state party points out that the author's case was among those considered by the Commission on Human Rights during the period of monitoring.

The author's further comments on the state party's observations

7.1. The author submitted his comments on 13 January 2001. Once again criticising and giving his opinion of various Togolese authorities, he contests the legality and legitimacy of the political regime in power. By way of evidence and in support of his communication, the author submits excerpts from various articles and books, without actually adding any new considerations in support of his previous allegations regarding human rights violations against himself personally or against members of his family.

7.2. He reiterates his comments of 22 August 2000 and makes further accusations against the political regime in office: corruption and denial of justice. He describes the current conditions for the issuance of passports by Togo, although this has no bearing on this communication.

7.3. Concerning the government's argument of inadmissibility because of the use of insulting and defamatory terms, the author believes that the terms he used were often insufficient to describe 'the whole horror in which the Togolese people [have] been trapped for almost 35 years'. He adds that, if the government still believes that the terms he used were insulting and defamatory, he stood 'ready to defend them before any judicial authority, any court of law, and to furnish irrefutable proof and incriminating evidence, producing as supporting witness the Togolese people'.

7.4. The author also cites 'the denial of justice' as justification for his failure to exhaust domestic remedies. In that connection, the author expounds on the idea that General Eyadema's conception of justice was entirely and exclusively self-serving. The author refers to the 'fireworks affair' and asks the head of state 'to respond immediately' to questions regarding the discovery and ordering of the explosives and also to explain the failure to produce any incriminating evidence in that case.

7.5. The author gives his opinion of the presiding judge of the court that convicted him, Ms Nana, as someone close to the government, and of the first deputy prosecutor, who did not investigate allegations of torture, as well as of others in high positions.

7.6. Regarding the non-exhaustion of available remedies, the author contends that 'any attempt to secure a remedy that presupposes an impartial judicial system is impossible so long as the state party has a dictatorship at the helm'. Regarding the National Human Rights Commission, his view is that none of the applicants who had submitted complaints to it in 1985 had obtained satisfaction.

7.7. The author submits that the fact that the Commission on Human Rights had concluded its consideration of the situation of human rights in Togo did not preclude the Committee from considering his communication.

Decision of the Committee on admissibility

8.1. Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its Rules of Procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

8.2. At its 71st session in April 2001, the Committee considered the admissibility of the communication.

8.3. The Committee noted that the part of the communication concerning the author's arrest, torture and conviction refers to a period in which the state party had not yet acceded to the Optional Protocol to the International Covenant on Civil and Political Rights, ie prior to 30 June 1988. However, the Committee observed that the grievances arising from that part of the communication, although they referred to events that predated the entry into force of the Optional Protocol for Togo, continued to have effects which could in themselves constitute violations of the Covenant after that date.

8.4. The Committee noted that the examination of the situation in Togo by the Commission on Human Rights could not be thought of as being analogous to the consideration of communications from individuals within the meaning of article 5, paragraph 2(a), of the Optional Protocol. The Committee referred to its previous decisions, according to which the Commission on Human Rights was not a body of international investigation or settlement within the meaning of article 5, paragraph 2(a), of the Optional Protocol to the International Covenant on Civil and Political Rights.

8.5. The Committee further noted that the state party contested the admissibility of the communication on the ground of non-exhaustion of domestic remedies, given that no remedy had been sought by the author in respect of alleged violations of rights under the Covenant. The Committee found that the author had not put forward any argument to justify the non-exhaustion of available domestic remedies in respect of his late brother. Consequently, the Committee decided that this part of the communication was inadmissible.

8.6. However, regarding the allegations about the author's own case (paragraphs 2.5, 5.6 and 5.8 above), the Committee considered that the state party had not responded satisfactorily to the author's contention that there was no effective remedy in domestic law with respect to the alleged violations of his rights as enshrined in the Covenant, and consequently it found the communication to be admissible on 5 April 2001.

Observations by the state party

9.1. In its observations of 1 October 2001 and 2002, the state party endorses the Committee's decision on the inadmissibility of the part of the communication concerning the author's brother, but contests the

admissibility of the remainder of the communication in respect of the author himself.

9.2. Referring to paragraph 2.5 of the decision on admissibility, the state party reiterates its submission that the author has failed to exhaust domestic remedies, stressing in particular the opportunities to seek a remedy through the Court of Appeal and, if need be, the Supreme Court. The state party notes that it fully shares the individual opinion of one member of the Committee and requests the Committee to take this opinion into account when re-examining the communication.

9.3. With reference to paragraph 5.6 of the decision on admissibility, the state party says that the regime has always respected the principle of the independence of the judiciary and that the author's doubts about the President of the court are gratuitous and unfounded claims made with the sole purpose of defaming her. The state party reiterates that the author's case was tried fairly and openly, in complete independence and impartiality, as the author's own counsel has noted (so the state party claims).

9.4. In connection with paragraph 5.8 of the decision on admissibility, the state party again refers to its observations of 2 March 2000.

Author's comments on observations by the State party

10.1. In his comments of 3 April, 7 June and 14 July 2002, the author restates his arguments, especially that of the failure by the state party to respect human rights, institutions and legal instruments, and the *de facto* lack of independence of the judiciary in Togo.

Re-examination of the decision on admissibility and consideration of the merits

11.1. The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, in accordance with the provisions of article 5, paragraph 1, of the Optional Protocol.

11.2. The Committee has taken note of the observations of the state party of 1 October 2001 and 2002 regarding the inadmissibility of the communication on the ground of failure to exhaust domestic remedies. It notes that the state party has adduced no new or additional elements concerning inadmissibility, other than the observations which it made earlier at the admissibility stage, which would prompt the Committee to re-examine its decision. The Committee therefore considers that it should not review its finding of admissibility of 5 April 2001.

11.3. The Committee passes immediately to consideration of the merits.

12. Noting the fact that the Optional Protocol entered into force for the state party on 30 June 1988, that is, subsequent to the release and exile of

the author, the Committee recalls its admissibility decision according to which it would need to be decided on the merits whether the alleged violations of articles 7, 9, 10 and 14 continued, after the entry into force of the Optional Protocol, to have effects that of themselves constitute a violation of the Covenant. Although the author claims that he has been forced into exile and to live apart from his family and relatives, and although he has after the Committee's admissibility decision provided some additional arguments why he believes that he cannot return to Togo, the Committee is of the view that insofar as the author's submission could be understood to relate to such continuing effects of the original grievances that in themselves would amount to a violation of article 12 or other provisions of the Covenant, the author's claims have not been substantiated to such a level of specificity that would enable the Committee to establish a violation of the Covenant.

13. The Human Rights Committee, acting under article 5(4) of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee do not reveal any violation of the Covenant.

Appendix

Individual opinion of Mr Abdelfattah Amor with regard to the decision on admissibility of 5 April 2001

[**14.**] While sharing the conclusion of the Committee regarding the inadmissibility of the part of the communication relating to the author's brother, I continue to have reservations about the admissibility of the rest of the communication. There are a number of legal reasons for this:

[**15.**] 1. Article 5, paragraph 2(b) of the Optional Protocol to the International Covenant on Civil and Political Rights states that: ''The Committee shall not consider any communication from an individual unless it has ascertained that the individual has exhausted all available domestic remedies. This shall not be the rule where the application of the remedies is unreasonably prolonged.'' Point number one: the onus is on the Committee to satisfy itself that the individual has exhausted all domestic remedies. The Committee's role in the case is to ascertain rather than to assess. The author's allegations, unless they focus on an unreasonable delay in proceedings, insufficient explanations offered by the state party, or manifest inaccuracies or errors, are not such as to necessitate a change in the Committee's role. Point number two: article 5, paragraph 2(b) of the Optional Protocol is quite unambiguous and requires no interpretation. It is perfectly clear and restrictive. It is not necessary to go beyond the text to make sense of it, which would mean twisting it and changing its meaning and scope. Point number three: the sole exception to the rule of exhaustion of domestic remedies concerns unreasonable delay in proceedings, which is clearly not applicable in the present instance.

[**16.**] 2. It is undeniable that the sentencing of the author to five years'

imprisonment in 1986 was never appealed, either before the author's pardon in January 1987 or at any time afterwards. In other words, from the standpoint of the criminal law, no remedy was ever explored, let alone applied.

[**17.**] 3. From the standpoint of the civil law and an action to seek compensation, the author has never, either as a principal party or in any other capacity, gone to court to claim damages, with the result that his case has been referred to the Committee for the first time as an initial action.

[**18.**] 4. The author could have referred the case to the Committee with effect from August 1988, the date on which the Optional Protocol came into force with respect to the state party. The fact that he has waited more than 11 years to take advantage of the new procedure available to him cannot fail to raise questions, including that of a possible abuse of the right of submission referred to in article 3 of the Optional Protocol.

[**19.**] 5. The Committee lacks accurate, consistent and systematic evidence that would enable it to corroborate the author's allegations about the state party's judicial system as a whole, either as regards its criminal or its civil side. By basing its position on the general absence of effective remedies, as claimed by the author, the Committee has made a decision which, legally speaking, is questionable and could even be contested.

[**20.**] 6. It is to be feared that this decision will constitute a vexatious precedent, in the sense that it could be taken to condone a practice that lies outside the scope of article 5, paragraph 2(b) of the Optional Protocol. To sum up, I am of the view that, considering the circumstances described in the communication, the author's doubts about the effectiveness of the domestic remedies do not absolve him from exhausting them. The Committee should have concluded that the provision contained in article 5, paragraph 2(a), of the Optional Protocol had not been satisfied and that the communication was inadmissible.

Individual opinion by Committee member Hipolito Solari-Yrigoyen (dissenting)

[**21.**] I disagree with the present communication on the grounds set forth below.

[**22.**] 12. The Committee notes the fact that the Optional Protocol entered into force for the state party on 30 June 1988, that is, subsequent to the release and exile of the author. At the same time the Committee recalls its admissibility decision according to which it would need to be decided on the merits whether the alleged violations of articles 7, 9, 10 and 14 continued, after the entry into force of the Optional Protocol, to have effects that of themselves constitute a violation of the Covenant. In this regard, the author says that he has been forced into exile and to live apart from his family and relatives. In the view of the Committee, this claim should be understood as referring to the alleged violations of the author's rights in

1985-1987, which relate to such continuing effects of the original grievances that in themselves would amount to a violation of article 12 and other related provisions of the Covenant which permanently prevent his safe return to Togo.

[**23.**] 12.1 The Committee observes that in its first presentation, on 2 March 2000, the state party denied that the author had been forced into exile, but that subsequently, after his detailed and specific comments made on 22 August 2000, it has not provided any explanation or made any statement which would clarify the matter, in accordance with its obligations under article 4.2 of the Optional Protocol. By means of a simple statement it could have rebutted the author's claim that he is unable to return safely to Togo and offered assurances regarding his return, but it did not do so. It should be borne in mind that only the state party could offer such guarantees to put an end to the ongoing effects which underlie the author's exile by arbitrarily depriving him of his right to return to his own country. In its presentations made on 27 November 2000 and 1 October 2001 and 2002, the state party confined itself to rejecting the admissibility of the complaint as far as the author is concerned. It should be borne in mind that the state has supplied no new elements which would indicate that the continuing effects of the events which occurred before 30 June 1988 have ceased.

[**24.**] 12.2 It is necessary to ask whether the time which elapsed between the date when the Optional Protocol entered into force for the state party and the date when the complaint was submitted might undermine or nullify the argument relating to continuing effects which mean that the author's exile is involuntary. The answer is no, since exiles have no time limits as long as the circumstances which provoked them persist, which is the case with the state party. In many cases these circumstances have persisted longer than the normal human life span. Moreover, it cannot be forgotten that forced exile imposes a punishment on the victim with the aggravating factor that no judge has provided the accused with all the guarantees of due process before imposing the punishment. The punishment of exile, in short, is an administrative punishment. It is in addition a manifestly cruel one, as society has considered since the remotest times because of the effects on the victim, his family and his emotional and other ties when he is forcibly uprooted.

[**25.**] 12.3 Article 12 of the Covenant prohibits forced exile, stating that no one shall be arbitrarily deprived of the right to enter his own country. In General Comment 27, the Committee stated that the reference to the concept of arbitrariness covers all state action, legislative, administrative and judicial. Moreover, the possibility that the author may have dual nationality is of no importance, since, as also mentioned in the General Comment, 'the scope of ''his own country'' is broader than that of ''his own nationality'''. Thus, the persons entitled to exercise this right can be

identified only by interpreting the meaning of the phrase 'his own country', which gives recognition to a person's special links with that country.

[**26.**] 13. The Human Rights Committee is of the view that the original grievances suffered by the author in Togo in 1985-1987 have a continuing effect in that they prevent him from returning in safety to his own country. Consequently, there has been a violation of article 12, paragraph 4, of the Covenant, read in conjunction with articles 7, 9, 10 and 14.

[**27**.] 14. In accordance with article 2, paragraph 3(a), of the Covenant, the Committee considers that the author is entitled to an effective remedy.

[**28.**] 15. Bearing in mind that, by becoming a party to the Optional Protocol, the state has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the state party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognised in the Covenant and to provide an effective and enforceable remedy when a violation has been established, the Committee wishes to receive from the state party, within 90 days, information about the measures taken to give effect to the Committee's views. The state party is also requested to publish the Committee's views.

ZAMBIA

Chambala v Zambia

(2003) AHRLR (HRC 2003)

Communication 856/1999, *Alex Soteli Chambala v Zambia*
Decided at the 78th session, 15 July 2003, CCPR/C/78/D/856/1999

Evidence (failure of state to respond to allegations, 7.1)
Personal liberty and security (arbitrary arrest and detention, 7.2, 7.3)

1. The author of the communication is Alex Soteli Chambala, a Zambian citizen, born in 1948. He claims to be a victim of a violation by Zambia[1] of the International Covenant on Civil and Political Rights (the Covenant) article 9, paragraphs 3 and 5. He is not represented by counsel.

The facts as presented by the author

2.1. The author was arrested and detained without charge on 7 February 1987. He was served with a police detention order[2] pursuant to regulation 33(6) of the Preservation of Public Security Act on 12 February 1987. On 24 February 1987 the police detention order was revoked, but on the same day he was served with a presidential detention order pursuant to regulation 33 (1) of the Preservation of Public Security Act. The grounds of the detention were served on the author on 5 March 1987; they state that he was being detained for a) receiving and keeping an escaped prisoner, Henry Kalenga, at his house, b) whom the author knew was detained for offences under the Preservation of Public Security Act, c) that he assisted Mr Kalenga in his attempt to flee to a country hostile to Zambia, and d) that he never reported the presence of Mr Kalenga to the security forces.

2.2. After detention for over one year without any production before a court or a judicial officer, the author applied for release. On 22 September 1988, the High Court of Zambia decided that there were no reasons to keep him in detention. Nevertheless, the author was not released until December 1988, when the President revoked his detention. According

[1] The Covenant and the Optional Protocol to the Covenant entered into force for the state party on 10 July 1984.
[2] The Police Detention Order dated 12 February 1987 states that the author should be detained for a period not exceeding 28 days pending a decision whether a detention order should be made against him.

to the author, the maximum prison sentence for the offence he was charged with was six months.

2.3. The author argues that under Zambian law a person cannot seek compensation for unlawful detention. Furthermore, when he inquired with lawyers about the possibilities to submit a claim, he was told that his case was statute barred under Zambian laws. Thus, no domestic remedies are said to be available. Nevertheless, when the author learned that Peter Chico Bwalya and Henry Kalenga had received compensation after the adoption of decisions by the Human Rights Committee[3], he wrote to the Attorney-General's Office seeking compensation. Although the letters were registered at the Attorney General's Office, he received no reply.

The complaint

3.1. The author claims that the state party, by detaining him arbitrarily for almost two years, without bringing him before a judge or other officer authorised by law to exercise judicial power, has violated his rights under article 9, paragraphs 3 and 5 of the Covenant. These events may also raise further issues under article 9 of the Covenant.

The state party's submission on the admissibility and the merits of the communication

4. By *note verbale* of 26 March 2001, the state party conceded the events described in the communication, and indicated that it would be contacting the complainant with a view to compensating him for the period of detention at issue.

Subsequent communications with the parties

5.1. In his letters of 20 June and 9 November 2001, and again on 30 January 2002, the author advised the Committee that he had not yet received compensation from the state party. In the last letter, he wrote that he had reminded the Attorney-General's office, which is responsible for the payment, on 9 November 2001.

5.2. By *note verbale* of 7 March 2002, the Secretariat reminded the state party to fulfil its promise to compensate the author without further delay and requested the state party to inform it of the measures taken. No response was received from the state party.

Issues and proceedings before the Committee

Consideration of admissibility

6.1. Before considering any claims contained in a communication, the

[3] See *Bwalya v Zambia*, case 314/1988, views adopted on 14 July 1993, and *Kalenga v Zambia*, case 326/1988, views adopted on 27 July 1993.

Human Rights Committee must, in accordance with rule 87 of its Rules of Procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2. The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for the purposes of article 5, paragraph 2(a), of the Optional Protocol.

6.3. The Committee notes with concern that although the state party has conceded the truth of the facts alleged in the communication and has undertaken to compensate the author for the period of detention at issue, and in spite of a reminder from the Secretariat to this effect, the state party has failed to fulfil its undertaking.

6.4. The Committee notes that the state party has not contested the admissibility of the communication. On the basis of the information before it, the Committee therefore concludes that the author has met the requirements under article 5, paragraph 2 (b), of the Optional Protocol, and that there are no other obstacles for his claims to be admissible in respect of possible violations of article 9.

Consideration of the merits

7.1. The Committee has considered the communication in the light of all the information provided by the parties. It notes with concern the lack of information from the State party, and recalls that it is implicit in article 4, paragraph 2, of the Optional Protocol that a state party examine in good faith all the allegations brought against it, and that it provide the Committee with all the information at its disposal. The state party has not forwarded any pertinent information to the Committee other than its note of 26 March 2001. In the circumstances, due weight must be given to the author's allegations, to the extent that they have been substantiated.

7.2. With regard to the author's allegation that he was subjected to arbitrary detention, the Committee has noted that the author was detained for a period of 22 months, dating from 7 February 1987, a claim that has not been contested by the state party. Moreover, the state party has not sought to justify this lengthy detention before the Committee. Therefore, the detention was, in the Committee's view, arbitrary and constituted a violation of article 9, paragraph 1, read together with article 2, paragraph 3.

7.3. The Committee further notes that the author's detention for the further two months following the High Court's determination that there were no grounds to hold him in detention was, in addition to being arbitrary in terms of article 9, paragraph 1, also contrary to Zambian domestic law, thus giving rise to a violation of the right to compensation under article 9, paragraph 5.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it, disclose violations of article 9, paragraph 1, read together with article 2, paragraph 3, and of article 9, paragraph 5, of the Covenant.

9. In accordance with article 2, paragraph 3(a), of the Covenant, the state party is under an obligation to provide the author with an effective remedy. In view of the fact that the state party has committed itself to pay compensation, the Committee urges the state party to grant as soon as possible compensation to the author for the period that he was arbitrarily detained from 7 February 1987 to December 1988. The state party is under an obligation to ensure that similar violations do not occur in the future.

10. By becoming a state party to the Optional Protocol, the state party has recognised the competence of the Committee to determine whether there has been a violation of the Covenant or not. Pursuant to article 2 of the Covenant, the state party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognised in the Covenant and to provide an effective and enforceable remedy in cases in which a violation of the Covenant has been found by the Committee. The Committee wishes to receive from the state party, within 90 days, information about the measures taken to give effect to the Committee's views. The state party is also requested to publish the Committee's views.

TUNISIA

Thabti v Tunisia

(2003) AHRLR (CAT 2003)

Communication 187/2001, *Mr Dhaou Belgacem Thabti (represented by non-governmental organisation VÕritÕ-Action) v Tunisia*
Decided at the 31st session, CAT/C/31/D/187/2001

Admissibility (exhaustion of local remedies, 7.2)
Torture (prompt and impartial investigation, 10.5, 10.6, 10.7)
Evidence (insufficient elements, 10.9)

1. The complainant is Mr Dhaou Belgacem Thabti, a Tunisian citizen, born on 4 July 1955 in Tataouine, Tunisia, and resident in Switzerland since 25 May 1998, where he has refugee status. He claims to have been the victim of violations by Tunisia of the provisions of article 1, article 2, paragraph 1, article 4, article 5, article 12, article 13, article 14, article 15 and article 16 of the Convention. He is represented by the non-governmental organisation Vérité-Action.

1.2 Tunisia ratified the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment and made the declaration under article 22 of the Convention on 23 September 1988.

Facts as submitted by the complainant

2.1. The complainant states that he was an active member of the Islamist organisation ENNAHDA (formerly MTI). Following a wave of arrests in Tunisia, which commenced in 1990 and was targeted in particular against members of this organisation, he went into hiding from 27 February 1991. On 6 April 1991, at 1 am, he was arrested and severely beaten by the police, who kicked, slapped and punched him and struck him with truncheons.

2.2. Incarcerated in the basement cells in the Interior Ministry (DST) building in Tunis and deprived of sleep, the complainant was taken, the following morning, to the office of the Director of State Security, Ezzedine Jneyeh. According to the complainant, this official personally ordered his interrogation under torture.

2.3. The complainant provides a detailed description, accompanied by sketches, of the different types of torture to which he was subjected until 4 June 1991 in the premises of the Interior Ministry (DST).

2.4. The complainant describes what is customarily known as the 'roast chicken' position, in which the victim is stripped naked, his hands tied and his legs folded between his arms, with an iron bar placed behind his knees, from which he is then suspended between two tables. In this position he was subjected to beatings, in particular on the soles of his feet, until he passed out. The complainant adds that the policemen inflicting this torture would then bring him round by throwing cold water over his body and by applying ether to sensitive areas, such as his buttocks and testicles.

2.5. The complainant also claims to have been tortured in the 'upside-down' position, whereby the victim is stripped, hands tied behind his back and suspended from the ceiling by a rope tied to one or both of his feet, with his head hanging downwards. In this position he was kicked and struck with sticks and whips until he passed out. He adds that his torturers tied a piece of string to his penis which they then repeatedly tugged, as if to tear his penis off.

2.6. The complainant claims to have been subjected to immersion torture, in which the victim is suspended upside-down from a hoist and immersed in a tank of water mixed with soap powder, bleach and sometimes even urine and salt; the victim is unable to breathe and is therefore forced to keep swallowing this mixture until his stomach is full. He states that he was then kicked in the stomach until he vomited.

2.7. The complainant also maintains that he was tortured in the 'scorpion' position, in which the victim is stripped, his hands and feet tied behind his back, and then lifted by his torturers, face downwards, with a chain hoist, while pressure is applied to his spine. He states that, in this position, he was beaten and whipped on his legs, arms, stomach and genitals.

2.8. The complainant also claims to have been subjected to 'table torture', in which he was stripped, made to lie flat on his back or stomach on a long table, with his arms and legs tied down, and was then beaten.

2.9. In support of his claims of torture and the effects of torture, the complainant submits a certificate from a Swiss physiotherapist, a report by a neurological specialist in Fribourg and a certificate of psychiatric treatment from the medical service of a Swiss insurance company. He also cites an observation mission report by the International Federation for Human Rights, stating that, during proceedings initiated on 9 July 1992 against Islamist militants, including the complainant, all the defendants that were interviewed complained that they had been subjected to serious physical abuse whilst in police custody.

2.10. The complainant provides a list of persons who subjected him to torture during this period, namely, Ezzedine Jneieh, Director of DST; Abderrahmen El Guesmi; El Hamrouni; Ben Amor, Inspector of Police; and Mahmoud El Jaouadi, Slah Eddine Tarzi and Mohamed Ennacer-Hleiss, all of Bouchoucha Intelligence Service. He adds that his torturers were as-

sisted by two doctors and that he witnessed torture being inflicted on his fellow detainees.

2.11. On 4 June 1991, the complainant appeared before the military examining magistrate, Major Ayed Ben Kayed. The complainant states that, during the hearing, he denied the charges against him of having attempted a *coup d'état*, and that he was refused the assistance of counsel.

2.12. The complainant claims that he was then placed in solitary confinement in the premises of the Ministry of the Interior (DST), from 4 June to 28 July 1991, and refused all visits, mail, medicine and necessary medical attention, except for one visit, on 18 July 1991, by Dr. Moncef Marzouki, President of the Tunisian Human Rights League. The complainant adds that he was not fed properly, that he was denied the right to practise his religion and that he was once again subjected to torture.

2.13. From 28 July 1991, when his period of police custody ended, the complainant was repeatedly transferred between different prison establishments in the country — in Tunis, Borj Erroumi (Bizerte), Mahdia, Sousse, Elhaoireb and Rejim Maatoug — which transfers, he maintains, were designed to prevent him having any contact with his family.

2.14. The complainant describes the bad conditions in these detention facilities, such as overcrowding, with 60-80 persons in the small cells in which he was held, and the poor hygiene, which caused sickness: he maintains that, as a result, he developed asthma and suffered skin allergies and that his feet are now disfigured. He states that on several occasions he was placed in solitary confinement, partly because of the hunger strikes he mounted in the 9 April prison in Tunis over 12 days in July 1992, and in Mahdia over 8 days in October 1995 and 10 days in March 1996, as a protest against the conditions in which he was being held and the ill-treatment to which he was subjected, and partly by arbitrary decision of the prison warders. He also stresses that he was stripped naked and beaten in public.

2.15. On 9 July 1992 the complainant's case was heard by the Bouchoucha military court in Tunis. He maintains that he was only able to have one meeting with his counsel, on 20 July 1992, and that it was conducted under the surveillance of the prison warders. On 28 August 1992, he was sentenced to a term of six years' imprisonment.

2.16. On completion of his sentence on 27 May 1997, as indicated in the prison discharge papers he submits, the complainant was placed under administrative supervision for a period of five years, which effectively meant that he was placed under house arrest in Remada, 600 kilometres from Tunis, where his wife and children were living. Four months later, on 1 October 1997, he fled Tunisia for Libya then made his way to Switzerland, where he obtained political refugee status on 15 January 1999. In support of his statements, the complainant submits a copy of the report issued on 10 March 1996 by the Tunisian Committee for Human Rights

and Freedoms, describing his condition after his release, and a certificate from the Swiss Federal Office for Refugees, on the granting of his political refugee status. The complainant adds that, after he had fled from the country, he was sentenced in absentia to 12 years' non-suspended imprisonment.

2.17. Finally, the complainant states that members of his family, in particular his wife and their five children, have been the victims of harassment (night-time raids, systematic searches of their home, intimidation, threats of rape, confiscation of property and money, detention and interrogation, constant surveillance), and of ill-treatment (the complainant's son Ezzedinne has been detained and severely beaten) by the police throughout the period of his detention and after he fled the country, continuing until 1998.

2.18. As to whether all domestic remedies have been exhausted, the complainant states that he complained of acts of torture committed against him to the Bouchoucha military court, in the presence of the national press and international human rights observers. He maintains that the President of the court tried to ignore him but, when he insisted, replied that nothing had been established. In addition, the judge refused outright the complainant's request for a medical check.

2.19. The complainant adds that, after the hearing and his return to prison, he was threatened with torture if he repeated his claims of torture to the court.

2.20. The complainant maintains in addition that, from 27 May 1997, the date of his release, his house arrest prevented him from lodging a complaint. He explains that the Remada police and *gendarmerie* took part a continuing process of harassment and intimidation against him during the daily visits he made for the purposes of administrative supervision. According to the complainant, the mere fact of submitting a complaint would have caused increased pressure to be applied against him, even to the point of his being returned to prison. Being under house arrest, he was also unable to apply to the authorities at his legal place of residence, in Tunis.

2.21. The complainant maintains that, while Tunisian law might make provision for the possibility of complaints against acts of torture, in practice, any victim submitting a complaint will become the target of intolerable police harassment, which acts as a disincentive to the use of this remedy. According to the complainant, any remedies are therefore ineffective and non-existent.

Substance of the complaint

3.1. The complainant maintains that the Tunisian government has breached the following articles of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment:

Article 1. The practices described above, such as the 'roast chicken' position, the 'upside-down' position, the 'scorpion' position, immersion torture, 'table torture' and solitary confinement, to which the complainant was subjected, constitute acts of torture.

Article 2, paragraph 1. Not only has the state party failed to take effective measures to prevent torture, it has even mobilised its administrative machinery and, in particular, its police force as an instrument of torture against the complainant.

Article 4. The state party has not ensured that all the acts of torture to which the complainant has been subjected are offences under its criminal law.

Article 5. The state party has instituted no legal proceedings against those responsible for torturing the complainant.

Article 12. The state party has not carried out an investigation of the acts of torture committed against the complainant.

Article 13. The state party has not undertaken any examination of the allegations of torture made by the complainant at the beginning of his trial; instead, these have been dismissed.

Article 14. The state party has ignored the complainant's right to make a complaint and has thereby deprived him of his right to redress and rehabilitation.

Article 15. The complainant was sentenced on 28 August 1992 to a prison sentence on the basis of a confession obtained as a result of torture.

Article 16. The repressive measures and practices described above, such as violation of the right to medical care and medicine and the right to send and receive mail, restriction of the right to property and the right to visits by family members and lawyers, house arrest and harassment of the family, applied by the state party against the complainant constitute cruel, inhuman and degrading treatment or punishment.

State party's observations on admissibility

4.1. On 4 December 2001, the state party challenged the admissibility of the complaint on the grounds that the complainant has neither employed nor exhausted available domestic remedies.

4.2. The state party maintains that the complainant may still have recourse to the available domestic remedies, since, under Tunisian law, the limitation period for acts alleged to be, and characterised as, serious offences is ten years.

4.3. The state party explains that, under the criminal justice system, the complainant may submit a complaint, from within Tunisia or abroad, to a representative of the Public Prosecutor's Office with jurisdiction in the area

in question. He may also authorise a Tunisian lawyer of his own choice to submit the complaint or request a foreign lawyer to do so with the assistance of a Tunisian colleague.

4.4. Under the same rules of criminal procedure, the Public Prosecutor will receive the complaint and institute a judicial enquiry. In accordance with article 53 of the Code of Criminal Procedure, the examining magistrate to whom the case is referred will hear the author of the complaint. In the light of this hearing, he may decide to hear witnesses, question suspects, undertake on-site investigations and seize physical evidence. He may order expert studies and carry out any actions which he deems necessary for the uncovering of evidence, both in favour of and against the complainant, with a view to discovering the truth and verifying facts on which the trial court will be able to base its decision.

4.5. The state party explains that the complainant may, in addition, lodge with the examining magistrate during the pre-trial proceedings an application for criminal indemnification for any harm suffered, over and above the criminal charges brought against those responsible for the offences against him.

4.6. If the examining magistrate deems that the public right of action is not exercisable, that the acts do not constitute a violation or that there is no *prima facie* case against the accused, he shall rule that there are no grounds for prosecution. If, on the other hand, the magistrate deems that the acts constitute an offence punishable by imprisonment, he shall send the accused before a competent court — which in the present instance, where a serious offence has been committed, would be the Indictment Chamber. All rulings by the examining magistrate are immediately communicated to all the parties to the proceedings, including the complainant who brought the criminal indemnification proceedings. Having been thus notified within a period of 48 hours, the complainant may, within four days, lodge an appeal against any ruling prejudicial to his interests. This appeal, submitted in writing or orally, is received by the clerk of the court. If there is *prima facie* evidence of the commission of an offence, the indictment chamber sends the accused before the competent court (criminal court or criminal division of a court of first instance), having given rulings on all the counts established during the proceedings. If it chooses, it may also order further information to be provided by one of its assessors or by the examining magistrate; it may also institute new proceedings, or conduct or order an inquiry into matters which have not yet been the subject of an examination. The decisions of the Indictment Chamber are subject to immediate enforcement.

4.7. A complainant seeking criminal indemnification may appeal on a point of law against a decision of the Indictment Chamber once it has been notified. This remedy is admissible when the indictment chamber rules that there are no grounds for prosecution; when it has ruled that the application for criminal indemnification is inadmissible, or that the prose-

cution is time-barred; when it has deemed the court to which the case has been referred to lack jurisdiction; or when it has omitted to make a ruling on one of the counts.

4.8. The state party stresses that, in conformity with article 7 of the Code of Criminal Procedure, the complainant may bring criminal indemnification proceedings before the court to which the case has been referred (criminal court or criminal division of the court of first instance) and, as appropriate, may lodge an appeal, either with the Court of Appeal if the offence in question is an ordinary offence, or with the criminal division of the Court of Appeal if it is a serious offence. The complainant may also appeal to the Court of Cassation.

4.9. The state party maintains that the domestic remedies are effective.

4.10. According to the state party, the Tunisian courts have systematically and consistently acted to remedy deficiencies in the law, and stiff sentences have been handed down on those responsible for abuses and violations of the law. The state party says that, between 1 January 1988 and 31 March 1995, judgments were handed down in 302 cases involving members of the police or the national guard under a variety of counts, 227 of which fell into the category of abuse of authority. The penalties imposed varied from fines to terms of imprisonment of several years.[1]

4.11. The state party maintains that, given the complainant's 'political and partisan' motives and his 'offensive and defamatory' remarks, his complaint may be considered an abuse of the right to submit complaints.

4.12. The state party explains that the ideology and the political platform of the movement of which the complainant was an active member are based exclusively on religious principles, promoting an extremist view of religion which negates democratic rights and the rights of women. This is an illegal movement, fomenting religious and racial hatred and employing violence. According to the state party, this movement perpetrated terrorist attacks which caused material damage and loss of life over the period 1990-1991. For that reason, and also because it is in breach of the Constitution and the law on political parties, this movement has not been recognised by the authorities.

4.13. The state party explains that the complainant is making serious accusations, not genuinely substantiated by any evidence, against the judicial authorities by claiming that judges accept confessions as evidence and hand down judgements on the basis of such evidence.

Complainant's comments on the state party's observations

5.1. In a letter dated 6 May 2002, the complainant challenges the state

[1] The examples cited by the state are available for information in the file.

party's argument that he was supposedly unwilling to turn to the Tunisian justice system and make use of domestic remedies.

5.2. In this context, the complainant recalls his statements concerning the torture to which he had been subjected and his request for a medical check made to the judge of the military court, all of which were ignored and not acted upon, and his reports of violations of articles 13 and 14 of the Convention against Torture, as well as his contention that placing him under administrative supervision impeded due process. According to the complainant, the practice described above is routinely applied by judges, particularly against political prisoners. In support of his arguments, he cites extracts from reports by the Tunisian Committee for Human Rights and Freedoms, the International Federation for Human Rights and the Tunisian Human Rights League. He also refers to the annual reports of such international organizations as Amnesty International and Human Rights Watch, which have denounced the practices described by the complainant.

5.3. The complainant also challenges the explanations by the state party regarding the possibility of promptly instituting legal proceedings, the existence of an effective remedy and the possibility of bringing criminal indemnification proceedings.

5.4. The complainant argues that the state party has confined itself to repeating the procedure described in the Code of Criminal Procedure, which is far from being applied in reality, particularly where political prisoners are concerned. In support of his argument, he cites reports by Amnesty International, Human Rights Watch, the World Organisation against Torture, the National Consultative Commission on Human Rights in France and the National Council for Fundamental Freedoms in Tunisia. He also refers to the Committee against Torture's final observations on Tunisia, dated 19 November 1998. The complainant stresses that the Committee against Torture recommended, among other things, that the state party should, first, ensure the right of victims of torture to lodge a complaint without the fear of being subjected to any kind of reprisal, harassment, harsh treatment or prosecution, even if the outcome of the investigation does not prove their allegations, and to seek and obtain redress if these allegations are proven correct; second, ensure that medical examinations are automatically provided following allegations of abuse and an autopsy is performed following any death in custody; and third, ensure that the findings of all investigations concerning cases of torture are made public and that this information includes details of any offences committed, the names of the offenders, the dates, places and circumstances of the incidents and the punishment received by those who were found guilty. The Committee also noted that many of the regulations existing in Tunisia for the protection of arrested persons were not adhered to in practice. It also expressed its concern over the wide gap that existed between law and practice with regard to the protection of human rights, and was particularly disturbed by the reported widespread practice of

torture and other cruel and degrading treatment perpetrated by security forces and the police, which, in certain cases, resulted in death in custody. In addition, the complainant mentions the decision by the Committee against Torture relating to communication 60/1996, *Faisal Baraket v Tunisia*. The complainant believes that the state party's statement regarding the possibility of ensuring an effective remedy constitutes political propaganda without any legal relevance. He explains that the cases cited by the state party (para 4.10) relate to Tunisian citizens who were not arrested for political reasons, whereas the authorities reserve special treatment for cases involving political prisoners.

5.5. The complainant also challenges the state party's argument that a Tunisian lawyer can be instructed from abroad to lodge a complaint.

5.6. The complainant maintains that this procedure is a dead letter and has never been respected in political cases. According to him, lawyers who dare to defend such causes are subject to harassment and other forms of serious encroachment on the free and independent exercise of their profession, including prison sentences.

5.7. The complainant maintains that his situation as a political refugee in Switzerland precludes him from successfully concluding any proceedings that he might initiate, given the restrictions placed on contacts between refugees and the authorities in their own countries. He explains that severance of all relations with the country of origin is one of the conditions on which refugee status is granted, and that it plays an important role when consideration is being given to withdrawing asylum. According to the complainant, such asylum would effectively end if the refugee should once again, of his own volition, seek the protection of his country of origin, for example by maintaining close contacts with the authorities or paying regular visits to the country.

5.8. Lastly, the complainant believes that the state party's comments regarding his membership of the ENNAHDA movement and the aspersions cast upon it demonstrate the continued discrimination against the opposition, which is still considered illegal. According to the complainant, with its references in this context to terrorism, the state party is demonstrating its bias and any further talk of ensuring effective domestic remedies is therefore pure fiction. He also stresses that the prohibition of torture and inhuman or degrading treatment is a provision which admits of no exception, including for terrorists.[2]

[2] The complainant also refers to communication 91/1997, *A v Netherlands*, concerning which the Committee against Torture upheld the complaint of a Tunisian asylum-seeker who was a member of the opposition because of the serious risk that he would be tortured if he returned to Tunisia.

5.9. Finally, in the light of his previous explanations, the complainant rejects the observation by the state party to the effect that the present complaint constitutes an abuse of the right to submit complaints.

Additional observations from the State party on admissibility

6.1. On 8 November 2002 the state party again challenged the admissibility of the complaint. It maintains, first, that the complainant's claims about recourse to the Tunisian justice system and the use of domestic remedies are baseless and unsupported by any evidence. It adds that proceedings in relation to the allegations made in the complaint are not time-barred, since the time-limit for bringing proceedings in such cases is ten years. It argues that the complainant offers no evidence in support of his claims that the Tunisian authorities' customary practice makes it difficult to initiate prompt legal action or apply for criminal indemnification. It adds that the complainant's refugee status does not deprive him of his right to lay complaints before the Tunisian courts. Third, it maintains that, contrary to the complainant's allegations, it is open to him to instruct a lawyer of his choice to lodge a complaint from abroad. Lastly, the state party reaffirms that the complaint is not based on any specific incident and cites no evidence, and constitutes an abuse of the right to submit complaints.

Committee's decision on admissibility

7.1. At its 29th session, the Committee considered the admissibility of the complaint, and in a decision of 20 November 2002 declared it admissible.

7.2. With regard to the issue of the exhaustion of domestic remedies, the Committee noted that the state party challenged the admissibility of the complaint on the grounds that the available and effective domestic remedies had not been exhausted. In the present case, the Committee noted that the state party had provided a detailed description both of the remedies available, under law, to any complainant and of cases where such remedies had been applied against those responsible for abuses and for violations of the law. The Committee considered, nevertheless, that the state party had not sufficiently demonstrated the relevance of its arguments to the specific circumstances of the case of this complainant, who claims to have suffered violations of his rights. It made clear that it did not doubt the information provided by the state party about members of the security forces being prosecuted and convicted for a variety of abuses. But the Committee pointed out that it could not lose sight of the fact that the case at issue dates from 1991 and that, given a statute of limitations of ten years, the question arose of whether, failing interruption or suspension of the statute of limitations — a matter on which the state party had provided no information — action before the Tunisian courts would be disallowed. The Committee noted, moreover, that the complainant's allegations related to facts that had already been reported publicly to

the judicial authorities in the presence of international observers. The Committee pointed out that to date it remained unaware of any investigations voluntarily undertaken by the state party. The Committee therefore considered it very unlikely in the present case that the complainant would obtain satisfaction by exhausting domestic remedies, and decided to proceed in accordance with article 22, paragraph 5(b) of the Convention.

7.3. The Committee noted, in addition, the argument by the state party to the effect that the complainant's claim was tantamount to abuse of the right to lodge a complaint. The Committee considered that any report of torture was a serious matter and that only through consideration of the merits could it be determined whether or not the allegations were defamatory. Furthermore, the Committee believed that the complainant's political and partisan commitment adduced by the state party did not impede consideration of this complaint, in accordance with the provisions of article 22, paragraph 2 of the Convention.

State party's observations on the merits

8.1. In its observations of 3 April 2003 and 25 September 2003, the state party challenges the complainant's allegations and reiterates its position regarding admissibility.

8.2. In relation to the allegations concerning the state party's 'complicity' and inertia *vis-à-vis* 'practices of torture', the state party indicates that it has set up preventive[3] and dissuasive[4] machinery to combat torture so as to prevent any act which might violate the dignity and physical integrity of any individual.

8.3. Concerning the allegations relating to the 'practice of torture' and the 'impunity of the perpetrators of torture', the state party considers that the complainant has not presented any evidence to support his claims. It emphasises that, contrary to the complainant's allegations, Tunisia has taken all necessary legal and practical steps, in judicial and administrative bodies, to prevent the practice of torture and prosecute any offenders, in accordance with articles 4, 5 and 13 of the Convention. Equally, according to the state party, the complainant has offered no grounds for his inertia and failure to act to take advantage of the effective legal opportunities

[3] This includes instruction in human rights values in training schools for the security forces, the Higher Institute of the Judiciary and the National School for training and retraining of staff and supervisors in prisons and correctional institutions; a human-rights-related code of conduct aimed at senior law enforcement officials; and the transfer of responsibility for prisons and correctional institutions from the Ministry of the Interior to the Ministry of Justice and Human Rights.

[4] A legislative reference system has been set up: contrary to the complainant's allegation that the Tunisian authorities have not criminalized acts of torture, the state party indicates that it has ratified the Convention against Torture without reservations, and that the Convention forms an integral part of Tunisian domestic law and may be invoked before the courts. The provisions of criminal law relating to torture are severe and precise (Criminal Code, art 101 *bis*).

available to him to bring his case before the judicial and administrative authorities (see paragraph 6.1). Concerning the Committee's decision on admissibility, the state party emphasises that the complainant cites not only 'incidents' dating back to 1991, but also 'incidents' dating from 1995 and 1996, that is, a time when the Convention against Torture was fully incorporated into Tunisian domestic law and when he reports 'ill-treatment' that he claims to have suffered while being held in Mahdia prison. Hence the statute of limitations has not expired, and the complainant should urgently act to interrupt the limitation period, either by contacting the judicial authorities directly, or by performing an act which has the effect of interrupting the limitation. The state party also mentions the scope for the complainant to lodge an appeal for compensation for any serious injury caused by a public official in the performance of his duties,[5] noting that the limitation period stands at 15 years.[6] The state party points out that the Tunisian courts have always acted systematically to remedy deficiencies in the law on acts of torture (see paragraph 4.10).

8.4. As for the allegations of failure to respect guarantees relating to judicial procedure, the state party regards them as unfounded. According to the state party, the authorities did not prevent the complainant from lodging a complaint before the courts — on the contrary, he opted not to make use of domestic remedies. As for the 'obligation' of judges to ignore statements made as a result of torture, the state party cites article 15 of the Convention against Torture, and considers that it is incumbent on the accused to provide the judge with at least basic evidence that his statement has been made in an unlawful manner. In this way he would confirm the truth of his allegations by presenting a medical report or a certificate proving that he had lodged a complaint with the public prosecutor's office, or even by displaying obvious traces of torture or ill-treatment to the court. However, the state party points out that although, in the case relating to Mr Thabti, the court had ordered a medical check for all the prisoners who so wished, the complainant voluntarily opted not to make such a request, preferring to reiterate his allegations of ill-treatment to the court, for the purpose of focusing on himself the attention of the observers attending the hearing. The complainant justifies his refusal to undergo the medical examination ordered by the court on the grounds that the doctors would behave in a compliant manner. The state party replies that the doctors are appointed by the examining magistrate or the court from among the doctors working in the prison administration and doctors who have no connection with it and who enjoy a reputation and

[5] Under the Administrative Court Act of 1 June 1972, the state may be held responsible even when it is performing a sovereign act if its representatives, agents or officials have caused material or moral injury to a third person. The injured party may demand from the state compensation for the injury suffered, under art 84 of the Code of Obligations and Contracts, without prejudice to the direct liability of its officials *vis-à-vis* the injured parties.

[6] Administrative Court — judgment 1013 of 10 May 1003 and judgment 21816 of 24 January 1997.

integrity above all suspicion. Lastly, according to the state party, the complainant did not deem it necessary to lodge a complaint either during his detention or during his trial, and his refusal to undergo a medical examination illustrates the baselessness of his allegations and the fact that his actions form part of a strategy adopted by the ENNAHDA illegal extremist movement in order to discredit Tunisian institutions by alleging acts of torture and ill-treatment but not making use of available remedies.

8.5. Concerning the allegations relating to the trial, according to the state party, although the complainant acknowledges that two previous cases against him in 1983 and 1986 were dismissed for lack of evidence, he continues nevertheless to accuse the legal authorities systematically of bias. In addition, contrary to the complainant's allegations that during his trial and during questioning the examining magistrate attached to the Tunis military court denied him the assistance of counsel, the state party points out that Mr Thabti himself refused such assistance. According to the state party, the examining magistrate, in accordance with the applicable legislation, reminded the complainant of his right not to reply except in the presence of his counsel, but the accused opted to do without such assistance, while refusing to answer the examining magistrate's questions. Given the complainant's silence, the magistrate warned him, in accordance with article 74 of the Code of Criminal Procedure, that he would embark on examination proceedings, and noted this warning in the record. Concerning the complainant's claim that he was found guilty on the sole basis of his confession, the state party points out that, under the last paragraph of article 69 and article 152 of the Code of Criminal Procedure, a confession on the part of the accused cannot relieve the judge of the obligation to seek other evidence, while confessions, like all items of evidence, are a matter for the independent appreciation of the judge. On that basis, it is a constant of Tunisian case law that an accused cannot be found guilty on the sole basis of a confession.[7] In the case in question, the basis for the court's decision, in addition to the confessions made by the complainant throughout the judicial proceedings, was statements by witnesses, testimony by his accomplices and items of evidence.

8.6. Concerning the allegations relating to prison conditions, and in particular the transfers between one prison and another, which the complainant considers an abuse, the state party points out that, in keeping with the applicable regulations, transfers are decided upon in the light of the different stages of the proceedings, the number of cases and the courts which have competence for specific areas. The prisons are grouped in three categories: for persons held awaiting trial; for persons serving custodial sentences; and semi-open prisons for persons found guilty of ordinary offences, which are authorised to organize agricultural labour.

[7] Judgment 4692 of 30 July 1996, published in the *Revue de Jurisprudence et Législation (RJL)*; judgment 8616 of 25 February 1974 *RJL* 1975; and judgment 7943 of 3 September 1973 *RJL* 1974.

According to the state party, as the status of the complainant had changed from that of remand prisoner to that of a prisoner serving a custodial sentence, and bearing in mind the requirements as to investigations in his case or in other similar cases, he was transferred from one prison to another, in accordance with the applicable regulations. Moreover, the conditions in which the complainant was held, wherever he was held, were in keeping with the prison regulations governing conditions for holding prisoners in order to ensure prisoners' physical and moral safety. The state party also considers baseless the complainant's allegations improperly equating the conditions in which he was held with degrading treatment. It points out that prisoners' rights are scrupulously protected in Tunisia, without any discrimination, whatever the status of the prisoner, in a context of respect for human dignity, in accordance with international standards and Tunisian legislation. Medical, psychological and social supervision is provided, and family visits are allowed.

8.7. Contrary to the allegations that the medical consequences suffered by the complainant are due to torture, the state party rejects any causal link. Moreover, according to the state party, the complainant was treated for everyday medical problems and received appropriate care. Lastly, following an examination by the prison doctor, the complainant was taken to see an ophthalmologist, who prescribed a pair of glasses on 21 January 1997.

8.8. Concerning the allegations that he was denied visits, according to the state party the complainant regularly received visits from his wife Aicha Thabti and his brother Mohamed Thabti, in accordance with the prison regulations, as demonstrated by the visitors' records in the prisons in which he was held.

8.9. Concerning the allegations relating to administrative supervision and the social position of Mr Thabti's family, according to the state party, the administrative supervision to which the complainant was subject after having served his prison term, and which he equates with ill-treatment, is in fact an additional punishment for which provision is made in article 5 of the Criminal Code. The state party therefore considers that the punishment cannot be regarded as ill-treatment under the Convention against Torture. Lastly, contrary to the complainant's allegations, the state party maintains that the complainant's family is not suffering from any form of harassment or restrictions, and that his wife and his children are in possession of their passports.

Observations by the complainant

9.1. In his observations dated 20 May 2003, the complainant sought to respond to each of the points contained in the above observations by the state party.

9.2. Concerning the preventive arrangements for combating torture, the complainant considers that the state party has confined itself to listing an arsenal of laws and measures of an administrative and political nature which, he says, are not put into effect in any way. To support this assertion he cites reports prepared by the non-governmental organisation National Council for Fundamental Freedoms in Tunisia (CNLT).[8]

9.3. In relation to the establishment of a legislative reference system to combat torture, the complainant considers that article 101*bis* of the Code of Criminal Procedure was adopted belatedly in 1999, in particular in response to the concern expressed by the Committee against Torture at the fact that the wording of article 101 of the Criminal Code could be used to justify serious abuses involving violence during questioning. He also claims that this new article is not applied, and attaches a list of the victims of repression in Tunisia between 1991 and 1998 prepared by the non-governmental organisation Vérité-Action. He also points out that the cases cited by the state party to demonstrate its willingness to act to combat torture relate only to accusations of abuse of authority and violence and assault, as well as offences under the ordinary law, and not to cases of torture leading to death or cases involving physical and moral harm suffered by the victims of torture.

9.4. Concerning the practice of torture and impunity, the complainant maintains that torturers do enjoy impunity, and that in particular no serious investigation has been carried out into those suspected of committing crimes of torture. Contrary to the claims made by the state party, he states that he endeavoured to lodge a complaint with the military court on several occasions, but that the President of the court always ignored his statements relating to torture on the grounds that he had no medical report in his possession. According to the reports prepared by CNLT, the court heard from the various accused and their counsel a long account of the atrocities committed by the officials of the state security division. According to the complainant, from among the total number of 170 prisoners scheduled to be tried before the Bouchoucha military court, the prison authorities selected only 25 to be given medical checks by military doctors. He claims that he was not informed of this check when he was being held in remand, but learned of it only in court. According to the complainant, the president ignored the fact that the other accused had not had medical checks, and it is false to claim that he himself freely opted not to demand one. When apprised of this fact, the President simply ignored the objections of the prisoners and their counsel, including the complainant, in flagrant breach of the provisions of the law relating to the prisoners' right to a medical report and their constitutional right to be heard, as the CNLT report confirms. According to the complainant, this

[8] *Le procès-Tournant: A propos des procès militaires de Bouchoucha et de Bab Saadoun en 1992*, October 1992; *Pour la réhabilitation de l'indépendance de la justice,* April 2000 — December 2001.

is proved by the state party's acknowledgement that during the hearing he raised allegations of ill-treatment. In addition, according to the complainant, whereas a state governed by the rule of law should automatically follow up any report of a criminal act which may be regarded as a serious offence, the Tunisian authorities have always contented themselves with dismissing the claims as 'false, contradictory and defamatory', without taking the trouble to launch investigations to determine the facts in accordance with the requirements of Tunisian criminal procedure. The complainant considers that his allegations are at the very least plausible in terms of the detail of the torture he suffered (names, places and treatment inflicted), but the state party contents itself with a blanket denial. The complainant did not mention torturers because of their membership of the security forces, but because of specific and repeated attacks on his physical and moral integrity and his private and family life. The initiation of an investigation designed to check whether a person belonging to the security forces has committed acts of torture or other acts does not constitute a violation of the presumption of innocence but a legal step which is vital in order to investigate a case and, if appropriate, place it before the judicial authorities for decision. In relation to appeals before the courts, the complainant considers that the State party has confined itself to repeating the description of legal options open to victims set out in its previous submissions without responding to the last two sentences of paragraph 7.2 of the decision on admissibility. He reiterates that the theoretical legal options described by the state party are inoperative, while listing in support of this conclusion cases in which the rights of the victims were ignored. He points out that the case law cited by the state party relates to cases tried under ordinary law and not to prisoners of opinion.

9.5. Concerning the complainant's inertia and lack of action, he considers that the state party is inconsistent in holding that acts of torture are regarded as serious offences in Tunisian law and accordingly prosecuted automatically, while awaiting a complaint by the victim before taking action. He also re-emphasises his serious efforts described above to demand a medical examination and an investigation into the torture he had suffered. With particular reference to a report prepared by CNLT,[9] he mentions the circumstances surrounding the medical examinations of 25 prisoners, carried out with the aim of giving an appearance of respect for procedural guarantees, and the lack of integrity of the appointed doctors.[10] He points out that video recordings were made of the hearings in

[9] Available for information in the file.

[10] 'The role played by some of the doctors was no less serious, in the sense of what they did during the torture by assisting the torturers [to assess] the state of the victim and the degree of torture the victim could bear [. . .] information gathered from the torture victims or from analyses carried out in which famous doctors knowingly concealed the truth about the causes of the injuries suffered by the accused during episodes of physical torture' — CNLT report, October 2002.

the Bouchoucha military court, which could then be replayed to check each complainant's statements.

9.6. Concerning the allegations relating to the trial, the complainant points out, first, that the dismissal of proceedings against him in 1983 and 1986 took place in a political context of *détente* (in 1983 and 1984, the phased release of the leaders of the *Mouvement de la Tendance Islamique*, which became ENNAHDA in 1989) and the legitimisation of a new regime (a presidential amnesty was proclaimed after the 1987 *coup d'état*), and illustrated the fact that the courts were dependent on the executive branch (as shown in reports prepared by non-governmental organisations).[11] Second, in relation to his refusal of the assistance of counsel, the complainant provides the following corrections and produces a report prepared by CNLT.[12] Appearing before examining magistrate Ayed Ben Gueyid, attached to the Tunis military court, the complainant reiterated his request to be assisted by a court-appointed lawyer or one instructed by his family. The complainant designated Mr Najib ben Youssef, who had been contacted by his family. This lawyer advised him to consult Mr Moustafa El-Gharbi, who was able to assist the complainant only from the fourth week of the trial onwards, and was able to pay him only one or two visits in the 9 April prison, under close surveillance by prison guards. In response to the complainant's request for the assistance of a lawyer, the military examining magistrate replied '[n]o lawyer', prompting the complainant to say '[n]o lawyer, no statement'. Following this declaration, the complainant reports that he was violently beaten by military policemen, in a room next to the office of the military examining magistrate, during a break which was imposed and ordered by the magistrate. The complainant was then placed in solitary confinement in the 9 April prison in Tunis for two months. Following this punishment, the examining magistrate's file was missing from the first hearing attended by the complainant, a matter which the complainant explained to the president of the court by describing what had happened before the military examining magistrate.

9.7. Concerning the allegations relating to his confession, the complainant maintains that his confession was extracted under torture, and, citing the reports of CNLT, states that such methods are used in political trials and sometimes in trials involving offences under ordinary law. Concerning the testimony of the prosecution witness Mohamed Ben Ali Ben Romdhane, his fellow prisoner, the complainant states that he does not know this person, and that he was not among the 297 persons who were tried in Bouchoucha court, and calls on the state party to produce the transcript of the testimony provided by this person, together with the court file, to make it possible to check whether the court took its decision on the basis

[11] International Commission of Jurists, Report on Tunisia, 12 March 2003.
[12] Available for information in the file.

of a confession obtained as a result of torture. According to the complainant, the reference to this witness is pure invention on the part of the torturers. Secondly, the complainant points out that, even if a prosecution witness had appeared, the accused should have had an opportunity to challenge his testimony or to confront him, which did not happen.

9.8. Concerning the conditions in which he was held, and concerning visits, the complainant considers that the state party has once again confined itself to brief and general observations in response to his plentiful, specific and substantiated evidence. He explains that he was transferred for purposes of punishment, and not for any matter related to cases pending before the courts, and in that connection provides the following chronology:

6 April 1991 Arrested and held in the basement of the Interior Ministry; 13 May 1991, transferred to Mornag prison incommunicado.

4 June 1991 Handed over to the political police to sign the transcript of the interrogation, without being informed of its content; handed over to the military examining magistrate, then at 11 pm transferred to the 9 April prison in Tunis, where he was held until the end of November 1991 (including two months in solitary confinement).

1 December 1991 Transferred to Borj Erroumi prison in Bizerte (70 kilometres from his family home).

4 July 1992 Transferred to the 9 April prison in Tunis, where he was held until 15 September 1992; this period corresponded to that of the court hearings.

28 August 1992 Sentenced to six years' non-suspended imprisonment and five years' administrative supervision.

15 September 1992 Transferred to Borj Erroumi prison in Bizerte, where he was held until 4 July 1993.

4 July 1993 Transferred to Mahdia prison (200 kilometres from his home), where he was held until 19 September 1993.

19 September 1993 Transferred to Sousse prison (160 kilometres from his home), where he was held until 4 April 1994.

4 April 1994 Transferred to Mahdia prison, where he was held until the end of December 1994.

End of December 1994 Transferred to 9 April prison in Tunis; interrogated and tortured at the Interior Ministry for four consecutive days.

End of December 1995 Transferred to Mahdia prison; hunger strike from the middle to the end of February 1996 to support a demand for better prison conditions.

End of February 1996 Transferred to El Houerib prison in Kairouan (250 kilometres from his home) following his hunger strike.

20 March 1996 Transfer to Sousse prison; three weeks' hunger strike in January 1997 to support a demand for better prison conditions.

7 February 1997 Transferred to Rejim Maatoug prison (600 kilometres from his home, in the middle of the desert).

27 February 1997 Transfer to Sousse prison.

27 May 1997 Released, placed under administrative supervision for five years and house arrest at Nekrif-Remada (630 kilometres from his family home).

1 October 1997 Fled Tunisia.

9.9. The complainant explains that each time he was transferred, his family was obliged to spend two or three months ascertaining his new place of detention, since the prison administration provided such information only very sparingly. According to the complainant, the purpose of these transfers was to deprive him of the psychological and moral support of his family, and thus to punish him. He points out that the prison entry and exit logs can confirm his claims. He explains that denial of visits constituted a form of revenge against him each time he sought to exercise a right and took action to that end, for example in the form of a hunger strike. In addition, the complainant's family found it difficult to exercise the right to visit him because of the many transfers, the remoteness of the places of detention and the conditions imposed on the visitors — the complainant's wife was ill-treated to make her remove her scarf, and guards were permanently present between two sheets of wire mesh about one metre apart separating her from the complainant.

9.10. Concerning the allegations relating to the provision of care, the complainant repeats that he was denied the right to consult a doctor to diagnose the consequences of the torture he had suffered, and draws the Committee's attention to the medical certificate contained in his file. Concerning the treatment cited by the state party, the complainant points out that the medical check was carried out three weeks after his hunger strike, that glasses were prescribed for him when he was in danger of going blind, and that they were supplied only after a delay of about two months.

9.11. In relation to administrative supervision, the complainant considers that any punishment, including those provided for in the Tunisian Criminal Code, may be characterized as inhuman and degrading if the goal pursued is neither the rehabilitation of the offender nor his reconciliation with his social environment. He explains that he was forced to undergo administrative supervision 650 kilometres from his family home, in other words placed under house arrest, which was not stipulated in his sentence. He adds that each time he reported to the police station to sign the supervision log, he was ill-treated, sometimes beaten and humiliated by the

police officers. According to the complainant, who produces a CNLT report,[13] administrative supervision serves only to bolster the police's stranglehold over the freedom of movement of former prisoners.

9.12. Concerning the situation of his family, the complainant records the suffering caused by the police surveillance and various forms of intimidation. He mentions that his eldest son was repeatedly slapped in front of his brothers and mother at the door of their home when he returned from school, and questioned at the regional police station about what his family was living on. In addition, the members of the family received their passports only after the complainant arrived in Switzerland on 25 May 1998 and was granted asylum. And the first members of the family received their passports only seven months later, on 9 December 1998.

9.13. In relation to the ENNAHDA movement, the complainant maintains that the organisation is well known for its democratic ideals and its opposition to dictatorship and impunity, contrary to the state party's explanations. In addition, he challenges the accusations of terrorism levelled by the State party.

9.14. Lastly, according to the complainant, the state party is endeavouring to place the entire burden of proof on the victim, accusing him of inertia and failure to act, seeking protection behind a panoply of legal measures which theoretically enable victims to lodge complaints and evading its duty to ensure that those responsible for crimes, including that of torture, are automatically prosecuted. According to the complainant, the state party is thus knowingly ignoring the fact that international law and practice in relation to torture place greater emphasis on the role of States and their duties in order to enable proceedings to be completed. The complainant notes that the state party places the burden of proof on the victim alone, even though the supporting evidence, such as legal files, registers of police custody and visits, and so on, is in the sole hands of the state party and unavailable to the complainant. Referring to European case law,[14] the complainant points out that the European Court and Commission call on states parties, in the case of allegations of torture or ill-treatment, to conduct an effective investigation into the allegations of ill-treatment and not to content themselves with citing the theoretical arsenal of options available to the victim to lodge a complaint.

Consideration of the merits

10.1. The Committee examined the complaint, taking due account of all the information provided to it by the parties, in accordance with article 22, paragraph 4, of the Convention.

[13] Available for information in the file.

[14] Guide to the Jurisprudence on Torture and Ill-Treatment — Article 3 of the European Convention for the Protection of Human Rights, Debra Long (APT); *Ribitsch v Austria; Assenov v Bulgaria.*

10.2. The Committee took note of the state party's observations of 3 April 2003 challenging the admissibility of the complaint. It notes that the points raised by the state party are not such as to prompt reconsideration of the Committee's decision on admissibility, notably owing to the lack of new or additional information from the state party on the matter of the investigations voluntarily carried out by the State party (see paragraph 7.2). The Committee therefore does not consider that it should review its decision on admissibility.

10.3. The Committee therefore proceeds to examine the merits of the complaint, and notes that the complainant alleges violations by the state party of article 1, article 2, paragraph 1, article 4, article 5, article 12, article 13, article 14, article 15 and article 16 of the Convention.

10.4. Article 12 of the Convention, the Committee notes that article 12 of the Convention places an obligation on the authorities to proceed automatically to a prompt and impartial investigation whenever there is reasonable ground to believe that an act of torture or ill-treatment has been committed, no special importance being attached to the grounds for the suspicion.[15]

10.5. The Committee notes that the complainant complained of acts of torture committed against him to the Bouchoucha military court at his trial from 9 July 1992 onwards, in the presence of the national press and international human rights observers. It also notes that the state party acknowledges that the complainant reiterated his allegations of ill-treatment several times before the court, in order, according to the state party, to focus the attention of the observers attending the hearing. The Committee also takes note of the detailed and substantiated information provided by the complainant regarding his hunger strikes in the 9 April prison over 12 days in July 1992 in Tunis, and in Mahdia over eight days in October 1995 and ten days in March 1996, as a protest against the conditions in which he was being held and the ill-treatment to which he was subjected. The Committee notes that the state party did not comment on this information, and considers that these elements, taken together, should have been enough to trigger an investigation, which was not held, in breach of the obligation to proceed to a prompt and impartial investigation under article 12 of the Convention.

10.6. The Committee observes that article 13 of the Convention does not require either the formal lodging of a complaint of torture under the procedure laid down in national law or an express statement of intent to institute and sustain a criminal action arising from the offence, and that it is enough for the victim simply to bring the facts to the attention of an authority of the state for the latter to be obliged to consider it as a tacit but unequivocal expression of the victim's wish that the facts should

[15] Communication 59/1996 (*Encarnación Blanco Abad v Spain*).

be promptly and impartially investigated, as prescribed by this provision of the Convention.[16]

10.7. The Committee notes, as already indicated, that the complainant did complain of ill-treatment to the Bouchoucha military court, and resorted to hunger strikes in protest at the conditions imposed on him. Yet notwithstanding the jurisprudence under article 13 of the Convention, the Committee notes the state party's position maintaining that the complainant should have made formal use of domestic remedies in order to lodge his complaint, for example by presenting to the court a certificate proving that a complaint had been lodged with the office of the public prosecutor, or displaying obvious traces of torture or ill-treatment, or submitting a medical report. On this latter point, to which the Committee wishes to draw its attention, it is clear that the complainant maintains that the President of the Bouchoucha court ignored his complaints of torture on the grounds that he had no medical report in his possession, that the complainant was informed only during his trial of the medical checks carried out on a portion of the accused during remand, and that the President of the court ignored his demands for his right to a medical report to be respected. On the other hand, the state party maintains that the complainant voluntarily opted not to request a medical examination although the court had ordered such examinations for all prisoners who wished to undergo one. The Committee refers to its consideration of the report submitted by Tunisia in 1997, at which time it recommended that the state party should ensure that medical examinations are provided automatically following allegations of abuse, and thus without any need for the alleged victim to make a formal request to that effect.

10.8. In the light of its practice relating to article 13 and the observations set out above, the Committee considers that the breaches enumerated are incompatible with the obligation stipulated in article 13 to proceed to a prompt investigation.

10.9. Finally, the Committee considers that there are insufficient elements to make a finding on the alleged violation of other provisions of the Convention raised by the complainant at the time of adoption of this decision.

11. The Committee against Torture, acting under article 22, paragraph 7, of the Convention, is of the view that the facts before it disclose a violation of articles 12 and 13 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

12. Pursuant to rule 112, paragraph 5 of its Rules of Procedure, the Committee urges the state party to conduct an investigation into the complainant's allegations of torture and ill-treatment, and to inform it, within 90 days from the date of the transmittal of this decision, of the steps it has taken in response to the views expressed above.

[16] Communications 6/1990 (*Henri Unai Parot v Spain*) and 59/1996 (*Encarnación Blanco Abad v Spain*).

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

BOTSWANA

Interights and Others (on behalf of Bosch) v Botswana

(2003) AHRLR (ACHPR 2003)

Communication 240/2001, *Interights et al (on behalf of Mariette Sonjaleen Bosch) v Botswana*
Decided at the 34th ordinary session, November 2003, 17th Annual Activity Report
Rapporteur: Chigovera

Interim measures (10, 49, 50)
Fair trial (effect of misdirection, 22, 24-28)
Interpretation (international standards, 27, 31)
Evidence (Commission not to evaluate facts, 29)
Dignity (disproportionate penalty, 30-37)
Admissibility (late submission of grounds for complaint, 40, 41)
Cruel, inhuman or degrading treatment (death penalty, 41)
Life (death penalty, clemency procedure, 43-48; trend towards abolition, 52)

Summary of facts

1. The communication is submitted by Edward Luke II of Luke and Associates, Saul Lehrfreund of Simons Muirhead and Burton (practising advocates based in the United Kingdom and Botswana) and Interights, a human rights NGO based in the United Kingdom, on behalf of Mariette Sonjaleen Bosch who is of South African nationality.

2. Mrs Bosch was convicted of the murder of Maria Magdalena Wolmarans by the High Court of Botswana on 13 December 1999 and sentenced to death. She appealed to the Court of Appeal of Botswana, which dismissed her appeal on 30 January 2001.

3. The complainant alleges that the judge who convicted Mrs Bosch wrongly directed himself that the burden of proof was on the accused 'to prove on a balance of probabilities' that someone else was responsible for the killing and thereby reversing the presumption of innocence. That the Court of Appeal wrongly upheld the conviction despite recognising the fact that the judge had fundamentally erred by reversing the onus of proof.

4. The complainant further alleges that her right to life has been violated by the imposition of the death penalty for what was alleged to be a crime of passion, in circumstances where there were clearly extenuating circumstances.

5. It is also alleged that Mrs Bosch is likely to suffer inhuman treatment and punishment because the execution will be carried out by the cruel method of death by hanging, which exposes the victim to unnecessary suffering, degradation and humiliation.

Complaint

6. The complainant alleges a violation of articles 1, 4, 5 and 7(1) of the African Charter on Human and Peoples' Rights.

Procedure

7. The communication was received at the Secretariat of the Commission on 7 March 2001 by fax.

8. On 12 March 2001, the Secretariat of the African Commission wrote to Interights requesting complete copies of the judgments of the High Court and Court of Appeal of Botswana.

9. On 26 March 2001, the Secretariat of the Commission received by courier the full text of the judgment of the Court of Appeal of Botswana delivered on 30 January 2001 and expert affidavits relating to the manner and speed in which a person executed by hanging would meet their death.

10. On 27 March 2001, the Chairman of the Commission wrote to the President of Botswana appealing for a stay of execution pending consideration of the communication by the Commission.

11. The President of Botswana did not respond to the appeal but information received at the Commission indicates that Mrs Bosch was executed by hanging on 31 March 2001.

12. At its 29th ordinary session, the Commission decided to be seized of the complaint and the parties to the communication were informed of this decision.

13. At its 30th ordinary session held in Banjul, The Gambia, the Commission heard oral submissions from the complainants and declared the communication admissible.

14. On 9 November 2001, the Secretariat informed the parties of the decision of the African Commission and requested them to transmit their written submissions on admissibility and on the merits to the secretariat.

15. The African Commission continued the process of exchanging information between the parties.

16. At its 34th ordinary session, held from 6 to 20 November 2003 in Banjul, The Gambia, the African Commission considered the communication and delivered its decision on the merits.

Law

Admissibility

17. The admissibility of communications brought pursuant to article 55 of the Charter is governed by the conditions stipulated in article 56 of the African Charter. This article lays down seven conditions, which generally must be fulfilled by a complainant for a communication to be declared admissible.

18. The complainants submit that they have fulfilled all the conditions of article 56 of the African Charter. They argue that Mrs Bosch was convicted of the murder of Maria Magdalena Wolmarans by the High Court of Botswana on 13 December 1999 and sentenced to death. She appealed to the Court of Appeal of Botswana, which dismissed her appeal on 30 January 2001. On 7 March 2001, 35 days after the Court of Appeal of Botswana had handed down its decision dismissing Mrs Bosch's appeal, the complainant filed this communication with the African Commission. They submit that this matter has not been submitted for examination under any other procedure of international investigation or settlement. The complainants also state that all local remedies were exhausted and the complaint was filed with the African Commission within a reasonable time from the time local remedies were exhausted. Therefore the African Commission should declare the communication admissible.

19. In their response, the respondent state concedes that all local remedies in this matter were exhausted, as the Court of Appeal is the last and final court in Botswana.

20. The Commission notes that the respondent state and the complainants agree that all domestic remedies were exhausted and thus declares the communication admissible.

Merits

21. Three issues relating to alleged violations of the African Charter were originally raised on behalf of the applicant. A fourth issue, namely whether or not there was a violation of articles 1, 4 and 7(1) in declining to respect the indication of provisional measures was added when consolidated submissions were made. Two further issues were added in the document entitled Note of Applicant's Submissions, circulated at the 31st session bringing the total number of issues to six. One of the six issues, namely, whether the methods of execution in Botswana, by hanging, breached article 5 of the African Charter was abandoned during the hearing of the matter at the African Commission's 31st ordinary session. Each of the remaining issues will be dealt with in turn.

Alleged violation of the right to fair trial

22. With regard to the alleged violation of the right to fair trial under article 7(1)(b) of the African Charter, the issue is whether the misdirection by the trial judge in regard to the onus of proof was so fatal as to negate the right to fair trial in the circumstances of this case. Simply put, does a misdirection *per se* vitiate the holding of a fair trial in violation of article 7 of the African Charter and of necessity leads to the quashing of a conviction with capital consequences.

23. In this regard, it was submitted that the placing of the burden of proof on the applicant was a violation of a fundamental right such as would negate the holding of a fair trial and that the court of appeal wrongly held that this did not result in a miscarriage of justice.

24. In dealing with this issue it is important to recognise that there is no general rule or international norm stating that any misdirection *per se* vitiates a verdict of guilt. As pointed out by the state party, what is generally accepted in several countries, particularly common law countries, is the rule that a misdirection will vitiate a verdict of guilt only where such misdirection either on its own or 'cumulatively is or are of such a nature as to result in a failure of justice'. The legal position is aptly stated in Archbold, *Criminal pleading, evidence and practice*[1] as follows:

> The very basic and fundamental function of the courts of justice is to ensure that no substantial miscarriage of justice is allowed through the operation of the judicial process. The courts cannot be seen to undermine the very foundation for the existence of the judiciary, namely justice, unaffected by technicalities and sophistry of the legal profession.

In other words, where a court is satisfied that despite any misdirection or irregularity in the conduct of the trial the conviction was safe, the court would uphold such conviction.

25. The Court of Appeal thoroughly examined the evidence led at the trial and the effect of the misdirection and came to the conclusion that there was a massive body of evidence against the applicant which would lead to no other conclusion than that it was the applicant and no one else who murdered the victim, and that the quality of the evidence was such that no miscarriage of justice was occasioned.

26. A breach of article 7(1) of the African Charter would only arise if the conviction had resulted from such misdirection. As pointed out by the Court of Appeal at page 47 of the judgment, the trial judge 'meticulously evaluated the evidence and came to the only conclusion possible on the evidence'.

27. A number of decisions have been taken in the European Court [of Human Rights] on article 6(2) of the European Convention on Human Rights which also provides for the presumption of innocence. In discussing

[1] 2002 ed 18.

article 6(2), R Clayton and H Tomilson observe[2] that the article does not prohibit presumption of facts and law, and citing *Salabiaku v France* (1988) 13 EHRR 379 paragraph 28 state that the State must however '. . . confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence.'[3] A more appropriate discussion of article 6(2) can be found in the *Digest of case-law relating to the European Convention on Human Rights (1955-1967)*[4] where it is stated:

> If the lower court has not respected the principle of presumption of innocence, but the higher court in its decision has eliminated the consequences of this vice in the previous proceedings, there has been no breach of article 6(2).[5]

28. As already discussed above, the Court of Appeal 'meticulously evaluated the evidence' between pages 11-20, 62-74 and 77-111 of the judgment and was satisfied that despite the misdirection, there was adequate evidence to convict the Applicant of murder.

29. It should be noted here that it is for the courts of state parties and not for the Commission to evaluate the facts in a particular case and, unless it is shown that the courts' evaluation of the facts was manifestly arbitrary or amounted to a denial of justice, the Commission cannot substitute the decision of the courts with that of its own. It has not been shown that the courts' evaluation of the evidence was in any way arbitrary or erroneous as to result in a failure of justice. The Commission therefore finds that there is no basis for finding that the state party violated its obligations under articles 4 and 7 (1).

Alleged Violation of article 5

30. The second issue relates to the allegation that the sentence of death in this case was a disproportionate penalty in the circumstances of this case and hence a violation of article 5 of the Charter.

31. While it is accepted that the death penalty should be imposed after full consideration of not only the circumstances of the individual offence, but also the circumstances of the individual offender, (Inter-American Commission of Human Rights in *Downer and Tracey v Jamaica* (41/2000) 14 April 2000), there is no rule of international law which prescribes the circumstances under which the death penalty may be imposed. It should be pointed out here that apart from stating the trend in other jurisdictions and decisions of other human rights bodies governed by specific statutes, it has not been established that the courts in this case did not consider the full circumstances before imposing the death penalty. If anything, the courts fully considered all the circumstances in this case (see pages 48

[2] 114, para 11.238.
[3] See also *Hoang v France* (1992) 16 EHRR 53.
[4] 1970, UGA Huele, Belgium.
[5] *Digest of Case-Law Relating to the European Convention on Human Rights 1955-1967* UGA Huele, Belgium, para 153 on 140.

to 55 of the judgment of the Court of Appeal). It is clear that the submission that the imposition of the death penalty was disproportionate to the gravity of the crime in this case is based on an erroneous assumption of what amounts to extenuating circumstances.

32. Extenuating circumstances are facts bearing on the commission of the crime, which reduce the moral blameworthiness of the accused as distinct from his/her legal culpability. First, the facts or circumstances must be directly related to or connected with the criminal conduct in question. The court is only concerned with facts which lessen the seriousness or culpability of that particular criminal conduct.

33. Second, extenuation relates to moral blameworthiness. It is the state of mind of the offender at the time of the commission of the offence that is a relevant consideration, otherwise offenders would use any personal circumstance totally unrelated to the conduct complained of to escape punishment.

34. In considering whether or not extenuating circumstances exist, the inquiry is:

a) Whether there were at the time of the commission of the crime facts or circumstances which could have influenced the accused's state of mind or mental faculties and could serve to constitute extenuation;
b) Whether such facts or circumstances, in their cumulative effect, probably did influence the accused's state of mind in doing what she/he did; and
c) Whether this influence was of such a nature as to reduce what he did.

35. The claimed capacity for redemption or reformation and or good character is certainly not connected with the commission of the particular murder and therefore not relevant considerations to this finding of extenuating circumstances.

36. In deciding on the proportionality of a sentence one would have to fully weigh the seriousness of the offence against the sentence. It is quite evident from the Court of Appeal records that the murder committed by Mrs Bosch involved considerable effort and careful planning.

37. Thus, while the African Commission acknowledges that the seriousness or gruesome nature of an offence does not necessarily exclude the possibility of extenuation, it cannot be disputed that the nature of the offence cannot be disregarded when determining the extenuating circumstances. As such, the African Commission finds no basis for faulting the findings of both the trial court and Court of Appeal as it relates to this issue.

Issue of reasonable notice

38. It was submitted that failure to give reasonable notice of the date and time of execution amounts to cruel, inhuman and degrading punishment and treatment in breach of article 5 of the African Charter and that ex-

ecution under such circumstances violates the protection of law provisions under article 3 as it deprives an individual of the right to consult a lawyer and obtain such relief from the courts as may be open to him or her.

39. It should be noted that this issue was not addressed by the respondent state in its written submissions primarily because it had not been communicated to it. The issue was not even raised in the authors' consolidated submissions of the record of their oral submissions on admissibility made at the 30th session and submitted to the African Commission's Secretariat on 18 March 2002.

40. The issue only surfaced with the authors' written submissions, distributed shortly before the hearing of the matter at the 31st session of the African Commission. It was therefore not surprising that no useful submissions or submissions at all were made on behalf of the respondent state on the issue. Neither was there any debate on the issue at the instance of the Commissioners, as they had not had an opportunity to consider those submissions.

41. In the circumstances it would be fundamentally unfair to the respondent state to deal with the substance of this issue save to observe that a justice system must have a human face in matters of execution of death sentences by affording a condemned person an opportunity to

> arrange his affairs, to be visited by members of his intimate family before he dies, and to receive spiritual advice and comfort to enable him to compose himself, as best he can, to face his ultimate ordeal.[6]

Alleged violation of article 4 — clemency procedure was unfair

42. This is one of the two issues raised rather belatedly and the approach in issue 3 above applies. The comments made hereunder are for future guidance in matters of this nature; it being pointed out that the communication procedure is an attempt to achieve or address failed justice at the domestic level, which follows the rules of natural justice and would not permit any springing of surprises.

43. Applicant alleges that in exercising his clemency, the President acts 'arbitrarily'. The main issue is whether or not presidential clemency is what is envisaged in article 4 of the Charter. Article 4 proscribes the arbitrary deprivation of the right to life. A process is put in all jurisdictions to ensure that due process is had in ensuring that the right to life is not violated. This process includes the holding of a trial so that an accused is given an opportunity to defend his cause. It is that process that can be challenged to be arbitrary. The intervention of the President does not in any way affect the non-arbitrariness of the process. The due process in Botswana was followed with the applicant's case following the process that has been

[6] *Guerra v Baptiste* [1996] AC 397 at 418.

established to guarantee applicant's rights. Her matter was heard in both the High Court and the Court of Appeal.

44. It should also be noted that the exercise of clemency, unlike the process described above, is discretionary in most jurisdictions and is for the most part discretionary; it is given to him to be exercised in his own judgement and discretion[7]. Whilst the Constitution of Botswana provides for the constitution of an Advisory Committee on the Prerogative of Mercy, the President is only required to request and get advice from that Committee if he so wishes. However, he can only exercise his power of clemency after presentation of a written report of the case from the trial judge, together with any other information that he may require.

45. The question then is whether or not the President arbitrarily deprived the applicant of her right to life. The word 'arbitrarily' is defined in *Black's Dictionary*[8]

> as fixed or done capriciously or at pleasure. Without adequate determining principle; not founded in the nature of things; not done or acting according to reason or judgment; depending on the will alone; absolutely in power; capriciously; tyrannical; despotic . . . Without fair, solid, and substantial cause; that is, without cause based on law . . . Ordinarily 'arbitrary' is synonymous with bad faith or failure to exercise honest judgment and an arbitrary act would be one performed without adequate determination of principle and one not founded in nature of things.

A similar definition is provided in Stround's *Judicial Dictionary*[9] and Classen's *Dictionary of Legal Words and Phrases*.[10]

46. The other factor that needs to be considered is the time factor. On 30 January 2001, the Court of Appeal dismissed the applicant's case. On 5 February 2001 a memo from the Gaborone Women's Prison to the Divisional Commander states that applicant was advised of her right to petition the President. On 7 February 2001, the Attorney-General of Botswana wrote to the applicant's lawyers on the issue. The lawyers wrote to the Clemency Committee on 26 February 2001, requesting more time to prepare a clemency petition. The preliminary submissions were only submitted on 15 March 2001, one and a half months after the appeal was dismissed. It is acknowledged that on 6 March the lawyers wrote to the President requesting information as to when the clemency hearing was to be held. Attendance of the applicant or her lawyers at the hearing is clearly impractical. One can envisage the President now sitting as a court to hear oral submissions from petitioners. Not only is the suggestion misconceived and implications thereof impractical, but the implications will also result in undermining the office and dignity of the President.

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[7] BO Nwabueze *Executive independence and the Courts Presidentialism in Commonwealth Africa* at 33.
[8] 5th ed, West Publishing Company, 1979.
[9] 5th Sweet and Maxwell Limited, 1986.
[10] Vol 1 Butterworths, 1975.

47. In any event, the right to be heard does not entail entitlement to the benefit of all the facilities which are allowed to a litigant in a judicial trial. Thus, the 'right to be heard' in appropriate circumstances may be confined to the submission of written representations. These are clearly appropriate circumstances for written representations.

48. However, it should be noted that a person must be given reasonable time in which to assemble the relevant information and to prepare and put forward his representations (see also Baxter *op cit* at 552).

Alleged violation of articles 1, 4 and 7(1): Execution of applicant pending consideration of applicant's communication by the African Commission

49. The last argument is that article 1 of the African Charter obliges a state party to comply with the requests of the African Commission. The complainants base this argument on the letter written by the chairperson of the African Commission to the President of Botswana on 27 March 2001 seeking a stay of execution. The letter was communicated by fax.

50. In its oral submissions during the 31st ordinary session, the respondent state argued that the fax was never received by the President. However, in this particular case, the African Commission is not in possession of any proof that the fax was indeed received by the President of Botswana.

51. Article 1 obliges state parties to observe the rights in the African Charter and to 'adopt legislative or other measures to give effect to them'. The only instance that a state party can be said to have violated article 1 is where the state does not enact the necessary legislative enactment.[11]

52. However, it would be remiss for the African Commission to deliver its decision on this matter without acknowledging the evolution of international law and the trend towards abolition of the death penalty. This is illustrated by the UN General Assembly's adoption of the Second Optional Protocol to the ICCPR and the general reluctance by those states that have retained capital punishment on their statute books to exercise it in practice. The African Commission has also encouraged this trend by adopting a Resolution Urging States to envisage a Moratorium on the Death Penalty[12] and therefore encourages all states party to the African Charter on Human and Peoples' Rights to take all measures to refrain from exercising the death penalty.

[11] See the Case of *Young, James and Webster* which discusses art 1 of the European Convention which is similar to art 1 of the Charter.

[12] Adopted at the 26th ordinary session of the African Commission held from 1–15 November 1999, Kigali, Rwanda.

For the above reasons, the African Commission:

- Finds that the Republic of Botswana is not in violation of articles 1, 4, 5 and 7(1) of the African Charter on Human and Peoples' Rights;[13]
- Strongly urges the Republic of Botswana to take all measures to comply with the Resolution urging States to envisage a Moratorium on the Death Penalty;
- Requests the Republic of Botswana to report back to the African Commission when it submits its report in terms of article 62 of the African Charter on measures taken to comply with this recommendation.

[13] Commissioner N Barney Pityana asked to be recused from participating in consideration of this communication at the 29th ordinary session of the African Commission and as such did not take part in all discussions relating to this matter.

DEMOCRATIC REPUBLIC OF THE CONGO

Institute for Human Rights and Development in Africa (on behalf of Simbarakiye) v Democratic Republic of the Congo

(2003) AHRLR (ACHPR 2003)

Communication 247/2002, *Institute for Human Rights and Development in Africa (on behalf of Jean Simbarakiye) v Democratic Republic of Congo*
Decided at the 33rd ordinary session, May 2003, 16th Annual Activity Report
Rapporteur: Melo

Admissibility (exhaustion of local remedies, 30-32)

Summary of facts

1. The complainant, Mr Jean Simbarakiye, is a national of Burundi currently a refugee in Lomé, Togo.

2. He is assisted by the Institute for Human Rights and Development in Africa, an NGO with observer status with the African Commission, with its head office at Banjul, Gambia, PO Box 1896, Tel 220 962280/954131, Fax: 220 494178, E-mail: info@africaninstitute.org; Website: www.africaninstitute.org.

3. Mr Jean Simbarakiye states that he arrived in Zaire, now Democratic Republic of Congo, in 1974 where he obtained the status of political refugee granted and recognised by the Republic of Zaire and the United Nations High Commission for Refugees.

4. He did his university studies there up to 1984 and, in 1989, he was employed as a civil electrical engineer by *Office National des Transports* (ONATRA) for and on behalf of the state of Zaire.

5. In 1996, following the war between the Democratic Republic of Congo and Burundi, Uganda and Rwanda in the east of the country, the *Haut Conseil de la République*, the transitional parliament, during its session held on 31 October 1996, adopted Resolution 04/HCR6PT/96 by which it was decided to 'terminate work contracts for all Rwandan, Burundian and Ugandan subjects . . .'

6. Pursuant to this decision, Mr Jean Simbarakiye was dismissed on 3 January 1997, without prior notice or compensation, by ONATRA, for the sole reason of being of Burundi origin.

7. He has three children, and his wife is a Congolese (DRC) national.

8. The communication also alleges that from January 1997, when he was dismissed without prior notice or compensation, to June 1997, when he left DRC, Mr Simbarakiye made numerous but unsuccessful attempts to obtain justice by approaching the Congolese authorities.

9. Due to moral and material pressure, he was forced to leave DRC in June 1997 and took refuge in Lomé, Togo, where he continued enjoying the status of refugee, without having exhausted local remedies.

10. He continued his contacts with the *Chargé d'Affaires* of DRC in Lomé and, through him, sent a letter on 21 February 2000 to the Minister of Justice of DRC but, all in all, all his efforts, just like those of his wife after he left DRC in June 1997 till her own departure for Lomé in 2000, were not fruitful.

The complaint

11. The communication alleges Resolution 4 of the *Haut Conseil de la République*, the transitional parliament of the Democratic Republic of Congo, violates articles 1, 2, 3, 7, 14, 15 and 18 of the African Charter.

Procedure

12. The communication was received by the Secretariat of the African Commission on 3 April 2002, which acknowledged receipt of the same to counsel of the complainant, the Institute for Human Rights and Development on 4 April 2002.

13. At its 31st ordinary session held in Pretoria, South Africa, from 2 to 16 May 2002, the African Commission decided to be seized of the communication and referred consideration of the admissibility of the case to its 32nd ordinary session.

14. The Secretariat informed the concerned parties through a *note verbale* and a letter dated 27 June 2002. In response, the complainant, through his counsel, filed his submissions on the admissibility of the communication, which were received at the Secretariat of the African Commission on 12 August 2002.

15. The government of DRC, through the Minister for Human Rights, acknowledged receipt of the correspondence from the Secretariat of the African Commission concerning the communication by a letter dated 20 July 2002 and referenced 737 and which was received at the Secretariat on 26 December 2002.

16. The DRC delegation to the 32nd ordinary session of the African Commission held in Banjul, The Gambia, from 17 to 23 October 2002, handed

to the Secretariat of the African Commission the submissions of the government on the admissibility of communication 247/2002.

17. The African Commission deferred consideration of the communication to its 33rd ordinary session scheduled for Niamey, Niger, from 15 to 29 May 2003.

18. By *note verbale* and a letter dated 2 December 2002, the Secretariat of the African Commission informed the parties of the African Commission's decision and forwarded the documents submitted by each of the parties.

19. On 31 January 2003, the complainant sent to the Secretariat written submissions in reply to the submissions of the government of DRC.

20. At its 33rd ordinary session held from 15 to 29 May 2003 in Niamey, Niger, the African Commission considered this communication and declared it inadmissible.

Law

Admissibility

21. The complainant alleges that he did not exhaust local remedies because he was subjected to moral and material pressure.

22. The government of DRC submitted that he did not provide proof of the impracticability to exhaust local remedies while he was in the DRC and in Lomé, Togo, in June 1997.

23. In fact, the government of DRC explains that local remedies exist and are available and that even in Togo, the complainant had the possibility of taking legal action before bringing the matter before the African Commission.

24. Article 56(5) of the African Charter on Human and Peoples' Rights requires that communications sent to the African Commission shall be considered if they '... are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged'.

25. Article 56 aims thus at enabling, among others, the respondent government to be aware of the harmful effects of its actions on human rights and look into the possibility of taking corrective measures before being sued in an international court.

26. As far as the African Commission is concerned, the existence of a local remedy should be both theoretical and practical, a condition without which the local remedy in question would be neither available nor effective.

27. Such is the case when, for objective reasons, the complainant cannot take his case to the courts of the respondent state in conditions that guarantee him a fair trial.

28. The African Commission has indeed never admitted that the condition of exhaustion of local remedies apply *ipso facto* for receiving a communication, when it finds it illogical to require the exhaustion of local remedies.

29. To support his allegations relating to the impossibility for him to exhaust local remedies, the complainant exhaustively referred to the African Commission's previous decisions through the following communications:

communication 39/90, *Pagnoule (on behalf of Mazou v Cameroon*;[1] communication 103/93, *Abubakar v Ghana*;[2] communications 147/95 and 149/96, *Jawara v The Gambia*;[3] communications (consolidated) 25/89, 47/90, 56/91, 100/94, *Free Legal Assistance Group and Others v Zaire*;[4] communication 71/92, *Rencontre Africaine pour la Défense des Droits de l'Homme v Zambia*;[5] and communication 74/92, *Commission Nationale des Droits de l'Homme et des Libertés v Chad*.[6]

30. The African Commission feels that none of these communications is identical with the communication brought by the complainant who, moreover, did not attempt to exhaust local remedies prior to bringing the matter before the African Commission in 2002.

31. Considering that he left DRC in June 1997, there is no indication that he attempted to exhaust local remedies whilst in Togo, nor did his wife (who remained in DRC until November 2002) attempt to take any action to exhaust local remedies.

32. Furthermore, the complainant does not provide evidence showing the moral and material constraints alleged to have prevented him from exhausting local remedies available under the laws of DRC.

For these reasons, the African Commission:

In accordance with article 56(5) of the African Charter, declares this communication inadmissible for non-exhaustion of local remedies.

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[1] [(2000) AHRLR 57 (ACHPR 1997)]. The complainant had taken numerous legal actions both non contentious and contentious without any success. The Commission felt then that local remedies had been exhausted.

[2] [(2000) AHRLR 124 (ACHPR 1996)]. The complainant was sentenced and sent to prison. Following his escape from prison, he took refuge abroad and seized the African Commission. The African Commission felt that it was not logical to ask him to return and exhaust local remedies in Ghana.

[3] [(2000) AHRLR 107 (ACHPR 2000)]. The complainant was a Head of State who had been toppled and sentenced *in absentia*. The African Commission felt that local remedies were not available and that in such conditions, it was not logical to ask him to return to The Gambia to exhaust local remedies.

[4] [(2000) AHRLR 74 (ACHPR 1995)]. Considering that the condition of exhaustion of local remedies was not applicable to the letter when it is neither practical nor desirable that the complainant seizes the courts for each violation, the African Commission declared the consolidated communications admissible due to the nature of the violations which were serious and massive violations of human rights.

[5] [(2000) AHRLR 321 (ACHPR 1996)]. The Commission felt that the condition of exhaustion of local remedies does not mean that complainants must exhaust local remedies when, in practical terms, these are neither available nor practical.

[6] [(2000) AHRLR 66 (ACHPR 1995)]. The African Commission felt that it could not be asked of the complainant to exhaust local remedies when he would not be in a position to seize the national courts.

EGYPT

Arab Organisation for Human Rights v Egypt

(2003) AHRLR (ACHPR 2003)

Communication 244/2001, *Arab Organisation for Human Rights v Egypt*
Decided at the 33rd ordinary session, May 2003, 16th Annual Activity Report
Rapporteur: El Hassan

Admissibility (withdrawal of complaint, 18)

Summary of facts

1. The complaint is filed by the Arab Organisation for Human Rights (AOHR), Egypt on behalf of Professor Saadeddin Mohammed Ibrahim (male, 61), Nadia Mohammed Ahmed Abdel Nour (female, 49), Khaled Ahmed Mohammed Al-Fayyad (male, 29), Usama Hashem Hammad 'Ali (male, 28), Mohammed Hassanein Hassanein 'Amara (male, 49), Magda Ibrahim Ibrahim Al-Bey (female, 41), and Marwa Ibrahim Zaki Ahmed Al Sayyid Gouda (female).

2. This complaint follows the trial and conviction by the Supreme Security Court of the respondent state in May 2001 of professor Saadeddin Ibrahim, Director and Chair of the Board of Directors of the Ibn Khaldun Center for Development Studies, who was also treasurer of *Hay'at Da'am al-Nakhibat* (Association for the Support of Women Voters, known in Egypt as 'Hoda Association'), together with 27 other persons, including the six other individuals mentioned above. They were all working either as permanent employees or project associates of the two organisations and ten of them were tried *in absentia*.

3. The complainant alleges that the accused were charged with deliberately disseminating information abroad about the internal situation in the respondent state damaging its stature contrary to article 80(d) of the Penal Code, conspiring to bribe public officials to undermine the performance of their duties contrary to articles 40(2), 40(3), and 48 of the Penal Code, receiving donations from the European Union (EU) without prior permission from the competent authorities contrary to articles 1(6) and 2(1) of Military Order 4 of 1992, using deceptive methods to defraud the EU of funds made available to the two organisations contrary to article 336 (1) of the Penal Code, and accepting and offering bribes and of forgery of official documents contrary to articles 103, 104, 107bis, 207, 211, and

214 of the Penal Code. They were convicted and sentenced to several terms of imprisonment ranging from seven years with hard labour to one year suspended terms.

4. In the process of apprehending, trying and convicting the accused, the complainant alleges that the respondent state violated their pre-trial and trial rights, freedom of expression, rights to appeal, and rights to effective domestic remedies. Regarding pre-trial violations, the complainant alleges that Professor Ibrahim, Usama Hamad Ali, and Nadia Abdel Nour were first arrested by officers of the *Mabahith Amn al-Dawla al-'Ulya* (state security intelligence) on 30 June 2000. Professor Ibrahim and Nadia Abdel Nour were held in administrative detention without access to judicial supervision or other remedies until 10 August 2000 when they were released on bail. During this period, no formal charges were brought against them. Usama Hamad 'Ali was initially released on 1 July 2000 but was later re-arrested and similarly held in administrative detention until granted bail in August 2000. No charges were brought against all the accused until 24 September 2000. They were held in sub-human conditions and interrogated for unduly long hours. Having been arrested without warrants, Nadia Abdel Nour and Usama Hammad 'Ali were neither informed of the reasons for their arrest nor were they afforded access to their lawyers during interrogation. The former was allowed access to her lawyer only after over three weeks since she first requested for it.

5. Regarding violations during the trial, the complainant alleges that the accused were denied adequate time and facilities for the conduct of their defense, their defense councils were denied access to the prosecution's evidence. Although the trial began on 18 November 2000, the defense lawyers were granted access to examine the prosecution's evidence on 19 March 2001, by which time they had called most of their witnesses. They were permitted to examine these documents only for three hours and were not allowed to make any copies thereof. In addition, defense lawyers were required to conduct the examination in the presence and under the supervision of staff of the Supreme State Security Prosecution.

6. In May 2001, the prosecution concluded its closing statement to be followed by the introduction of hundreds of pages of additional written evidence by the defense, which the court accepted. On the same day, however, and after adjourning at about 14:00 hours local time for one and half hours, the judges of the Supreme Security Court returned guilty verdicts and announced the sentence. The considered judgment of the Court was out only on 19 June 2001, nearly one month after the conclusion of the trial, thereby denying the accused their right to appeal against the decision promptly.

7. The complainant, moreover, alleges that these trials sought to punish the accused for opinions lawfully held and disseminated by them, that there were no domestic remedies for the pre-trial and trial rights violations as Law 105 of 1980 setting up the Supreme State Security Courts denies

the accused of full rights of appeal, that they could only appeal on procedural points to the Court of Cassation and not on substantive issues, that the Court of Cassation can not acquit the accused in such an appeal, that the said Court of Cassation can only order a re-trial which would effectively subject the accused to second jeopardy, and that an acquittal in an appeal by Cassation can only be ordered should a second appeal against a re-trial is successful.

Complaint

8. The complainant alleges violation of articles 5, 6, 7(1)(a-d) and 9(2) of the African Charter on Human and Peoples' Rights.

9. The complainant prays for the African Commission to request the respondent state to:

> Take steps to vacate the conviction of the accused and take all other steps necessary to ensure adequate redress to the latter due to the violations of articles 7 and 9(2) of the Charter; and adequately compensate the accused for violation of their rights under articles 5 and 6 of the Charter.

Procedure

10. The complaint was dated 24 December 2001 and received at the Secretariat on 26 December 2001 by fax and on 2 January 2002 by mail.

11. After registering the complaint, the Secretariat learnt that the matter was pending before the Court of Cassation of the respondent state. On 24 January 2002, the Secretariat wrote to the complainant acknowledging receipt of the complaint and requesting the latter further clarification on the status of the appeal before the said court.

12. At its 31st ordinary session held from 2 to 16 May 2002 in Pretoria, South Africa, the African Commission considered the complaint and decided to be seized thereof.

13. On 28 May 2002, the Secretariat wrote to the complainant and the respondent state of this decision and requested them to forward their submissions on admissibility before the 32nd ordinary session of the African Commission.

14. At its 32nd ordinary session held from 17 to 23 October 2002 in Banjul, The Gambia, the African Commission examined the complaint and decided to defer its consideration on admissibility to the 33rd ordinary session.

15. On 7 November 2002, the Secretariat wrote to the complainants and respondent state to inform them of this decision.

16. The two parties forwarded their submissions on admissibility to the Secretariat. Each party was given copies of submissions from the other party.

17. On 9 April 2003, the complainant wrote to the Secretariat informing it that the Court of Cassation in Egypt had acquitted Professor Saadeddin Ibrahim. The complainant also requested the withdrawal of its communication concerning Dr Saadeddin Ibrahim.

18. By fax dated 17 April 2003, the complainant confirmed that its request for withdrawal was made on behalf of all the alleged victims in the communication.

For the abovementioned reasons, the African Commission:

Takes note of the withdrawal of the communication by the complainant and decides to close the file.

* * *

Interights v Egypt

(2003) AHRLR (ACHPR 2003)

Communication 261/2002, *Interights et al v Egypt*
Decided at the 33rd ordinary session, May 2003, 16th Annual Activity Report
Rapporteur: El Hassan

Admissibility (withdrawal of complaint, 9)

Summary of facts

1. The complaint is submitted by Interights representing the Pan-African Movement (PAM), the Legal Resources Consortium (LRC), the Legal Defence and Aid Project (LEDAP) and *Recontre Africaine Pour la Defense des Droits de l'Homme* (RADDHO) who filed the same on behalf of Professor Saadeddin Mohammed Ibrahim, head of the Ibn Khaldun Centre for Development Studies (IKC) and 27 other persons.

2. This complaint follows the trial and conviction by the Supreme Security Court of the respondent state in May 2001 of professor Saadeddin Ibrahim, Director and Chair of the Board of Directors of the Ibn Khaldun Center for Development Studies, who was also treasurer of *Hay'at Da'am al-Nakhibat* (Association for the Support of Women Voters, known in Egypt as 'Hoda Association'), together with 27 other persons. They were all working either as permanent employees or project associates of the two organisations and ten of them were tried *in absentia*.

3. The complainants allege that the accused were charged with deliberately disseminating information abroad about the internal situation in the respondent state damaging its stature contrary to article 80(d) of the Penal

Code, conspiring to bribe public officials to undermine the performance of their duties contrary to articles 40(2), 40(3), and 48 of the Penal Code, receiving donations from the European Union (EU) without prior permission from the competent authorities contrary to articles 1(6) and 2(1) of Military Order 4 of 1992, using deceptive methods to defraud the EU of funds made available to the two organisations contrary to article 336 (1) of the Penal Code, and accepting and offering bribes and of forgery of official documents contrary to articles 103, 104, 107bis, 207, 211, and 214 of the Penal Code. They were convicted and sentenced to several terms of imprisonment ranging from seven years with hard labour to one year suspended terms.

4. In the process of apprehending, trying and convicting the accused, the complainants allege that the respondent state violated their pre-trial and trial rights, freedom of expression, rights to appeal, and rights to effective domestic remedies.

Complaint

5. The complainants allege violations of articles 2, 3, 4, 5, 6, 7(1), 9(2), 13(1), 16(1) and (2) and 26 of the African Charter on Human and Peoples' Rights.

Procedure

6. The complaint was dated 4 October 2002 and received at the Secretariat on 9 October 2002 by mail.

7. At its 32nd ordinary session held from 17 to 23 October 2002 in Banjul, The Gambia, the African Commission considered the complaint and decided to be seized thereof.

8. On 4 November 2002, the Secretariat wrote to the complainant and respondent state to inform them of this decision and requested them to forward their submissions on admissibility to the Secretariat before the 33rd ordinary session of the African Commission.

9. At its 33rd ordinary session held from 15 to 29 May 2003 in Niamey, Niger, the African Commission heard the complainant's oral submissions on the matter, during which the latter made an explicit oral request to the African Commission to withdraw the communication. The complainant also stated it will send its written request for the same soon.

For the abovementioned reasons, the African Commission:

Takes note of the withdrawal of the communication by the complainant and decides to close the file.

ERITREA AND ETHIOPIA

Interights (on behalf of Pan African Movement and Others) v Eritrea and Ethiopia

(2003) AHRLR (ACHPR 2003)

Communication 233/99, *Interights (on behalf of Pan African Movement and Citizens for Peace in Eritrea) v Ethiopia* and communication 234/99, *Interights (on behalf of Pan African Movement and Inter Africa Group) v Eritrea*
Decided at the 33rd ordinary session May 2003, 16th Annual Activity Report
Rapporteurs: 26th-30th sessions: Badawi and Johm; 31st-33rd sessions: Johm

Admissibility (complaint submitted by NGO, 33, 34; exhaustion of local remedies, massive violations, 37, 39; consideration by other international body, 19, 46, 49, 53 , 55-57, 60)

Summary of facts

1. The complainant alleges that sometime in the second quarter of 1998 there was an international armed conflict between Eritrea and Ethiopia that led to the beginning of active hostilities between the two countries.

2. During this period it is alleged by the complainant that thousands of persons of Ethiopian nationality were expelled from Eritrea, either directly or constructively by the creation of conditions in which they had no choice other than to leave Eritrea. In particular, over 2 500 were forcibly expelled and dumped at the border where there was ferocious fighting and heavily infested with anti-personnel land mines.

3. It is also alleged that between June 1998 and July 1999, more than 61 000 people of Eritrean ethnic descent who are legal residents or citizens of Ethiopia were deported from Ethiopia. Most of these are urban deportees.

4. The complainant asserts that in both cases, thousands of persons of Ethiopian origin and those of Eritrean origin were arrested and interned in Eritrea and Ethiopia respectively under harsh conditions with no visitation rights for their families, no food, clothing and toilet facilities for extended periods of time.

5. The complainant alleges that some Ethiopian women and young girls were tortured and raped in the affected areas by Eritrean soldiers.

6. The complainant also alleges that most of the deportees were subjected to cruel, inhuman and degrading treatment. Furthermore, the governments of Eritrea and Ethiopia arbitrarily deprived most of the deportees their property.

7. Specifically in the case of those persons deported by the government of Eritrea, some deportees were forced to work without salaries in exchange for protection. Yet others were forced out of their rental accommodation, suffering forcible eviction and homelessness as a result.

8. While in the case of those persons deported by the government of Ethiopia, the deportees, prior to their deportation were required to transfer their rights over their property in Ethiopia by a power of attorney to a legal agent. In compliance with this, husbands often designated their wives as their legal agents, only to find that their wives were given a month or two to sell their properties and were then deported a week or two after they were told to sell. In effect, the deportation was accompanied in most cases by an expropriation of the property of the deportees. In some cases some deportees also had their rental properties taken over. Some bank accounts were frozen, and some savings books were destroyed, making it impossible for the deportees or their designated agents to gain access to such savings.

9. The complainant claims that while effecting the said deportations, parents and children were forcibly separated without any provision for the care, feeding, and housing of the children. As at the time of submission of the complaints, neither parents nor children can travel across the Eritrean-Ethiopian border and even telephone communication is impractical.

Complaint

10. The complainant alleges violations of articles 1, 2, 3, 4, 5, 6, 7(1), 12(1), (2), (4) and (5), 14, 15, 16 and 18(1) of the African Charter.

Procedure

11. The complaint lodged by Interights against Eritrea and Ethiopia was received at the Secretariat of the African Commission on 5 October 1999.

12. At its 26th ordinary session held in Kigali, Rwanda, the African Commission decided to be seized of communications 233/99 and 234/99 and requested the parties to furnish it with additional information on its admissibility in accordance with article 56 of the Charter.

13. On 17 January 2000, the Secretariat conveyed the above decision to the parties and forwarded a copy of the summary of the communication and the original text of the complaint together with the documents attached thereto.

14. On 30 April 2000, during the 27th ordinary session of the African Commission, the Allard K Lowenstein International Human Rights Law Clinic at the Yale Law School in the United States submitted an *amicus curiae* brief to the African Commission on the complaint brought against Ethiopia.

15. At its 27th ordinary session held in Algeria, the African Commission heard the representatives of the parties on the admissibility of the case. It declared both communications admissible and requested parties to submit their arguments on the merits. The various parties were informed accordingly of the decision of the African Commission.

16. At its 28th ordinary session held in Cotonou, Benin, the African Commission heard both parties.

17. At its 29th ordinary session held in Libya, the African Commission heard both parties and decided to consolidate communications 233/99 and 234/99. The African Commission deferred consideration both communications on the merits to the 30th ordinary session and invited parties to the communication 233/99 and 234/99 to submit arguments for the purpose of clarifications in terms of rule 104 of the Rules of Procedure of the African Commission:

a. On the desirability or otherwise of considering the communications under the provisions of articles 47-54 of the African Charter on Human and Peoples' Rights on communications between states and to follow the procedure laid down there-under;
b. On the extent to which matters covered by the complaint are the subject of the peace agreement between the government of Democratic Federal Republic of Ethiopia and the government of state of Eritrea signed in Algiers on 12 December 2000, including the mechanism for the consideration of claims by individuals in either state whose citizenship may be in dispute [Article 5(8)];

And in the alternative:

c. Indicate the relevance or otherwise of Article 56(7); and
d. Whether a final decision on the merits at this stage will have an impact and what effect, if any, that would have on the peace process between the two countries.

18. On 18 June 2001 both parties were informed of the African Commission's decision and were invited to forward their submissions on the abovementioned questions.

19. At its 30th ordinary session held in The Gambia, the African Commission heard oral submissions from all the parties and decided as follows:

- The governments of the Federal Democratic Republic of Ethiopia and the state of Eritrea should submit claims relating to the abovementioned communication to the Claims Commission.

- That any correspondence relating to communication 233/99 and 234/99 made to the Claims Commission should be copied and forwarded to the African Commission.
- To postpone further consideration on the merits of communication 233/99 and 234/99 to the 31st Ordinary Session to ascertain whether matters covered by the communication are also covered by and have been submitted to the Claims Commission.

20. On 24 October 2001 the parties were informed of the decision of the African Commission.

21. During the 31st ordinary session of the African Commission, Eritrea submitted a letter from the President of the Claims Commission. In that letter the President of the Claims Commission states to the effect that, Eritrea and Ethiopia can provide the African Commission with copies of their statements of claim or other appropriate information relating to the Claims Commission if required by the African Commission.

22. At its 31st ordinary session, the African Commission heard oral submissions from all the parties to the communication and decided to defer consideration of the matter to the 32nd session in order to allow the complainants time to forward their written responses to the written submissions of Ethiopia.

23. On 7 June 2002, all the parties to the abovementioned communication were informed of the African Commission's decision. Interights was requested to forward its written response to the Secretariat of the African Commission within two months from the date of notification.

24. On 30 July 2002, Interights was reminded that the Secretariat was awaiting to receive their written submissions on or before 7 August 2002. There has been no response from Interights thus far.

25. At its 32nd ordinary session, the African Commission heard oral submissions from the state of Eritrea and decided to defer consideration of this communication to the 33rd ordinary session. Parties to the communication were informed accordingly.

26. At its 33rd ordinary session, held from 15 to 29 May 2003, in Niamey Niger, the African Commission decided to suspend consideration of these communications *sine die.*

Law

Admissibility

27. The admissibility of communications brought pursuant to article 55 of the Charter is governed by the conditions stipulated in article 56 of the Charter. This article lays down seven conditions, which generally must be fulfilled by a complainant for a communication to be declared admissible.

28. Of the seven conditions, the government of Ethiopia claims that the complainants have not fulfilled three; namely: article 56(1), (5) and (7). Additionally, it questions the neutrality, credibility and integrity of the NGOs submitting the communication.

29. The state of Eritrea on its part claims that the Complainants have not fulfilled two conditions, namely: article 56(6) and (7).

30. Article 56(1) of the African Charter stipulates 'Communications relating to human and peoples rights referred to in article 55 ... shall be considered if they: (1) Indicate their authors even if the latter request anonymity.'

31. The government of Ethiopia submits that the complainants being NGOs are expected to provide the names of their representatives, and since they failed to do so in their letter of August 1999, the African Commission should reject the communication.

32. Furthermore, the government of Ethiopia questions the neutrality, credibility and integrity of the NGOs submitting the communications. This, the government alleges is evidenced by the superficial treatment given by the complainant NGOs to the plight of thousands of Ethiopians suffering in the hands of the Eritrean government whereas with respect to Eritrea, they submitted a detailed verbatim report. Ethiopia thus claims that the submission on Ethiopia is only an attempt by the complainant to give it a semblance of credibility.

33. The African Commission is of the view that in terms of article 56(1) of the African Charter, it is enough if the said complaint bears, as in this case, the name of one of the organisation's representatives. Thus the present complaint cannot be declared inadmissible on the basis of article 56(1).

34. With respect to the question of the neutrality, credibility and integrity of the NGOs submitting the communication, the African Commission does not consider this issue as one that falls within the requirement for the admissibility of the communication as stipulated under article 56 of the Charter. In any case, the evidence before the African Commission does not lead it to uphold the submission of the government of Ethiopia on the credibility, neutrality and integrity of the NGOs, particularly Interights, which effectively became the complainant.

35. Article 56(5) of the African Charter stipulates: 'Communications relating to human and peoples rights referred to in Article 55 ... shall be considered if they: (5) Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged.'

36. Regarding the issue of exhaustion of local remedies, the government of Ethiopia submits that the complainants have not availed themselves of the remedies available at the local courts before approaching the African Commission.

37. The complainant asserts, and the African Commission is of the opinion that there were no domestic remedies available to the complainants, as a practical matter in this case. In coming to this decision the African Commission relies on its decision on the issue in Communication 71/92 *Recontre Africaine Pour la Defense des Droits de l'Homme v Zambia* [(2000) AHRLR 321 (ACHPR 1996) para 15], a case that involved mass deportation and transfer of multiple victims. In this case the African Commission observed that:

> The mass nature of the arrests, the fact that victims were kept in detention prior to their expulsion, and the speed with which the expulsions were carried out gave the complainants no opportunity to establish the legality of these actions in the courts. For complainants to contact their families, much less attorneys was not possible. Thus, the recourse referred to by the government . . . was as a practical matter not available to the complainants.

38. The government of Eritrea alleges that the complainant has not fulfilled the conditions stipulated under article 56(6) of the African Charter. Article 56(6) of the African Charter reads:

> Communications relating to human and peoples rights referred to in article 55 . . . shall be considered if they: (6) are submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized of the matter.

39. The African Commission is of the view that bearing in mind its decision in relation to article 56(5), compliance with the provisions of article 56(6) of the African Charter by the complainant is rendered inapplicable.

40. Both the governments of Eritrea and Ethiopia also raise an objection to the African Commission admitting the communications stating that the complainants did not comply with the provisions of article 56(7) of the African Charter.

41. At its 27th ordinary session held in Algeria, after hearing the representatives of the parties on the admissibility of the case, the African Commission decided to declare both communications admissible.

42. It is to be recalled that at its 29th ordinary session held in Libya, the African Commission heard oral submissions from all the parties and decided to consolidate communications 233/99 and 234/99. The African Commission also postponed further consideration on the merits of the case to the 30th ordinary session and invited parties to the communication 233/99 and 234/99 to submit arguments for the purpose of clarifications in terms of Rule 104 of the Rules of Procedure of the African Commission.

Clarifications sought by the African Commission in terms of Rule 104 of the Rules Of Procedure of the African Commission: The desirability or otherwise of considering the communications under articles 47-54 of the African Charter

43. The respondent states argue that it is undesirable that the commu-

nications before the African Commission be converted into state-to-state proceedings. The government of Ethiopia takes this position because the two countries, Ethiopia and Eritrea, have already negotiated and signed a peace agreement with regard to the conflict that gave rise to the human rights violations that were committed by the respective states. Therefore the African Commission should discontinue considering the complaints before it and let the Ethiopian-Eritrean Claims Commission handle the matters raised within the complaints.

44. The communications presently before the African Commission are governed by articles 55-57 of the Charter, a category of cases clearly distinct from complaints governed by articles 47-54 of the Charter. The provisions of the African Charter and the Rules of Procedure do not provide for any procedure to convert non-state communications into inter-state communications. The initiation of an inter-state complaint is dependent on the voluntary exercise of the sovereign will of a state party to the Charter, which decision can only be made by states in accordance with the Charter. From the submissions of the respondent states, the African Commission comes to the conclusion that Ethiopia and Eritrea do not wish to initiate an inter-state complaint before the African Commission; furthermore they believe that the complaint against them that is before the African Commission should be dismissed as they believe that the Ethiopian-Eritrean Claims Commission would be better suited to handle the matters raised in those complaints. The African Commission cannot and will therefore not consider the communication under articles 47-54, a procedure relating to the consideration of inter-state communications.

The extent to which matters covered by the complaints are the subject of the peace agreement between the governments of Ethiopia and Eritrea, signed on 12 December 2000, including the mechanism for the consideration of claims by individuals in either state whose citizenship may be in dispute (article 5(8))

45. The matters raised by the complainants before the African Commission relate to abuse of human rights of people in violation of the provisions of the African Charter by the governments of Ethiopia and Eritrea during the period of the Ethiopian-Eritrean conflict.

46. Article 5(1) of the peace agreement between the respondent states establishes a Claims Commission and further spells out its mandate. Article 5(1) of the peace agreement provides:

> (1) Consistent with the Framework Agreement, in which the parties commit themselves to addressing the negative socio-economic impact of the crisis on the civilian population, including the impact on those persons who have been deported, a neutral Claims Commission shall be established. The mandate of the Commission is to decide through binding arbitration, all claims for loss, damage or injury by one Government against the other, and by nationals (including both neutral and juridical persons) of one party against the Government of the other party or entities owned or controlled by the other party that are: (a)

related to the conflict that w as the subject of the Framework Agreement, the Modalities for its Implementation or, Cessation of Hostilities Agreement, and (b) result from violations of international humanitarian law, including the 1949 Geneva Conventions, or other violations of international law.

47. The mechanism for the considering claims brought by Ethiopia and Eritrea is governed by article 5(8) of the peace agreement which provides:

(8) Claims shall be submitted to the Commission by each of the parties on its own behalf and on behalf of its nationals, including both natural and juridical persons. All claims submitted to the Commission shall be filed no later than one year from the effective date of this agreement. Except for claims submitted to another mutually agreed settlement mechanism in accordance with paragraph 16 or filed in another forum prior to the effective date of this agreement, the Commission shall be the sole forum for adjudicating claims described in paragraph 1 or filed under paragraph 9 of this article, and any such claims which could have been and were not submitted by that deadline shall be extinguished, in accordance with international law.

48. As part of their submissions on the clarification sought by the African Commission, the government of Ethiopia forwarded documents relating to the Claims Commission's hearings that were held from 1 to 2 July 2001. During the hearings, the Claims Commission addressed itself to the nature of the claims that the governments of Ethiopia and Eritrea will place before it. The Claims Commission was of the view that its jurisdiction under article 5(1) includes two basic types of claims. The parties may file traditional inter-state claims under the principles of the law of state responsibility for injury to the claimant state. These may include claims for injuries to the state occurring by reason of injuries to its nationals in violation of international law. Or, the parties may choose to file the claims of individual nationals that fall within the scope of article 5(1). The Claims Commission is open to either approach, or to a combination of them, so long as no duplicate compensation for the same injury results.

49. At the 31st session of the African Commission, both the respondent states asserted that they had filed with the Claims Commission, all the matters covered by communication 233/99 and 234/99.

50. The government of Eritrea contended that it made claims for violations of the rights of Eritrean citizens and/or Ethiopian citizens of Eritrean ethnic origin and that these claims also constitute allegations of violations of the African Charter and of international law (Statements of Claims 15, 16, 17, 19 and 21). The claims include the internment without trial of civilians because of their membership in political organisations or for reasons of their ethnicity or national origin. The government of Eritrea stated that it made claims on behalf of persons of Eritrean citizenship and/or Eritrean national origin for the illegal internment of civilians in concentration camps without formal accusation or trial, the physical maltreatment and torture of such individuals, the discriminatory dismissals from employment, evictions from rental property, and seizure of property from persons of Eritrean national origin who are still present in Ethiopia.

51. The government of Ethiopia also argues that the allegations presented in this communication have been submitted to the Claims Commission. They state that in their Statement of Claim 5 that they submitted before the Claims Commission, they made claims for the unlawful treatment of Ethiopian nationals living in Eritrea, including arbitrary detention, mass internment, torture, abuse, murder, forced disappearances, forced conscription into the military, confiscation of property and systematic rape of Ethiopian women. The Statement of Claim also includes factual representations relating to the Eritrean government's policy of discrimination against Ethiopians in Eritrea, including arbitrary dismissal of Ethiopian nationals from public and private employment in Eritrea; Eritrea's unlawful restrictions on the freedom of movement, including exit from Eritrea and forceful expulsion of Ethiopians and unlawful and inhuman conditions during the expulsion of Ethiopian nationals from Eritrea.

The relevance or otherwise of article 56(7) of the African Charter

52. Article 56(7) of the African Charter provides:

> Communications relating to human and peoples' rights referred to in article 55 received by the Commission, shall be considered if they: (7) do not deal with cases which have been settled by these States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organisation of African Unity or the provisions of the present Charter.

53. Article 56(7) of the Charter precludes the African Commission from considering cases that have been settled by states in accordance with the principles of the Charter of the United Nations, or the Charter of the Organisation of African Unity or the provisions of the present Charter.

54. The complainant refers the African Commission to its decision in communication 59/91, *Embga Mekongo v Cameroon,* where it held that mediation by political institutions such as the European Union was irrelevant to article 56(7) of the Charter. Interights thus submits that this holding applies with equal force to the political organs of the OAU.

55. The Claims Commission created by a peace agreement should not be viewed as a political organ of the OAU; rather it is a body that has been established under a peace agreement and which, under article 5(13), is bound to apply rules of international law and cannot make decisions *ex aequo et bono.* Indeed the Claims Commission has ruled that in dealing with evidence, they must apply evidentiary rules that prove or disprove disputed facts (see decision 4 of the Claims Commission). The Claims Commission therefore has the capacity, unlike the African Commission, to deal with complex matters such as the citizenship status of the individuals, what amount of compensation shall be awarded and to whom, in respect of the violations that they have suffered. Such was the complexity that the African Commission was faced with in *Embga Mekongo v Cameroon* [(2000) AHRLR 56 (ACHPR 1995)] where it found a violation of Me-

kongo's rights but stated that it was unable to determine their amount and the *quantum* should be determined under the law of Cameroon.

56. In communication 60/91, *Constitutional Rights Project (in respect of Akamu and Others v Nigeria* [(2000) AHRLR 180 (ACHPR 1995) para 8], the African Commission held that it would not rely on the process or mechanism of a 'discretionary, extra-ordinary ... non-judicial nature' or that 'have no obligation to decide according to legal principles' to preclude the admissibility of a communication under article 56(7) of the African Charter. The African Commission would say that this is clearly not the case with regard to the Claims Commission as has been demonstrated by article 5(13) of the peace agreement that provides that it is bound to apply rules of international law and cannot make decisions *ex aequo et bono*. This therefore puts the Claims Commission under those bodies envisaged under article 56(7).

57. From the submissions of the respondent states, it seems to the African Commission, that the matters brought before it, are matters that have been placed before the Claims Commission which can therefore adequately deal with such matters.

58. At the 31st ordinary session, the complainants requested the African Commission to defer consideration of these communications to the 32nd ordinary session to enable them submit written responses to the respondent states' submissions. The African Commission granted the request and informed the parties accordingly. The Secretariat of the African Commission has written to the complainants asking them to forward the stated written responses but there has been no reaction from them.

59. In principle the appropriate remedy of those claims submitted to the Claims Commission should be monetary compensation. However, it is also within the Claims Commission's mandate to provide other types of remedies that are acceptable within international practice. It is probable that the African Commission will reach a decision finding the respondent states in violation of the rights of the individuals on whose behalf Interights is acting. However, as was the case in *Mekongo v Cameroon (supra),* the African Commission would certainly be constrained in awarding compensation and may have to refer this matter to the Claims Commission and at which point the matter would certainly be time barred.

60. While the African Commission would have opted to proceed and deal with the instant communications, the respondent states parties have assured the African Commission that all the issues before the African Commission will be brought before the Claims Commission.

For these reasons, the African Commission decides as follows:

- To suspend consideration of communication 233/99 and 234/99 *sine die*, and await the decision of the Claims Commission with regard to matters contained in this communication;

- That the respondent states keep the African Commission regularly informed of the process before the Claims Commission with particular reference to the matters contained in these communications;
- The Republic of Ethiopia and the state of Eritrea are requested to transmit a copy of the text of the decision of the Claims Commission to the Secretariat of the African Commission as soon as it is delivered;
- In the event that the Claims Commission does not fully address the human rights violations contained herein, to reopen the matter for consideration; and
- Reserves its decision on the merits of these communications.

ERITREA

Zegveld and Another v Eritrea

(2003) AHRLR (ACHPR 2003)

Communication 250/2002, *Liesbeth Zegveld and Mussie Ephrem v Eritrea*
Decided at the 34th ordinary session, November 2003, 17th Annual Activity Report
Rapporteur: Rezag Bara

Interim measures (urgent appeal, 10, 15, 54)
Admissibility (exhaustion of local remedies, remedies must be available, effective and sufficient, 23, 35-37, 39, 40; reconsideration of admissibility decision, 44, 45)
Interpretation (international standards, 29, 36, 62)
Personal liberty and security (no legal remedies to challenge detention, 35, 53, 56; *incommunicado* detention, 53, 55)
Evidence (failure of state party to respons to allegations, 46)
Expression (persecution because of opinions expressed, 59-62)

Summary of facts

1. The complaint is filed by Dr Liesbeth Zegveld, an international lawyer at a Netherlands based firm - Böhler Franken Koppe De Feijter, and Mr Mussie Ephrem, an Eritean living in Sweden.

2. The complainants allege that 11 former Eritrean government officials, namely, Petros Solomon, Ogbe Abraha, Haile Woldetensae, Mahmud Ahmed Sheriffo, Berhane Ghebre Eghzabiher, Astier Feshation, Saleh Kekya, Hamid Himid, Estifanos Seyoum, Germano Nati, and Beraki Ghebre Selassie were illegally arrested in Asmara, Eritrea on 18 and 19 September 2001 in violation of Eritrean laws and the African Charter on Human and Peoples' Rights. They were part of a group of 15 senior officials of the ruling Peoples Front for Democracy and Justice (PFDJ) who had been openly critical of the Eritrean government policies. In May 2001, they wrote an open letter to ruling party members criticising the government for acting in an 'illegal and unconstitutional' manner. Their letter also called upon 'all PFDJ members and Eritrean people in general to express their opinion through legal and democratic means and to give their support to the goals and principles they consider just'. The government subsequently announced that the 11 individuals mentioned above, on whose

behalf the present complaint is being filed, had been detained 'because of crimes against the nation's security and sovereignty'.

3. The complaint also alleges that the detainees could be prisoners of conscience, detained solely for the peaceful expression of their political opinions. Their whereabouts is currently unknown. The complainants allege that the detainees may be held in some management building between the capital Asmara and the port of Massawa. They have reportedly not been given access to their families or lawyers. The complainants fear for the safety of the detainees.

4. The complainants state that they have made a request for *habeas corpus* to the Minister of Justice of Eritrea. They claim that they could not submit the same to the courts, as the place of detention of the 11 former officials was unknown. They allege that in the *habeas corpus* the Eritrean authorities were asked, among others, to reveal where the 11 detainees were being held, to either charge and bring them to court or promptly release them, to guarantee that none of them would be ill treated and that they have immediate access to lawyers of their choice, their families and adequate medical care. The complainants allege that no reaction has been received from the Eritrean authorities.

5. Together with their complaint the complainants submitted a request for provisional measures to the African Commission in accordance with rule 111 of the Rules of Procedure of the African Commission.

Complaint

6. The complainants allege violations of articles 2, 6, 7(1), and 9(2) of the African Charter on Human and Peoples' Rights.

7. The complainants pray that should the detainees be tried, the trial should be held in accordance with international human rights standards and without recourse to the death penalty. They claim that such a trial should not be before the Special Court, which they allege fails to meet international standards of fair trial.

Procedure

8. The complaint was dated 9 April 2002 and received at the Secretariat on 9 April 2002 by fax, and on 9 and 11 April 2002 by email.

9. On 19 April 2002, the Secretariat wrote to the complainants acknowledging receipt of the complaint, and informing them that their request for provisional measures was noted and would be acted upon accordingly.

10. On 3 May 2002, the African Commission wrote a letter of appeal to His Excellency Issayas Afewerki, President of the State of Eritrea, respectfully urging him to intervene in the matter being complained of pending the outcome of the consideration of the complaint before the Commission.

11. At its 31st ordinary session held from 2 to 16 May 2002 in Pretoria, South Africa, the African Commission considered the complaint and decided to be seized thereof.

12. On 20 May 2002, the Ministry of Foreign Affairs of the state of Eritrea responded to the Commission's appeal and confirming to the latter that the alleged victims on whose behalf the complaint was filed had their quarters in appropriate government facilities, had not been ill-treated, have had continued access to medical services and that the government was making every effort to bring them before an appropriate court of law as early as possible.

13. On 28 May 2002, the Secretariat wrote to the complainants and the respondent state of the Commission's decision to be seized of the matter and requested them to forward their submissions on admissibility before the 32nd ordinary session of the Commission.

14. The Secretariat of the African Commission forwarded the Ministry's response to the Chairperson of the African Commission on 7 June 2002 and to the complainants on 18 June 2002.

15. On 25 October 2002, the African Commission wrote, by way of follow up on its urgent appeal in the matter, to the respondent state reminding it that it was the responsibility of the member state's general prosecutor to bring the accused before a competent court of law in accordance with the rules guaranteeing fair trial under relevant national and international instruments.

16. The two parties made submissions on admissibility.

17. At its 33rd ordinary session held from 15 to 29 May 2003, in Niamey, Niger, the African Commission heard oral submissions from both parties to the communication and decided to declare the communication admissible.

18. On 10 June 2003, the Secretariat of the African Commission wrote informing the parties to the communication of the African Commission's decision and requested them to forward their submissions on the merits of the communication within three months.

19. The chairperson of the African Commission forwarded a letter dated 10 June 2003 appealing to HE the President of Eritrea to intervene in this matter and urge the authorities holding the 11 individuals to release them or bring them before the courts in Eritrea.

20. At its 34th ordinary session, held from 6 to 20 November 2003 in Banjul, The Gambia, the African Commission considered the communication and delivered its decision on the merits.

Law

Admissibility

21. The admissibility of communications brought pursuant to article 55 of the African Charter is governed by the conditions stipulated in article 56 of

the African Charter. This article lays down seven conditions, which must generally be fulfilled by a complainant for a communication to be declared admissible.

22. At issue in the present communication is whether the complainants have pursued and exhausted the domestic legal remedies of Eritrea, and if not, whether the exception to the exhaustion of domestic remedies rule should apply. This issue of exhaustion of domestic remedies is governed by article 56(5) of the African Charter and it provides:

> Communications . . . received by the Commission shall be considered if they: . . . are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged.

23. The rule requiring exhaustion of local remedies has been applied by international adjudicating bodies and is premised on the principle that the respondent state must first have an opportunity to redress by its own means within the framework of its own domestic legal system, the wrong alleged to have been done to the individual.

24. In determining whether this communication should be declared admissible or otherwise, the African Commission must have regard to the arguments put forward by the complainants and the respondent state.

25. The complainants submit they have attempted to exhaust local remedies in Eritrea. They state that on 26 November 2001 and on 9 April 2002, they submitted a *habeas corpus* request through the Eritrean Minister of Justice asking the Eritrean authorities to disclose where the 11 detainees were being held and why. The complainants also requested that the detainees be brought to court and charged in accordance with the law, however, there was no response to their request. A similar request was made on 26 June 2002 (which is after the African Commission was seized of their complaint) to the Eritrean High Court in Asmara to which there was no reply either.

26. In her oral submissions during the 33rd ordinary session of the African Commission, Zegveld stated that in an attempt to access the local courts, they had requested locally based legal practitioners (whom she declined to name) to bring the matter before the local courts. However, the said lawyers later informed her that they would not be able to pursue the detainees' case in the domestic courts for fear of persecution by the authorities and for fear of jeopardising their legal practice.

27. The complainants further submit that for more than 18 months, the 11 detainees have been held in detention without formal charges and with no access to their lawyers or families, thus rendering them unable to seek legal or administrative redress. Furthermore, there has been no response from the government of Eritrea or High Court of Asmara, in relation to the complainants' requests of 26 November 2001 and 9 April 2002.

28. Under the circumstances presented above, the complainants aver that the requirement to exhaust local remedies can no longer apply because even where such remedies would have been existent they have been unduly prolonged in this case.

29. The complainants refer the African Commission to a decision of the European Court of Human Rights in *Öcalan v Turkey*[1] where the court held that Öcalan's isolation and the fact that the Turkish police obstructed his access to lawyers made it impossible for the applicant to have effective recourse to a domestic remedy under Turkish law.

30. In its written submissions, the respondent state argues that the complainants addressed their *habeas corpus* request to the Minister of Justice who is a member of the executive branch with no capacity to address and take decisions on this matter either in substance or in procedure. They submit that only the judiciary has the authority to take action on any civil, criminal and other issues of judicial nature including, the matter of *habeas corpus*.

31. During the 33rd ordinary session, the representative of the respondent state submitted that to date the complainants have not submitted themselves to the courts in Eritrea. He informed the African Commission that he had personally checked with the High Court of Asmara to establish whether the matter had been brought to the court's attention but there was no case file on this matter.

32. The representative of the respondent state argues that the complainants' assertion that they have not been able to access the domestic courts is speculative. He stated that Zegveld should accredit herself to the courts in Eritrea to enable her bring this matter before the local courts.

33. The respondent state further submits that they have been unable to bring the 11 detainees before a court of law because of the nature of the criminal justice system in Eritrea. The representative of the respondent state informed the African Commission that the criminal justice system in Eritrea was inherited from Ethiopia and is therefore lacking. Within the High Court of Asmara, there is only one chamber responsible for handling criminal cases including criminal matters from the lower courts. As such, the court's calendar is highly congested and difficult to manage. Therefore cases are bound to take time before they are heard by the courts and this is the very reason for the delay in bringing the matter of the 11 detainees before a court of law.

34. There are exceptions to the rule of exhaustion of domestic remedies and the complainants have argued that they could not exhaust the domestic remedies because the domestic legislation of the Eritrea does not

[1] Application 46221/99, 12 March 2003.

afford due process of law for the protection of the rights that have allegedly been violated.

35. At this stage, it should be made clear that, when a person is being held in detention and accused for committing a crime, the African Commission holds that it is the responsibility of the member state, through its appropriate judicial bodies, to bring this person promptly before a competent court of law in order to enable him/her to be tried in accordance with rules guaranteeing the right to a fair trial in accordance with national and international standards.

36. The Inter-American Court of Human Rights in the *Velasquez* case,[2] while interpreting article 46 of the American Convention (similar to article 56(5) of the African Charter) which relates to the issue of exhaustion of domestic remedies, stated that, for the rule of prior exhaustion of domestic remedies to be applicable, the domestic remedies of the state concerned must be available, adequate and effective in order to be exhausted. The Court also opined that where a party raises non-exhaustion of local remedies because of the unavailability of due process in the state, the burden of proof will shift to 'the state claiming non-exhaustion and it has an obligation to prove that domestic remedies remain to be exhausted and that they are effective'.

37. In consolidated communication 147/95 and 149/96,[3] the African Commission also ruled that domestic remedies must be available, effective and sufficient; a domestic remedy is considered available if the petitioner can pursue it without impediment, it is effective if it offers a prospect of success and it is sufficient if it is capable of redressing the complaint.

38. The African Commission notes that by its own admission, the respondent state has indicated that it has not yet put in place structures that would ensure that cases are handled 'within reasonable time'. However, the respondent state goes ahead to assure the African Commission that the detainees will be brought before a court of competent jurisdiction in due course.

39. The state has a constitutional or statutory requirement to provide an accessible, effective and possible remedy whereby alleged victims can seek recognition and restoration of their rights before resorting to the international system for protection of human rights. Such procedures should not be mere formalities that, rather than enable the realisation of those rights, to the contrary, dilute with time any possibility of success with respect to their assertion, recognition or exercise.

40. Very clearly, the situation as presented by the respondent state does not afford due process of law for protection of the rights that have been alleged to be violated; the detainees have been denied access to the

[2] *Velasquez Rodríguez* case, judgment of 29 July1988, Inter-Am Ct HR (Ser C) 4 (1988).
[3] *Jawara v The Gambia* [(2000) AHRLR 107 (ACHPR 2000)].

remedies under domestic law and have thus been prevented from exhausting them. Furthermore, there has been unwarranted delay in bringing these detainees to justice.

41. For these reasons, the African Commission declares this communication admissible.

Ruling by the African Commission on request by the respondent state to revisit the decision on admissibility

42. The present communication was declared admissible at the 33rd ordinary session of the African Commission held in May 2003. In response to the African Commission's request for written submissions on the merits, the respondent state in a *note verbale* expressed its dismay at the African Commission's decision to declare the matter admissible. They stated that they found the African Commission's decision on admissibility unacceptable and therefore requested that the African Commission revisits its decision on admissibility.

43. Before dealing with the merits of the communication, the African Commission would like to pronounce itself on the request by the respondent state to revisit its decision on admissibility.

44. Firstly, it should be noted that the respondent state did not bring any new element, either on the facts of the case as considered by the African Commission or on the legal grounds upon which he is making such a request.

45. Secondly, rule 118(2) of the African Commission's Rules of Procedure stipulates that: 'If the Commission has declared a communication inadmissible under the Charter, it may reconsider this decision at a later date if it receives a request for reconsideration.' The Rules of Procedure do not make provision for the African Commission to revisit its decision once a communication has been declared admissible. Furthermore, it has been the practice of the African Commission not to reconsider a decision declaring a communication admissible. For these reasons the African Commission upholds its decision on admissibility in this matter.

Merits

46. The African Commission delivered its decision on admissibility of this communication at its 33rd ordinary session and informed the parties of its decision on 10 June 2003. The Secretariat of the African Commission further requested the parties to forward their submissions on the merits of the communication within three months. Whereas the complainants forwarded their written submissions on the merits of the communication, none were received from the respondent state. It is an established principle of the African Commission that where allegations of violations of provisions of the African Charter go uncontested by the government concerned, the African Commission must decide on the facts as given.

This principle also conforms to the practice of other international human rights adjudicatory bodies. In the present communication therefore, the African Commission is left with no alternative but to proceed and deliver a decision on the merits based on the submissions of the complainants.[4] Although the African Commission has in this decision referred to the oral submissions made by the respondent state during the 33rd ordinary session, especially as they relate to some issues that touch upon the merits of the communication, the respondent state's failure to present comprehensive submissions on the merits has been done at its own peril.

47. By *note verbale* dated 20 May 2002, the respondent state informed the African Commission that the 11 persons had indeed been detained for

> conspiring to overthrow the legal government of the country in violation of relevant OAU resolutions, colluding with hostile foreign powers with a view to compromising the sovereignty of the country, undermining Eritrean National Security and endangering Eritrean society and the general welfare of its people.

The respondent state further stated that such detention was in conformity with the criminal code of the country. In their oral submissions made during the 33rd ordinary session in May 2003, the respondent state further admitted that they had not at the time brought the 11 detainees before any court of law.

48. The complainants aver that the 11 persons who were former Eritrean government officials, had been openly critical of the Eritrean government policies and as a direct result of their open letter criticising the government of Eritrea for acting in an illegal and unconstitutional manner, they were arrested and detained for committing 'crimes against the nation's security and sovereignty'.

49. The complainants state that the 11 detainees have since September 2001 been held *incommunicado* and have never been brought before any courts of law in violation of article 17(4) of the Constitution of the State of Eritrea and article 6 of the African Charter. Article 17(4) of the Constitution provides that every person who is held in detention must be brought before a court of law within 48 hours of his arrest and no person shall be held in custody beyond such a period without the authority of the court.

50. The complainants submit that the abovementioned acts by the respondent state violate articles 2, 6 and 7(1) of the African Charter.

51. Article 2 of the African Charter provides:

> Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any

[4] Communications 74/92, *Commission Nationale des Droits de l'Homme et des Libertes v Chad* [(2000) AHRLR 66 (ACHPR 1995)] and 232/99, *Ouko v Kenya* [(2000) AHRLR 135 (ACHPR 2000)].

> kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national or social origin, fortune, birth or other status.

Article 6 of the African Charter provides:

> Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.

Article 7(1) of the African Charter provides:

> Every individual shall have the right to have his cause heard. This comprises (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force; (b) the right to be presumed innocent until proved guilty by a competent court or tribunal; (c) the right to defence, including the right to be defended by counsel of his choice; (d) the right to be tried within a reasonable time by an impartial court or tribunal.

52. Although article 6 of the African Charter guarantees the right to liberty and security of the person, this is not an absolute right because the African Charter allows the deprivation of this right through lawful means. The African Charter specifically prohibits arbitrary arrests and detention.

53. Evidence before the African Commission indicates that the 11 persons have been held *incommunicado* and without charge since they were arrested in September 2001. This fact has not been contested by the respondent state. They are being held in custody and have been cut off from communication with the outside world, with no access to their lawyers or families. Their whereabouts are unknown, putting their fate under the exclusive control of the respondent state.

54. The African Commission on two occasions wrote letters of appeal to the President of the state of Eritrea informing him about the communication before the African Commission and requested him to intervene in the matter to ensure that the 11 persons are removed from secret detention and brought before the courts of law in Eritrea. In a *note verbale* dated 20 May 2002, the Ministry of Foreign Affairs of the state of Eritrea informed the African Commission that the 11 persons were being held in appropriate government facilities, that they had not been ill-treated and had access to medical services. The Ministry assured the African Commission that the government was making every effort to bring them before an appropriate court of law as early as possible. The African Commission notes that to date it has not received any information or substantiation from the respondent state demonstrating that the 11 persons were being held in appropriate detention facilities and that they had been produced before courts of law.

55. *Incommunicado* detention is a gross human rights violation that can lead to other violations such as torture or ill-treatment or interrogation without due process safeguards. Of itself, prolonged *incommunicado* de-

tention and/or solitary confinement could be held to be a form of cruel, inhuman or degrading punishment and treatment. The African Commission is of the view that all detentions must be subject to basic human rights standards. There should be no secret detentions and states must disclose the fact that someone is being detained as well as the place of detention. Furthermore, every detained person must have prompt access to a lawyer and to their families and their rights with regards to physical and mental health must be protected as well as entitlement to proper conditions of detention.[5]

56. The African Commission holds the view that the lawfulness and necessity of holding someone in custody must be determined by a court or other appropriate judicial authority. The decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed. In any event, detention should not continue beyond the period for which the state can provide appropriate justification. Therefore, persons suspected of committing any crime must be promptly charged with legitimate criminal offences and the state should initiate legal proceedings that should comply with fair trial standards as stipulated by the African Commission in its Resolution on the Right to Recourse and Fair Trial[6] and elaborated upon in its Guidelines on the Right to Fair Trial and Legal Assistance in Africa.[7]

57. In the present communication, the respondent state did not provide the African Commission with any details regarding the specific laws under which the 11 persons were detained but instead generally states that their detention is in 'consonance with the existing criminal code . . . and other relevant national and international instruments'. The 11 persons were detained on account of their political beliefs and are being held in secret detention without any access to the courts, lawyers or family. Regrettably, these persons' rights are continually being violated even today, as the respondent state is still holding them in secret detention in blatant violation of their rights to liberty and recourse to fair trial.[8]

58. The complainants further allege that the 11 persons were arrested and detained because they expressed opinions that were critical of the respondent state. The complainants submit that this amounts to a violation of article 9(2) of the African Charter, which provides '[e]very individual shall have the right to express and disseminate his opinions within the law'.

[5] Consolidated communication 143/95, 150/96, *Constitutional Rights Project and Another v Nigeria* [(2000) AHRLR 235 (ACHPR 1999)].

[6] Adopted by the African Commission at its 11th ordinary session held from 2 to 9 March 1992 in Tunis, Tunisia.

[7] Adopted by the African Commission at its 33rd ordinary session held from 15 to 29 May 2003 in Niamey, Niger.

[8] Consolidated communication 140/94, 141/94, 145/95, *Constitutional Rights Project and Others v Nigeria* [(2000) AHRLR 227 (ACHPR 1999)]; UNHRC Communication 440/1990.

59. The right to freedom of expression has been recognised by the African Commission as a fundamental individual human right which is also a cornerstone of democracy and a means of ensuring the respect for all human rights and freedoms.[9] Nonetheless, this right carries with it certain duties and responsibilities and it is for this reason that certain restrictions on freedom of expression are allowed. However, article 9(2) as well as principle II(2) of the Declaration of Principles on Freedom of Expression in Africa categorically state that such restrictions have to be provided for by law.[10]

60. It is a well settled principle of the African Commission that any laws restricting freedom of expression must conform to international human rights norms and standards relating to freedom of expression[11] and should not jeopardise the right itself. In fact, the African Charter in contrast to other international human rights does not permit derogation from this or any other right on the basis of emergencies or special circumstances.

61. Consequently, if any person expresses or disseminates opinions that are contrary to laws that meet the aforementioned criteria, there should be due process and all affected persons should be allowed to seek redress in a court of law.[12]

62. The facts as presented leave no doubt in the mind of the African Commission that the respondent state did indeed restrict the 11 persons' right to free expression. No charges have been brought against the 11 persons and neither have they been brought before the courts. Such restrictions not only violate the provisions of the African Charter but are also not in conformity with international human rights standards and norms.

For the above reasons, the African Commission:

- Finds the state of Eritrea in violation of articles 2, 6, 7(1) and 9(2) of the African Charter on Human and Peoples' Rights;
- Urges the state of Eritrea to order the immediate release of the 11 detainees, namely, Petros Solomon, Ogbe Abraha, Haile Woldetensae, Mahmud Ahmed Sheriffo, Berhane Ghebre Eghzabiher, Astier Feshation, Saleh Kekya, Hamid Himid, Estifanos Seyoum, Germano Nati, and Beraki Ghebre Selassie; and
- Recommends that the state of Eritrea compensates the abovementioned persons.

[9] Preamble to the Resolution on the Adoption of the Declaration of Principles on Freedom of Expression in Africa adopted by the African Commission at its 32nd ordinary session held from 17 to 23 October 2003 in Banjul, The Gambia.

[10] Principle II(2) of the Declaration of Principles on Freedom of Expression in Africa provides 'Any restrictions on freedom of expression shall be provided for by law, serve a legitimate interest and be necessary and in a democratic society'.

[11] Consolidated communication 140/94, 141/94, 145/95, *Constitutional Rights Project and Others v Nigeria* [(2000) AHRLR 227 (ACHPR 1999)].

[12] Communication 232/99, *Ouko v Kenya* [(2000) AHRLR 135 (ACHPR 2000)].

THE GAMBIA

Purohit and Another v The Gambia

(2003) AHRLR (ACHPR 2003)

Communication 241/2001, *Purohit and Moore v The Gambia*
Decided at the 33rd ordinary session of the African Commission, May 2003, 16th Annual Activity Report
Rapporteur: Chigovera

Admissibility (exhaustion of local remedies, lack of legal aid, 35-38)
State responsibility (duty to give effect to rights in the Charter in national law, 43)
Interpretation (international standards, 47, 48)
Equality, non-discrimination (discrimination on the grounds of disability, 50, 52-54)
Cruel, inhuman or degrading treatment (degrading language, 58, 59, 61)
Personal liberty and security (no legal remedies to challenge detention, 64, 65, 68)
Limitations of rights (must not undermine international standards, 64)
Fair trial (right to be heard, 72)
Political participation (right to vote, 74-76)
Health (special measures for mental health patients, 80-83; progressive realisation, 84)

Summary of facts

1. The complainants are mental health advocates, submitting the communication on behalf of patients detained at Campama, a psychiatric unit of the Royal Victoria Hospital, and existing and 'future' mental health patients detained under the Mental Health Acts of the Republic of The Gambia.

2. The complaint was sent by fax and received at the Secretariat on 7 March 2001.

3. The complainants allege that legislation governing mental health in The Gambia is outdated.

4. It is alleged that within the Lunatics Detention Act (the principle instrument governing mental health) there is no definition of who a lunatic is, and that there are no provisions and requirements establishing safeguards during the diagnosis, certification and detention of the patient.

5. Further, the complainants allege that there is overcrowding in the psychiatric unit, no requirement of consent to treatment or subsequent review of continued treatment.

6. The complainants also state that there is no independent examination of administration, management and living conditions within the unit itself.

7. The complainants also complain that patients detained in the psychiatric unit are not even allowed to vote.

8. The complainants notify the African Commission that there is no provision for legal aid and the Act does not make provision for a patient to seek compensation if his/her rights have been violated.

Complaint

9. The complainants allege a violation of articles 2, 3, 5, 7(1)(a) and (c), 13(1), 16 and 18(4) of the African Charter on Human and Peoples' Rights.

Procedure

10. Ms H Purohit and Mr P Moore presented the communication and it was received at the Secretariat on 7 March 2001.

11. On 14 March 2001, the Secretariat wrote to the complainants requesting that they furnish the names of the persons on whose behalf they were acting.

12. On 4 April 2001, the Secretariat received the names of the persons on whose behalf Purohit and Moore were acting and it was stated clearly that those persons wished to remain anonymous.

13. At its 29th ordinary session from 23 April to 7 May 2001 in Tripoli, Libya, the African Commission examined the complaint and decided to be seized of it.

14. On 23 May 2001, the Secretariat conveyed the above decision to the parties and requested parties to furnish it with additional information on admissibility in accordance with article 56 of the African Charter and forwarded a copy of the text of the complaint to the respondent state. The parties were requested to present their written submissions to the Secretariat within three months of notification of the decision.

15. During the 30th ordinary session held from 13 to 27 October 2001 in Banjul, The Gambia, the African Commission considered the complaint and the *rapporteur* of the communication addressed questions to the representative of the respondent state. The representative stated that she was not in a position to provide satisfactory responses to the questions posed at the time but promised to do so soon after the 30th session. The African Commission decided to defer consideration of this communication to the 31st ordinary session pending receipt of the respondent state's submissions.

16. On 9 November 2001, the Secretariat wrote to the complainants informing them of the decision taken by the African Commission at its 31st session and also forwarded them copies of the respondent state's submissions that were received at the Secretariat on 11 October 2001. The complainants were also reminded to forward exhaustive submissions on the question of admissibility of the complaint within two months.

17. On 9 November 2001, the Secretariat also forwarded a *note verbale* to the respondent state informing it of the decision of the African Commission and reminding them to furnish the African Commission with responses to the questions raised by the African Commission at its 31st Session within two months.

18. The Secretariat also on numerous occasions by telephone and in writing reminded the Solicitor-General of the respondent state to ensure that their written submissions on this matter are forwarded to the Secretariat.

19. At the 31st ordinary session held from 2 to 16 May 2002 in Pretoria, South Africa the African Commission considered the communication and it was declared admissible.

20. On 29 May 2002, the Secretariat informed the parties of the decision of the African Commission and requested them to transmit their written submissions on admissibility to the Secretariat within a period of 3 months.

21. At its 32nd ordinary session held from 17 to 23 October in Banjul, The Gambia, the African Commission decided to defer consideration of the communication on the merits and the parties were informed accordingly.

22. By a *note verbale* dated 30 October 2002, the respondent state was reminded to forward its written submissions on the merits to the Secretariat of the African Commission within a period of two months.

23. At its 33rd ordinary session held from 15 to 29 May 2003 in Niamey, Niger, the African Commission considered this communication and decided to deliver its decision on the merits.

Law

Admissibility

24. Article 56 of the African Charter governs admissibility of communications brought before the African Commission in accordance with article 55 of the African Charter. All of the conditions of this article are met by the present communication. Only article 56(5), which requires that local remedies be exhausted, necessitates close scrutiny. Article 56(5) of the African Charter provides: 'Communications . . . received by the Commission shall be considered if they: (5) are sent after exhausting local remedies, if any unless it is obvious that this procedure is unduly prolonged'.

25. The rule requiring exhaustion of local remedies as a condition of the presentation of a complaint before the African Commission is premised on

the principle that the respondent state must first have an opportunity to redress by its own means within the framework of its own domestic legal system, the wrong alleged to have been done to the individual.

26. The complainants submit that they could not exhaust local remedies because there are no provisions in the national laws of The Gambia allowing for the complainants to seek remedies where a violation has occurred.

27. The respondent state concedes that the Lunatics Detention Act does not contain any provisions for the review or appeal against an order of detention or any remedy for detention made in error or wrong diagnosis or treatment. Neither do the patients have the legal right to challenge the two separate medical certificates, which constitute the legal basis of their detention.

28. The respondent state submits that in practice patients found to be insane are informed that they have a right to ask for a review of their assessment. The respondent state further states that there are legal provisions or procedures within the Gambia that such a vulnerable group of persons could have utilised for their protection. Section 7(d) of the Constitution of The Gambia recognises that common law forms part of the laws of The Gambia. As such, respondent state argues, the complainants could seek remedies by bringing an action in tort for false imprisonment or negligence where a patient held at Campama psychiatric unit is wrongly diagnosed.

29. The respondent state further submits that patients detained under the Lunatics Detention Act have every right to challenge the Act in a constitutional court claiming that their detention under that Act deprives them of their right to freedom of movement and association as provided for under the Gambian Constitution.

30. The concern raised in the present communication is that in the Gambia, there are no review or appeal procedures against determination or certification of one's mental state for both involuntary and voluntary mental patients. Thus the legislation does not allow for the correction of an error assuming a wrong certification or wrong diagnosis has been made, which presents a problem in this particular case where examination of the said mental patients is done by general practitioners and not psychiatrists. So if an error is made and there is no avenue to appeal or review the medical practitioners' assessment, there is a great likelihood that a person could be wrongfully detained in a mental institution.

31. Furthermore, the Lunatics Detention Act does not lay out fixed periods of detention for those persons found to be of unsound mind, which, coupled with the absence of review or appeal procedures could lead into a situation where a mental patient is detained indefinitely.

32. The issue before the African Commission is whether or not there are domestic remedies available to the complainants in this instance.

33. The respondent state indicates that there are plans to amend the Lunatics Detention Act, which, in other words, is an admission on part of the respondent state that the Act is imperfect and would therefore not produce real substantive justice to the mental patients that would be detained.

34. The respondent state further submits that even though the Act itself does not provide review or appeal procedures, there are legal procedures or provisions in terms of the constitution that the complainants could have used and thus sought remedies in court. However, the respondent state has informed the African Commission that no legal assistance or aid is availed to vulnerable groups to enable them access the legal procedures in the country. Only persons charged with capital offences get legal assistance in accordance with the Poor Persons Defence (Capital Charge) Act.

35. In the present matter, the African Commission cannot help but look at the nature of people that would be detained as voluntary or involuntary patients under the Lunatics Detention Act and ask itself whether or not these patients can access the legal procedures available (as stated by the respondent state) without legal aid.

36. The African Commission believes that in this particular case, the general provisions in law that would permit anybody injured by another person's action are available to the wealthy and those that can afford the services of private counsel. However, it cannot be said that domestic remedies are absent as a general statement – the avenues for redress are there if you can afford it.

37. But the real question before this Commission is whether looking at this particular category of persons the existent remedies are realistic. The category of people being represented in the present communication are likely to be people picked up from the streets or people from poor backgrounds and as such it cannot be said that the remedies available in terms of the Constitution are realistic remedies for them in the absence of legal aid services.

38. If the African Commission were to literally interpret article 56(5) of the African Charter, it might be more inclined to hold the communication inadmissible. However, the view is that, even as admitted by the respondent state, the remedies in this particular instance are not realistic for this category of people and therefore not effective and for these reasons the African Commission declares the communication admissible.

Merits

39. The present communication was declared admissible at the African Commission's 31st ordinary session in May 2002. The respondent state has since been requested numerous times to forward their submissions on the merits but to no avail. On 29 April 2003, two weeks prior to the 33rd

Ordinary Session, the respondent state finally forwarded their written submissions to the Secretariat of the African Commission.

40. In coming to its decision, the African Commission will refer the more recent written submissions on the merits as presented by the respondent state as well the respondent state's submissions on admissibility in particular where they address issues relating to the merits of this communication.

41. When states ratify or accede to international instruments like the African Charter, they do so voluntarily and very much awake to their responsibilities to implement the provisions of these instruments. It therefore troubles the African Commission to be forced to make several requests to the respondent state for its submissions, which are pertinent to its consideration of communications. In the present communication, it is very much unfortunate that the African Commission was forced to take this path bearing in mind the fact that its headquarters are within the respondent state. This situation not only seriously hampers the work of the African Commission but it also defeats the whole purpose of the African Charter, to which the respondent state professes to be aligned with. The African Commission therefore hopes that in future the respondent state will be forthcoming to its requests especially those relating to communications.

42. The complainants submit that by ratifying the African Charter, the respondent state undertook an obligation to bring its domestic laws and practice in conformity with the African Charter. This presupposes that any domestic law, which violates the African Charter, should as soon as the respondent state ratifies or accedes to the African Charter be brought into conformity with articles provided for therein. 'As soon as' in this context would mean that states that are party to the African Charter should take immediate steps, mindful of their obligations, to bring their legislation in line with the African Charter. The legislation in dispute in the present communication – the LDA was enacted in 1917 and the last amendment to this Act was effected in 1964. There is no doubt that since 1964, there have been many developments in the field of human rights, particularly addressing the rights of persons with disabilities. As such, the LDA should have long been amended to bring it in line with the changed circumstances.

43. In principle, where domestic laws that are meant to protect the rights of persons within a given country are alleged to be wanting, the African Commission holds the view that it is within its mandate to examine the extent to which such domestic law complies with the provisions of the African Charter.[1] This is because when a state ratifies the African Charter it is obligated to uphold the fundamental human rights

[1] Communication 211/98 – *Legal Resources Foundation v Zambia* [(2001) AHRLR 84 (ACHPR 2001).

contained therein.[2] Otherwise if the reverse were true, the significance of ratifying a human rights treaty would be seriously defeated. This principle is in line with article 14 of the Vienna Convention on the Law of Treaties of 1980.[3]

44. The complainants submit that the provisions of the Lunatics Detention Act (LDA) condemning any person described as a 'lunatic' to automatic and indefinite institutionalisation are incompatible with and violate articles 2 and 3 of the African Charter. Section 2 of the LDA defines a 'lunatic' as including 'an idiot or person of unsound mind'.

45. The complainants argue further that to the extent that mental illness is a disability,[4] the practice of detaining persons regarded as mentally ill indefinitely and without due process constitutes discrimination on the analogous ground of disability.

46. Article 2 of the African Charter provides:

> Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national or social origin, fortune, birth or other status.

Article 3 of the African Charter provides: '1. Every individual shall be equal before the law 2. Every individual shall be entitled to equal protection of the law.'

47. In interpreting and applying the African Charter, the African Commission relies on its own jurisprudence, and as provided by articles 60 and 61 of the African Charter, on appropriate and relevant international and regional human rights instruments, principles and standards.

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[2] In the case of *Attorney-General v Dow* 1994 6 BCLR 1 per Ammisah JP at pages 27-30 and Aguda JA at pages 43-47, The Botswana Appeal Court correctly observed that there is a presumption that when states sign or ratify treaties or human rights instruments, they signify their intention to be bound by and to adhere to the obligations arising from such treaties or human rights instruments even if they do not enact domestic legislation to effect domestic incorporation.

[3] Article 14 of the Vienna Convention provides as follows: '1. The consent of a state to be bound by a treaty is expressed by ratification when: (a) the treaty provides for such consent to be expressed by means of ratification; (b) it is otherwise established that the negotiating states were agreed that ratification should be required; (c) the representative of the state has signed the treaty subject to ratification; or (d) the intention of the state to sign the treaty subject to ratification appears from the full powers of its representative or was expressed during the negotiation. 2. The consent of a state to be bound by a treaty is expressed by acceptance or approval under conditions similar to those which apply to ratification.

[4] Para 17 of the Introduction to the Standard Rules on the Equalisation of Opportunities for Persons with Disabilities (UNGA Resolution 48/96 of 20th December 1993) provides that 'The term ''disability'' summarizes a great number of different functional limitations People may be disabled by physical, intellectual or sensory impairment, medical conditions or mental illness.'

48. The African Commission is, therefore, more than willing to accept legal arguments with the support of appropriate and relevant international and regional human rights instruments, principles, norms and standards taking into account the well recognised principle of universality which was established by the Vienna Declaration and Programme of Action of 1993 and which declares that 'All human rights are universal, indivisible and interdependent, and interrelated'.[5]

49. Articles 2 and 3 of the African Charter basically form the anti-discrimination and equal protection provisions of the African Charter. Article 2 lays down a principle that is essential to the spirit of the African Charter and is therefore necessary in eradicating discrimination in all its guises, while article 3 is important because it guarantees fair and just treatment of individuals within a legal system of a given country. These provisions are non-derogable and therefore must be respected in all circumstances in order for anyone to enjoy all the other rights provided for under the African Charter.

50. In their submissions to the African Commission, the respondent state conceded that under the LDA, persons declared 'lunatics' do not have the legal right to challenge the two separate medical certificates that constitute the legal basis of their detention. However, the respondent state argued, that in practice patients found to be insane are informed that they have a right to ask for a review of their assessment. The respondent state further argues that section 7(d) of the Constitution of The Gambia recognises that common law forms part of the laws of The Gambia. Therefore, such a vulnerable group of persons is free to seek remedies by bringing a tort action for false imprisonment or negligence if they believe they have been wrongly diagnosed and as a result of such diagnosis been wrongly institutionalised.

51. Furthermore, the respondent state submits that patients detained under the LDA have every right to challenge the Act in a constitutional court claiming that their detention under that Act deprives them of their right to freedom of movement and association as provided for under the Constitution of The Gambia.

52. In view of the respondent state's submissions on the availability of legal redress, the African Commission questioned the respondent state as to whether legal aid or assistance would be availed to such a vulnerable group of persons in order for them to access the legal procedures of in the country. The respondent state informed the African Commission that only persons charged with Capital Offences are entitled to legal assistance in accordance with the Poor Persons Defence (Capital Charge) Act.

53. The category of persons that would be detained as voluntary or involuntary patients under the LDA are likely to be people picked up from

[5] Vienna Declaration and Programme of action, A/CONF 157/23, para 5.

the streets or people from poor backgrounds. In cases such as this, the African Commission believes that the general provisions in law that would permit anybody injured by another person's act can only be available to the wealthy and those that can afford the services of private counsel.

54. Clearly the situation presented above fails to meet the standards of anti-discrimination and equal protection of the law as laid down under the provisions of articles 2 and 3 of the African Charter and principle 1(4)[6] of the United Nations Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Illnesses and the Improvement of Mental Health Care.[7]

55. The complainants further submit that the legislative scheme of the LDA, its implementation and the conditions under which persons detained under the Act are held, constitute separately and together violations of respect for human dignity in article 5 of the African Charter and the prohibition against subjecting anybody to cruel, inhuman or degrading treatment as contained in the same Charter provision.

56. Article 5 of the African Charter provides:

> Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

57. Human dignity is an inherent basic right to which all human beings, regardless of their mental capabilities or disabilities as the case may be, are entitled to without discrimination. It is therefore an inherent right which every human being is obliged to respect by all means possible and on the other hand it confers a duty on every human being to respect this right.

58. In *Media Rights Agenda v* Nigeria[8] the African Commission held that the term 'cruel, inhuman or degrading punishment and treatment' is to be interpreted so as to extend to the widest possible protection against abuses, whether physical or mental; furthermore, in *Modise v* Botswana,[9] the African Commission stated that exposing victims to 'personal suffering and indignity' violates the right to human dignity. Personal suffering and indignity can take many forms, and will depend on the particular circumstances of each communication brought before the African Commission.

59. Under the LDA, persons with mental illness have been branded as 'lunatics' and 'idiots', terms, which without any doubt dehumanise and

[6] Principle 1(4) provides: 'There shall be no discrimination on the grounds of mental illness. ''Discrimination'' means any distinction, exclusion or preference that has the effect of nullifying or impairing equal enjoyment of rights'.
[7] GA Res 46/119, 46 UN GAOR Supp. (49) at 189, UN Doc A/46/49 (1991).
[8] Communication 224/98 [(2000) AHRLR 262 (ACHPR 2000)].
[9] Communication 97/93 (decision reached at the 27th ordinary session of the African Commission held in 2000) [(2000) AHRLR 30 (ACHPR 2000)].

deny them any form of dignity in contravention of article 5 of the African Charter

60. In coming to this conclusion, the African Commission would like to draw inspiration from principle 1(2) of the United Nations Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Care. Principle 1(2) requires that 'All persons with mental illness, or who are being treated as such persons, shall be treated with humanity and respect for the inherent dignity of the human person'.

61. The African Commission maintains that mentally disabled persons would like to share the same hopes, dreams and goals and have the same rights to pursue those hopes, dreams and goals just like any other human being.[10] Like any other human being, mentally disabled persons or persons suffering from mental illnesses have a right to enjoy a decent life, as normal and full as possible, a right which lies at the heart of the right to human dignity. This right should be zealously guarded and forcefully protected by all states party to the African Charter in accordance with the well established principle that all human beings are born free and equal in dignity and rights.[11]

62. The complainants also submit that the automatic detention of persons considered 'lunatics' within the meaning of the LDA violates the right to personal liberty and the prohibition of arbitrary arrest and detention in terms of article 6 of the African Charter.

63. Article 6 of the African Charter provides:

> Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.

64. Article 6 of the African Charter guarantees every individual, be they disabled or not, the right to liberty and security of the person. Deprivation of such liberty is only acceptable if it is authorised by law and is compatible with the obligations of states parties under the African Charter.[12] However, the mere mention of the phrase 'except for reasons and conditions previously laid down by law' in article 6 of the African Charter does not mean that any domestic law may justify the deprivation of such persons' freedom and neither can a state party to the African Charter avoid its

[10] Art 3 of the UN Declaration on the Rights of Disabled Persons, UNGA Resolution 3447 (XXX) of 9 December 1975, provides that '[d]isabled persons have the inherent right to respect for their human dignity. Disabled persons, whatever the origin, nature and seriousness of their handicaps and disabilities, have the same fundamental rights as their fellow citizens of the same age, which implies first and foremost the right to enjoy a decent life, as normal and as full as possible'.

[11] Art 1 Universal Declaration of Human Rights of 1948.

[12] Consolidated communications 147/95, 149/95 – *Jawara v The Gambia* [(2000) AHRLR 107 (ACHPR 2000)]).

responsibilities by recourse to the limitations and claw back clauses in the African Charter.[13] Therefore, any domestic law that purports to violate this right should conform to internationally laid down norms and standards.

65. Article 6 of the African Charter further states that no one may be arbitrarily arrested or detained. Prohibition against arbitrariness requires among other things that deprivation of liberty shall be under the authority and supervision of persons procedurally and substantively competent to certify it.

66. Section 3(1) of the LDA prescribes circumstances under which mentally disabled persons can be received into a place of detention and they are: On submission of two certificates by persons referred to under the LDA as 'duly qualified medical practitioners'; Upon an order being made by and signed by Judge of the Supreme Court, a Magistrate or any two Justices of the Peace.

67. A 'duly qualified medical practitioner' under the LDA has been defined as 'every person possessed of a qualification entitling him to be registered and practice medicine in The Gambia'.[14]

68. By these provisions, the LDA authorises the detention of persons believed to be mentally ill or disabled on the basis of opinions of general medical practitioners. Although the LDA does not lay out fixed periods of detention for persons found to be mentally disabled, the respondent state has submitted that in practice the length of time spent by patients in the unit ranges from two to four weeks and that it is only in exceptional circumstances that patients may be detained longer than this period. These exceptional circumstances apply to mainly schizophrenics, and vagrant psychotics without any family support and known addresses. The African Commission takes note of the fact that such general medical practitioners may not be actual experts in the field of mental health care and as such there is a possibility that they could make a wrong diagnosis upon which certain persons may be institutionalised. Additionally, because the LDA does not provide for review or appeal procedures, persons institutionalised under such circumstances would not be able to challenge their institutionalisation in the event of an error or wrong diagnosis being made. Although this situation falls short of international standards and norms[15], the African Commission is of the view that it does not violate the provisions of article 6 of the African Charter because article 6 of the African Charter was not intended to cater for situations where persons in need of medical assistance or help are institutionalised.

[13] Communication 211/98 *Legal Resources Foundation v Zambia* [(2001) AHRLR 84 (ACHPR 2001)].

[14] Sec 2 Lunatics Detention Act Cap 40:05, Laws of The Gambia.

[15] See principles 15, 16 and 17 of the UN Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Care.

69. The complainants also allege that institutionalisation of detainees under the LDA who are not afforded any opportunity of being heard or represented prior to or after their detention violates article 7(1)(a) and (c) of the African Charter.

70. Article 7(1)(a) and (c) of the African Charter provides:

> 1. Every individual shall have the right to have his cause heard. This comprises: a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; . . . c) the right to defense, including the right to be defended by counsel of his choice.

71. It is evident that the LDA does not contain any provisions for the review or appeal against an order of detention or any remedy for detention made in error or wrong diagnosis or treatment. Neither do the patients have the legal right to challenge the two separate medical certificates, which constitute the legal basis of their detention. These omissions in the LDA clearly violate articles 7(1)(a) and (c) of the African Charter.

72. The guarantees in article 7(1) extend beyond hearings in the normal context of judicial determinations or proceedings. Thus article 7(1) necessitates that in circumstances where persons are to be detained, such persons should at the very least be presented with the opportunity to challenge the matter of their detention before the competent jurisdictions that should have ruled on their detention.[16] The entitlement of persons with mental illness or persons being treated as such to be heard and to be represented by counsel in determinations affecting their lives, livelihood, liberty, property or status, is particularly recognised in principles 16, 17 and 18 of the UN Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Care.

73. The complainants submit that the failure of the respondent state to provide for and enable the detainees under the LDA to exercise their civic rights and obligations, including the right to vote, violates article 13(1) of the African Charter which provides:

> Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.

74. In its earlier submissions, the respondent state admits that persons detained at Campama are not allowed to vote because they believe that allowing mental health patients to vote would open the country's democratic elections to much controversy as to the mental ability of these patients to make an informed choice as to which candidate to vote for. Subsequently, the respondent state in its more recent submissions sug-

[16] Communication 71/92, *Rencontre Africaine pour la defense des droits de l'homme v Zambia*, (1995); Communication 159/96, *UIDH et al v Angola*, (1997).

gests that there are limited rights for some mentally disabled persons to vote; however this has not been clearly explained.

75. The right provided for under article 13(1) of the African Charter is extended to 'every citizen' and its denial can only be justified by reason of legal incapacity or that the individual is not a citizen of a particular state. Legal incapacity may not necessarily mean mental incapacity. For example a state may fix an age limit for the legibility of its own citizens to participate in its government. Legal incapacity, as a justification for denying the right under article 13(1) can only come into play by invoking provisions of the law that conform to internationally acceptable norms and standards.

76. The provisions of article 13(1) of the African Charter are similar in substance to those provided for under article 25 of the International Covenant on Civil and Political Rights. In interpreting article 13(1) of the African Charter, the African Commission would like to endorse the clarification provided by the Human Rights Committee in relation to article 25. The Human Rights Committee has expressed that any conditions applicable to the exercise of article 25 rights should be based on objective and reasonable criteria established by law.[17] Besides the view held by the respondent state questioning the mental ability of mentally disabled patients to make informed choices in relation to their civic duties and obligations, it is very clear that there are no objective bases within the legal system of the respondent state to exclude mentally disabled persons from political participation.

77. The complainants submit that the scheme and operation of the LDA both violate the right to health provided for in article 16 of the African Charter when read with article 18(4) of the African Charter.

78. Article 16 of the African Charter provides:

> 1. Every individual shall have the right to enjoy the best attainable state of physical and mental health 2. State Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

79. Article 18(4) of the African Charter provides: 'The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs'.

80. Enjoyment of the human right to health as it is widely known is vital to all aspects of a person's life and well-being, and is crucial to the realisation of all the other fundamental human rights and freedoms. This right includes the right to health facilities, access to goods and services to be guaranteed to all without discrimination of any kind.

[17] Human Rights Committee, General Comment 25 (57), Adopted by the Committee at its 1510th meeting, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (1996), paragraph 4.

81. More so, as a result of their condition and by virtue of their disabilities, mental health patients should be accorded special treatment which would enable them not only attain but also sustain their optimum level of independence and performance in keeping with article 18(4) of the African Charter and the standards applicable to the treatment of mentally ill persons as defined in the Principles for the Protection of Persons with Mental Illness and Improvement of Mental Health Care.

82. Under the principles, 'mental health care' includes analysis and diagnosis of person's mental condition and treatment, care and rehabilitation for a mental illness or suspected mental illness. The principles envisage not just 'attainable standards', but the highest attainable standards of health care for the mentally ill at three levels. First, in the analysis and diagnosis of a person's mental condition; second, in the treatment of that mental condition and; thirdly, during the rehabilitation of a suspected or diagnosed person with mental health problems.

83. In the instant case, it is clear that the scheme of the LDA is lacking in terms of therapeutic objectives as well as provision of matching resources and programmes of treatment of persons with mental disabilities, a situation that the respondent state does not deny but which never-the-less falls short of satisfying the requirements laid down in articles 16 and 18(4) of the African Charter.

84. The African Commission would however like to state that it is aware that millions of people in Africa are not enjoying the right to health maximally because African countries are generally faced with the problem of poverty which renders them incapable to provide the necessary amenities, infrastructure and resources that facilitate the full enjoyment of this right. Therefore, having due regard to this depressing but real state of affairs, the African Commission would like to read into article 16 the obligation on part of states party to the African Charter to take concrete and targeted steps, while taking full advantage of its available resources, to ensure that the right to health is fully realised in all its aspects without discrimination of any kind.

85. The African Commission commends the respondent state's disclosure that there is no significant shortage of drug supplies at Campama and that in the event that there are drug shortages, all efforts are made to alleviate the problem. Furthermore, that it has taken steps to improve the nature of care given to mental health patients held at Campama. The respondent state also informed the African Commission that it is fully aware of the outdated aspects of the LDA and has therefore long taken administrative steps to complement and/or reform the archaic parts of the LDA. This is however not enough because the rights and freedoms of human beings are at stake. Persons with mental illnesses should never be denied their right to proper health care, which is crucial for their survival and their assimilation into and acceptance by the wider society.

For the above reasons, the African Commission:

- Finds the Republic of The Gambia in violation of articles 2, 3, 5, 7 (1)(a) and (c), 13(1), 16 and 18(4) of the African Charter.
- Strongly urges the government of The Gambia to: (a) Repeal the Lunatics Detention Act and replace it with a new legislative regime for mental health in The Gambia compatible with the African Charter on Human and Peoples' Rights and international standards and norms for the protection of mentally ill or disabled persons as soon as possible; (b) Pending (a), create an expert body to review the cases of all persons detained under the Lunatics Detention Act and make appropriate recommendations for their treatment or release; (c) Provide adequate medical and material care for persons suffering from mental health problems in the territory of The Gambia;
- Requests the government of The Gambia to report back to the African Commission when it submits its next periodic report in terms of article 62 of the African Charter on measures taken to comply with the recommendations and directions of the African Commission in this decision.

KENYA AND OTHERS

Association pour la Sauvegarde de la Paix au Burundi v Kenya, Rwanda, Tanzania, Uganda, Zaire and Zambia

(2003) AHRLR (ACHPR 2003)

Communication 157/96, *Association pour la Sauvegarde de la Paix au Burundi v Tanzania, Kenya, Uganda, Rwanda, Zaire and Zambia*
Decided at the 33rd ordinary session, May 2003, 17th Annual Activity Report
Rapporteurs: 20th session: Duarte; 21st-25th sessions: Ondziel-Gnelenga; 26th-33rd sessions: Rezag-Bara

Interim measures (reducing effect of embargo, 32)
State responsibility (non-retroactivity of Charter, 52-54)
Locus standi (class action, 63)
Admissibility (exhaustion of local remedies, 65)
International law (legality of international trade embargo, 72-77)
Sanctions (must not be excessive, indiscriminate and open ended, 75, 76)

Summary of facts

1. The communication was submitted by the *Association Pour la Sauvegarde de la Paix au Burundi* (ASP-Burundi, Association for the Preservation of Peace in Burundi), a non-governmental organisation based in Belgium. The communication pertains to the embargo imposed on Burundi by Tanzania, Kenya, Uganda, Rwanda, Zaire (now Democratic Republic of Congo), Ethiopia, and Zambia following the overthrow of the democratically elected government of Burundi and the installation of a government led by retired military ruler, Major Pierre Buyoya with the support of the military.

2. The respondent states cited in the communication are all in the Great Lakes region, neighbouring Burundi and therefore have an interest in peace and stability in their region. At the Summit of the Great Lakes held in Arusha, Tanzania on 31 July 1996 following the unconstitutional change of government in Burundi, a resolution was adopted imposing an embargo on Burundi. The resolution was later supported by the United Nations Security Council and by the OAU. All except the Federal Republic of Ethiopia were, at the time of the submission of the communication,

state parties to the African Charter on Human and Peoples' Rights. Ethiopia acceded to the African Charter on 17 June 1998.

The complaint

3. The complainant claims that the embargo violates: Article 4 of the African Charter, because it prevented the importation of essential goods such as fuel required for purification of water and the preservation of drugs; and prevented the exportation of tea and coffee, which are the country's only sources of revenue; Article 17(1) of the African Charter, because the embargo prevented the importation of school materials; Article 22 of the African Charter, because the embargo prevented Burundians from having access to means of transportation by air and sea; Article 23(2)(b) of the African Charter, because Tanzania, Zaire and Kenya sheltered and supported terrorist militia.

4. The communication also alleges violation of articles 3(1), (2) and (3) of the OAU Charter, because the embargo constitutes interference in the internal affairs of Burundi.

Procedure

5. The communication is dated 18 September 1996 and was received at the Secretariat on 30 September 1996.

6. At its 20th session, held in October 1996 in Grand Bay, Mauritius, the Commission decided to be seized of the communication.

7. On 10 December 1996, the Secretariat sent copies of the communication to the Ugandan, Kenyan, Tanzanian, Zambian, Zairian and Rwandan governments.

8. On 12 December 1996, a letter was sent to the complainant indicating that the admissibility of the communication would be considered at the 21st session.

9. At its 21st session, held in April 1997, the Commission decided to be seized of the communication and deferred consideration of its admissibility to the following session. It also requested the respondent state parties to send in their comments within the stipulated deadline.

10. At its 22nd session, the Commission declared the communication admissible and asked the Secretariat to obtain clarification on the terms of the embargo imposed on Burundi from the Secretary General of the OAU. The respondent states parties were also, once again, requested to provide the Commission with their reactions, as well as their comments and arguments as regards the decision on merit.

11. On 18 November 1997, letters were addressed to the parties to inform them of the Commission's decision.

12. On 24 February 1998, the Secretariat of the Commission wrote to the OAU Secretary General requesting clarification on the terms of the embargo imposed on Burundi.

13. On 19 May 1998, the Secretariat received the Zambian government's reaction to the allegations made against it by the plaintiff. It claims that the sanctions imposed on Burundi ensued from a decision taken by Great Lakes countries in reaction to the *coup d'état* of 25 July 1996, which brought Major Pierre Buyoya to power, ousting the democratically elected government of President Ntibantuganya.

14. According to Zambia, the said sanctions were aimed at putting pressure on the regime of Major Buyoya with a view to causing it to restore constitutional legality, reinstate parliament, which is the symbol of democracy, and lift the ban on political parties. It was also aimed at causing the regime to immediately and unconditionally initiate negotiations with all Burundian groups so as to re-establish peace and stability in the country, in accordance with the decisions of the Arusha Regional Summit of 31 July 1996.

15. Regarding the allegation that Zambia violated resolution 2625(XXV), adopted on 24 October 1970 by the General Assembly of the United Nations, the Zambian government claims that the United Nations Security Council, in resolution no 1072(1996), upheld the decision of the Arusha Regional Summit to impose sanctions on Burundi.

16. Furthermore, Zambia states that it has derived no benefit of any sort from the embargo imposed on Burundi. On the contrary – the embargo had affected not only the inhabitants of Burundi, but also those of the states that imposed it. In Zambia for example, it continues, many workers at the Mpulungu port were sent on unpaid leave because there was no work, as a result of the embargo. The Zambian State thereby lost many billion Kwacha in revenue. This, according to the Zambian government, is the cost Zambia accepted to pay to contribute to the international effort to promote democracy, justice and the rule of law.

17. Regarding the allegation of violation by Zambia of article 3(1), (2) and 3 of the Charter of the Organisation of African Unity on non-interference in the internal affairs of member states, the Zambian government recalls that the Organisation of African Unity, through its Secretariat, has held many meetings on the situation in Burundi. It concludes, therefrom that the decisions of the Arusha Regional Summit were endorsed by the Organisation of African Unity. Moreover, it points out that the sanctions imposed on Burundi were decided in consultation with the United Nations Organisation and the Organisation of African Unity.

18. As regards the allegation of violation by Zambia of the provisions of article 4 of the African Charter on Human and Peoples' Rights on the right to life and physical and moral integrity, Zambia points out that the sanctions monitoring committee had authorised the importation into Burundi,

through United Nations agencies, of essential items such as infants' food, medical and pharmaceutical products for emergency treatment, among others. It concludes therefore that the embargo is far from being a total blockade.

19. To the allegation of violation of article 17 of the African Charter on Human and Peoples' Rights on the right to education, Zambia responds with the same arguments indicated above.

20. Zambia stresses that it is a democratic state. This, it states, is enshrined in article 1(1) of its Constitution, which states that the country '. . . is a sovereign, unitary, indivisible, multiparty democratic state'. It thereby justifies what it refers to as its support for the ongoing democratisation process in Africa and claims to abhor regimes led by ethnic minorities. The Great Lakes countries in general and Zambia in particular, it continues, were right in imposing sanctions on Burundi to bring about the restoration of democracy and discourage *coups d'état* in Africa.

21. On 8 September 1998, the Secretariat received the reaction of the Tanzanian government on the communication under consideration. The latter rejected the allegations made against its country and ended with a plea for inadmissibility of the communication on the grounds, among others, that it contains several contradictions which were only aimed at defending the aggrieved state's interests. This country proceeded to argue its case as follows:

22.

> There is great confusion in the facts as presented by the complainant; there are also many lies contained therein, particularly the accusation that Tanzania was preparing to send its army to Burundi at the request of the International Monetary Fund and the World Bank which had promised to fund the operation. The undeniable truth, and ASP-Burundi knows it well, is that the essential reason why Tanzania and the other countries in the region decided to impose sanctions is to bring about the negotiation of a lasting peace among all Burundian parties. The sanctions are used as a means of pressure, and the results are palpable, as in the restoration of the National Assembly, the lifting of the ban on political parties and the initiation of unconditional negotiations among all parties to the conflict. The discrete contacts with Mr Léonard Nyangoma of CNDD are a step in the right direction envisaged in the imposition of the sanctions.

23. Regarding the allegation that Tanzania violated article 4 of the African Charter, citing the article, it stresses,

> it is rather surprising to see ASP-Burundi using this article to support an allegation of human rights violations resulting from the sanctions. This association forgets or pretends to be unaware that the security situation in Burundi took a turn for the worse before and after the coup d'état and that it can be said emphatically that this provision of the Charter had been violated in a shameless way during this period. In June 1996, President S Ntibantuganya and the then Prime Minister, Mr Nduwayo, came to Arusha to solicit sub-regional assistance in the form of troops.

Tanzania then goes on to enumerate some cases of violation of human rights by the Burundian government. It emphasises, *inter alia*,

> that the war being waged against the Hutu militia by the Burundian army is conducted with ever increasing vigour, the massacre by the Burundian army of 126 refugees on their way back to their country from Tanzania, the establishment of concentration camps in Karugi, Mwamanya and Kayanza, camps that are populated by Hutus who are denied food even to the point of death, the detention of the Speaker of the National Assembly, Mr Léons Ngandakumana . . .

24. Reacting to the allegation of violation of article 17(1) of the Charter, Tanzania points out that

> education and educational institutions were not the targets of the embargo; however, due to its multiplier effect, they were affected. In view of this, at the meeting held in Arusha on 6 April 1997, the leaders of the countries that had imposed the embargo decided to exclude educational materials on the list of items that are not subject to the embargo. This was with a view to alleviating the suffering of ordinary citizens.

25. Responding to the allegation of violation of article 22 of the Charter, Tanzania argues that it is

> difficult to conceive that it is possible to enjoy economic and socio-cultural rights without enjoying the fundamental rights, which are the political rights that condition the others. The most fundamental and important rights, which deserve to be recognised and which are currently being trampled upon by the regime in power are political rights. The Great Lakes countries, other African countries and the international community at large would like to see an end to the cycle of violence in Burundi. This can only be achieved by way of a political settlement negotiated among the various Burundian factions.

26. Tanzania argues

> the enjoyment of economic, cultural and social rights cannot be effective in the morass that Burundi has fallen into. Constitutional legality has first to be restored. That is the reinstatement of a democratically elected Parliament, the lifting of the ban on political parties, and the beginning of political talks involving all parties to the conflict . . .

In reaction to the allegation of violation of article 23(2) of the Charter, Tanzania states

> it has never granted shelter to terrorists fighting against Burundi. However, Tanzania admits that it has always welcomed in its territory streams of refugees from Rwanda and Burundi each time trouble fares up in those two countries. Tanzania has always refused to serve as a rear base or staging post for any armed movement against its neighbours. Leaders of political parties and factions are welcomed in Tanzania just like other refugees are. But they are not allowed to carry out military activity against Burundi from Tanzanian territory.

27. In response to the accusation that it violated the provisions of article III paragraphs 1, 2 and 3 of the OAU Charter, Tanzania states that 'it has not violated any of the principles enshrined in those texts.' It emphasises that

> despite its size, Burundi remains a sovereign state like any other African state.

> The sanctions imposed on it by its neighbouring countries do not undermine its sovereignty or its territorial integrity, nor much less its inalienable right to its own existence.

On the contrary, continues Tanzania,

> the sanctions could play an important role in reminding the Burundian authorities of the content of the preamble to the OAU Charter, which states that all members of the OAU are conscious of the fact that freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples. Another provision states that in order to create conditions for human progress, peace and security must be established and maintained. Peace and security are lacking in Burundi and the sanctions imposed on it could be one of the means of achieving them through dialogue.

28. As regards the allegation of violation of article III paragraph 4 of the OAU Charter, Tanzania comments:

> ASP-Burundi deliberately ignores one very important provision of the OAU Charter which states that OAU members solemnly affirm their adherence to the principle of the peaceful resolution of disputes by negotiation, mediation, conciliation and arbitration. The idea behind the imposition of the sanctions is precisely that of causing the application of this principle which a view to achieving lasting peace in Burundi. Contrary to ASP-Burundi's contention that a dangerous precedent had been set, Tanzania believes that the countries of the Great Lakes region had set a favourable precedent. In the pursuit of the goals and objectives of the OAU, article II paragraph 2(2) states 'to these ends, the member States shall cooperate and harmonise their general policies in the political and diplomatic fields'.

Tanzania concludes its exposition with a response to ASP-Burundi's accusation that it had violated certain texts adopted by the United Nations, including some provisions of the organisation's Charter. It emphasises in particular that

> the concept of regional arrangement adopted by the Great Lakes countries is straight out of chapter VIII of the United Nations Charter: article 52 of the said Charter stipulates that regional arrangements may be used for keeping international peace and security, with the proviso that such actions shall be consistent with the goals and principles of the United Nations. This provision allows for regional arrangements to be used for peaceful settlements before having recourse to the Security Council. And indeed, the Council encourages regional arrangements.

29.

> Tanzania does not believe that the imposition of sanctions is an interference in the internal affairs of Burundi. Tanzania is more concerned about the potential consequences of the instability currently prevailing in Burundi. All neighbouring countries share the same concern, since it is true that the instability in Burundi signifies for them inflow of refugees, instability in their own territory as a consequence of that prevailing in Burundi and which could transform into a generalised conflagration in the entire region. The imposition of sanctions should be seen as a preventive means of self defence aimed at avoiding seeing the region plunge into instability and chaos.

30. Tanzania further emphasises that

> in fact, all the sanctions that were adversely affecting the ordinary Burundian citizen were softened when the leaders of the Great Lakes countries met in Arusha on 16 April 1997. This included the lifting of the sanctions on food products, school materials, construction materials, as well as all medical items, and agricultural products and inputs.

31.

> The sixth Summit of the Great Lakes countries held in Kampala on 21 February 1998, unanimously decided to maintain the sanctions against the Burundian military regime. In this vein, the enforcement of the sanctions shall be scrupulously monitored by the organ established for this purpose; this is with a view to ensuring the implementation of the decisions taken by the countries of the region. It is important to note that the sanctions were declared by the countries of the region and not unilaterally by Tanzania. Hence, if ASP-Burundi has a just cause to defend, it should do so against the region and not against Tanzania.

32. At its 24th session held in Banjul, The Gambia, after hearing the Rwandan Ambassador, who presented his government's position on this affair, and considering the responses of Zambia and Tanzania, the Commission decided to address a recommendation to the Chairman in Office of the Organisation of African Unity (OAU), with a copy to the Secretary General, requesting the states involved in the affair to find means of reducing the effects of the embargo. It was however stressed that this should be without any prejudice to the decision that the Commission would take on the merit of the communication.

33. The Secretariat wrote to the parties informing them of the Commission's decision.

34. On 26 March 1999, the Secretariat received the reaction of the author of the communication to the Tanzanian and Zambian memoranda. In its view, Tanzania's argument that it did not violate article 4 of the African Charter is baseless. It argues that

> after the *coup d'état* security in the country improved considerably. On the contrary, the embargo deprived the Burundian people of their basic needs, especially as regards health care and nutrition, claiming many victims.

35. It continues:

> Tanzania claims not to have violated article 17 of the Charter with the argument that the embargo was relaxed in April 1997. This shows *a contrario* that before the relaxation, which had no effect in reality, the said provision had been violated; that is from 31 July 1996 to April 1997.

36. According to the plaintiff,

> Tanzania also claims not to have violated article 22 of the Charter with the argument that of all human rights, it is what it refers to as the 'political right' that matters most.

It continues by saying that Tanzania's argument is unfounded since

> . . . the right to life for example is more important than any 'political right'. The choice is clear between someone who takes your life and someone who denies you your right to elect your head of state.

37. According to the plaintiff, 'all groups that are attacking Burundi – PALIPEHUTU, FROLINA, CNDD . . . etc – operate from that country.'

38. The complainant avers,

> Tanzania claims not to have violated article 3 items 1, 2, 3 of the OAU Charter. But imposing on Burundi a manner whereby it can 'resolve' its internal problems, under the pressure of an embargo, undoubtedly constitutes interference in the internal affairs of Burundi.

39. The complainant continues:

> it is evident that Tanzania violated international law by imposing an embargo on Burundi. ASP-Burundi hereby calls on the African Commission on Human and Peoples' Rights to declare that country guilty and condemn it to pay damages.

40. As regards the memorandum submitted by Zambia, the plaintiff states that:

> Zambia claims not to have violated resolution 2625 of the United Nations with the argument that the UN had approved the decision to impose the embargo. Whether the UN approved the measure or not changes nothing, for the initiative should have come from the United Nations and not the other way around! Hence, the decision to impose the embargo had no legal basis.

41. It continues:

> along the same line of thought, Zambia claims that it did not violate article 3(1), (2), and (3) of the OAU Charter for the reason that the OAU had approved the embargo. Once again, the approval came after the fact. It was not the OAU that mandated these countries to impose the embargo.

42. According to the petitioner

> Zambia claims . . . that it did not violate article 4 of the African Charter on Human and Peoples' Rights with the argument that in April 1997, some alleviation measures were introduced. ASP-Burundi points out that this provision was violated from the time of the imposition of the embargo (August 96) to the date those measures were introduced (April 97), and the measures did not even bear any effect in reality.

From the foregoing, the complainant draws the following conclusion

43.

> It is abundantly clear that Zambia, as well as Tanzania, have violated international law and that this violation caused very serious injury to the Burundian people. ASP — Burundi therefore urges the African Commission on Human and Peoples' Rights to declare Zambia guilty of this and to constrain it to pay the relevant damages.

44. On 24 March 2000, the Secretariat received a *note verbale* from the Kenyan Ministry of Foreign Affairs requesting a copy of the communica-

tion submitted by ASP-Burundi. The request was met, and a reaction is still being awaited.

45. At its 27th ordinary session held in Algeria, the Commission examined the case and deferred its further consideration to the next session.

46. The Commission's decision was communicated to the parties on 20 July 2000.

47. On 17 August 2000, the Secretariat of the Commission received a *note verbale* from the Ministry of Foreign Affairs of the Republic of Uganda claiming that it had never been notified of the existence of this communication.

48. On 21 August 2000, the Secretariat of the Commission replied the said Ministry stating among other things that such notification had long been served the competent authorities of the Republic of Uganda, in 1996, as soon as the case was filed. A copy of the communication was however forwarded to the Ministry.

49. During the 28th ordinary session held in Cotonou, Benin, from 26 October to 6 November 2000, the Commission considered the communication and noted that although Ethiopia was a party to the case, it had never received notification of the communication.

50. The Commission therefore asked the Secretariat to check whether Ethiopia had ratified the African Charter at the time the decision on the embargo was taken.

51. If it had, the Secretariat should then send it notification of the communication opposing that embargo and ask for its comments and observations on the issue.

52. Given that Ethiopia ratified the African Charter two years after the decision to impose the embargo on Burundi was taken, the Secretariat of the Commission did not send a copy of the case file to Ethiopia for notification.

53. The Secretariat acted in this manner in accordance with the decision taken by the 28th ordinary session of the Commission.

54. Moreover, this decision of the Commission is in line with the principle of non-retroactivity of the effects of agreements, which is contained in article 28 of the Vienna Convention on Treaties.

55. The Secretariat informed the concerned parties about the decision of the 30th session, and the Tanzanian and Zambian embassies in Addis Ababa reacted by saying that their respective governments were never informed of this case and they requested to be given a copy of the case-file.

56. In reply, the Secretariat conveyed the documents requested to the two embassies, as well as all necessary information that could help elucidate

the progress of the case submitted to the Commission, in respect of which their states had contributed by submitting defence statements.

57. At the 31st session (2-16 May 2002, Pretoria, South Africa), delegates from some of the accused states (DRC, Rwanda, Tanzania, Uganda and Zambia) presented some oral comments on the position of their respective governments during the Commission's consideration of the communications.

58. The said delegations in turn flatly rejected the allegations levelled against their governments pointing out in a nutshell, that:

- The sanctions adopted by the Summit of the countries of the Great Lakes region held on 31 July 1996, in Arusha, Tanzania, were not aimed at providing advantages to the countries that made the decisions but, were meant to put pressure on the government brought about by the military *coup d'etat* of 25 July 1996 in Burundi, with a view to bringing it to restore constitutional legality, democracy, peace and stability.
- The joint initiative taken by their governments were part of their contribution to the international efforts aimed at promoting the rule of law, in spite of the sacrifices that this initiative entailed for the people of the countries that initiated the embargo against Burundi, who also suffered from the consequences of the said embargo.

59. After the session, the Secretariat informed the states concerned and the complainant about the status of the communication by *note verbale* and by letter respectively.

60. At the 32nd session held from 17 to 23 October 2002, in Banjul, The Gambia, the Commission was unable to consider the merits of communication, because of time constraints occasioned by the reduction of this session's duration.

61. The African Commission consequently deferred consideration of the matter to its 33rd ordinary session scheduled to take place from 15 to 29 May 2003, in Niamey, Niger.

62. The African Commission considered this communication during the 33rd ordinary session and decided to deliver its decision on the merits.

Law

Admissibility

63. The Commission had to resolve the matter of the *locus standi* of the author of the communication. It would appear that the authors of the communication were in all respects representing the interests of the military regime of Burundi. The question that was raised was whether this communication should not rather be considered as a communication from a state and be examined under the provisions of articles 47-54 of

the African Charter. Given that it has been the practice of the Commission to receive communications from non-governmental organisations, it was resolved to consider this as a class action. In the interests of the advancement of human rights this matter was not rigorously pursued especially as the respondent states did not take exception by challenging the *locus standi* of the author of the communication. In the circumstances the matter was examined under article 56.

64. Under article 56(5) and (6) of the African Charter on Human and Peoples' Rights, communications other than those referred to in article 55 received by the Commission and relating to human and peoples' rights shall be considered if they:

> (5) are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged; (6) are submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized of the matter.

65. These provisions of the African Charter are hardly applicable in this matter inasmuch as the national courts of Burundi have no jurisdiction over the state respondents herein. This is yet another indication that this communication appropriately falls under communications from states (articles 47-54).

66. However, drawing from general international law and taking into account its mandate for the protection of human rights as stipulated in article 45(2), the Commission takes the view that the communication deserves its attention and declares it admissible.

Merits

67. The communication was submitted by the *Association pour la Sauvegarde de la Paix au Burundi* against states of the Great Lakes region (DRC, Kenya, Rwanda, Tanzania, Uganda, Zambia) and Ethiopia, in the wake of an embargo declared by these countries against Burundi on 31 July 1996, following the *coup d'etat* carried out by the Burundian army on 25 July against the democratically elected government.

68. The communication alleges that by its very existence this embargo violated and continues to violate a number of international obligations to which these states have subscribed, including those emanating from the provisions of the Charter of the Organisation of African Unity (OAU), the African Charter on Human and Peoples' Rights, as well as Resolution 2625 (XXV) of the General Assembly of the United Nations on the principles of international law applicable to friendly relations and cooperation between States on the basis of the United Nations Charter.

69. The states accused in the communication, particularly Zambia and Tanzania which submitted written conclusions on the case, reject the allegations against them, stating among other things, that while it is true that the decision to impose an embargo against Burundi was taken

at the Arusha Summit of 31 July 1996 at which they participated, (with the exception of Zambia, which only joined the others after the Arusha decision), it is equally true that following this, the decision to impose an embargo against Burundi was endorsed by the Organisation of African Unity and the United Nations Security Council.

70. The decision to impose the embargo against Burundi is thus based, by implication, on the provisions of chapters VII and VIII of the United Nations Charter, regarding Action With Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression and Regional Arrangements, in the sense that the military coup which deposed the democratically elected government constituted a threat to, indeed a breach of, the peace in Burundi and the region.

71. The respondent states took collective action as a sub-regional consortium to address a matter within the region that could constitute a threat to peace, stability and security. Their action was motivated by the principles enshrined in the charters of the OAU and of the United Nations. The Charter of the OAU stipulates that 'freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples'. It goes on to promote international cooperation 'to achieve a better life for the peoples of Africa . . .'

72. The resolution to impose the embargo on Burundi was taken at a duly constituted Summit of the states of the Great Lakes Region who had an interest in or were affected by the situation in Burundi. The resolution was subsequently presented to the appropriate organs of the OAU and the Security Council of the United Nations. No breach attaches to the procedure adopted by the states concerned. The embargo was not a mere unilateral action or a naked act of hostility but a carefully considered act of intervention which is sanctioned by international law. The endorsement of the embargo by resolution of the Security Council and of the Summit of Heads of State and Government of the OAU does not merit a further enquiry as to how the action was initiated.

73. The United Nations Security Council is vested with authority to take prompt and effective action for the maintenance of international peace and security. In doing so, states agree that the Security Council 'acts on their behalf . . .' This suggests that, once endorsed by resolution of the Security Council, the embargo is no longer the acts of a few neighbouring states, but that it imposes obligations on all member states of the United Nations.

74. The Charter of the United Nations allows that member states of the UN may be called upon to apply measures including, 'complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations . . .' Economic sanctions and embargoes are legitimate interventions in international law.

75. The critical question and one which may affect the legitimacy of the action is whether such action as has been determined is excessive and disproportionate, is indiscriminate and seeks to achieve ends beyond the legitimate purpose. Sanctions therefore cannot be open-ended, the effects thereof must be carefully monitored, measures must be adopted to meet the basic needs of the most vulnerable populations or they must be targeted at the main perpetrators or authors of the nuisance complained of. The Human Rights Committee has adopted a General Comment in this regard precisely in order to create boundaries and limits to the imposition of sanctions.

76. We are satisfied that the sanctions imposed were not indiscriminate, that they were targeted in that a list of affected goods was made. A monitoring committee was put in place and situation was monitored regularly. As a result of these reports adjustments were made accordingly. The report by the Secretary General of the OAU is indicative of the sensitivity called upon in international law:

> . . . besides their political, economic and psychological impact, they [the sanctions] continue to have a harsh impact on the people. The paradox is that they enrich the rich and impoverish the poor, without effectively producing the desired results . . . It would, perhaps, be appropriate to review the question of the sanctions, in such a way as to minimise the suffering of the people, maximise and make effective the pressures on the intended target.

(CM/2034 (LXVIII), 68th ordinary session of the Council of Ministers, Ouagadougou, 1-6 June 1998).

77. We accept the argument that sanctions are not an end in themselves. They are not imposed for the sole purpose of causing suffering. They are imposed in order to bring about a peaceful resolution of a dispute. It is self-evident that Burundians were in dispute among themselves and the neighbouring states had a legitimate interest in a peaceful and speedy resolution of the dispute.

78. With regard to the allegations of interference in the domestic affairs of other sovereign states, the Commission recognises that international law has provided careful procedures where such interference may be legitimate. It is our view that the present matters falls on all fours with the provisions of international law.

79. Having thus dismissed the seminal charges against the respondent states, however, the Commission wishes to observe that the matters complained of here have now been largely resolved. The embargo has been lifted and by the agency of the OAU and with the active participation of neighbouring states a peace process is underway in Burundi.

For these reasons the African Commission:

- Finds that the respondent states are not guilty of violation of the African Charter on Human and Peoples' Rights as alleged.

- Takes note of the entry into force of the Burundi Peace and Reconciliation Agreement, alias Arusha Accord, and that the respondent states in the communication are among the states that have sponsored the said Accord.
- Also notes the efforts of the respondent states aimed at restoring a lasting peace, for the development of the rule of law in Burundi, through the accession of all Burundian parties to the Arusha Accord.
- Welcomes the entry into force of the Constitutive Act of the African Union in 2000 to which the Republic of Burundi and all the respondent states are now party, and which also provides for the promotion and respect of human and peoples' rights and the explicit censure of states that 'come to power by unconstitutional means'.

LIBERIA

Woods and Another v Liberia

(2003) AHRLR (ACHPR 2003)

Communicaton 256/2002, *Samuel Kofi Woods II and Kabineh M Ja'neh v Liberia*
Decided at the 34th ordinary session, Nov 2003, 17th Annual Activity Report
Rapporteur: Dankwa

Interim measures (11)
Admissibility (loss of contact with complainant, 16)

Summary of facts

1. The complaint is filed by Mr Samuel Kofi Woods II and Mr Kabineh M J'aneh on behalf of Hassan Bility, Ansumana Kamara and Mohamed Kamara, all Liberian journalists for the independent *Analyst* newspaper in Monrovia.

2. The complainants allege that in the afternoon of 24 June 2002, plain-clothes state security officers from the National Police Force, National Security Agency, National Bureau of Investigation, Fire Service, Immigration, Ministry of Defence, Anti-Terrorist Unit, Special Security Service, and Ministry of National Security arrested Hassan Bility, Ansumana Kamara and Mohammed Kamara, all journalists working for the independent *Analyst* newspaper in Monrovia.

3. The complaint also alleges that the said arrest and detention of the journalists were not disputed as the Minister of Information, Mr Reginald Goodridge, has confirmed the same. To date, there was no charge proffered against them and they continue to languish in detention, which is in contravention of the African Charter, the Constitution of Liberia and the Universal Declaration of Human Rights (UDHR).

4. It is alleged that in consideration of the available constitutional local remedies *vis-à-vis* the arbitrary arrest and detention of these journalists, and further to the petition filed by an assortment of human rights organisations in Liberia at the First Judicial Circuit Court, Criminal Assizes 'B' of Montserrado county, the latter issued a special writ of *habeas corpus*, which, however, was allegedly not complied with.

5. The complainants further allege that the subsequent announcement by the Liberian government of its intention to arraign the detained journalist

before a military tribunal would restrain, deprive and deny them of their human rights to liberty, freedom and due process of laws as enshrined in the Liberian Constitution, the African Charter, and the UDHR.

6. Together with their complaint the complainants submitted a request for provisional measures to the African Commission in accordance with rule 111 of the Rules of Procedure of the African Commission.

Complaint

7. The complainants allege violations of articles 6, 7(b), and 7(d) of the African Charter on Human and Peoples' Rights.

8. The complainants pray that in addition to provisionally ordering the immediate release of the detainees in consonance with rule 111 of the Rules of Procedure of the African Commission, the Commission grant any and all other remedies/redress that it shall deem right and appropriate.

Procedure

9. The complaint was dated 9 August 2002 and received at the Secretariat on 16 August 2002 by post.

10. At its 32nd ordinary session held from 17 to 23 October 2002 in Banjul, The Gambia, the African Commission considered the complaint and decided to be seized thereof.

11. On 23 October 2002, the African Commission appealed to His Excellency Charles Taylor, President of the Republic of Liberia, respectfully urging him to intervene in the matter being complained of pending the outcome of the consideration of the complaint before the African Commission.

12. On 4 November 2002, the Secretariat wrote to the complainants and respondent state to inform them that the African Commission had been seized of the communication and requested them to forward their submissions on admissibility before the 33rd ordinary session of the Commission.

13. The Secretariat requested the parties on several occasions to submit their arguments on admissibility.

14. At its 34th ordinary session held from 6 to 20 November 2003 in Banjul, The Gambia, the African Commission considered this communication and declared it inadmissible.

Law

Admissibility

15. Article 56(5) of the African Charter requires that 'a communication be introduced subsequent to exhaustion of local remedies, if they exist, unless

it is obvious to the Commission that the procedure for such recourse is abnormally prolonged'.

16. The complainants have, despite repeated requests, however, not furnished their submissions on admissibility, especially on the question of exhaustion of domestic remedies.

For these reasons the African Commission:

In accordance with article 56(5) of the African Charter, declares this communication inadmissible due to non-exhaustion of local remedies.

NIGERIA

Aigbe v Nigeria

(2003) AHRLR (ACHPR 2003)

Communication 252/2002, *Stephen O Aigbe v Nigeria*
Decided at the 33rd ordinary session, May 2003, 16th Annual Activity Report
Rapporteur: Johm

Admissibility (loss of contact with complainant, 16)

Summary of facts

1. The complaint is filed by Stephen O Aigbe, Master Warrant Officer (MWO) in the Nigerian Army.

2. The complaint details the mistreatment of the complainant by the Nigerian Army. On 17 January 1996, the complainant claims that he was removed from his office, arbitrarily detained, and accused of trying to overthrow General Abacha. On 12 April 1996 and 12 September 1996, he was arraigned on 12 counts of mutiny, a capital charge. He alleges that despite certain authorities' observations that the charges were false, he was not acquitted and the charges are still pending in a faulty trial process. The rule of laws and court procedures should have been followed and exhausted by officials before a judge takes far reaching decisions on any matter. According to the complainant, the proceedings violated the rule of law by not following armed forces regulations, which call for investigation and then court martial.

3. The complainant also alleges several violations in relation to his terms of military service. He alleges that several colleagues burgled his barracks and, despite his complaint to the relevant authority, his case was never investigated. In addition, he was denied living accommodations in the barracks for two years and was denied the right to reach [his] pay point since July 1999 and to take his leave for six years.

4. The complainant also claims he faces death threats from subordinate soldiers and the affluent Generals. He claims harassment, intimidation, humiliation, embarrassment, discrimination, annihilation and threats to his life. In addition to death threats, he alleges daily occurrences of 'other acts of organised open intimidation [by soldiers and generals]'.

5. He alleges that he has sought redress before several authorities, pursuant to Armed Forces Decree 105 of 1993, but certain officers were

obstructing his access to justice. Despite his detailed submissions, the authorities have failed to provide adequate redress for his grievances and have bluntly refused to give him 'audience at any level', violating military and constitutional procedure. He claims that bribery played a role in keeping his case from being heard.

6. He further alleges that his family has been involved in occult practices and that members of the military, who are also involved, conspired against him. He notes that he wrote 'so many petitions and protest letters to the Nigerian Army Council' and to the Oputa Panel.

Complaint

7. The complainant alleges violations of articles 4, 5, 6, and 7(1)(a), (b), (c), and (d) of the Charter.

8. In his prayer for redress, the complainant requests that the African Commission: Intervene quickly to save him and his family from 'the risk of assassination or extra-judicial killing or torture to death'; help restore contact with his children after 'full and impartial investigations into all allegations of state agents in his separation [from his children], cult acts and practices for government by [his] children and [his] legal wife'; write to the Nigerian Attorney-General and Minister of Justice to request an investigation into the mutiny allegations that he faces; call for an independent, impartial and public investigation into the burgling of his barracks; call for a probe into the 'reallocation of [his] motorcycle loan to another soldier'; assist him in seeking asylum outside Nigeria since he faces continuous persecution there; and send him 10 000 Naira to enable him to eat.

Procedure

9. The undated complaint was received at the Secretariat on 14 June 2002 by mail.

10. On 24 July 2002, the Secretariat wrote to the complainant informing him that the complaint was registered and that it will be considered at the African Commission's 32nd ordinary session, which was scheduled to take place from 17 to 23 October 2002 in Banjul, The Gambia.

11. At its 32nd ordinary session held from 17 to 23 October 2002 in Banjul, The Gambia, the African Commission considered the complaint and decided to be seized thereof.

12. On 4 November 2002, the Secretariat wrote to the parties to inform them of this decision and requested them to forward their submissions on admissibility before the 33rd ordinary session of the African Commission.

13. At its 33rd ordinary session held from 15 to 29 May 2003 in Niamey, Niger, the African Commission considered this communication and declared it inadmissible.

Law

Admissibility

14. Article 56(5) of the African Charter requires that a communication be introduced subsequent to exhaustion of local remedies, if they exist, unless it is obvious to the Commission that the procedure for such recourse is abnormally prolonged.

15. The complainant had alleged that he sought redress before 'several authorities'. The African Commission has no indication in the file before it that there was any proceeding before the domestic courts on the matter.

16. The complainant has, despite repeated requests, however, not furnished his submissions on admissibility, especially on the question of exhaustion of domestic remedies.

For these reasons, the African Commission:

In accordance with article 56(5) of the African Charter, declares this communication inadmissible due to non-exhaustion of local remedies.

SENEGAL

Mouvement des Réfugiés Mauritaniens au Sénégal v Senegal

(2003) AHRLR (ACHPR 2003)

Communication 254/02, *Mouvement des Réfugiés Mauritaniens au Sénégal v Senegal*
Decided at the 33rd ordinary session, May 2003, 16th Annual Activity Report
Rapporteur: Sawadogo

Admissibility (exhaustion of local remedies, 19-21)

Summary of facts

1. The complainant alleges that on the eve of the demonstration by the refugees of Podor in commemoration of International Refugee Day, the Prefect of the town of Podor banned the said demonstration.

2. The complainant does not show whether he had complied with the necessary procedures to obtain authorisation for the demonstration. He however points out that he had sent the programme of the demonstration to the following institutions and persons:

3. African Commission on Human and Peoples' Rights; United Nations High Commissioner for Refugees; Commission for Assistance to Returnees and Displaced Persons; Governor of Saint-Louis; Prefect of Podor; Deputy Prefect of Thille Boubacar and the press.

4. The text of the decision of the Prefect of Podor banning the demonstration which was scheduled to take place on Thursday 20 and Friday 21 June 2002 in the towns of Madina Moussa, Diolly, Podor and Ngaolé was dated 19 June 2002, citing the need to keep law and order as the reason for this action.

5. The submission of the complainant includes the programme of the demonstration sent to the above-mentioned institutions and persons, the decision of the Prefect of Podor dated 19 June 2002, banning the demonstration scheduled to take place on Thursday 20 and Friday 21 June 2002 in towns of Madina Moussa, Diolly, Podor and Ngaolé.

Complaint

6. The complainant alleges that Senegal violated articles 5, 9 and 11 of the African Charter on Human and Peoples' Rights.

Procedure

7. The communication was received at the Secretariat of the African Commission on 6 August 2002.

8. On 12 August 2002, the Secretariat of the African Commission acknowledged receipt of the communication and informed the complainant that the complaint was registered and would be considered at the 32nd ordinary session scheduled to take place in Banjul, The Gambia, from 17 to 23 October 2002.

9. At the 32nd ordinary session held from 17 to 23 October 2002 in Banjul, The Gambia, after considering the communication, the African Commission decided to be seized with the said communication.

10. On 30 October 2002, the Secretariat of the African Commission informed the parties of the above-mentioned decision and asked them to provide it with more information on the admissibility of the communication, in accordance with article 56 of the African Charter. It also sent a copy of the communication to the respondent state. It requested the parties to send their written observations to the Secretariat within two months after notification of the decision.

11. At its 33rd ordinary session held from 15 to 29 May 2003 in Niamey, Niger, the African Commission considered this communication and declared it inadmissible.

Law

Admissibility

12. The admissibility of communications submitted under article 56 of the African Charter is governed by the conditions set out in article 56 of the African Charter. The applicable provision in this particular case is that of article 56(5) which stipulates that 'Communications . . . shall be considered if they: (5) are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged . . .'

13. In the case under consideration, the complainant alleges that on the eve of the demonstration for the commemoration of the International Refugee Day, the Prefect of the town of Podor issued a ban of the demonstration by Mauritanian refugees.

14. The complainant filed the decision of the Prefect of Podor banning the demonstration scheduled to take place on 20 and 21 June 2002 in the towns of Madina Moussa, Diolly, Podor and Ngaolé.

15. In the complainant's written observations, it is alleged that according to the information received, the procedure applied in such a case by *Conseil d'Etat* would be unduly prolonged, but without elaborating how.

16. In its response, the respondent state refers to the provisions of article 56 of the African Charter and rule 116 of its Rules of Procedure which provide for the exhaustion of local remedies as a requirement for the African Commission to rule on the admissibility of communications.

17. The respondent state also recalls that the guidelines for submission of communications provide that each communication should particularly indicate that local remedies have been exhausted.

18. The representative of the respondent state stated during the 33rd ordinary session that the complainant had not undertaken any efforts to challenge the decision banning the demonstration.

19. She pointed out the decision complained of was an administrative measure against which the complainant could have taken legal action and obtained redress in the following two ways: a) Appeal to a higher administrative authority which consists of seizing the hierarchical authority for abuse of authority, including the Governor, the Minister of Interior, the Prime Minister and, finally, the President of the Republic in accordance with the Institutional Act 92-24 of 30 May 1992, relating to *Conseil d'Etat* as amended and article 729 of the Code of Civil Procedure; b) Administrative law action, through seizure of *Conseil d'Etat* canceling the administrative decision complained of for abuse of authority.

20. The representative of the respondent state demonstrated that these local remedies existed but that the complainant had not utilised any of them. She further pointed out that in emergency cases, the procedure of hour by hour interim order in an urgent case was also available to those seeking justice. She therefore concluded that the complainant had not exhausted local remedies.

21. In light of the above submissions, the African Commission notes that the complainant did not provide proof of attempting to exhaust the local remedies that were available to him.

For these reasons the African Commission:

Declares the communication inadmissible for non-exhaustion of local remedies.

SUDAN

Law Office of Ghazi Suleiman v Sudan I

(2003) AHRLR (ACHPR 2003)

Communications 222/98 and 229/99, *Law Office of Ghazi Suleiman v Sudan*
Decided at the 33rd ordinary session, May 2003, 16th Annual Activity Report
Rapporteur: Pityana

State responsibility (improved situation does not extinguish claim, 39, 40)
Torture (preventive measures, 46)
Personal liberty and security (arbitrary arrest and detention, 50)
Fair trial (right to be heard, 52, 53; impartial court, military tribunal, 53, 61-67; appeal, 53; presumption of innocence, 56; access to legal counsel, 60)

Summary of facts

1. Communication 222/98 was submitted by the law office of Ghazi Suleiman, a law firm based in Khartoum, Sudan, on behalf of Abdulrhaman Abd Allah Abdulrhaman Nugdall (unemployed), Adb Elmahmoud Abu Ibrahim (religious figure) and Gabriel Matong Ding (engineer).

2. It is alleged that the three persons were put in jail and the necessary investigations carried out in accordance with the 1994 law relating to national security. The acts of these persons had terrorist and propaganda objectives aimed at endangering the security and peace of the country and innocent civilians.

3. The complainant alleges that these individuals were arrested on 1 July 1998 or around this date and that they were detained by the government of Sudan without charge and were refused contact with their lawyers or their families.

4. He adds that their lawyers requested, in vain, the competent authorities, including the Supreme Court (Constitutional Division), authorisation to visit their clients. The last of these requests was rejected on 5 August 1998. There are reasons to believe that these detainees are subjected to torture.

5. The same law office of Ghazi Suleiman submitted a similar communication 229/99 on behalf of 26 civilians. These are civilians being tried under a

military court, accused of offences of destabilising the constitutional system, inciting people to war or engaging in the war against the state, inciting opposition against the government and abetting criminal or terrorist organisations under the law of Sudan.

6. It is alleged that this court was established by presidential decree and that it is mainly composed of military officers. Of the four members of the court, three are active servicemen. The communication adds that the court is empowered to make its own rules of procedure which does not have to conform to the established rules of fair trial.

7. The complainant claims also that all these suspects were refused the right to assistance of defenders of their choice and sufficient time and access to their files with a view to preparing their defense. Violation of the right to defense by lawyers of their choice is allegedly based on the judgment delivered by the military court on 11 October 1998 with a view to preventing the lawyers chosen by the accused to represent them. Mr. Ghazi Suleiman, main shareholder of the complaining law firm, is one of these lawyers. It is also reported that the decisions of this court are not subject to appeal.

The complaint

8. The complainant alleges that articles 5, 6 and 7(a), (b), (c) and (d) of the African Charter have been violated.

Procedure

9. The communication was received at the Secretariat on 28 September 1998.

10. During its 25th ordinary session held from 26 April to 5 May 1999 in Bujumbura, Burundi, the African Commission decided to consider the communication.

11. On 11 May 1999, the Secretariat of the African Commission notified the two parties of this decision.

12. The African Commission considered the communication during its 26th ordinary session held in Kigali, Rwanda, from 1 to 15 November 1999, and requested the complainant to submit in writing his comments on the issue of exhaustion of local remedies. Furthermore, it requested the parties to provide it with the relevant legislation and court decisions (in English or French).

13. On 21 January 2000, the Secretariat of the African Commission wrote to the parties informing them of the decision of the African Commission.

14. During its 27th ordinary session held from 27 April to 11 May 2000 in Algiers, Algeria, the African Commission heard the oral submissions of the parties and decided to consolidate all the communications brought

against Sudan. The African Commission requested the parties to provide their written submission on the issues of exhaustion of local remedies.

15. On 30 June 2000, these decisions were communicated to the parties.

16. At the 28th ordinary session held from 23 October to 6 November 2000 in Cotonou, Benin, the African Commission decided to defer consideration of this case to the 29th ordinary session and requested the Secretariat to incorporate the oral submissions of the state delegate and the written submissions of the counsel into the draft decision to enable the African Commission take a reasoned decision on admissibility.

17. During the 29th ordinary session held in Tripoli, Libya, 23 April to 7 May 2001, the African Commission heard the parties on the case. Following detailed discussions, the African Commission noted that the complainant had submitted a comprehensive dossier on the case. It was therefore recommended that consideration of the communication be deferred to the 30th ordinary session, pending the submission of detailed replies of the respondent state.

18. On 19 June 2001, the Secretariat of the African Commission informed the parties of the above mentioned decision and requested the respondent state to send its written submissions within two months from the date of notification of the African Commission's decision.

19. During the 30th ordinary session held from 13 to 27 October 2001 in Banjul, The Gambia, the respondent state and Dr Curtis Doebler presented their oral submissions. The African Commission decided to defer consideration of these communications to the ordinary session and requested the government of Sudan to reply to the complainant's submissions.

20. On 15 November 2001, the Secretariat of the African Commission informed the parties of the decision of the African Commission and requested the respondent state to submit its written comments within two months from the date of the notification of the said decision.

21. During its 31st ordinary session held from 2 to 16 May 2002 in Pretoria, South Africa, the African Commission heard oral submissions from the two parties and declared the communication admissible. The African Commission also decided to consolidate communications 222/98 and 229/99 due to the similarity of the allegations.

22. On 29 May 2002, the respondent state and the complainants were informed of the decision adopted by the African Commission.

23. At the 32nd ordinary session held from 17 to 23 October 2002 in Banjul, The Gambia, the representative of the respondent state made oral and written submissions requesting the African Commission to review its decision on admissibility relating to all the communications brought by the complainant against the government of Sudan. The African Commission informed the respondent state that the issue of admissibility of the

communications had been settled and that the respondent state should submit its arguments on the merits.

24. At its 33rd ordinary session held from 15 to 29 May 2003 in Niamey, Niger, the African Commission considered this communication and decided to deliver its decision on the merits.

Submissions of the complainant

25. The complainant informed the African Commission that the victims were released at the end of 1999, following the pardon granted by the President of Sudan. When they were released, the government announced that the case was closed and that no other legal proceedings could or would be initiated. The pardon was granted on condition that the victims renounce their right to appeal.

26. The complainant informed the African Commission that there exists no effective means of obtaining redress, and that even when an appeal is made to the Constitutional Court, this has no effect because of the state of emergency in force. He added that lack of appropriate means of obtaining redress is a result of political restrictions which prevent its implementation.

Submissions of the respondent state

27. In its written submissions, the respondent state stresses that the acts committed by the accused amounted to a terrorist crime endangering national peace and security. Considering the cruel nature of the crime characterised by the use of lethal weapons and given that these crimes are provided for in parts 5, 6 and 7 of the 1991 Criminal Code of Sudan, the accused were judged by a military court in conformity with the 1986 law relating to the peoples' armed forces, following the assent of the Minister of Justice as applied for by the military authorities under the law. The court's sessions were open to the public and the accused were treated in accordance with the law which guarantees them the right to fair trial. They exercised their right to freely choose their legal counsel. The legal counsel was composed of nine prominent names from the Sudanese Bar, presided over by Abel Alaire Esq, former Vice President of the Republic of Sudan.

28. The defense counsel submitted an appeal to the Constitutional Court, thus suspending the course of military proceedings. The Constitutional Court delivered a final judgment rendering void the decision of the military court.

29. The President of the Republic then pardoned the accused in this criminal case so as to promote national harmony and peace to which Sudan has always aspired, and prepare a climate of understanding and comprehensive peace. In the light of this Presidential proclamation, the Minister of

Justice instructed that the legal proceedings be discontinued and that the accused to be released immediately.

30. The pardon was published in the media and neither the declaration of the President of the Republic nor the decision of the Minister of Justice expressly states the condition prohibiting the accused from appealing to the courts or that they should renounce any of their rights.

31. The respondent state is convinced that the government of Sudan, has, in all the procedures, complied with the provisions of the African Charter on Human and Peoples' Rights as well as the principles of international law on human rights.

Law

Admissibility

32. The admissibility of the communications submitted in conformity with article 55 of the Charter is governed by the conditions set out in article 56 of the same Charter. The applicable provision in this particular case is article 56(5) which stipulates that: 'Communications . . . shall be considered if they: . . . (5) are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged . . .'

33. The case under consideration is a consolidation of two communications with similar allegations.

34. In his oral submissions, the delegate of the state informed the African Commission that after the adoption of the new 1998 Constitution, the political situation in Sudan was marked by important political developments which were characterised by the return to Sudan of many opposition figures and leaders of political parties living abroad, and these could go about their political activities in the country in a climate of peaceful coexistence, freedom, pardon and dialogue with a view to building the unity of Sudan. During this period, Sudan was distinguished by its respect and commitment to the United Nations Charter and the OAU Charter in its relations with neighbouring states, and it was able to re-establish relations with a view to realising cooperation and trust so as to strengthen African unity and solidarity. Following these developments, the state discontinued the legal proceedings against the complainants. Since then, they exercise their political activities freely and in a climate of forgiveness and brotherhood.

35. The respondent state insists that the complainants were allowed access to justice and were not deprived of their right to submit their applications for the protection of their constitutional rights. It considers that the complainants did enjoy all their rights provided for by article 9 of the International Covenant on Civil and Political Rights.

36. The complainant alleges that there are no effective means of obtaining redress because the victims were forced to renounce their right to take

legal action against the government. They were pardoned and released on condition that they renounce their right to claim damages from the government. By renouncing the right to claim damages, the complainants had been denied access to domestic remedies but they had not renounced their right to bring the matter before an international body.

37. The complainant and the respondent state are in agreement about the fact that the applicants brought an action before the Supreme Court (Constitutional Division) which on 13 August 1998 decided that the 1994 law on national security took precedence over international law on individual's rights, including the African Charter on Human and Peoples' Rights.

38. The complainant adds that though the applicants were released at a later date, there has been no compensation for violation of their human rights. He affirms on the other hand that the applicants have exhausted all local remedies with regard to compensation for violation of their human rights by the decision of the Supreme Court (Constitutional Division) of 13 August 1998.

39. The African Commission feels that the obligations of the states are of an *erga omnes* nature and do not depend on their citizens. In any case, the fact that the victims were released does not amount to compensation for violation. The African Commission has taken note of the changes introduced by the government of Sudan with a view to wider protection of human rights but wishes to point out that these changes have no effect whatsoever on past acts of violation and that, under its mandate of protection, it must make a ruling on the communications.

40. Supported by its earlier decisions, the African Commission has always treated communications by ruling on the alleged facts at the time of submission of the communication (see *Organisation Mondiale Contre la Torture and Others v Rwanda* [(2000) AHRLR 282 (ACHPR 1996)]). Accordingly, even if the situation has changed for the better, allowing the release of the suspects, the position has not changed with regard to the accountability of the government in terms of the acts of violation committed against human rights.

41. For these reasons, the African Commission declares this communication admissible.

Merits

42. Article 5 of the Charter stipulates that:

> Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

43. The complainant alleges that in the two months of their detention, the

suspects were imprisoned, tortured and deprived of their rights. They disputed their detention and treatment inflicted on them as being against the international law on human rights and the law of Sudan.

44. Furthermore, detaining individuals without allowing them contact with their families and refusing to inform their families of the fact and place of the detention of these individuals amounts to inhuman treatment both for the detainees and their families.

45. Torture is prohibited by the Criminal Code of Sudan and the perpetrators are liable to imprisonment for three months or a fine.

46. The African Commission appreciates the government's action of taking legal action against those who committed torture but the scope of the measures taken by the government is not proportional to the magnitude of the abuses. It is important to take preventive measures such as stopping secret detentions, the search for effective solutions in a transparent legal system and continuation of investigations of allegations of torture.

47. Considering that the acts of torture have been admitted by the respondent state, even though it did not specify whether legal action was taken against those who committed them, the African Commission considers that these acts illustrate the government's violation of the provisions of article 5 of the African Charter.

48. Article 6 of the Charter stipulates that:

> Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.

49. Communication 222/98 alleges that the plaintiffs were arrested and detained without being told the reason for their arrest and without charge. The complainant submits that their arrest was illegal and was not based on the legislation in force in the country and that their detention without access to their lawyers was a violation of the norms which prohibit inhuman and degrading treatment and provide for the right to fair trial.

50. The respondent state confirms that the detainees submitted their application contesting their arrest and treatment received during their detention. However, the respondent state indicates that the plaintiffs did not follow the lengthy procedure required for the restoration of their rights and that, accordingly, the court rejected the said application by decision M/A/AD/1998. It should be stressed particularly that the respondent state does not dispute that the victims were arrested without being charged. This is a prima facie violation of the right not to be illegally detained as provided for by article 6 of the African Charter.

51. The complainant alleges that article 7(1) of the African Charter was violated, in that it stipulates that:

> Every individual shall have the right to have his cause heard. This comprises:(a) the right to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; (b) the right to be presumed innocent until proved guilty by a competent court or tribunal; (c) the right to defence, including the right to be defended by counsel of his choice; (d) the right to be tried within a reasonable time by an impartial court or tribunal.

52. All these provisions are inter-linked and when the right to have one's cause heard is violated, other acts of violations may also be committed such that the detentions become illegal and are detrimental to the proceedings of a fair trial in the proper form.

53. Furthermore, in terms of form, the fact that the decisions of the military court are not subject to appeal and that civilians are brought to a military court constitutes a *de jure* procedural irregularity. Additionally, to prevent the submission of an appeal to competent national courts violates article 7(1)(a) and increases the risk of not redressing the procedural defects.

54. In the communication under consideration, the complainant alleges that the victims were declared guilty in public by investigators and highly placed government officers. It is alleged that the government organised wide publicity around the case, with a view to convincing the public that there had been an attempted coup and that those who had been arrested were involved in it. The government showed open hostility towards the victims by declaring that 'those responsible for the bombings' will be executed.

55. The complainant alleges that in order to reconstitute the facts, the military court forced the victims to act as if they were committing crimes by dictating to them what to do and those pictures were filmed and used during the trial. It is claimed that the authorities attested to the guilt of the accused on the basis of these confessions. The African Commission has no proof to show that these officers were the same as those who presided over or were part of the military court that tried the case. These pictures were not presented to the African Commission as proof. In such conditions, the African Commission cannot carry out an investigation on the basis of non-established proof.

56. However, the African Commission condemns the fact that state officers carried out the publicity aimed at declaring the suspects guilty of an offence before a competent court establishes their guilt. Accordingly, the negative publicity by the government violates the right to be presumed innocent, guaranteed by article 7(1)(b) of the African Charter.

57. As shown in the summary of facts, the complainants did not get permission to get assistance from counsel and those who defended them were not given sufficient time or access to the files to prepare their defense.

58. The victims' lawyer, Ghazi Suleiman, was not authorised to appear before the court and despite several attempts, he was deprived of the right to represent his clients or even contact them.

59. Concerning the issue of the right to defense, communications 48/90, 50/91, 52/91, 89/93 *Amnesty International and Others v Sudan* [(2000) AHRLR 297 (ACHPR 1999) para 64] are clear on this subject. The African Commission held in those communications that:

> The right to freely choose one's counsel is essential to the assurance of a fair trial. To give the tribunal the power to veto the choice of counsel of defendants is an unacceptable infringement of this right. There should be an objective system for licensing advocates, so that qualified advocates cannot be barred from appearing in particular cases. It is essential that the national bar be an independent body which regulates legal practitioners, and that the tribunals themselves not adopt this role, which will infringe the right to defense.

60. Refusing the victims the right to be represented by the lawyer of their choice, Ghazi Suleiman, amounts to a violation of article 7(1)(c) of the African Charter.

61. It is alleged that the military court which tried the victims was neither competent, independent nor impartial insofar as its members were carefully selected by the head of state. Some members of the court are active military officers. The government did not refute this specific allegation, but just declared that the counsels submitted an appeal to the Constitutional Court, thus suspending the course of military proceedings. The Constitutional Court delivered a final judgment, rendering void the decision of the military court against the accused.

62. In its Resolution on Nigeria (adopted at the 17th session), the African Commission stated that among the serious and massive acts of violation committed in the country, there was 'the restriction of the independence of the court and the establishment of military courts which had no independence nor rules of procedure to try individuals suspected of being opponents of the military regime'.

63. The government confirmed the allegations of the complainants concerning the membership of the military court. It informed the African Commission in its written submissions that the military court had been established by a presidential decree and that it was mainly composed of military officers; of the four members, three were active servicemen and that the trial had taken place legally.

64. This composition of the military court alone is evidence of impartiality. Civilians appearing before and being tried by a military court presided over by active military officers who are still under military regulations violate the fundamental principles of fair trial. Likewise, depriving the court of qualified staff to ensure its impartiality is detrimental to the right to have one's cause heard by competent organs.

65. In this regard, it is important to recall the general stand of the African Commission on the question of civilians being tried by military courts. In its Resolution on the Right to a Fair Trial and Legal Aid in Africa, during the adoption of the Dakar Declaration and Recommendations, the African Commission noted:

> In many African countries, military courts or specialised criminal courts exist side by side with ordinary courts to hear and determine offences of a purely military nature committed by military staff. In carrying out this responsibility, military courts should respect the norms of a fair trial. They should in no case try civilians. Likewise, military courts should not deal with offences which are under the purview of ordinary courts.

66. Additionally, the African Commission considers that the selection of active military officers to play the role of judges violates the provisions of paragraph 10 of the fundamental principles on the independence of the judiciary which stipulates that: 'Individuals selected to carry out the functions of judges should be persons of integrity and competent, with adequate legal training and qualifications.' (Communication 224/98 *Media Rights Agenda v Nigeria* [(2000) AHRLR 262 (ACHPR 2000)]).

67. Article 7(1)(d) of the Charter requires the court to be impartial. Apart from the character of the membership of this military court, its composition alone gives an appearance, if not fact, of the absence of impartiality, and this therefore constitutes a violation of article 7(1)(d) of the African Charter.

For these reasons, the African Commission:

- Finds the Republic of Sudan in violation of the provisions of articles 5, 6 and 7(1) of the African Charter;
- Urges the government of Sudan to bring its legislation in conformity with the African Charter;
- Requests the government of Sudan to duly compensate the victims.

* * *

Law Office of Ghazi Suleiman v Sudan II

(2003) AHRLR (ACHPR 2003)

Communication 228/99, *Law Office of Ghazi Suleiman v Sudan*
Decided at the 33rd ordinary session, May 2003, 16th Annual Activity Report
Rapporteur: Pityana

Admissibility (exhaustion of local remedies, remedies must be available, effective and sufficient, fear for life, 32, 33; appeal, 34, 35; state of emergency, 36)
Interpretation (international standards, 47-50)
Expression (persecution of human rights defender, 52, 53, 61-63, 65)
Association (persecution based on opinions, 56)
Movement (right to travel within country, 64)

Summary of facts

1. The complainant is a law firm based in Khartoum, Sudan. The complaint dated 1 January 1999 was received in the Secretariat on 29 January 1999

2. The complaint is submitted on behalf of Mr Ghazi Suleiman, the principal partner in the law firm of Ghazi Suleiman.

3. The complainant alleges that Mr Ghazi Suleiman was invited by a group of human rights defenders to deliver a public lecture on 3 January 1999 in Sinnar, Blue Nile State. He alleges further that Mr Ghazi Suleiman was prohibited from traveling to Sinnar by some security officials who threatened that if he made the trip, he would be arrested.

4. It is also alleged that this threat and the implied threat of repercussions for the group prevented him from embarking on the trip.

Additional information

5. The complainant claims that the following actions were directed against Mr Ghazi Suleiman in the period between January 1998 and May 2002 to which this communication pertains: Threats by security officials of the government of Sudan preventing travel to Sinnar on 3 January 1999; an arrest on 7 April 1999; an arrest 8 June 1999; an attack on his office and his person on 17 November 1999; an arrest on 26 March 2000; an arrest on 9 December 2000; an arrest on 9 May 2002.

Complaint

6. The complainant alleges violations of articles 9, 10, 11 and 12 of the Charter on Human and Peoples' Rights (the Charter) and that all these

rights have been suspended under the National Security Act 1994, as amended in 1996.

Procedure

7. At its 25th ordinary session held from 26 April to 5 May 1999 in Bujumbura, Burundi, the African Commission on Human and Peoples' Rights (the Commission) was seized of the communication.

8. On 18 August 1999, the Secretariat of the African Commission notified the parties of this decision.

9. The African Commission considered the communication at its 26th ordinary session held from 1 to 15 November in Kigali, Rwanda and requested the complainant to submit written submissions on the issue of exhaustion of local remedies. In addition, the parties were requested to furnish the African Commission with the relevant legislation and court decisions (in either English or French).

10. On 21 January 2000, the Secretariat of the African Commission wrote to the parties informing them of the decision of the African Commission.

11. At the 27th ordinary session held from 27 April to 11 May 2000 in Algiers, Algeria, the parties made oral submissions and the African Commission decided to consolidate this communication with all the other communications brought against Sudan. It requested parties to address it further on the issue of exhaustion of domestic remedies.

12. The above decision was communicated to parties on 30 June 2000.

13. At the 28th ordinary session held from 23 October to 6 November 2000 in Cotonou, Benin, the African Commission decided to defer consideration of this communication to the 29th ordinary session and requested the Secretariat to incorporate the oral submissions made by the respondent state and the complainant into the draft decision to enable the African Commission to make a reasoned decision on admissibility.

14. At the 29th ordinary session held in Tripoli, Libya, the African Commission noted that the complainant had submitted a detailed brief on the case. It was therefore recommended that consideration of this communication be deferred to the 30th session pending submission of a detailed response by the respondent state.

15. On 19 June 2001, the Secretariat of the African Commission informed the parties of the above decision and requested the respondent state to forward its written submissions within two months from the date of notification of the decision.

16. During the 30th session held from 13 to 27 October in Banjul, The Gambia, the African Commission heard the oral submissions from both parties. Following detailed discussions on the matter, the African Commission noted that the respondent state had not responded to the issues

raised by the complainant. The African Commission therefore deferred consideration of these communications to the 31st Session, pending receipt of detailed written submissions from the respondent state to those of the complainant.

17. On 15 November 2002, the Secretariat of the African Commission informed the parties on the decision of the African Commission and requested respondent state to forward its written submissions within two months from the date of notification of its decision.

18. At its 31st ordinary session held from 2 to 16 May 2002 in Pretoria, South Africa, the African Commission heard submissions from both parties and declared the communication admissible.

19. On 29 May 2002, the respondent state and the complainants were informed of the African Commission's decision.

20. At the 32nd ordinary session held from 17 to 23 October 2002 in Banjul, The Gambia, the representative of the respondent state requested the African Commission orally and in writing to review its decision on admissibility relating to all the communications brought by the complainant against the government of Sudan. The African Commission informed the respondent state that the issue of admissibility of the communications had been settled and that the respondent state should submit its arguments on the merits.

21. At its 33rd ordinary session held from 15 to 29 May 2003 in Niamey, Niger, the African Commission considered this communication and decided to deliver its decision on the merits.

Law

Admissibility

22. Article 56(5) of the Charter stipulates that communications:

> relating to human rights . . . received by the African Commission shall be considered if they . . . are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged.

23. The complainant alleges that no effective remedies existed at the time of the violation of human rights because the acts of security officers in Sudan were not subject to review by judicial authorities and furthermore, security officials were protected from prosecution by the National Security Act of 1994.

24. The complainant alleges that the National Security Act of 1994, which was in effect at the time of Mr Ghazi Suleiman's arrest, 'by its terms, ensured that the security forces could and would operate completely outside the law'. The result is that the threats of the security officials against Mr Ghazi Suleiman, as well as their ability to carry them out, were acts conducted with impunity and against which Mr Suleiman had no domestic remedy.

25. The complainant states that in practice, procedures that may exist for the redress of human rights abuses by the government of Sudan are often inaccessible to individuals whose human rights have been violated because the regular judicial and the administrative remedies have substantial obstacles that prevent their use.

26. The respondent state requested that this complaint be thrown out or withdrawn on the grounds that it is lacking in veracity, evidence or justification. It is submitted that the complainant is trying to cause damage to the Sudanese judiciary on the basis of baseless allegations that bear no relationship to the substance of the complaint.

27. The respondent state submits that Ghazi Suleiman is a human rights advocate in Sudan and as such there is no way he could have failed to bring a complaint with respect to the threat if it had really taken place. The respondent state further submits that the complainant should have exercised his constitutional rights by instituting court proceedings against the law enforcement agencies for failure to comply with and violating the Constitution and the law.

28. The respondent state also submitted that the domestic remedies are effective and provided legislation and case precedents to support this claim.

29. The rule of exhausting domestic remedies is the most important condition for admissibility of communications, there is no doubt therefore, in all communications seized by the African Commission, the first requirement considered concerns the exhaustion of local remedies in terms of article 56 (5) of the Charter.

30. Article 56(5) of the Charter requires 'the exhaustion of all domestic remedies, if they are of a judicial nature, are effective and are not subordinate to the discretionary power of the public authorities'. (See paragraph 37 of communications 48/90, 50/91 and 89/93 *Amnesty International and Others v Sudan* [(2000) AHRLR 297 (ACHPR 1999)]).

31. Furthermore, the African Commission has held that:

> 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.

(See paragraph 32 of communications 147/95 and 149/96 *Jawara v The Gambia* [(2000) AHRLR 107 (ACHPR 2000)]).

32. The respondent state's assertion of non-exhaustion of domestic remedies will therefore be looked at in this light. The existence of a remedy must be sufficiently certain, not only in theory but also in practice, failing which, it will lack the requisite accessibility and effectiveness. In the present case, the complainant submits that Ghazi Suleiman could not resort to the judiciary of Sudan because of a general fear for his life.

33. In order to exhaust local remedies within the spirit of article 56(5) of the Charter, one needs to have access to those remedies, but if Mr Suleiman is constantly threatened, harassed and imprisoned, of course he would have no access to local remedies, they would be considered to be unavailable to him.

34. The National Security Act of 1994 introduces an unfortunate aspect of the inexistence of remedies by stipulating that 'no legal action or appeal is provided for against any decision issued under this law'. This manifestly makes the procedure less protective of the victim.

35. The right to an appeal is a right falling under the right to have one's cause heard as provided under article 7 of the Charter. The right of appeal is also a determinant for the fulfillment of the requirement of exhaustion of local remedies under article 56(5) of the Charter.

36. It should be noted that the actual application of the law was also made difficult due to the state of emergency in the country during this period. The complainants had difficulty to obtain justice and exhaust existing local remedies due to the political situation of the country. In this case, 'it is reasonable to assume that not only the procedure of local remedies will be unduly prolonged, but also that it will yield no results'. (See communication 129/94 *Civil Liberties Organisation v Nigeria* [(2000) AHRLR 188 (ACHPR 1995)]).

37. For the above reasons, the African Commission declares the communication admissible.

38. The African Commission wishes to acknowledge the information brought to its attention by the respondent state outlining the development that the overnment of Sudan had undertaken in respect of the constitutional reforms to guarantee the civil liberties of its citizens and the judicial system of the country. The African Commission hopes that with these changes, the judicial system will be able to handle matters relating to human rights abuses expeditiously.

Merits

39. Article 9 of the Charter provides: 'Every individual shall have the right to receive information. Every individual shall have the right to express and disseminate his opinions within the law'.

40. The African Commission affirms the 'fundamental importance of freedom of expression and information as an individual human right, as a cornerstone of democracy and as a means of ensuring respect for all human rights and freedoms'.[1]

[1] Declaration of Principles on Freedom of Expression in Africa adopted by the African Commission on Human and Peoples' Rights 32nd ordinary session, October 2002.

41. The African Commission also holds that article 9 'reflects the fact that freedom of expression is a basic human right, vital to an individual's personal development, his political consciousness, and participation in the conduct of public affairs in his country'. (Communications 105/93, 128/ 94, 130/ 94 and 152/96 *Media Agenda and Others Project v Nigeria* [(2000) AHRLR 200 (ACHPR 1998) para 54]).

42. The communication alleges that Mr Ghazi Suleiman was arrested, detained, mistreated, and punished for his promotion and encouragement of human rights, which the respondent state claims are inconsistent with its laws. These activities consisted of speaking out about violations of human rights, encouraging the government to respect human rights, encouraging democracy in his public speeches and interviews, and discussing democracy and human rights with others. These activities have not been conducted secretly, but have been carried out in public by Mr Ghazi Suleiman for many years.

43. It is alleged that Mr Ghazi Suleiman was exercising his right to freedom of expression to advocate human rights and democracy in Sudan and was stopped; or, he was contemplating the exercise of his human rights for the same reasons but was prevented from exercising these rights.

44. During the 27th ordinary session of the African Commission, the representative of the respondent state did not contest the facts adduced by the complainant, however, he stated that the 1998 Constitution of Sudan guarantees the right to freedom of movement (article 23), right to freedom of expression (article 25) and the right to freedom of association (article 26). He did not provide any defense to the allegations of arrests, detentions and intimidation of Mr Ghazi Suleiman.

45. The respondent state did not submit arguments on the merits in respect of this communication. In the view of the foregoing, the African Commission shall base its argument on the elements provided by the complainant and condemn the state's failure not to submit arguments on the merits.

46. In adopting the Resolution on the Right to Freedom of Association, the African Commission noted that governments should be especially careful that

> 2. In regulating the use of this right, the competent authorities should not enact provisions which would limit the exercise of this freedom; 3. The regulation of the exercise of the right to freedom of association should be consistent with states' obligations under the African Charter on Human and Peoples' Rights.[2]

Mr Ghazi Suleiman's speech is a unique and important part of political debate in his country.

[2] See Resolution on the Freedom of Association, adopted at the 11th ordinary session in Tunis, 2 to 9 March 1992.

47. Article 60 of the Charter provides that the African Commission shall draw inspiration from international law on human and people's rights.

48. The European Court on Human Rights recognises that 'freedom of political debate is at the very core of the concept of a democratic society . . .'[3]

49. The African Commission's view affirms those of the Inter-American Court of Human Rights which held that:

> freedom of expression is a cornerstone upon which the very existence of a society rests. It is indispensable for the formation of public opinion. It is also a condition *sine qua non* for the development of political parties, trade unions, scientific and cultural societies and, in general, those who wish to influence the public. It represents, in short, the means that enable the community, when exercising its options, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free.[4]

50. The Inter-American Court states that:

> when an individual's freedom of expression is unlawfully restricted, it is not only the right of that individual that is being violated, but also the right of all others to 'receive' information and ideas.[5]

It is particularly grave when information that others are being denied concerns the human rights protected in the African Charter as did each instance in which Mr Ghazi Suleiman was arrested.

51. The charges levied against Mr Ghazi Suleiman by the government of Sudan indicate that the government believed that his speech threatened national security and public order.

52. Because Mr Suleiman's speech was directed towards the promotion and protection of human rights, 'it is of special value to society and deserving of special protection'.[6]

53. In keeping with its important role of promoting democracy in the continent, the African Commission should also find that a speech that contributes to political debate must be protected. The above challenges to Mr Ghazi Suleiman's freedom of expression by the government of Sudan and violate his right to freedom of expression under article 9 of the African Charter. However, the allegations of arrests, detentions and threats constitute also a violation of article 6 of the Charter.

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[3] *Lingens v Austria*, Judgment of the Eur Crt HR Series AN 236 (April 1992) and *Thorgeirson v Iceland*, Judgment of the Eur Crt HR Series AN 239 (June 1992).

[4] Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (arts 13 and 29 American Convention on Human Rights) Advisory Opinion OC-5/85, Series AN 5, November 1985 at para 70.

[5] Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (arts 13 and 29 of the American Convention on Human Rights) Advisory Opinion OC-5/85, November 13, 1985, Inter-Am Court HR Ser AN 5 at para 30.

[6] Art 6 UN Human Rights Defenders' Declaration.

54. Articles 10 of the Charter provides '[e]very individual shall have the right to free association provided that he abides by the law'.

55. Article 11 of the Charter provides:

> Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law, in particular those enacted in the interest of national security . . . and rights and freedoms of others.

56. By preventing Mr Ghazi Suleiman from gathering with others to discuss human rights and by punishing him for doing so, the respondent state had violated Mr Ghazi Suleiman's human rights to freedom of association and assembly which are protected by articles 10 and 11 of the African Charter.

57. The right to freedom of movement is guaranteed by article 12 of the Charter that reads in relevant paragraph 1: 'Every individual shall have the right to freedom of movement and residence within the borders of the state provided he abides by the law.'

58. The communication alleges that some security officials who prohibited Mr Ghazi Suleiman from traveling to Sinnar, threatened him that if he made the trip, he would be arrested.

59. The complainant states that Ghazi Suleiman was arrested and released after being convicted, sentenced and incarcerated. Before his release, he was made to sign a statement restraining his future freedom, which he refused to sign.

60. The respondent state argues that Mr Ghazi Suleiman has never been prohibited from delivering lectures on human rights. He indicates that Mr Ghazi Suleiman was free to travel and he in fact participated in a human rights conference held in Milan, Italy without any intervention from the authorities. The respondent state adds that there is no control of movement of the people within the national territory, which is in line with article 12 of the African Charter on Human and Peoples' Rights.

61. Mr Ghazi Suleiman was acting to promote the protection of human rights in his country, Sudan. This is not only indicated by his longstanding record of human rights advocacy, but also by the events that transpired around the time of each arrest or act of harassment. These events always concerned actions or statements he made in support of human rights.

62. Such actions and expressions are among the most important exercises of human rights and as such should be given substantial protection that do not allow the state to suspend these rights for frivolous reasons and in a manner that is thus disproportionate to the interference with the exercise of these fundamental human rights.

63. The disproportionate actions of the government of Sudan against Mr Ghazi Suleiman is evidenced by the fact that the government has not

offered Mr Ghazi Suleiman an alternative means of expressing his support for human rights in each instance. Instead the respondent state has either prohibited Mr Ghazi Suleiman from exercising his human rights by issuing threats, or punished him after summary trial, without considering the value of his actions for the protection and promotion of human rights.

64. By stopping Mr Ghazi Suleiman from traveling to Sinnar, which is located in the Blue Nile State, a part within the country under the control of the government of Sudan, to speak to a group of human rights defenders, the government of Sudan violated Mr Ghazi Suleiman's right to freedom of movement in his own country. This constitutes a violation of article 12 of the Charter

65. The fact that Mr Ghazi Suleiman advocates peaceful means of action and his advocacy has never caused civil unrest is additional evidence that the complained-about actions of the respondent state were not proportionate and necessary to the achievement of any legitimate goal. Furthermore, the actions of the government of Sudan not only prevent Mr Ghazi Suleiman from exercising his human rights, but these actions have a seriously discouraging effect on others who might also contribute to promoting and protecting human rights in Sudan.

66. For the above reasons, the interference with Mr Ghazi Suleiman's rights of freedom of expression, association and assembly cannot be justified.

For these reasons the African Commission:

- Finds the Republic of Sudan in violation of articles 6, 9, 10, 11 and 12 of the African Charter on Human and Peoples' Rights,
- Requests the government of Sudan to amend its existing laws to provide for *de jure* protection of the human rights to freedom of expression, assembly, association and movement.

* * *

Doebbler v Sudan

(2003) AHRLR (ACHPR 2003)

Communication 236/2000, *Curtis Doebbler v Sudan*
Decided at the 33rd ordinary session, May 2003, 16th Annual Activity Report
Rapporteur: Chirwa

Admissibility (exhaustion of local remedies, 27)
Cruel, inhuman or degrading treatment (corporal punishment, 35-38, 42, 44)
Interpretation (international standards, 38)

Summary of facts

1. The complainant alleges that on 13 June 1999, the students of the Nubia Association at Ahlia University held a picnic in Buri, Khartoum, along the banks of the river. Although under the law no permission is necessary for such a picnic, the students nevertheless sought permission and got it from the local authorities.

2. After starting off for some hours, security agents and policemen accosted the students, beating some of them and arresting others. They were alleged to have violated 'public order' contrary to article 152 of the Criminal Law of 1991 because they were not properly dressed or acting in a manner considered being immoral.

3. The complainant avers that the acts constituting these offences comprised of girls kissing, wearing trousers, dancing with men, crossing legs with men, sitting with boys and sitting and talking with boys.

4. The eight students arrested were Hanan Said Ahmed Osman, Sahar Ebrahim Khairy Ebrahim, Manal Mohammed Ahamed Osman, Omeima Hassan Osman, Rehab Hassan Abdelmajid, Huda Mohammed Bukhari, Noha Ali Khalifa and Nafissa Farah Awad.

5. On 14 June 1999, the eight students referred to in the above paragraph were convicted and sentenced to fines and or lashes. The said punishment was executed through the supervision of the court. This type of punishment is widespread in Sudan.

6. Complainant alleges that the punishment meted out was grossly disproportionate, as the acts for which the students were punished were minor offences, which ordinarily would not have attracted such punishments. The alleged punishments therefore constitute cruel, inhuman and degrading punishment.

7. No written record of the proceedings is publicly available.

8. The complainant submits on the issue of exhaustion of local remedies that since the sentences have already been executed, domestic remedies would no longer be effective.

Complaint

9. The complainant alleges violation of article 5 of the Charter.

Procedure

10. The complaint was received at the Secretariat of the African Commission on 17 March 2000.

11. At the 27th ordinary session held from 27 April to 11 May 2000 in Algiers, Algeria, the African Commission heard oral submissions from the parties, decided to be seized of the communication and consolidated it with all the other communications against the Republic of Sudan. The African Commission then requested the parties to address it on the issue of exhaustion of domestic remedies.

12. The above decision was communicated to parties on 30 June 2000.

13. At its 28th ordinary session held from 23 October to 6 November 2000 in Cotonou, Benin, the African Commission decided to defer consideration of this communication to the 29th ordinary session and requested the Secretariat to incorporate the oral submissions of the respondent state to enable the African Commission take a reasoned decision on admissibility.

14. At the 29th ordinary session held from 23 April to 7 May 2001 in Tripoli, Libya, the representatives of the respondent state present at the session informed the African Commission that they were not aware of the communications 235/2000 and 236/2000 *Doebbler v Sudan*. During the session, the Secretariat provided the representatives of the respondent state with copies of the said communications. The African Commission decided to defer consideration of these communications to the next session.

15. On 19 June 2001, the Secretariat of the African Commission informed the parties of the decision of the African Commission and requested the respondent state to forward its written submissions within two months from the date of notification of this decision.

16. During the 30th ordinary session held from 13 to 27 October 2001 in Banjul, The Gambia, the African Commission heard the oral submissions of the parties with respect to this matter. Following detailed discussions, the African Commission noted that the respondent state had not responded to the issues raised by the complainant. The African Commission therefore decided to defer consideration of these communications to the 31st session, pending receipt of detailed written submissions from the respondent state in response to the submissions of the complainant.

17. On 15 November 2002, the Secretariat of the African Commission informed the parties on the decision of the African Commission and requested the respondent state to forward its written submissions within two months from the date of notification of this decision.

18. At its 31st ordinary session held from 2 to 16 May 2002, in Pretoria, South Africa, the African Commission heard submissions from both parties and declared the communication admissible.

19. On 29 May 2002, the respondent state and the complainants were informed of the African Commission's decision.

20. At the 32nd ordinary session, the representative of the respondent state made oral and written submissions requesting the African Commission to review its decision on admissibility relating to all the communications brought by the complainant against the government of Sudan. The African Commission informed the respondent state that the issue of admissibility of the communications had been settled and that the respondent state should submit its arguments on the merits.

21. At its 33rd ordinary session held from 15 to 29 May 2003 in Niamey, Niger, the African Commission considered this communication and decided to deliver its decision on the merits.

Law

Admissibility

22. Article 56(5) of the Charter stipulates that

> communications relating to human and peoples' rights . . . received by the Commission shall be considered if they: . . . are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged . . .

23. The complainant alleges that no effective domestic remedies exist as the punishments were carried out immediately after the verdict and sentencing by the court of first instance. As a result, any right of appeal was thus illusionary and ineffective for preventing the cruel, inhuman and degrading punishment to which the petitioners were subjected. The complainant submits that a remedy that has no prospect of success does not constitute an effective remedy and states that the Criminal Code of Sudan had been steadfastly applied in numerous cases and hence there was no reasonable prospect of success of having it declared invalid.

24. He adds that a visa was denied to the legal representative of the victims. By failing to ensure that the victims were given a fair hearing in which their lawyers represented them in matters concerning their human rights under the Charter, the government of Sudan denied the victims the right to local effective remedies.

25. The respondent state claims that the lawyers for the accused have not submitted any appeal against the judgment of the Court of Cassation, and after the expiry of the stipulated period for submitting an appeal to the

Supreme Court the judgment became final. The defendants had the possibility of appealing against the judgment of the Court of Cassation to the Supreme Court since article 182 of the 1991 Criminal Procedure [Act] entitles them to this right.

26. The respondent state believes that the case does not deserve to be considered and submits that the accused students committed acts deemed criminal by the existing laws of the country; they legally appeared before the courts and enjoyed their right to defense by a lawyer. They had an opportunity to appeal, which they did only once, and have not exhausted the opportunities which the law offered them. Article 56(5) of the Charter provides for the requirement of exhausting all local remedies before appealing to the African Commission. He therefore requests the African Commission to declare the communication inadmissible.

27. In order to exhaust the local remedies within the spirit of article 56(5) of the Charter, one needs to have access to those remedies but if victims have no legal representation it would be difficult to access domestic remedies.

28. For the above reasons, the African Commission declares the communication admissible.

Merits

29. Article 5 of the African Charter reads:

> Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

30. Complainant alleges that eight of the students of the Ahlia University were arrested and convicted by a public order court for acts that violated the 'public order'. He states that they were all sentenced to fines and between 25 and 40 lashes, the lashes were carried out in public on the bare backs of the women using a wire and plastic whip that leaves permanent scares on the women.

31. He points out that the instrument used to inflict the lashes was not clean and no doctor was present to supervise the execution of punishment and that the punishment therefore, could have resulted in sever infections to the victims.

32. Complainant alleges that the punishment of lashings is disproportionate and humiliating because it requires a girl to submit to baring her back in public and to the infliction of physical harm which are contrary to the high degree of respect accorded to females in Sudanese society.

33. The respondent state argues that the court found the accused guilty and decided to have them flogged with either a fine of 50 000 Sudanese pounds each, or one-month imprisonment.

34. The respondent state informed the African Commission that the lashings were justified because the authors of the petition committed acts found to be criminal according to the laws in force in the country.

35. There is little or no dispute between the complainant and the government of Sudan concerning the facts recounted above. The only dispute that arises is to whether or not the lashings for the acts committed in this instance violate the prohibition of article 5 as being cruel, inhumane, or degrading punishment.

36. Article 5 of the Charter prohibits not only cruel but also inhuman and degrading treatment. This includes not only actions which cause serious physical or psychological suffering, but which humiliate or force the individual against his will or conscience.

37. While ultimately whether an act constitutes inhuman degrading treatment or punishment depends on the circumstances of the case. The African Commission has stated that the prohibition of torture, cruel, inhuman, or degrading treatment or punishment is to be interpreted as widely as possible to encompass the widest possible array of physical and mental abuses. (See communication 225/98 *Huri-Laws v Nigeria* [(2000) AHRLR 273 (ACHPR 2000)]).

38. The European Court of Human Rights in *Tyler v United Kingdom*[1] applying article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 221, entered into force 3 February 1953, that is substantially similar prohibition of cruel, inhuman, and degrading punishment as article 5 of the Charter, has similarly held that even lashings that were carried out in private, with appropriate medical supervision, under strictly hygienic conditions, and only after the exhaustion of appeal rights violated the rights of the victim. The Court stated that:

> the very nature of judicial corporal punishment is that it involves one human being inflicting physical violence on another human being. Furthermore, it is institutionalised violence that is in the present case violence permitted by law, ordered by the judicial authorities of the state and carried out by the police authorities of the state. Thus, although the applicant did not suffer any severe or long lasting physical effects, his punishment whereby he was treated as an object in the power of authorities — constituted an assault on precisely that which it is one of the main purposes of article 3 to protect, namely a person dignity and physical integrity. Neither can it be excluded that the punishment may have had adverse psychological effects.

39. The complainant alleges that the punishment meted out was grossly disproportionate, as the acts for which the students were punished were

[1] *European Court of Human Rights, 26 Eur Ct HR (ser. A) (1978), 2 EHRR 1 (1979-80) at para 30; Ireland v United Kingdom*, European Court of Human Rights, 25 Eur Ct HR (1978), 2 E.H.R.R. 25 (1979-80) at para 162.

minor offences, which ordinarily would not have attracted such punishments.

40. The complainant submits that according to Islamic law the penalty of lashings may be meted out for some serious crimes. For example, *hadd* offenses may be punished with lashes under Sharia' because they are considered grave offences[2] and strict requirements of proof apply. Minor offenses, however, cannot be punished as *hadd* because the Qur'an does not expressly prohibit them with a prescribed penalty. The acts committed by the students were minor acts of friendship between boys and girls at a party.

41. The African Commission, however, wishes to assert that it was not invited to interpret Islamic Sharia' Law as obtains in the Criminal Code of the respondent state. No argument was presented before it nor did the African Commission consider arguments based on the Sharia' Law. The African Commission hereby states that the inquiry before it was confined to the application of the African Charter in the legal system of a state party to the Charter.

42. There is no right for individuals, and particularly the government of a country, to apply physical violence to individuals for offences. Such a right would be tantamount to sanctioning state sponsored torture under the Charter and contrary to the very nature of this human rights treaty.

43. The facts in this communication have not been disputed by the respondent state. In their oral submissions at the 33rd ordinary session, the respondent state confirmed this by stating that it was the opinion of the respondent state that it was better for the victims to have been lashed rather than hold them in detention for the said criminal offences and as such deny them of the opportunity to continue with their normal lives.

44. The law under which the victims in this communication were punished has been applied to other individuals. This continues despite the government being aware of its clear incompatibility with international human rights law.

For these reasons, the African Commission:

- Finds the Republic of Sudan in violation of article 5 of the African Charter on Human and Peoples' Rights and,
- Requests the government of Sudan to: immediately amend the Criminal Law of 1991, in conformity with its obligations under the African Charter and other relevant international human rights instruments; abolish the penalty of lashes; and take appropriate measures to ensure compensation of the victims.

[2] There are six crimes to which the *hadd* ('fixed') penalties apply, namely, *zina* (fornication, Qur'an 24:2), *qadhf* (false accusation of fornication, Qur'an 24:4), *sukr* (drunkenness, prescribed in the Qur'an and Sunnah), *sariqa* (theft, Qur'an 5:38), *ridda* (apostasy), and *haraba* (rebellion, Qur'an 5:33). Also see Abdullahi Ahmed An-N'aim, *Towards an Islamic Reformation: Civil Liberties, Human Rights, and International Law* (1990) at 108 and accompanying endnotes.

DOMESTIC DECISIONS

GHANA

Ghana Commercial Bank Ltd v Commission on Human Rights and Administrative Justice

(2003) AHRLR (GhSC 2003)

Ghana Commercial Bank Ltd v Commission on Human Rights and Administrative Justice
Supreme Court, 29 January 2003
Judges: Ampiah, Atuguba, Wood, Brobbey and Baddoo
Extracts: Judgments of Brobbey. Full text of judgment on www.chr.up.ac.za
Previously reported: [2003-2004] SCGLR 91
Work (termination of employment, 8, 10)
Constitutional supremacy (9)
Equal protection of the law (unequal treatment by private enterprise, 10-14, 16, 17, 19)
Evidence (enforcement of decisions of Human Rights Commission, 24-29, 51)
Fair trial (enforcement of decisions of Human Rights Commission, 42, 52)

Brobbey J S C

[**1.**] The facts that gave rise to this appeal are as follows: The appellant, the Ghana Commercial Bank, employed the complainant for some twenty-one years. In 1984, his appointment was terminated at a time when he was a manager of the bank. The reason for the termination was that he had contravened the regulations of the bank by granting a loan facility of six million seven hundred thousand *cedis* (¢6 700 000) to a customer of the bank without prior approval from its head office. In addition to terminating the appointment, the appellant withheld the entitlements of the complainant until such time that the customer would pay the loan.

[**2.**] According to the complainant, he granted the facility in the normal course of business and after he had satisfied himself of the customer's assets, the purpose of the loan and the viability of the customer's business. Besides, the loan was also secured with assets of the customer worth twenty-five million *cedis* (¢25 000.00).

[**3.**] Dissatisfied with the action taken against him, the complainant petitioned the Commission on Human Rights and Administrative Justice for redress. After investigating the petition, the Commission decided in favour

of the complainant by recommending that the appellant should pay the complainant some sums of money. The appellant failed to comply with the recommendations of the Commission. To enforce its decision and recommendations, the Commission then applied to the High Court in the terms of article 229 of the 1992 Constitution and the Commission on Human Rights and Administrative Justice Act, 1993 (Act 456).

[**4.**] The application was made by originating summons or originating motion of notice and was supported by an affidavit together with the decision of the Commission. The appellant resisted the application by filing an affidavit in opposition. The court heard arguments from the Commission and the appellant, after which it endorsed the decision of the Commission. An order of enforcement was then issued. The appellant promptly appealed to the Court of Appeal against the decision of the High Court. The Court of Appeal upheld the decision of the High Court, subject to some variations. Dissatisfied with that decision, the appellant appealed to this court on the following four grounds:

(1) the judgment was not supported by law and the evidence adduced at the hearing;
(2) the trial court not having seen and examined the evidence adduced before the commission, erred in seeking to enforce a ruling based on the evidence;
(3) the petition was statute-barred and the respondent Commission should not have entertained it; and
(4) the damages awarded by the court cannot be justified in law.

[**5.**] In its submissions, the appellant made a number of points in support of the first ground of appeal. One of the points was that it was wrong for the Commission for Human Rights and Administrative Justice (CHRAJ), the respondent, the High Court and the Court of Appeal, to have concluded that the termination of the complainant's employment was wrong because the reasons for the termination were harsh, unjust, unfair and discriminatory. That point was premised on the principle that the appellant had no obligation to have provided any reason for terminating the appointment so long as the procedure agreed by the contract of employment was complied with. Therefore the reason for terminating the employment was irrelevant and could not be used for describing it as harsh, unjust, unfair and discriminatory. In support of this principle, counsel for the appellant cited *Bannerman-Menson v Ghana Employers Association* [1996-97] SCGLR 417 *Bank of Ghana v Nyarko* [1973] 2 GLR 275, and *Aryee v State Construction Corporation* [1984-86] 1 GLR 424, CA.

[**6.**] There is no doubt that the decisions in these cases were as stated by counsel for the appellant. Those decisions, however, have to be considered in the light of the statutory powers given to CHRAJ. That Commission was created by the 1992 Constitution, art 216. The functions of the Commission were set out in article 218 of that Constitution and they include the following (as set out in clauses (a), (c) and (d) of article 218):

(a) to investigate complaints of violations of fundamental rights and freedoms, injustice, corruption, abuse of power and unfair treatment of any person by a public officer in the exercise of his official duties;
(b) to investigate complaints concerning practices and actions by persons, private enterprises and other institutions where those complaints allege violations of fundamental rights and freedoms under this Constitution; . . .
(d) to take appropriate action to call for the remedying, correction and reversal of instances specified in paragraphs (a), (b) and (c) of this clause through such means as are fair, proper and effective . . .

[**7.**] The import of these provisions is quite clear: it is simply that the CHRAJ was set up to investigate complaints of particular types, namely, complaints of violations of fundamental rights and freedoms. The scope of the violations that it can investigate has been elaborated in chapter five of the 1992 Constitution. Their investigations may cover violations of fundamental rights even in private enterprises, such as the Ghana Commercial Bank, the appellant herein.

[**8.**] What has to be examined critically is whether or not the complaint, which the complainant made to the Commission, was one covered by the constitutional provisions referred to, namely, whether or not the complaint raised violations of fundamental human rights and freedoms. There is no doubt that the complaint raised issues on violation of fundamental rights in relation to the complainant's right to work or his right to fair pay for the work he had done. In the instant case, the Commission approached the issues raised by the complaint from the point of view of violation of fundamental human rights and freedoms. On the other hand, the appellant approached solution to the problems raised by the complaint from the point of view of common law and naturally relied on common law principles enunciated in previously decided cases.

[**9.**] The well-established principle is that where the common law conflicts with terms of a statute, the statute should prevail. In the instant case, it would appear that common law principles enunciated in those cases referred to by counsel conflict with the specific provisions of the 1992 Constitution establishing the Commission and giving it specific functions to perform. It is obvious that the provisions of the Constitution should prevail over the common law principles. Considering the appeal on those lines, the submissions of counsel for the appellant did not answer the basic issue posed before the commission, namely, whether or not the complaint raised violations of fundamental rights and freedoms.

[**10.**] It was part of the case of the complainant that he granted a loan facility of six million seven hundred thousand *cedis* (¢6 700 000). That led to the appellant terminating his appointment and withholding his entitlements. According to the complainant, other managers had granted similar facilities far in excess of the amount he granted. Some of the amounts granted were as must as 36, 41, 57, 92, 180 and 230 million *cedis*. Nothing was done to the managers who granted those facilities. They were allowed to continue working or did not have their appointments termi-

nated. The complainant contended that the termination of his appointment for a much smaller amount of six million seven hundred thousand *cedis* (¢6 700 000) was discriminatory. In its decision, the Commission accepted that argument. The High Court and the Court of Appeal endorsed the decision on that point. The appellant forcefully argued that the decision and the endorsements were wrong. The basis of that argument was that the appellant bank had clear rules to the effect that its managers had a ceiling in respect of the amount that could be granted as loan facility. Beyond the ceiling, no manager was allowed to grant any facility without express authorisation from its head office. Any manager who breached the regulations did so at his own risk and was subject to sanctions including the type meted out to the complainant. To the appellant, the breach of the regulations by the complainant was sufficient ground to terminate his appointment.

[**11.**] It is apparent from the record of appeal that the appellant did not dispute the fats that those heavier amounts were granted by other managers and further that the appointments of those managers were not terminated. By its silence on the two facts, it became apparent that the complainant had been treated differently but more harshly from other managers for much less breach of the rules of the appellant. By definition, a person is said to have been discriminated against where he is treated differently on grounds of race, colour or religion. Granting that there are clear rules on the granting of loans, the appellant should have been able to explain to the respondent Commission or the High Court why, in spite of the existence of those clear rules, those other managers, who had committed what *prima facie* amounted to worse breaches of the rules, were not merely left off the hook but were also allowed to continue working as if what they did was nothing at all. In the absence of any explanation, the Commission, the High Court and the Court of Appeal are obviously right in concluding that the termination of the appointment of the complainant was indeed discriminatory.

[**12.**] If for any reason the appellant was not sure whether or not the termination amounted to discrimination, the 1992 Constitution contains provisions that clarify the issue of discrimination. Article 17 reads as follows:

a. All persons shall be equal before the law.
b. A person shall not be discriminated against on grounds of gender, race, colour, ethnic origin, religion, creed or social or economic status.
c. For the purposes of this article, 'discriminate' means to give different treatment to different persons attributable only or mainly to their respective descriptions by race, place of origin, political opinions, colour, gender, occupation, religion or creed, whereby persons of one description are subjected to disabilities or restrictions to which persons of another description are not made subject or are granted privileges or advantages which are not granted to persons of another description.

[**13.**] When the fundamental law of the land, ie article 17 of the 1992 Constitution, mandates that everyone is equal before the law, the appel-

lant Ghana Commercial Bank, cannot operate a system by which its employees are not equal before the law. A system by which there appears to be different laws for different employees or by which the laws in the bank are applied differently to different employees is surely discriminatory. It is no defence to argue that the reason for the different treatment has not been proved. It is equally no defence to argue that the rules of the bank must be obeyed but the complainant had not obeyed them and therefore there was justification in terminating his appointment.

[**14.**] Where laws in an institution like the appellant bank are applied differently and inconsistently, it is probable that that inconsistency may lead some employees to believe that the laws may not always be invoked or that the employee's actions may be exempted. That in itself may be an inducement for some employees not to strive to obey the laws. When that happens, the employer, like the appellant herein, would have created a situation for which it has itself to blame.

[**15.**] The most fallacious argument was the contention by counsel for the appellant to the effect that no matter how beneficial an action may be, if it does not comply with the rules or laid down procedure, the action will still be wrong. In support of that argument, counsel cited the five to four majority decision of the Supreme Court in *Tsatsu Tsikata (1) v Attorney-General (1)* [2001-2002] SCGLR 189. The argument was based on the wrong application of the *ratio decidendi* of the case. The principle relied upon came out of the said first five to four majority decision. When the case went on review, the argument put forward by counsel for the appellant was debunked in the six to five majority decision also reported as *Tsatsu Tsikata (2) v Attorney-General (2)* [2001-2002] SCGLR 620 which reversed the original five to four majority decision. In any case, the authority in that case did not support the argument made on behalf of the appellant.

[**16.**] The basic question at stake is why the rules of the bank should be applied differently from one manager to another; or why the breach of the rules of the bank should result in the termination of one manager but the breach of the same rule in worse circumstances, should attract consequences totally different from the termination meted out to another manager. For that different treatment, no answer was given by the appellant. The different treatment meted out to the complainant for the lesser breach of the appellant's rules constituted the essence of the allegation of discrimination.

[**17.**] On those facts, the termination of the appointment of the employment of the complainant was discriminatory. Article 17 that deals with discrimination is one of the provisions on fundamental human rights under the 1992 Constitution. The action of the appellant in terminating the appointment of the complainant was in clear violation of that article.

[**18.**] Since the Commission's jurisdiction over the complaint is grounded on violations of fundamental rights and freedoms, it is only fair for it to

seek solution to that complaint upon consideration of human rights principles. This explains why the Commission considered the complaint on the basis of violation of fundamental human rights and freedoms and not on common law principles. Having found that the termination of the complainant's employment was unjust, discriminatory and unfair, it was right in deciding that there had been violation of fundamental rights and freedoms in terms of article 218(a) of the 1992 Constitution.

[**19.**] The decision of the Commission on the complaint of discrimination and its endorsement by the High Court and the Court of Appeal were supported by the fundamental law of the land, namely, the 1992 Constitution and the evidence on the record. The attempt by counsel for the appellant to impugn that decision must fail. There was no merit in the first ground of appeal and it should therefore be dismissed.

[**20.**] In his submissions before this court, counsel for the appellant contended that where parties have freely entered into a contract in which they have spelt out their rights and liabilities, and one party exercises his rights under the contract by complying with a term of the contract, that compliance or exercise cannot be described as unreasonable, unfair or oppressive. The short answer to this point is that if the same act which amounts to an exercise of contractual rights gives rise to violation of fundamental human rights and freedoms, an institution like the Commission granted statutory authority to investigate the violation or otherwise of the fact, may assume jurisdiction to investigate the violation as well. The establishment of the Commission therefore creates a serious situation in Ghana and seems effectively to affect common law principles on contracts, employment and many other issues.

[**21.**] The second ground of appeal was that 'The trial court not having seen nor examined the evidence adduced before the [C]ommission, erred in seeking to enforce a ruling based on that evidence.'

[**22.**] When the recommendations made after the investigations were not enforced by the appellant one year from the date they were made, the Commission instituted action in the High Court under the Commission for Human Rights and Administrative Justice Act, 1993 (Act 456), section 18(2) for the enforcement of those recommendations.

[**23.**] There are no special rules under the 1992 Constitution or Act 456 specifying the method to be adopted when the Commission seeks to enforce its recommendations. The Commission took the action by originating summons or notice of motion. As the Court of Appeal concluded by reference to *People's Popular Party v Attorney-General* [1971] 1 GLR 138 (as stated in the headnote):

> when a statute (in this case the Constitution, article 28(2)) provides for an application to court without specifying the form in which it is to be made and the normal rules of court do not expressly provide for any special procedure, such an application may be made by an originating motion.

On this authority, the use of originating summons or notice of motion by the Commission could not be faulted.

[**24.**] When the Commission went to court by originating notice of motion, it was supported by affidavit and the decision embodying its recommendations. The appellant contested it by filing affidavit in opposition. Since originating notice of motion is determined by affidavit evidence, if the judge to determine it is satisfied with that kind of evidence before him or her, judgment may be given on the basis of that evidence.

[**25.**] However, there are only two conditions under which the investigation proceedings before the Commission may have to be laid before the judge. The first is where the trial judge considers it necessary that the investigation proceedings should be produced before the trial court. That court does not need to order the re-investigation of the decision. This is because if the proceedings are produced and it is found that the decision embodying the recommendation is not supported by the proceedings, the application to enforce the decision or recommendation will fail and just has to be dismissed. The onus is on the Commission seeking the enforcement to ensure that what is sought to be enforced, is supported by the investigation proceedings. That is subject to the discretion of the judge and how the judge sees the issues in the case. This may be considered as subjective, but, of course, it is subject to reasonable assessment and evaluation of the evidence before the judge. That discretion may be exercised to call for the proceedings only where such course is, in the opinion of the judge, necessary in order to do substantial justice to the parties. The occasion when this criterion may be said to exist to warrant such action from the judge will depend on the facts of each case and will differ from case to case.

[**26.**] The second occasion is where one party, usually the defendant, raises issues that can only be resolved by re-examination of the evidence before the investigating body, or by production of the record of proceedings before the investigating body, ie the Commission.

[**27.**] In effect, there can be no categorical rule (as wrongly contended by the appellant) that whenever the Commission seeks to enforce its recommendation by originating notice of motion, the court where the motion has been filed has to call for the record of proceedings of the investigations culminating in the recommendations. It all depends on the circumstances of the case, how the judge considers the evidence before him/her and the nature of affidavit in opposition filed by the defendant or respondent. The onus is on the party who wishes the production of the record to file the relevant affidavit which will raise such issues as will convince the judge that the only way that the judge can do justice to the parties would be to call for the investigation proceedings.

[**28.**] In the instant case, the Commission supported its action before the High Court with a copy of its decision following the investigations as well

as an affidavit. In its defence, the appellant was also enjoined to file an affidavit in opposition and that too was done. In the latter affidavit, the appellant did not raise any issue that called for re-opening of the investigations or production of the investigation proceedings. If any such issue was raised in the affidavit in opposition that would have called for a ruling from the High Court judge. It was rather in the affidavit in support of the summons that the Commission deposed to the fact that the complaint was investigated by both written and oral evidence from the parties. That decision sent to the High Court for enforcement was obviously based on those investigations. The appellant must have been satisfied with the deposition. That was why in its affidavit in opposition and in its arguments before the High Court, it never raised any issue requiring the production of the investigation proceedings before by the High Court. If the appellant desired that the proceedings should have been laid before the High Court, it should have been raised that before the High Court, and not after the proceedings in the High Court had been concluded.

[**29.**] Since the issue was not raised in the High Court, if the judge was satisfied with the originating summons, the affidavits and arguments before her, she was entitled to deliver her judgment on them. That was precisely what she did and the appellant could not complain much later that the investigation proceedings should have been laid before the judge making the enforcement order. There was nothing in the record to indicate that the judge had difficulty in arriving at her decision to order the enforcement merely because the investigating proceedings were not before her.

[**30.**] The first time that the appellant raised the issue of production of the proceedings was in the submissions filed on its behalf. That was wrong procedure because it was done without seeking to file any motion to adduce fresh evidence. The point on re-opening the investigations or production of the proceedings before the trial judge was consequently untenable. There was no merit in the second ground of appeal and that too should be dismissed.

[**31.**] By far the most fundamental ground of appeal was ground (3) by which the appellant contended that the entire claim of the complainant before the Commission was statute-barred. The appellant's argument in support of that ground was based on the provisions of the Limitations Decree, 1972 (NRCD 54) and the Commission for Human Rights and Administrative Justice Act, 1993 (Act 456). NRCD 54, section 4 provides that no action founded on tort or simple contract shall be brought after the expiration of six years. In the instant case, the complainant was dismissed in 1984. He lodged his complaint with the Commission in 1993, nine years later. It was argued on behalf of the appellant that in terms of NRCD 54, the action was barred after 1990 and therefore the commission should not have acceded to investigate the complaint.

[**32.**] On the other hand, the Commission contended that the Limitations Decree, 1972 was not applicable to investigations by the Commission.

[**33.**] The case of *Commission on Human Rights and Administrative Justice (1) v Attorney-General* [1998-99] SCGLR 871 was cited to support that contention. That case decided that the Limitations Decree, 1972 did not apply to investigations by the Commission because the Commission is not a court.

[**34.**] A careful reading of that case will reveal that the judgment distinguished between the powers and functions of the Commission and the enforcement of its decisions or recommendations. From pages 882 to 885 of the report on the case, the powers and functions of the Commission were discussed. The objects and functions of the Commission were rightly described as investigative and educational.

[**35.**] As was stated at the beginning of this opinion, the Commission has been set up to investigate violations of fundamental rights and freedoms, as stated in article 218(a) of the Constitution and section 7 of Act 456. The scope of the matters that the Commission may investigate is dilated in chapter five of the 1992 Constitution and the long title of Act 456.

[**36.**] Those two provisions merely confine the matters that the Commission may investigate to violations of fundamental rights and freedoms. It is rare to talk of violations in the future. In this country, violations of fundamental human rights and freedoms occur before they become an issue. History or the timing of the violation is therefore of significance. The 1992 Constitution did not specify the time within which the violations may be started or concluded. It would appear that the omission was deliberate. Subject to the provisions of the Constitution, there is no time limit in terms of time on how far the Commission can go in respect of its investigations. That means that subject to the 1992 Constitution, the Commission can investigate any matter that concerns violations of fundamental rights and freedoms irrespective of when the violation took place. To that extent, it can correctly be stated that the functions of the Commission, in so far as they are investigative of violations of fundamental rights and freedoms, are not subject to the Limitation Decree, 1972 (NRCD 54).

[**37.**] It is significant to emphasise on the peculiar nature of the particular investigative power of the Commission, ie into fundamental rights and freedoms. That is the justification for taking the powers and functions of the Commission out of NRCD 54. It is not the mere fact of the general investigative powers *simpliciter*.

[**38.**] Another strong reason that supports the non-applicability of NRCD 54 to the investigative functions of the Commission is the fact that it is possible that its investigations may unearth the Commission of a criminal offence that may be recommended for prosecution. It is settled law that any criminal offence can be prosecuted at any time. Excepting express provisions in a statute barring prosecution, public policy mandates that

criminals be prosecuted and punished whenever they can be laid hands on but should not be allowed to get away with crimes by mere affluxion of time. Public policy therefore supports the view that the Limitations Decree, 1972 should not apply to the investigative functions of the Commission.

[**39.**] It has to be pointed out that these arguments concern the application of the Limitation Decree, 1972 only. As was stated in *Commission on Human Rights and Administrative Justice (1) v Attorney-General (supra),* Act 456, section 13(2)(a) contains built-in limitations that constrain time in respect of matters that the Commission may investigate and that provision is obviously binding on the Commission.

[**40.**] Investigating violations of fundamental rights and freedoms is one thing, and enforcing the decisions or recommendations of the Commission is another matter altogether. The 1992 Constitution envisages that judicial powers are essential in order to enforce the decisions or recommendations of the Commission. That is why care has been taken to ensure that enforcement of the decision or recommendation of the Commission should be referred to the courts. By article 125(3) of the Constitution, judicial power in the country has been vested in the judiciary. The Commission is not part of the judiciary. Just like the provisions in the Constitution and those in Act 456, the case referred to, namely, *Commission on Human Rights and Administrative Justice (1) v Attorney-General* rightly makes it clear that the Commission has no judicial powers. For the purpose of performing its functions, it has some powers similar to those exercised by the courts, especially those powers specified in article 219 of the Constitution. Those powers, however, do not constitute the Commission into a court.

[**41.**] After making recommendations based on its investigations, what the Commission has been empowered to do (as stated in article 229 of the Constitution) is to: 'bring an action before any court in Ghana and may seek any remedy which may be available from that court'. There are similar provisions in Act 456, section 18(2), save that the section states that the Commission 'may seek such remedy as may be appropriate for the enforcement of the recommendations of the [C]ommission'. When the Commission has made its recommendation or taken its decision that is not complied with, the law requires the Commission to refer the decision or recommendation to the courts for enforcement. When reference is made to the court for enforcement, the court is to order the enforcement of the decision within the framework of laws it was set up to operate. If nothing at all, this will seem to be emphasised by the constitutional provision in article 229 that the Commissioner 'may seek any remedy available in that court'. The remedy available in that court must be remedy permissible by the law, including statutory law. If the remedy to be granted goes contrary to law, it will surely not be remedy available in a court of law like the High Court.

[**42.**] In the instant case, the cause of action accrued in 1984. Under section 4 of the Limitation Decree, 1972 the complainant had six years to institute action to enforce his rights. He took action by lodging the

complaint with the Commission in 1993, nine years later. Therefore, by the time he took action on his complaint at the Commission and the Commission made its decision or recommendation and referred it to the High Court for enforcement, section 4 of the Decree had barred the enforcement by the High Court. The remedy barred by law could not by any stretch of the imagination or strength of argument be described as remedy available in a High Court of justice, like the High Court in the instant case. The enforcement of the instant decision was not available in any High Court. The High court therefore erred in ordering the enforcement of the decision of the Commission.

[**43.**] The courts have been established to administer justice according to law. Administering justice according to law means according to the laws of the land, statutory and common law inclusive. No court will consciously order the enforcement of any decision that it knows to have infringed aspects of the laws of the land. That will be absurd and the thought of it would be inconceivable. It would only do so where there are express provisions of the law permitting the infringement. In the instant case, there are no express provisions in the 1992 Constitution or any other statute permitting the infringement of the Limitation Decree, 1972 by the courts.

[**44.**] It has already been explained that when the decision of the Commission was referred to the court for enforcement, the reference may not give rise to automatic re-opening of the decision or re-investigation. At the same time, the reference does not compel the court to rubber stamp the enforcement. It will, at best, call for the record of the proceedings giving rise to the decision only if it can be demonstrated that, that is necessary to do justice to the parties in the case. After calling for the record, it is not impossible for the court in the interest of justice to consider whether any aspect of the decision was supported by the investigation proceedings of the case.

[**45.**] The possibility that the case may be re-opened underscores the fact that the court has no obligation to blind itself to flaws or legal infringements in the decision or the investigation that gave rise to the decision. To argue that even if the decision of the Commission infringes the Limitation Decree, 1972 it should nevertheless be enforced by the court would not be different from arguing that if the decision of the Commission amounts to a nullity or illegality, it should nevertheless be enforced because it came from the Commission. That argument cannot be right and should not be countenanced.

[**46.**] One serious observation apparent in this appeal is the language that counsel for the appellant used in conducting his case. On some occasions, he referred to the decision of the Commission and its use of some authorities as 'fraudulent'. Fraud connotes a crime and has very serious but pejorative connotations. Counsel should not have used that word to describe what the Commission did when all that he was trying to put across was the fact that he did not agree with the actions or application of the principle by the Commission. The Commission protested in its reply and

there was every justification for the protest. The words chosen by counsel for the appellant were not merely inappropriate but were wrongly used in those circumstances. Nobody is perfect. Counsel for parties do make one mistake or the other at various times but if the mistake does not import crime, it should not be described as such. For instance, counsel for the appellant contended in his submissions before this court that the appellant in the High Court challenged the findings of the Commission. That was totally wrong because the affidavit filed on behalf of the appellant was challenging the facts relied on in arriving at the decision of the Commission. Would the appellant's counsel be happy for his submissions to have been described as fraudulent merely because he stated facts that were inaccurate?

[**47.**] The legal profession is a noble one and members should be more discreet and circumspect in the choice of words used to describe actions of its members without necessarily labelling ourselves as criminals or frauds where there is no justification for that description.

[**48.**] In conclusion, the legal position is that the Limitation Decree, 1972 (NRCD 54), does not apply to investigations conducted by the respondent Commission on Human Rights and Administrative Justice. Subject to its built-in limitation in section 13(2)(a) of Act 456 that I leave to my sister Wood JSC to elaborate upon in her opinion, and the provisions of the 1992 Constitution, the Commission may investigate any violation of fundamental rights and freedoms irrespective of when the violation took place.

[**49.**] Where the decision or recommendation following the investigation is to be enforced, the enforcement is to be taken out of the Commission into the court. The court is bound to give effect to all the laws of the land in seeking to order the enforcement. If the enforcement breaches any existing law, it will not have to be ordered.

[**50.**] Since the trial judge had no jurisdiction to have ordered the enforcement of the decision arising out of the investigations that were barred by the Limitation Decree, 1972 it would serve no useful purpose to consider the validity or otherwise of the damages awarded. In the light of the decision on limitation, the issue of the damages awarded, raised in ground (4), became otiose.

[**51.**] To the extent that the appellant did not challenge the factual basis of the Commission's decision and the High Court judge was satisfied with the evidence before her when the case went to the High Court, the judge had no obligation to have ordered the production of the proceedings leading to that decision before considering her judgment. Ground (2) of the grounds of appeal consequently must fail and should be dismissed.

[**52.**] To the extent that the award cannot be enforce in a court of law because the Limitation Decree, 1972 (NRCD 54) barred it, ground (3) of the grounds of appeal succeeds and should be allowed.

KENYA

Mukungu v Republic

(2003) AHRLR (KeCA 2003)

Mukungu v Republic
Court of Appeal, 30 January 2003
Judges: Kwach, Bosire and O'Kubasu
Previously reported: [2002] 2 EA 482 (CAK)

Evidence (corroboration regarding sexual offences, 9-14)
Equality, non-discrimination (discrimination on the grounds of sex, 12-15)

Kwach, Bosire and O'Kubasu JJA

[**1.**] Following his trial by the senior resident magistrate at Voi, for the offence of rape contrary to section 140 of the Penal Code, John Mwashighadi Mukungo, the appellant, was convicted and sentenced to ten years imprisonment with hard labour and was ordered to receive two strokes of the cane. His first appeal to the Superior Court was dismissed on 28 February 2002 by GA Omwitsa, a commissioner of Assize. Being aggrieved by the said dismissal he brought the present appeal. This being a second appeal only issues of law may be canvassed.

[**2.**] The alleged offence was committed on 20 October 2000 at about 7:30 pm at Mwakingali estate in Taita Taveta district of the Coast Province. Clemence Wawuda, the complainant, was returning home from Voi township after some national celebrations, when she was accosted by the appellant who dragged her into a nearby house, forcibly stripped her naked, threw her onto a mattress which was on the floor and forcibly had sexual intercourse with her. She screamed for help, but no one came to her assistance. After the act, the appellant left her inside the house and went away after bolting the door from outside to prevent the complainant from escaping. Shortly later the appellant returned accompanied by another man who also forcibly had sexual intercourse with her. She did not identify him.

[**3.**] It was the complainant's testimony that several people saw the appellant pulling her to the house where he raped her, but when the complainant talked to them they did not bother to go to her assistance. Her effort later to make a telephone report of the incident to the police was fruitless. She then decided to report the matter to a village elder who on account of ill health could not assist her. He, however, asked his wife and children to

escort her to her house, which they did. She made a report the next day, to Phoebe Nanzala, a police constable, at Voi police station, who later arrested the appellant and charged him with the offence. Phoebe testified that the complainant reported to her that she had been raped by two men. Her evidence is however silent as to how she was able to know that the appellant was one of the two men who raped the complainant. It is, however, a matter from which an inference can be drawn that the complainant identified him to her. The complainant testified that the appellant was known to her before although not by name.

[**4.**] The complainant was medically examined. Her urine and a vaginal swabs were analysed. Some pus cells and spermatozoa were noted. Those confirmed she had recently had sexual intercourse. The appellant was not however, medically examined. So medical evidence did not connect him to the alleged offence.

[**5.**] The trial magistrate believed the complainant, looked for and found corroboration in the medical evidence and the testimony of Jenta Kwaze (Jenta) and Nyange Kwanze (Nyange). Jenta testified that someone knocked at her door on the material night seeking help. It was the complainant whom she only knew by appearance. She observed that the complainant appeared distraught and shaken, and was carrying her skirt and blouse in her hand. She had tied a sweater round her waist, and with her assistance they tried in vain to call the police. The complainant allegedly gave her the appellant's name but which she could not recall. Nyange corroborated Jenta's story on the complainant's appearance on the material night. Those were circumstances which supported her story that she had been raped.

[**6.**] On the basis of the evidence we have outlined the trial magistrate found the appellant guilty, convicted him and thereafter sentenced him as we earlier stated. The Superior Court on first appeal, affirmed the decision and hence the present appeal.

[**7.**] The only point of law raised in the appellant's memorandum of appeal is that his conviction was based on uncorroborated evidence.

[**8.**] The other grounds, which include a complaint that the sentence imposed on the appellant was harsh, are clearly issues of fact. Under the provisions of section 361(1) of the Criminal Procedure Code, second appeals to this Court must only relate to matters of law. So this Court lacks the jurisdiction to deal with them.

[**9.**] In *Mutonyi v Republic* [1982] KLR 203, this Court reiterated the definition of the term 'corroboration'. The Court said:

> an important element in the definition of corroboration is that it affects the accused by connecting him or tending to connect him with the crime, confirming in some material particular not only the evidence that the crime has been committed but also that the accused committed it see *Republic v Manilal Ishwerlal Purohit [*1942] 9 EACA 58, 61.

[**10.**] Corroboration is in effect other evidence to give certainty or lend support to a statement of fact. In sexual cases, corroboration is necessary as a matter of practice, to support the testimony of the complainant. However, there have been instances, as in *Republic v Cherop A Kinei and another* [1936] 3 EACA 124 and *Chila v Republic* [1967] EA 722 at 723 (CA), in which it was held that a conviction on uncorroborated evidence may be had if the court or jury, as the case may be, is satisfied, after duly warning itself on the dangers of convicting on uncorroborated evidence, of the truth of the complainant's evidence.

[**11.**] The need for corroboration in sexual offences appears to be based on what the Superior Court restated in *Maina v Republic* [1970] EA 370. There the Court said:

> Before leaving the matter of the first two counts we would state in the hope it will be of use to the Magistrate on future occasions, as pointed out by the Court of Appeal in *Henry and Manning v Republic* 53 criminal appeal rep 150, it has been said again and again that in cases of alleged sexual offences it is really dangerous to convict on the evidence of the woman or girl alone. It is dangerous because human experience has shown that girls and women sometimes tell an entirely false story which is very easy to fabricate, but extremely difficult to refute. Such stories are fabricated for all sorts of reasons and sometimes for no reason at all. In every case of an alleged sexual offence the magistrate should warn himself that he has to look at the particular facts of the particular case and if, having given full weight to the warning, he comes to the conclusion that in the particular case the woman or girl without any real doubt is speaking the truth then the fact that there is no corroboration need not stop his convicting. Most unfortunately, this was not done in the present case.

[**12.**] It is noteworthy that the same caution is not required of the evidence of women and girls in other offences. Besides there is neither scientific proof nor research finding that we know of to show that women and girls will, as a general rule, give false testimony or fabricate cases against men in sexual offences. And yet courts have hitherto consistently held that in sexual offences testimony of women and girls should be treated differently. Perhaps there was nothing objectionable about that discriminative treatment before Kenya became a republic in 1964. The Republic Constitution has various provisions against discriminatory treatment on the basis of, inter alia, race and sex. Section 82 of the Constitution, as material, provides as follows:

> (2) Subject to subsections (6), (8) and (9) no person shall be treated in a discriminatory manner by a person acting by virtue of any written law or in the performance of the functions of a public office or a public authority.
>
> (3) In this section the expression 'discriminatory' means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

[**13.**] Subsections (6), (8) and (9) are not relevant to the issue we are dealing with here. The Constitution has no provision authorising any discriminatory treatment of witnesses particularly with regard to matters of credibility. It is noteworthy that even the Evidence Act (Chapter 80) Laws of Kenya, has no provision on the issue of corroboration of the testimony of adult women and girls. Section 124 thereof makes provision for corroboration of the evidence of children. It is understandable as in their case children may be of such a tender age as not to understand the duty of telling the truth. In any case the treatment given to children under the aforesaid section is to them as children irrespective of their sex or race.

[**14.**] For the foregoing reasons we think that the requirement for corroboration in sexual offences affecting adult women and girls is unconstitutional to the extent that the requirement is against them *qua* women or girls.

[**15.**] Returning to the facts of the present appeal, the complainant's condition when she was first seen by Jenta and Nyange, on the material night clearly showed that she was in shock and distraught. She was half naked as she had only a sweater tied round her waist. She was carrying her skirt and blouse. That was consistent with the story she gave to the two witnesses that she had been raped in a nearby house, and that she had just escaped further sexual assault. The trial magistrate correctly observed, that her conduct and appearance at the time she was explaining her ordeal to the two witnesses was consistent with a person who had left in a hurry and who had been sexually assaulted. No doubt that material corroborated the complainant's story that she had been raped. But that evidence in no way points to the appellant as the rapist. Nor does it or any other evidence on record save that of the complainant tend to connect him with the alleged crime. If we were to rely on existing authorities, the corroborative evidence falls short of that required to support a conviction for rape notwithstanding concurrent findings of fact by the trial and first appellate courts that the complainant was a witness of truth. With such a finding, had the charge against the appellant been murder, robbery or any other non-sexual offence the appellant's conviction would certainly be held to be sound. We think that the time has now come to correct what we believe is a position which the courts have hitherto taken without a proper basis, if any basis existed for treating female witnesses differently in sexual cases such basis cannot properly be justified presently. The framers of the Constitution and Parliament have not seen the need to make provision to deal with the issue of corroboration in sexual offences. In the result, we have no hesitation in holding that decisions which hold that corroboration is essential in sexual offences before a conviction are no longer good law as they conflict with section 82 of the Constitution.

[**16.**] In the instant case the trial magistrate and the first appellate court having believed the complainant that she knew the appellant before, although not by name, and considering that the appellant was with the

complainant long enough in a room with ample light she clearly was able to recognise him as one of the two men who raped her. She was able to point him out to the police. In those circumstances and in view of the clear provisions of the Constitution against discriminative treatment on account of sex, we think that the appellant was properly convicted of the offence of rape contrary to section 140 of the Penal Code. Consequently his appeal has no merit. It is accordingly dismissed in its entirety. We so order.

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Juma and Others v Attorney-General

(2003) AHRLR (KeHC 2003)

Juma and Others v Attorney-General
High Court of Kenya at Nairobi, 13 February 2003
Judges: Mbogholi and Kuloba
Previously reported: [2003] 2 EA 461 (HCK)

Fair trial (meaning of fair hearing, 8, 10, 18, 21; facilities for preparation of defence, 10-12; pre-trial disclosure of material statements and exhibits, 13-19, 24, 27, 28, 30, 31, 33; adversary process, 20; presumption of innocence, 25)
Limitations (onus on alleging party to prove limitations are justified, 33)

Mbogholi and Kuloba JJ

[**1.**] It does not really matter how one puts it but what is raised in this reference is the very important question as to the right to access to information where a person facing criminal charges before a court of competent jurisdiction requests pre-trial disclosure of the prosecution witnesses' statements — the accused requesting copies of statements from potential witnesses for the prosecution on the ground, basically, that he requires disclosure of such information for the protection of his rights. It is a question which is at the centre of the constitutional doctrine of the fundamental right to the protection of the law secured by, among other things, being afforded a fair hearing within a reasonable time by an independent and impartial court established by law, being given adequate time and facilities for the preparation of one's defence and being given facilities to examine witnesses against one in a criminal case. It is a doctrine entrenched in sections 70 and 77(1), (2)(c) and (e) of the Constitution.

[**2.**] The genesis of this constitutional reference is the charging of the applicants with certain criminal offences, whereupon the applicants applied to the trial court, before the commencement of the trial for orders

that the prosecution do supply to the applicants copies of the statements made by the would-be prosecution witnesses and copies of exhibits on which the prosecution will rely at the trial — in particular, they want to be furnished with copies of exhibits taken from them by the police during criminal investigations. The trial court turned down this application and eventually the applicants have come to this Court in this reference complaining that their rights under sections 70, 77(1) and 77(2) of the Constitution of Kenya are in danger of being violated by the applicants not being allowed to have access to the prosecution witnesses' statements and exhibits. Those provisions say that for the purposes of a fair hearing and within a reasonable time a person who is charged with a criminal offence is to be given adequate time and facilities for the preparation of his defence and he is to be afforded facilities to examine the witnesses called by the prosecution. The issue for our determination centred on section 77(2) paragraphs (c) and (e) and we are to state the constitutional meaning and extent of a fair hearing within a reasonable time and giving an accused person copies of statements of witnesses to be called by the prosecution and copies of exhibits.

[**3.**] The applicants' case is that an accused person is entitled to those prosecution witnesses' statements and exhibits (in copy form), which the prosecution intends to rely on at the trial. They say that this right is subject only to the rules governing privileged communication. They say that as accused persons they will not be able to prepare for their defence if they are not availed of these facilities. It is not, they say, unusual to furnish the accused with copies of statements of prosecution witnesses before trial. For instance, they say, this is done in proceedings under the Armed Forces Act (Chapter 199); and, they add, in the civil process discovery and inspection devices that are employed to aid the other side to know the case of his opponent in advance of the hearing, without any harm. Keeping one's case secret until the trial is a thing of the past and serves little or no useful purpose today. On these arguments we were asked to state what it is that amounts to affording an accused person adequate facilities to prepare his defence.

[**4.**] The issue had arisen before the trial court which denied the applicants these very requests, on two grounds: that the practice in subordinate courts does not allow such cases; and that police have standing orders (Standing Order 32) according to which an accused person is not allowed to have access to police files. The state, in opposing the applicants' request for the desired information, says that any facility to which an accused person is entitled must be expressly provided for in the Constitution of Kenya or in a particular statute and can be availed only when the trial is underway and going on, but not before the trial begins, except in cases tried in the High Court only.

[**5.**] In this connection the state said that the only facilities to which an accused is entitled are the summoning of a witness or being allowed to

engage a lawyer of his own choice as provided for in section 77(2)(e) of the Constitution of Kenya, but at his own expense and again only in the course of a trial but not before the trial begins. In the case of statements of the witnesses for the prosecution the state argued that such statements are not to be availed to an accused person until after the witness concerned has testified on it. The only other facilities which the state says are envisaged by the Constitution are those which accord an accused the procedure where a case before a subordinate court proves unsuitable for summary trial; in which case under section 220 of the Criminal Procedure Code (Chapter 75), you apply to him the provisions relating to the committal of accused persons for trial before the High Court. The others are the facilities in relation to committal documents, under section 231 of the same Code, by which it is provided that not less than 14 days before the date fixed for committal proceedings, the prosecutor shall furnish the accused person or his advocate with one set of the committal documents. It was said that there is no provision in the Criminal Procedure Code for the equivalent of discovery in the civil process, there is no power to order the prosecution to produce statements of prosecution witnesses and exhibit documents, there is no rule of disclosure expressly provided for in Kenya with regard to the criminal process in subordinate courts.

[**6.**] Those were the arguments on both sides setting out and supporting the case for each party. The relevant provisions of the Constitution of Kenya which are under focus in this reference are in the following words:

> 77(1) If a person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.
> (2) Every person who is charged with a criminal offence: (c) shall be given adequate time and facilities for the preparation of his defence. (e) shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the court and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution.

[**7.**] What troubles the parties to this reference is the meaning to be given to these provisions. We do not find any sensible difficulty at all with regard to the meaning and intention of these provisions and their effect on the instant reference. We begin with the expression in section 77(1), 'a fair hearing' or trial.

[**8.**] It is an elementary principle in our system of the administration of justice, that a fair hearing within a reasonable time, is ordinarily a judicial investigation and listening to evidence and arguments, conducted impartially in accordance with the fundamental principles of justice and due process of law of which a party has had reasonable notice as to the time, place and issues or charges, for which he has had a reasonable opportunity to prepare, at which he is permitted to have the assistance of a lawyer of his choice as he may afford and during which he has a right

to present his witnesses and evidence in his favour, a right to cross-examine his adversary's witnesses, a right to be apprised of the evidence against him in the matter so that he will be fully aware of the basis of the adverse view of him for the judgment, a right to argue that a decision be made in accordance with the law and evidence. The adjective 'fair' describing the requisite hearing requires the court to ensure that every hearing or trial is reasonable, free from suspicion of bias, free from clouds of prejudice, every step is not obscure, and in whatever is done it is imperative to weigh the interest of both parties alike for both, and make an estimate of what is reciprocally just. The processing and hearing or trial of a case must be free from prejudice, favouritism and self interest; and the court must be detached, unbiased, even-handed, just, disinterested, balanced, upright and square. There must be shown all the quantities of impartiality and honesty. So a fair hearing is one which has the following minimum elements present. It must be one: (1) where the accused's legal rights are safeguarded and respected by law; (2) where a lawyer of the accused's choice looks after his defence unhindered; (3) where there is compulsory attendance of the witnesses if need be; (4) where allowance is made of a reasonable time in the light of all prevailing circumstances to investigate, properly prepare and present one's defence; (5) wherein an accused person's witnesses, himself, or his lawyer are not intimidated or obstructed in any improper manner; (6) wherein no undue advantage is taken by the prosecutor or anyone else, by reason of technicality or employment of a statute as an engine of injustice; (7) wherein witnesses are permitted to testify under the rules of the court within proper bounds of judicial discretion and under the law governing testimony of witnesses; and (8) where litigation is open, justice is done, and justice is seen to be done by those who have eyes to see, free from secrecy, mystery and mystique.

[**9.**] And as section 77(1) itself requires, a fair trial, having the above minimum qualities, must be undertaken, prosecuted and concluded within reasonable time, before and by an independent and impartial court established by law. These aspects do not arise for consideration on the present reference and we are mentioning them only for completeness of the interpretation of sub-section (1) of section 77.

[**10.**] Sub-section (2) paragraphs (c) and (e) of section 77 of the Constitution of Kenya is an elaboration on sub-section (1) and is an amplification of what a fair hearing or trial of a case ought to be. The sub-section requires in essence that for a hearing to be fair a person charged with a criminal offence must be afforded among other things 'facilities for the preparation of his defence' and 'facilities to examine the witnesses called by the prosecution and to obtain the attendance and carry out the examination of witnesses to testify on his behalf'. He must be given and afforded the facilities to do those things. In practical terms his constitutional edict is satisfied only if an accused person is given and allowed or afforded everything which promotes the ease of preparing his defence, examination of any witnesses called by the prosecution and securing witnesses to testify

on his behalf. He must be given and afforded that which aids or makes easier for him to defend himself if he chooses to defend the charge. In general terms it means that an accused person shall be free from difficulty or impediment and free more or less completely from obstruction or hindrance in fighting a criminal charge made against him. He should not be denied something the result of which denial will hamper, encumber, hinder, impede, inhibit, block, obstruct, frustrate, shackle, clog, handicap, chain, fetter, trammel, thwart or stall his case and defence or lessen and bottleneck his fair attack on the prosecution case.

[**11.**] We say so because we believe that the framers of our Constitution intended the expression 'facilities' in this section to be understood in its ordinary everyday meaning, free from any technicality and artificial bending of that word. In its ordinary connotation that word means the resources, conveniences, or means which make it easier to achieve a purpose; an unimpeded opportunity of doing something; favourable conditions for the easier performance of something; means or opportunities that render anything readily possible. Its verb is to 'facilitate' and means to render easy or easier the performance or doing of something to attain a result; to promote, help forward, assist, aid or lesson the labour of one; to make less difficult; or to free from difficulty or impediment.

[**12.**] That is what the Constitution of Kenya requires, in mandatory terms, the court to do in every case. The accused must be given and afforded those opportunities and means so that the prosecution does not gain an undeserved or unfair advantage over the accused; and so that the accused is not impeded in any manner and does not suffer unfair advantage and prejudice in preparing his defence, confronting his accusers and arming himself in his defence and so that no miscarriage of justice is occasioned.

[**13.**] Therefore in our considered judgment the provisions of the Constitution of Kenya under consideration can have life and practical meaning only if accused persons are provided with copies of statements made to the police by persons who will or may be called to testify as witnesses for the prosecution, as well as the copies of exhibits which are to be offered in evidence for the prosecution. This is not a novel idea. It is well known and approved in this country under the Emergency Regulations and it was never found to prejudice the prosecution at all. See *Kamau and others v Regina* [1954] 21 EACA 203 where this practice was approved by the Court of Appeal for Eastern Africa. This is only a recognition of the accused's elementary right to fair trial which depends upon the observance by the prosecution, no less than the court of the rules of natural justice. No authority is needed for such a proposition. On the broad basis of this right an accused person is plainly entitled (subject to statutory limitations on disclosure and public interest immunity) to be supplied in advance with copies of statements to the police by persons to be called as witnesses for the prosecution, and those who prepare and conduct prosecutions owe a

duty to the court to ensure that all relevant evidence of help is either led by them or made available to the accused reasonably early.

[**14.**] In an open and democratic society based on freedom and equality with the rule of law as its ultimate defender such as ours the package constituting the right to a fair trial contains in it the right to pre-trial disclosure of material statements and exhibits. In an open and democratic society of our type courts cannot give approval to trials by ambush and in criminal litigation the courts cannot adopt a practice under which an accused person will be ambushed. Subject to the rights of every person entrenched in the Constitution of Kenya and including the presumption of innocence until proved guilty beyond reasonable doubt, the fundamental right to a fair hearing by its nature requires that there be equality between contestants in litigation. There can be no true equality if the legal process allows one party to withhold material information from his adversary without just cause or peculiar circumstances of the case.

[**15.**] These are very compelling reasons to support our conclusion that an accused person should be informed well in advance of a hearing, of the evidence against him. The statements given to the prosecution by the witnesses and the exhibits if made available to the accused will enable him well before his appearance in the court for trial, to have the fullest opportunity to prepare for trial. By making a complete disclosure of the prosecution case, the accused gets to know the whole of the material that will be put against him: this is one important function of the committal procedure for cases to be tried in the High Court and it is useful.

[**16.**] Likewise, a preparatory discovery in anticipation of trial, has much to be said in its favour. In the case of unsophisticated or uneducated accused persons and witnesses who are often beyond reach by telephone or postal delivery and arrive in court only on the morning of the hearing of the trial, great harm is suffered if they had not seen beforehand the prosecution's case against them. Each witness for the prosecution has to be cross-examined virtually immediately and without any meaningful opportunity to prepare. Without knowing in advance what the next witness will say, the accused or his advocate is deprived of the opportunity to confront a witness with the evidence to be given by witnesses to be called later. In addition, the accused is generally unable to conduct any sort of investigation in order to determine, for example, whether an identification witness was actually at the scene, or has poor eyesight, or was sober at the time of the incident, because the accused is given no idea what any particular witness might be called to testify to. These are some of the serious handicaps on the accused under a procedure which denies pre-trial disclosure.

[**17.**] The fullest possible pre-trial access to information held by or in the control of the prosecution helps the accused or his advocate to determine precisely what case the accused has to meet, to prepare for cross-examination, to determine what witnesses are available to him, to make further inquiries if necessary and generally to explore such other avenues as may

be available to him. Obviously the constitutional right to be represented by a lawyer of one's choice would be meaningless if it did not mean informed representation. Moreover, an accused's right to adduce and challenge evidence cannot be exercised properly unless he can determine from the statements and exhibits of the prosecution's witnesses whether there are witnesses favourable to him who can be either those who had already made statements to the police or others who were mentioned in such statements. On looking at a statement made to the police, if the prosecution have not called the maker of the statement as a prosecution witness the accused may decide whether he should call him.

[**18.**] Section 77 of the Constitution of Kenya guarantees every accused person a fair hearing. A trial in a criminal court is in the nature of a contest. A fair hearing requires, by its nature, equality between the contestants, subject to the supreme principles of criminal jurisprudence, requiring the presumption of innocence and that the guilt of the accused be proved beyond any reasonable doubt. When one of the contestants has no pre-trial access to the statements taken by the police from potential witnesses the contest can neither be equal nor fair.

[**19.**] In addition, given the undoubted inequality as between the prosecution and the accused in many cases like with regard to access to forensic scientists, it is of paramount importance that the duty of disclosure be appreciated by those who prosecute and defend in criminal cases.

[**20.**] We are fully aware that in the adversary process of adjudication the element of surprise was formerly accepted and delighted in as a great weapon in the arsenal of the adversaries. But in the civil process this aspect has long since disappeared and full discovery is a familiar feature of civil practice. This change resulted from acceptance of the principle that justice is better served when the element of surprise is eliminated from the trial and the parties are prepared to address issues on the basis of complete information of the case to be met. It is therefore, surprising that in criminal cases in which the liberty of the subject is usually at stake, this aspect of the adversary system can be supported to linger on; and it is even more surprising that there should be resistance to any extent to discovery in criminal practice. Non-disclosure is a potent source of injustice and even with the benefit of hindsight, it is often difficult to say whether or not an undisclosed item of evidence might have shifted the balance or opened up a new line of defence.

[**21.**] It is not easy to justify the position which clings to the notion that the prosecution does not have the legal duty to disclose all relevant information. Opponents to such disclosure sometimes say that the duty should be reciprocal, so that the accused too should disclose his case before trial. This will be considered when an occasion presents itself for its consideration. It does not arise in the present reference before us. But while it deserves consideration in the future, it is not a valid reason for absolving the prosecution of its duty. In opposing disclosure, however, sight is always lost of

the fundamental difference in the respective roles of the prosecution and the defence. Always remember that the purpose of criminal prosecution is not to obtain a conviction; it is to lay before the court what the court considers to be credible evidence relevant to what is alleged to be a crime. The prosecutor has a duty to see that all available legal proof of the fact is presented; and this should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of the prosecutor excludes any notion of winning or losing: his function is a matter of public duty than which in civil life there can be none charged with greater responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness, of judicial proceedings.

[**22.**] The fruits of the investigation which are in the possession of the prosecution counsel are not the property of the prosecution for use in securing a conviction: it is the property of the public to be used to ensure that justice is done. The public pays for the state to carry out the investigations. The accused, too, as a taxpayer meets the expenses of the police investigations. In contrast, the accused has no obligation to assist the prosecution and is entitled to assume a purely adversarial role towards the prosecution. He is presumed to be innocent in the first place. Why should he help in being investigated? The absence of a duty to disclose on his part can therefore be justified as being consistent with this role and presumption of innocence.

[**23.**] It is sometimes feared that a general duty to reveal all relevant information would impose onerous new obligations on the prosecutors resulting in increased delays in bringing accused persons to trial. But this fear would be offset by the time saved which is now spent resolving disputes such as this one surrounding the present reference and dealing with matters that take the accused by surprise. In the latter case adjournments are frequently the result of non-disclosure and more time is taken by a defence advocate who is not prepared. Indeed much time would be saved and therefore delays reduced by reason of increase in guilty pleas, withdrawal of charges and shortening of preliminary hearings. Proper disclosure of evidence of great force may cause the accused to plead guilty, and this would be to the advantage both of the administration of justice and of the accused.

[**24.**] Other opponents of disclosure advance as a ground of their opposition that the material disclosed will be used to enable the accused to tailor his evidence to conform with the information of the prosecution, for example a witness may change his statement to conform with a previous statement given to the police. It is said that the accused with knowledge of the contents of the statements of the prosecution witnesses will falsely adjust his own evidence or his case in order to escape conviction. But this is not a valid fear. Disclosure is not to help liars tell more convincing lies but to help even one innocent person go free. There is nothing wrong in a witness refreshing his memory from a previous statement or document. The witness may even change his evidence as a result. This may rob

the cross-examiner of a substantial advantage but fairness to a witness may require that a trap not be laid by allowing the witness to testify without the benefit of seeing contradictory writings which the prosecutor holds close to his chest. The search for truth is advanced rather than retarded by disclosure of all relevant material.

[**25.**] Moreover, the reasoning that the accused will falsely adjust his own evidence or his own case to escape conviction assumes in advance of the trial that the accused is guilty of the offence charged and is likely to act dishonestly. Such reasoning offends the principle contained in section 77(2)(a) of the Constitution of Kenya which vests the accused with the right to be presumed innocent until he is proved or has pleaded guilty.

[**26.**] A matter which alarms opponents of a broad duty of disclosure is the fear that disclosure may put at risk the security and safety of persons who have provided the prosecution with information. But protection of the identity of informers is well covered by separate rules related to informer privilege and exceptions thereto (see *Marks v Beyfus* [1890] 25 QBD 494) and any rules with respect to disclosure would be subject to this and any rules of immunity.

[**27.**] There is an overriding concern that failure to disclose impedes the ability of the accused to make full answer and defence. The right to make full answer and defence is one of the pillars of criminal justice on which we heavily depend to ensure that the innocent are not convicted; and the erosion of this right due to non-disclosure may lead to the conviction and the incarceration of an innocent person. Anything less than complete disclosure by the prosecution falls short of decency and fair play.

[**28.**] An accused person needs to know in advance the case which will be made against him if he is to have a proper opportunity of giving his answer to that case to the best of his ability. Failure to disclose statements and/or exhibits in advance and their use at trial may lead to material irregularity in the course of the trial.

[**29.**] We find arguments against the existence of a duty to disclose before trial groundless while those in favour are overwhelming. We therefore hold that there is a general duty on the part of the state to disclose to the accused all the material which is known or possessed and which ought to be disclosed, and it proposes to use at the trial and especially all the evidence which may assist the accused even if the prosecution does not propose to adduce it.

[**30.**] At the same time, however, we hold that this obligation to disclose is not absolute. It is subject to the discretion of the trial court both with regard to denying disclosure and to the timing of disclosure. The discretion must be exercised judicially; there must be respect for sound principles, the law and certain facts shown to be present. Thus for example there is a discretion not to allow disclosure:

(1) where there are grounds for fearing that disclosing a statement might

lead to an attempt being improperly made to persuade a witness to make a statement retracting his original one, to change his story, not to appear in court or otherwise to intimidate him; or

(2) where the statement is sensitive and for this reason it is not in the public interest to disclose it, for example: (a) one dealing with matters of national security; (b) one disclosing the identity of an informant where there are good reasons for fearing that disclosure of his identity would put him or his family in danger; (c) one by, or disclosing the identity of a witness who might be in danger of assault or intimidation if his identity is known; (d) one which contains details which, if they became known, might facilitate the commission of other offences or alert someone not in custody that he was a suspect; (e) one disclosing some unusual form of surveillance or method of detecting crime; (f) one containing details of private delicacy to the maker and/or which might create risk of domestic strife.

[**31.**] Moreover, disclosable matter, and the obligation to disclose, only arises in relation to evidence which is or may be material in relation to the issues which are expected to arise or which unexpectedly do arise in the course of trial.

[**32.**] In many cases there will be voluntary disclosure but in the event of resistance the trial court will have to resolve the issue. If difficulties arise in a particular case the trial court may be the final judge, with a right of appeal unimpaired. Each case will depend on its own peculiarities and what we have listed above are examples only, and do not form an exclusive and exhaustive list of what may be considered by the trial court. In broad terms the trial court should be guided by the general principle that information ought not to be withheld if there is a reasonable possibility that the withholding of information will impair the right of the accused to make full answer and defence, unless the non-disclosure is justified by the law on state security and other good reasons like the security and safety of witnesses or persons who have supplied information to the investigation, irrelevance and interference with the investigation.

[**33.**] We hold that the state is obliged to provide an accused person with copies of witness statements and relevant documents. This is included in the package of giving and affording adequate facilities to a person charged with a criminal offence. In this connection it is for the prosecution to establish special circumstances upon which any limitation to the right of access may be based. The state must adduce evidence in individual cases to establish precisely what documents or statements or persons are to be protected and the basis for such limitation. In other words the onus of establishing the justification for a limitation of any of the fundamental rights guaranteed by the protection of the law provisions of the Constitution, must be on the party alleging such justification to derogate from the constitutional guarantees.

[**34.**] In this case we were not told precisely what statements and exhibits were in question. We order that the prosecution disclose to the accused all

the statements made by the prosecution witnesses, and the exhibits; but if it has any objection to disclosing any of them, it shall indicate to the accused what is objected to and the reason for such objection. If upon receiving such objection the accused shall still want disclosure of what is objected to, the accused will be at liberty to ask the trial court to determine the objection and direct and order accordingly, giving reasons for deciding the matter one way or the other. In reaching a decision the trial court shall be guided by the principles which we have set out in this judgement, and any relevant law.

[**35.**] Accordingly, we allow the reference, and direct a trial at which the statements and exhibits shall be disclosed to the accused before the commencement of the trial, unless there shall be a valid ground for non-disclosure. Any statutory provision in any legislation, or any police standing orders or other instrument which tends to limit this fundamental right guaranteed by the constitutional edicts which ensure the protection of the law, would be contrary to, and contravene the Constitution of Kenya and shall to the extent of the inconsistency with the Constitution, be void.

[**36.**] Having said the foregoing based on broad constitutional principles, we believe that in allowing extensive but controlled rights of access to information in the police files and exhibits, no prejudice will be occasioned to any party. If anything, the ends of justice shall surely be achieved and justice will reasonably be expedited.

[**37.**] We so order.

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Midwa v Midwa

(2003) AHRLR (KeCA 2000)

Midwa v Midwa
Court of Appeal of Kenya at Nairobi, 31 July 2000
Judges: Kwach, Tunoi and Keiwua
Previously reported: [2000] 2 EA 453 (CAK)

Cruel, inhuman or degrading treatment (6, 8)
Health (6, 8)
Children (best interest, 7, 9)
Equality, non-discrimination (discrimination on the grounds of HIV status, 10)

Kwach, Tunoi and Keiwua JJA

[**1.**] This is an application under Rule 5(2)(b) of the Court of Appeal Rules seeking an order for a stay of execution of the order of the superior court

(Rawal J) dated 6 June 2000, by which order the applicant, the wife in the petition, was expelled from the matrimonial home and consigned into the servants quarter euphemistically labelled an outhouse pending the hearing and determination of the intended appeal.

[**2.**] Though this is a peculiar case and one of its rare kind to reach this Court, we are somehow perturbed by the manner in which the learned Judge approached it. In the process she ignored the medical condition of the wife and the tender age of the children of the marriage and consequently made certain orders which plainly cry loudly for justice.

[**3.**] The parties are husband and wife. They solemnised their marriage under the African Christian Marriage and Divorce Act at the All Saints' Cathedral, Nairobi, on 10 February 1990. The husband works with Total Kenya Ltd while the wife is an officer with the National Bank of Kenya. They are blessed with two sons, now aged 7 and 10. The marriage appears to have been reasonably happy until in or about December 1996 when the wife tested HIV positive. The medical status of the husband has so far not been revealed.[**4.**] On 24 January 2000, the husband petitioned for divorce on the grounds of cruelty; the particulars thereof being given as that the wife having tested HIV positive was endangering the life of the husband. Other instances of cruelty cited in the petition are assaults, abuse and other matrimonial offences allegedly committed by the wife upon the person of the husband and the children. These are not relevant to the application before us and neither have they been tried in the cause which is still pending before the superior court.

[**5.**] Under the Matrimonial Causes Act (Chapter 152) Laws of Kenya only impotence, insanity and infectious venereal diseases are recognised as grounds of petition for divorce and for decree of nullity.

[**6.**] Ms Abida Ali for the wife, submits that the servants quarter is unfurnished, unpainted and incomplete. It has only a simple bed and a cooker. The wife is denied access and enjoyment of the matrimonial home and yet her salary is deducted every month in payment of the mortgage taken for its construction. She contended that it was totally unjustified for the learned Judge to confine the wife there in her present predicament.

[**7.**] As for the children, Ms Ali argues that there do not exist any exceptional circumstances so as to justify giving their custody to the father. She contended that to separate them from their mother will make them suffer psychologically and emotionally thereby causing them irreparable loss and damage.

[**8.**] We have no hesitation in holding that the intended appeal is arguable and not frivolous. The ruling of the learned Judge, on its face, smacks of insensitivity and total inconsideration of the facts presented before her. It is not denied that the wife is 50% holder of the entire property and that her salary services the mortgage. It is traumatising and dehumanising to

order her to live in the servants quarter of her own house. We agree with Ms Ali that in such conditions her health is likely to be adversely affected.

[**9.**] It is trite law that, *prima facie*, other things being equal, children of tender age should be with their mother, and where a court gives the custody of a child of tender age to the father it is incumbent on it to make sure that there really are sufficient reasons to exclude the *prima facie* rule. See *Re S* (an infant) [1958] 1 All ER 783 at 786 and 787 and *Karanu v Karanu* [1975] EA 18. The learned Judge, in our view, did not correctly direct herself on the principle that in cases of custody of the children the paramount consideration is their welfare. Moreover, as the record shows, there were no exceptional circumstances shown to justify depriving the mother of her natural right to have her children with her.

[**10.**] The husband in countering the application maintains that he cannot live together with his wife under the same roof as she poses a grave risk to his life. We sympathise. The wife is still working and servicing the mortgage. She avers that she is still strong and healthy despite the fact that she was diagnosed HIV positive about five years ago. Until the Court decrees otherwise the husband should not desert his wife. Presently it would be morally wrong.

[**11.**] If anything is done to upset and alter the state of health of the wife, substantial harm may be occasioned and the intended appeal will be rendered nugatory.

[**12.**] We allow the application and grant a stay of execution. We order that the wife be put back in the matrimonial home forthwith. The costs of this application shall be in the intended appeal.

NIGERIA

Independent National Electoral Commission and Another v Musa and Others

(2003) AHRLR (NgSC 2003)

Independent National Electoral Commission and Attorney-General of the Federation v Alhadji Abdulkadir Balarabe Musa (for and on behalf of Peoples Redemption Party), Alhaji Kalli Algazali (for and on behalf of Movement for Democracy and Justice, Alhaji MI Attah (for and on behalf of Nigerian Peoples Congress), Alhaji Musa Bukar Sani (for and on behalf of Communist Party of Nigeria and Chief Gani Fawehinmi (for and on behalf of National Conscience Party)
Supreme Court, 24 January 2003
Judges: Uwais, Belgore, Kutigi, Iguh, Ejiwunmi, Ayoola, Tobi
Extract: Ayoola JSC delivering the leading judgment; full text on www.chr.up.ac.za
Previously reported: [2003] 3 MJSC 1

Political participation (importance of political parties, need for balanced regulation, 11; regulation of political parties must be based on Constitution, 13, 19, 27, 30; power to decide on eligibility criteria for political parties, 32-35)
Association (prohibition for civil servants to become members of political parties, 38; payment of registration fee for political parties, 39)
Constitutional supremacy (limiting powers of Parliament, 26, 27, 29)

Emmanuel Olayinka Ayoola JSC

[**1.**] The respondents in this appeal were the plaintiffs in the Federal High Court Abuja Division (Adah J). In the originating summons commencing the action, the plaintiffs asked for the following relief:

1. A DECLARATION that the registration of political parties in Nigeria is governed by the provisions of the Constitution of the Federal Republic of Nigeria, 1999.

2. A DECLARATION that the 1st Defendant, Independent National Electoral Commission (INEC) cannot prescribe guidelines for the registration of political parties outside the conditions stipulated by the Constitution of the Federal Republic of Nigeria, 1999.

3. A DECLARATION that guideline No. 3(a) contained in the 1st Defendant's 'Guidelines for the registration of Political Parties' dated the 15th day of May, 2002

issued by the 1st Defendants, Independent National Electoral Commission (INEC) but released to the public on the 17th day of May, 2002 which prescribes that an association seeking registration as a political party must submit 'the names, residential addresses and States of origin respectively of the members of its National and State Executive Committees and the records of proceedings of the meeting where these officers were elected' is unconstitutional, and therefore null and void, in so far as it enjoins such association to submit the names, residential addresses and States of origin respectively of the members of its State Executive Committees, and the records of proceedings of the meetings where both members of its National and State Executive Committees were elected.

4. A DECLARATION that guideline No. 3(c) contained in the 1st Defendant's 'Guidelines for the registration of Political Parties' dated the 15th day of May, 2002 issued by the 1st Defendant, Independent National Electoral Commission (INEC) but released to the public on the 17th day of May, 2002 which prescribes that an association seeking registration as a political party must present 'a register showing that its membership is open to every citizen of Nigeria' is unconstitutional and therefore null and void.

5. A DECLARATION that guideline No. 3(d) (iv) contained in the 1st Defendant's 'Guidelines for the registration of Political Parties' dated the 15th day of May, 2002 issued by the 1st Defendant, Independent National Electoral Commission (INEC) but released to the public on the 17th day of May, 2002 which prescribes that an association seeking registration as a political party must show 'a provision that its Constitution and Manifesto conform with the provisions of the 1999 Constitution, the Electoral Act of 2001 and these guidelines'' is unconstitutional and therefore null and void in so far as the guideline relates to ''the Electoral Act, 2001 and these guideline'.

6. A DECLARATION that guideline No. 3(c) contained in the 1st Defendant's 'Guidelines for the registration of Political Parties' dated the 15th day of May, 2002 issued by the 1st Defendant, Independent National Electoral Commission (INEC) but released to the public on the 17th day of May, 2002 which prescribes that an association seeking registration as a political party must have ''a register showing the names, residential addresses of persons in at least 24 States of the Federation and FTC who are members of the association'' is unconstitutional and therefore null and void.

7. A DECLARATION that guideline No. 3(f) contained in the 1st Defendant's 'Guidelines for the registration of Political Parties' dated the 15th day of May, 2002 issued by the 1st Defendant, Independent National Electoral Commission (INEC) but released to the public on the 17th day of May, 2002 which prescribes that an association seeking registration as a political party must present 'an affidavit sworn to by the Chairman and Secretary of the association to the effect that no member of the National Executive of the association is a member of any other existing party or existing political Association' is unconstitutional and therefore null and void.

8. A DECLARATION that guideline No. 3(g) contained in the 1st Defendant's 'Guidelines for the registration of Political Parties' dated the 15th day of May, 2002 issued by the 1st Defendant, Independent National Electoral Commission (INEC) but released to the public on the 17th day of May, 2002 which prescribes that an association seeking registration as a political party must present 'a bank statement indicating the bank account into which all income of the proposed political association has been paid and shall continue to be paid and from which all expenses are paid and shall be paid' is unconstitutional and therefore null and void.

9. A DECLARATION that guideline No.3(h) contained in the 1st Defendant's 'Guidelines for the registration of Political Parties' dated the 15th day of May,

2002 issued by the 1st Defendant, Independent National Electoral Commission (INEC) but released to the public on the 17th day of May, 2002 which prescribes that an association seeking registration as a political party must submit 'the addresses of its offices, list of its staff, list of its operational equipment and furniture in at least 24 States of the Federation' is unconstitutional and therefore null and void.

10. A DECLARATION that guideline No.3(h) contained in the 1st Defendant's 'Guidelines for the registration of Political Parties dated the 15th day of May, 2002 issued by the 1st Defendant, Independent National Electoral Commission (INEC) but released to the public on the 17th day of May, 2002 in so far as it prescribes that a party seeking registration must submit a list of its staff, list of its operational equipment and furniture in its headquarters office at Abuja is unconstitutional and therefore null and void.

11. A DECLARATION that guideline No. 5(b) contained in the 1st Defendant's 'Guidelines for the registration of Political Parties' dated the 15th day of May, 2002 issued by the 1st Defendant, Independent National Electoral Commission (INEC) but released to the public on the 17th day of May, 2002 which prescribes that 'a person shall not be eligible to be registered as a member of political association seeking to be registered as a political party if he/she is in the civil service of the Federation or of a State' is unconstitutional and therefore null and void.

12. A DECLARATION that guideline No. 2(d) contained in the 1st Defendant's 'Guidelines for the registration of Political Parties dated the 15th day of May, 2002 issued by the 1st Defendant, Independent National Electoral Commission (INEC) but released to the public on the 17th day of May, 2002 which prescribes that each association seeking registration as a political party must accompany its application with twenty (20) copies of the Association's Constitution is unconstitutional and therefore null and void.

13. A DECLARATION that guideline No. 2(c) contained in the 1st Defendant's 'Guidelines for the registration of Political Parties' dated the 15th day of May, 2002 issued by the 1st Defendant, Independent National Electoral Commission (INEC) but released to the public on the 17th day of May, 2002 which prescribes payment of N100,000.00 (One hundred thousand Naira) by an association, that applies for registration is unconstitutional and therefore null and void.

14. A DECLARATION that Sections 74(2)(g) and (h), 74(6), 77(b) and 78(2)(b) of the Electoral Act, 2001 which enlarge and 79(2)(c) of the said Act which curtails the provisions of the 1999 Constitution on the registration of political parties are unconstitutional and therefore null and void and of no effect whatsoever.

15. A PERPETUAL INJUNCTION restraining the 1st Defendant, Independent National Electoral Commission (INEC), its agents, officers, privies from basing the registration of political parties either in whole or in part on guidelines nos. 3(a), 3(c), 3(d)(iv), 3(c), 3(f), 3(g) 3(h), 5(b), 2(c), and 2(d) or from acting on the said guidelines in the consideration or process of the registration of political parties.

16. AN ORDER compelling the 1st Defendant, Independent National Electoral Commission (INEC) to refund the sum of N100,000.00 (One hundred thousand Naira) paid by each of the associations that applied for the registration as political parties.

17. AN ORDER compelling the 1st Defendant, Independent National Electoral Commission (INEC) to return 19 of the 20 copies of the association's Constitution submitted to the Independent National Electoral Commission (INEC) by the political associations that have applied for registration as a political party.

[**2.**] The trial judge granted reliefs 1, 2, 13 and 16 in full and granted in part reliefs 14 in respect of section 74(2)(g) of the Electoral Act, 2001 only and 15 in respect of guidelines 2(c) and 3(g). The remaining reliefs were not granted by him. The plaintiffs, aggrieved by the decision, appealed to the Court of Appeal, Abuja Division (Musdapher, JCA, (as he then was) Muntaka-Coomassic and Bulkachuwa, JJ.C.A). The 1st respondent also cross-appealed.

[**3.**] The Court of Appeal allowed the main appeal by the plaintiffs and set aside part of the judgment of the trial court, refusing several of the reliefs sought by the plaintiffs. The Court below declared the guidelines issued by the 1st defendant, namely, 2(c), 2(d), 3(a), 3(c), 3(d)(iv), 3(e), 3(f), 3(g), 3(h) and 5(b) unconstitutional, null and void. It also declared sections 74(2)(g) and (h), 74(6), 77(b) 78(2)(b) and 79(2)(c) of the Electoral Act, 2001 unconstitutional, null and void. The Court finally made an order of injunction against the 1st defendant restraining it, its agents, officers, privies are 'from basing the registration of political associations as political parties on the aforesaid offending provisions of the Guidelines and the Electoral Act, 2001', and dismissed in its entirety the cross-appeal brought by the 1st defendant.

[**3.**] The defendants appealed to this Court against the decision of the Court of Appeal. At the conclusion on 29 October, 2002 of the counsel's argument the Court gave its judgment on 8 November 2002 and reserved the reasons for the judgment till 24 January, 2003. The appeals by both the 1st and 2nd defendants succeeded only in part and to the extent only that the Court below was in error in granting the 2nd and 12th reliefs and in granting the 14th and 15th reliefs in their entirety. Consequently, the Court granted reliefs 1, 3, 4, 5, 6, 7, 8, 9, 10, and 11, but refused reliefs 2, 12, 13, 16 and 17. Reliefs 14 and 15 were granted in part only, respectively as follows: That relief 14 is granted in part only, that is, in respect of sections 74 subsection (2)(h) and 79 subsection (2) of the Electoral Act, 2001 but not in respect of the other sections of the Act. That relief 15 is granted in part only, that is, in respect of guidelines 3(a), 3(c), 3(d), (iv), 3(c), 3(f), 3(g), 3(h) and 5(b), but not in respect of guidelines 2(c) and 2(d).

[**4.**] The plaintiffs were associations seeking registration as political parties. By virtue of section 221 of the Constitution '[n]o association, other than a political party, shall canvass for votes for any candidate at any election or contribute to the funds of political party or to the election expenses of any candidate at an election', and by virtue of section 222 of the Constitution:

> No association by whatever name called shall function as a political party, unless–
>
> (a) the names and addresses of its national officers are registered with the Independent National Electoral Commission;
>
> (b) the membership of the association is open to every citizen of Nigeria

irrespective of his place of origin, circumstance of birth, sex, religion or ethnic grouping;

(c) a copy of its constitution is registered in the principal office of the Independent National Electoral Commission in such form as may be prescribed by the Independent National Electoral Commission;

(d) any alteration in its registered constitution is also registered in the principal office of the Independent National Electoral Commission within thirty days of the making of such alteration;

(e) the name of the association, its symbol or logo does not contain any ethnic or religious connotation or give the appearance that the activities of the association are confined to a part only of the geographical area of Nigeria; and

(f) the headquarters of the association is situated in the Federal Capital Territory, Abuja.

[**5.**] The plaintiffs each applied to the Independent National Electoral Commission ('INEC' or 'the Commission') for registration as a political party. On 17 May 2002 INEC released guidelines for the registration of political parties. Being of the view that guidelines 2(c) and (d), 3(a), (c), (d)(iv), (e), (f), (g), (h); and 5(b) ('the impugned guidelines') were 'inconsistent with the provisions of the Constitution of the Federal Republic of Nigeria, 1999 relating to the registration of political parties' and that they should not be made to comply with the guidelines, the plaintiffs commenced the proceedings from which this appeal arose by originating summons whereby they sought, among other things, declarations of invalidity of those impugned guidelines and also of sections 74(2)(g) and (h), 74(6), 77(b), 78(2)(b) and 79(2)(c) of the Electoral Act, 2001.

[**6.**] INEC is one of the Federal Executive Bodies established by section 153(1) of the Constitution of the Federal Republic of Nigeria 1999 ('the Constitution'). Its composition and powers are by virtue of section 153(2) contained in Part 1 of the Third Schedule to the Constitution, paragraph 15(b) of which empowers it to: 'register political parties in accordance with the provisions of the Constitution and an act of the National Assembly', while paragraph 15(c) and (d), respectively, provided that the Commission shall have power to 'monitor the organisation and operation of the political parties, including their finances' and 'carry out such other functions as may be conferred upon it by an act of the National Assembly'.

[**7.**] Section 228 of the Constitution empowers the National Assembly to make laws, among other things

> (d) for the conferment on the Commission of other powers as may appear to the National Assembly to be necessary or desirable for the purpose of enabling the Commission more effectively to ensure that political parties observe the provisions of this part of this chapter.

[**8.**] The phrase '[t]his part of this Chapter' is that part dealing with political parties as are contained in sections 221-229 of the Constitution.

[**9.**] Pursuant to its power under section 228 of the Constitution, the National Assembly enacted the Electoral Act 2001 (''the Act''), Part III of

which made provisions for political parties. Section 74(1) of the Act provided that INEC shall have power to register political parties and regulate their activities from time to time. Subsection 2 of section 74 went on to provide that no association, by whatever name called, shall function as a political party, unless certain conditions are fulfilled. Therein was listed in paragraphs (a) — (f) thereof identical conditions of eligibility to function as a political party as have been specified in section 222 of the Constitution. The conditions in section 74(2) of the Act questioned by the plaintiffs were those they regarded as additional conditions prescribed in paragraphs (g) and (h) of that subsection. As earlier stated they also questioned the constitutionality of sections 74(6), 77(b), 78(2)(b) and 79(2)(c) of the Act. The trial court declared the invalidity of section 74(2)(g) but upheld the validity of the other provisions challenged. However, the Court of Appeal held that all the impugned provisions of the Act were unconstitutional and, therefore, null and void.

[**10.**] Section 74(2)(g) and (h) provided, respectively, that no association by whatever name called shall function as a political party, unless it provides evidence of payment of registration fee of N100 000 or as may be fixed from time to time by an act of the National Assembly, and, it provides the addresses of the offices of the political association in at least two-thirds of the total number of the states of the Federation spread among the six geo-political zones. Section 74(6) makes registration of an association as a political party conditional on compliance with the conditions prescribed in subsections 1 and 2 of section 74, and upon payment of the sum of N100 000 administration and processing fees. Section 77(b) provides that once an association is granted registration as a political party by the Commission, that political party shall further submit to the Commission a copy of the party's constitution drawn up in compliance with Chapter II of the Constitution of the Federal Republic of Nigeria and with the requirement of the relevant guidelines issued by the Commission. Section 78(2)(b) provided that the constitution and manifesto produced by a political party shall at all times be in compliance with the provisions of the Constitution, the electoral laws and guidelines made by the Commission. Section 79(c) provides that a person shall not be a member of a political party if he is a member of the public service of the Federation, a state or local government or area council as defined by the Constitution.

[**11.**] To put the issues in the appeal in proper perspective it is expedient to pause to emphasise that by section 14(1) of the Constitution, the Federal Republic of Nigeria shall be a state based on the principles of democracy and social justice. Political parties are essential organs of the democratic system. They are organs of political discussion and of formulation of ideas, policies and programmes. Plurality of parties widens the channel of political discussion and discourse, engenders plurality of political issues, promotes the formulation of competing ideas, policies and programmes and generally provides the citizen with a choice of forum for participation in governance, whether as a member of the party in government or of a

party in opposition, thereby ensuring the reality of government by discussion which democracy is all about in the final analysis. Unduly to restrict the formation of political parties or stifle their growth, ultimately, weakens the democratic culture. However, to leave political parties completely unregulated and unmonitored may eventually make the democratic system so unmanageable as to become a hindrance to progress, national unity, good government and the growth of a healthy democratic culture. Between the two apparent extremes — over-regulation and complete absence of regulation — is the need for balanced regulation. In interpreting the provisions of the Constitution and enactment relating to the formation, regulation and monitoring of political parties, the recognition of the need for balanced regulation is essential.

[**12.**] Section 40 of the Constitution of the Federal Republic of Nigeria 1999 ('the Constitution') provides that:

> Every person shall be entitled to assemble freely and associate with other persons, and in particular he may form or belong to any political party, trade union or any other association for the protection of his interests;
>
> Provided that the provisions of this section shall not derogate from the powers conferred by this Constitution on the Independent National Electoral Commission with respect to political parties to which that Commission does not accord recognition.

[**13.**] However, although section 40 of the Constitution entrenched the right of every person to form or belong to a political party, it is clear from the proviso to that section and several other provisions of the Constitution that the makers of the Constitution did not opt to leave political parties unregulated by the state. Regulation of political parties by the state manifests in the fact that the Constitution itself has set conditions for the existence and recognition of political parties and empowered the National Assembly to legislate for the regulation of political parties that may have already fulfilled the conditions of eligibility to function as political parties as prescribed by section 222 of the Constitution. Regulation of political parties by the state therefore comes in two forms, namely: regulation directly by the Constitution as in section 222 and regulation authorised by the legislature or other agency of the state as may be permitted by the Constitution. It follows that any attempt to regulate political parties not by the Constitution itself or by its authority is invalid.

[**14.**] The main issue that arose in the case was, thus, the extent to which the National Assembly could legislate to regulate political parties or by legislation authorise INEC so to do. In particular, the question arose whether, as regards the impugned provisions of the Act, the Constitution empowered the National Assembly to set additional conditions of eligibility for the functioning of political associations as political parties and, as regards the guidelines prescribed by INEC, whether the Constitution had also empowered, or had authorised the National Assembly to legislate to empower INEC to set such additional conditions. The subsidiary, but not

unimportant, question was whether, in regard to each of the impugned provisions, any or which of them amounted to such additional conditions beyond those prescribed by the Constitution. Viewed from a broader perspective, the general question as regards the Act was the real ambit of the powers of the National Assembly to legislate for the registration of political parties, while the particular question was as to the competence of the National Assembly to enact the impugned provisions of the Act. Similar questions arose in relation to the powers of INEC in regard to the guidelines and in particular, the competence of INEC to make the impugned guidelines.

[**15.**] Section 162 of the Act provided that:

> The Commission may, subject to the provisions of this Act, issue regulations, guidelines, or manuals for the purpose of giving effect to the provisions of this Act and for due administration thereof.

[**16.**] It was pursuant to this provision and the Constitution that INEC issued guidelines, some of which are the subject of this appeal. Guideline 2(c) and (d) stipulated, respectively, that the application for registration as a political party shall be accompanied by evidence of payment of prescribed fee of N100 000.00 in bank draft; and twenty copies of the association's constitution. Guideline 3, in so far as is relevant to this appeal, stipulated that:

> No association by whatever name called shall be registered as a political party unless the Association submits to the office of the Chairman of the Commission the following
>
> (a) The names, residential addresses and States of origin respectively of the members of its National and State Executive Committees and the records of proceedings of the meeting where these officers were elected. . . .
>
> (c) A Register showing that its membership is open to every citizen of Nigeria.
>
> (d) . . . (iv) A provision showing that its constitution and manifesto conform with the provisions of the 1999 Constitution, the Electoral Act of 2001 and these guidelines. . . .
>
> (e) A register showing the names, residential addresses of persons in at least 24 States of the Federation and F.C.T. who are members of the association. . . .
>
> (g) A bank statement indicating the bank account into which all income of the proposed political Association has been paid and shall continue to be paid and from which all expenses are paid and shall be paid.
>
> (h) The address of its lawful Headquarters office at Abuja and the address of its offices, list of its staff, list of its operational equipment and furniture in at least 24 States of the Federation. . . .

[**17.**] Guideline 5(b) stipulated that a person shall not be eligible to be registered as a member of political association seeking to be registered as a political party if he/she is in the civil service of the Federation or of a state. The Court of Appeal held that all these enumerated guidelines were unconstitutional and therefore null and void.

[**18.**] The Court of Appeal held that all the impugned provisions of the Act and of the guidelines, except one, were unconstitutional. Copious refer-

ences were made in the leading judgment of the Court delivered by Musdapher, JCA (as he then was), to authorities on principles of interpretation of the Constitution which are now well known and about which there was no controversy. For my part, I do not see any issue of interpretation of the Constitution that had arisen in the case. Rather, what was involved was application of clear and straightforward provisions of the Constitution. Be that as it may, at the end of the day, it is clear that the appeal to the court below was decided on the main ground that

> although the National Assembly has powers under section 228 of the Constitution to make any law in relation to an association wishing to be registered as a Political Party, it has no power to make any law in relation thereto outside the provisions contained under section 222 and perhaps section 223 of the Constitution.

[**19.**] The submission of counsel for the plaintiffs, who were the appellants in the court below, was that the Constitution having made provisions for the registration of political parties, the National Assembly lacked the 'legislative competence and *vires* to either enlarge, alter and curtail the clear provisions of the Constitution'. If that was the view that the Court of Appeal had intended to accept in the passage of the leading judgment quoted above, it is evident that the court below stated the position too narrowly than may be acceptable. What is clear is that the National Assembly cannot legislate inconsistently with the provisions of section 222 or 223 of the Constitution, but it can legislate for matters outside the provisions of either section 222 or section 223, provided there is legislative authority derived from other provisions of the Constitution. Being of the view that 'once an association meets the conditions spelt out under section 222 and section 223, such an association automatically transforms and becomes a political party capable of sponsoring candidates and canvassing for you in any constitutional recognised elective offices throughout Nigeria', the court below struck down all the impugned provisions, both of the Act and of the guidelines except one. For the sake of completeness, I note the views expressed by the court below as follows: in regard to section 40 of the Constitution, that the only derogation of the right to form or belong to a political party is as contained in the proviso to the section; in regard to section 228 of the Constitution, that the power it confers on INEC is limited to registered parties; in regard to the impugned provisions of the Act, that they were not within the contemplation of that section 228 of the Constitution.

[**20.**] On the 1st defendant's appeal from the decision of the Court of Appeal, Mr Eghobamien, SAN, learned counsel for INEC, raised two issues for determination thus: (1) Whether the court below had jurisdiction to adjudicate in the suit when the 2nd defendant was denied fair hearing, and (2) 'Whether the 1st appellant (Independent National Electoral Commission) have powers under the 1999 Constitution and the Electoral Act 2001 to make guidelines for political associations seeking to transform into political parties.' The first issue was unarguably without substance. The

2nd defendant who had not even appealed to the court below was a party to the appeal and had not complained that he was denied an opportunity of a hearing in the court below. It was thus surprising, to say the least, that senior counsel for the 1st defendant had considered the issue worthy not only of canvassing but also of being put at the forefront of his argument in the appeal which raised more serious and important issues. The formulation of the second issue raised by the 1st defendant was unhelpful, it being evident that there was no controversy in the case about the power of INEC to make guidelines. What was in issue was the extent to which such guidelines could be made.

[**21.**] For his part, Mr Jacobs, learned counsel for the 2nd defendant, raised two issues as follows:

1. Whether the National Assembly is not competent to enact the impugned provisions of the Act and thereby the same were rendered unconstitutional and void; and
2. Whether the impugned guidelines were not within the provisions of the Constitution with regard to the registration of Political Parties.

[**22.**] Although the plaintiffs had formulated issues for determination in different words the substance of the issues formulated by counsel on their behalf was the same as that formulated by the 2nd defendant's counsel.

[**23.**] In so far as the argument presented by counsel for the 1st defendant was directed at showing that the National Assembly had power to legislate for the registration of political parties and that INEC had power to make guidelines, the argument of the learned counsel was not of much assistance since the general question was not as to the existence of those powers but as regards the extent of the powers which these bodies have in regard to matters already stated. On the particular issues, counsel to the 1st defendant did not proffer any argument whatsoever on the competence of the National Assembly to enact the impugned provisions of the Act other than section 79(2) in respect of which he asserted, without any argument in support, that 'it cannot be right in fact and in law for a [civil servant] to be a card carrying member of any party in view of the crucial role he/she plays in the affairs of government'. On the issue of the guidelines, the argument presented by counsel for the 1st defendant was, largely, that the guidelines furthered in several respects the purposes of the Constitution and are in consonance with its provisions.

[**24.**] The submissions by counsel for the 2nd defendant were helpful though rather wide ranging. On the general question, it was submitted that the competence of the National Assembly to legislate in respect of registration of political parties was not taken away by the doctrine of covering the field because sections 222 and 223 of the Constitution have not 'completely, exhaustively and exclusively' covered the field of registration of political parties; and that section 222 of the Constitution did not evince an intention to list out exhaustively the requirements for the registration of political parties, nor did it state the modalities for the regis-

tration of the national officers of a political party or of its constitution. As to the ambit of the legislative power of the National Assembly, learned counsel for the 2nd defendant referred to item 56 of the Exclusive Legislative List in the Second Schedule to the Constitution where regulation of political parties was placed within the exclusive legislative power of the National Assembly; the proviso to section 40 of the Constitution; section 15(2) and (3)(d) of the Constitution and paragraph 15(b) of the Third Schedule, to support the submission, not only that the National Assembly has legislative power to legislate for the registration of political parties but also that the Constitution does not restrict the source of the power given to INEC to register political parties only to its provisions but extended it to the provisions of an act of the National Assembly. He called in aid section 228(d) of the Constitution and submitted that the National Assembly could make laws that may appear to it to be necessary or desirable for the purpose of enabling INEC more effectively to ensure that political parties observed the provisions of sections 222 and 223 of the Constitution. In his submission, most of the impugned provisions struck down by the court below were designed to fulfil the objectives of the Constitution of promoting national integration as spelt out in section 15(3) of the Constitution.

[**25.**] Chief Fawehinmi, SAN, learned counsel for the respondents, submitted, on the general issue, that section 222 of the Constitution is exhaustive of the requirements for recognition of a political association as a political party; that no guideline and no act of the National Assembly can 'add to, alter, enlarge, curtail, or repeat the conditions contained in section 222'; that if an act of the National Assembly duplicates the requirements in section 222 such law is inoperative to the extent of such duplication and if such law adds to, curtails, or alters the said requirements, it is unconstitutional and therefore, null and void; that section 228 of the Constitution merely empowered the National Assembly to make laws with respect to already registered political parties and that, in any event section 222 had already covered the field in respect of political parties seeking registration; and, relying on the doctrine of covering the field enunciated in *Attorney General, Abia State and 35 others v Attorney General of the Federation* (2002) 6 NWLR (Pt. 763) 264, that the National Assembly had no power to enact the impugned sections of the Act and INEC had no power to make guidelines on how an association can become a political party in so far as the Constitution has covered the field in section 222. Testing the impugned sections of the Act and guidelines against the backgrounds of principles stated by him he submitted that those impugned provisions were unconstitutional and therefore null and void.

[**26.**] In the final analysis this case is about the supremacy of the Constitution. Section 1(3) of the Constitution provided that: 'If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall to the extent of the inconsistency be void.'

[**27.**] I take as my starting point some interrelated propositions which flow from the acknowledged supremacy of the Constitution and by which the validity of the impugned provisions will be tested. First, all powers, legislative, executive and judicial must ultimately be traced to the Constitution. Secondly, the legislative powers of the legislature cannot be exercised inconsistently with the Constitution. Where it is so exercised it is invalid to the extent of such inconsistency. Thirdly, where the Constitution has enacted exhaustively in respect of any situation, conduct or subject, a body that claims to legislate in addition to what the Constitution had enacted must show that it has derived the legislative authority to do so from the Constitution. Fourthly, where the Constitution sets the condition for doing a thing, no legislation of the National Assembly or of a state House of Assembly can alter those conditions in any way, directly or indirectly, unless, of course the Constitution itself as an attribute of its supremacy expressly so authorised.

[**28.**] The legislative power of the National Assembly consists of the power to make laws for the peace and order and good government of the Federation or any part thereof with respect to any matter included in the exclusive legislative list set out in Part 1 of the Second Schedule to the Constitution, to the exclusion of the House of Assembly of states and to make laws with respect to any matter in the concurrent legislative list set out in the first column of Part II of the Second Schedule to the Constitution to the extent prescribed in the second column; and with respect to any other matters with respect to which it is empowered to make laws in accordance with the provisions of the Constitution.

[**29.**] Although the Constitution does not state that an act of the National Assembly cannot duplicate the provisions of the Constitution, by judicial interpretation, verging on policy, the consequence of such duplication has been variously described as 'inoperative', 'in abeyance', 'suspended'. (See *A-G Ogun State v A-G Federation* (1982) NSCC 1, at 11, 27-29, 35.) However, it is described, where the Constitution has covered the field as to the law governing any conduct, the provision of the Constitution is the authoritative statement of the law on the subject. The Constitution would not have 'covered the field' where it had expressly reserved to the National Assembly or any other legislative body the power to expand on or add to its provisions in regard to the particular subject. Where the Constitution has provided exhaustively for any situation and on any subject, a legislative authority that claims to legislate in addition to what the Constitution had enacted must show that, and how, it has derived its legislative authority to do so from the Constitution itself. In this case, section 222 of the Constitution having set out the conditions upon which an association can function as a political party, the National Assembly could not validly by legislation alter those conditions by addition or subtraction and could not by legislation authorise INEC to do so, unless the Constitution itself has so permitted.

[**30.**] The National Assembly has powers by virtue of section 228(d) of the Constitution, to confer by law powers on INEC as may appear to it to be necessary or desirable for the purpose of enabling the Commission more effectively to ensure that political parties observe the provisions of section 221-229 which deal with political parties; and, by virtue of item 56 of the exclusive legislative list, to legislate for the regulation of political parties. INEC has direct power granted by the Constitution to register political parties. Any enactment of the National Assembly referable to this purpose cannot be held invalid. By the same reasoning any guideline or regulation made by the Commission that carries into execution the same purpose cannot be unconstitutional.

[**31.**] However, does the power to register or regulate political parties include the power to determine eligibility of an association to function as a political party? Consideration of this question makes some prefatory observations pertinent. First, by setting out the conditions upon which an association shall function as a political party in section 222, the Constitution has impliedly withdrawn such matters from the ambit of any regulatory enactment that the National Assembly may make. Secondly, section 229 of the Constitution defines a political party in terms of its activities. A political party starts as and is basically an association. However, for an association to be able to engage in the activities which only a political party is permitted to engage in, that is to say function as a political party, it must comply with the provisions of section 222 of the Constitution. Section 222 is thus about conditions of eligibility of an association to engage in the activities that by virtue of section 221 only political parties can engage in as specified in section 229.

[**32.**] In dealing with provisions of the Constitution concerning political parties the Constitution used different words and phrases which must be clearly understood if confusion is not to be engendered. In the proviso to section 40 the Constitution spoke of 'recognition'; in paragraph 15(b) of the Third Schedule it spoke of registration by INEC of political parties; and, in section 222, as has been seen, the provisions are about eligibility to function as a political party. In my judgment, recognition of a political party is not quite the same thing as registration of a political party, while registration of a political party is quite distinct and is not the same thing as eligibility of an association to function as a political party, even though these are all interrelated aspects of the same subject. Registration is the process of recording the existence of a political party and it provides evidence and certification of compliance with section 222 of the Constitution. It is evident that a political party cannot be registered as being in existence unless the association has satisfied the conditions of eligibility in section 222. It is therefore clear that the power to register is not the same as and does not include the power to declare the conditions of eligibility. Similarly, the power to regulate or monitor political parties relates to associations which have a recognised existence as political parties. Such power does not also imply any power to legislate the conditions of elig-

ibility. Registration of political parties facilitates the exercise of the regulatory and monitoring powers of INEC which are within the purview of the legislative competence of the National Assembly. According recognition to a political party is the fact of acceptance of the existence of an association eligible to function as a political party, while registration is the recording and certification of that fact.

[**33.**] In this context, while the submission made by counsel for the 2nd appellant that section 222 of the Constitution does not evince an intention exhaustively to list out the requirements for registration of parties and that the modalities for registration of the national offices is not stated in that section, cannot be faulted as statements of fact, it is besides the point, because section 222 does not deal with registration of parties, there was no doubt that INEC has power to register political parties and the National Assembly can legislate in regard to the exercise of those powers. Where, however, in the exercise of legislative power to make laws to provide for the registration, monitoring and regulation of political parties the National Assembly purports to decree conditions of eligibility of an association to function as a political party the National Assembly would have acted outside its legislative authority as stated in the Constitution. Similarly, INEC acting under such law to prescribe conditions of eligibility would have acted inconsistently with the Constitution.

[**34.**] Applying the test inherent in the distinction between conditions of eligibility on the one hand, and registration, regulation or monitoring of political parties on the other, it becomes much easier to determine which of the impugned provisions of the Act and the Guidelines are outside the competence of the National Assembly or INEC. Before this test is applied, a further distinction should be drawn between guidelines which are administrative or procedural or evidential in nature. Guidelines which are administrative in nature merely relate to the administrative mechanism of the process of registration. Guidelines which are of a procedural nature relate to the procedure to be followed in seeking registration. Evidential guidelines relate to proof of compliance with the conditions of eligibility. Where the requirements for registration stated in any guideline or in the Act are not purely administrative or procedural or evidential, but are substantive conditions for eligibility beyond the conditions prescribed by section 222, such guidelines or provisions would have enlarged the conditions of eligibility in section 222 and be consequently void, notwithstanding that they may have been described as requirements for registration.

[**35.**] Applying this test, I felt no hesitation in holding that guideline 3(a) 3(c); 3(d)(iv); 3(e) 3(f); 3(g); 3(h) and 5(b) are neither related to administration nor to any procedure for seeking registration nor are they evidence of any conditions stated in section 222 as conditions of eligibility. They have no administrative significance in the process of registration. The conclusion was inescapable that as they stand, on their own and unrelated to any of the conditions of eligibility prescribed in section 222, but are

conditions of registration which are not procedural or evidential or required for any administrative purpose related to the process of registration, they are; albeit in a disguised form, fresh conditions for eligibility to function as a political party beyond what the Constitution had prescribed.

[**36.**] Guidelines 2(c) which related to evidence of payment of prescribed fee of N100 000 is a purely administrative requirement, while guideline 2(d) which provided that twenty copies of the association's constitution and manifesto shall accompany the application for registration is in furtherance of and is related to section 222(c) of the Constitution.

[**37.**] I now turn to the impugned provisions of the Act. It was clear enough that section 78(2)(b) of the Act which related to a political party already registered was valid as its provision came within the legislative competence of the National Assembly by virtue of section 4(1) of the Constitution and item 56 of the exclusive legislative list — regulation of political parties.

[**38.**] Section 79(2)(c) of the Act was invalid because it was inconsistent with section 40 of the Constitution. In terms of section 45(1)(a) of the Constitution, there is nothing reasonably justifiable in a democratic society in the interest of defence, public safety, public order, public morality or public health in prohibiting a member of the public service or civil service of the Federation, a state or local government or area council from eligibility to be registered as a member of a political party. The submission that the restriction is a valid derogation from section 40 by virtue of section 45(1)(a) of the Constitution was erroneous. However, this conclusion is limited to the question of the validity of section 79(2)(c) of the Act and is not related to any question, not now before this Court in these proceedings, of the extent to which the activities, as members of a political party, of the category of persons mentioned in that section can be validly restricted by relevant legislation in the interest of the public service. It may well be that the need to ensure objectivity of officers entrusted with the implementation of government programmes, continuity of administration and to foster a public confidence in and a healthy public perception of the public service are factors that may influence and justify some sort of restrictions. But, as earlier stated, that was not an issue in this appeal.

[**39.**] Section 74(2)(h) of the Act was bad because it added to the list of the conditions of eligibility which an association must satisfy before it could be eligible to function as a political party. On the other hand, section 74(2)(g) of the Act was valid because its provisions, relating as they were to production of payment of relevant fees, were purely administrative in relation to the registration process. Section 74(6) was objected to on the ground that it prescribed a requirement for payment of administrative and processing fees. It was argued that the provision was void because it prescribed an additional condition to those prescribed in section 222 of the Constitution. That argument, however, took an unnecessarily narrow view of the matter. The correct starting point is to consider the purpose of the pay-

ment and to relate it to the process of registration which is the essential certification of eligibility of an association to function as a political party. Seen in that context, the provisions of section 74(6) are purely administrative in nature. The provision in section 74(6) that only a political association that met the conditions stipulated in section 74(1) and (2) shall be registered as a political party was innocuous once the invalid provision in section 74(2)(h) is removed. Section 77(b) was valid because it related to a political party already registered and its provisions were within the regulatory and monitoring powers of INEC.

[**40.**] The declaration that the registration of political parties in Nigeria is governed by the provisions of the Constitution of Nigeria, 1999 was granted in the sense that and because the ultimate source of any registration or guideline or exercise of power relating to registration of parties must be traced to the Constitution, but not in the sense that the Constitution itself must make direct provisions relating to registration or its mechanism. It was because of this elucidation of the relevance of the Constitution to the registration of political parties that the second declaration was refused. The Constitution does not by itself expressly stipulate conditions for the registration of political parties. It only empowered INEC to register political parties and the National Assembly to legislate for the regulation of political parties. There were several guidelines made by INEC which though not within the conditions prescribed by the Constitution for eligibility of an association to function as a political party were quite valid because they were incidental and relevant to the registration process and were within the regulatory powers of INEC, the details of which cannot be expected to be set out in a Constitution. It is only those guidelines which were of the nature of conditions of eligibility to function as a political party that were invalid as being made without authority of the Constitution. In the result whether INEC could prescribe guidelines for the registration of political parties outside the conditions stipulated in the Constitution or not must depend on the nature of the guidelines. Procedural, evidential and purely administrative guidelines are 'outside the conditions stipulated by the Constitution', yet they are valid. When a declaration sought is couched in wide and imprecise terms, as in relief 2 in this case, it should be rejected. To grant such would lead to confusion.

[**41.**] The injunction sought in claims 16 and 17 related respectively to reliefs 12 and 13 which have been refused. Consequently, they too were refused. The declaratory and injunctive relief granted respectively in claims 14 and 15 reflected those sections of the Act and the Guidelines which were considered not to be valid.

[**42.**] Before I part with these reasons for judgment, it is expedient to note that the Electoral Act 2001 has been repealed during the pendency of this appeal by section 152 of the Electoral Act 2002. The reliefs sought related to the constitutionality of some provisions of the Electoral Act 2001 which have now been repealed and to some of the guidelines made by INEC

under the repealed Act. The declarations made in regard to provisions of the Electoral Act are of use only in so far as they were the source of the impugned guidelines. In the Electoral Act 2002 several of these impugned provisions have already been removed.

[**43.**] Be that as it may, it was for the reasons I have stated that I concurred in the orders made by the Court on 8 November 2002.

* * *

Nkpa v Nkume

(2003) AHRLR (NgCA 2000)

Okoroafor Nkpa v Chief Jacob Nkume
Court of Appeal (Port Harcourt Division), 6 April 2000
Judges: Pats-Acholonu, Akpiroroh, Ikongbeh
Previously reported: [2001] 6 NWLR 543

Association (power to impose levies, 4, 26; use of force, 39, 45, 51)
Conscience (levies for purpose against religious conviction, 4, 28)
Fair trial (impartial court, 19, 21, 23; stare decisis, 32, 33)
Evidence (evaluation, 22, 23)
Constitutional supremacy (customary practices that are inconsistent with fundamental rights, 34, 35, 50)
Forced labour (38)

Ikongbeh JCA

[**1.**] This appeal exemplifies the theme of Professor Chinua Achebes work, *Things Fall Apart*. The conflict between the traditional cultures of the indigenous peoples of what is now Nigeria and what I may term the new or acquired national culture is still as hot as at the times that Achebe wrote his book about. Some people still think that the old cultures work better than the new and they sometimes, to their chagrin, find their way back to the good old days hindered by the tenets and norms of the newer times. The 1st defendant/respondent, the village head of the plaintiffs village, is one of such people. He appears to believe that some of the problems facing his community require nothing but the instant result-yielding problem-solving tactics that worked so well for his fathers before him. In his dealing with the plaintiff and his wife prior the institution of the case giving rise to this appeal he thought that the older method of running the affairs of a community ought to apply and so set about applying it. He could not understand why the appellant should resist such a normal and necessary move. Nor could the learned Judge who heard the case between the contestants. Hence this appeal by the plaintiff.

[**2.**] The plaintiff had taken a writ of summons out of the Umuahia High Court of the then Imo State against the respondent and one Johnson C Okeiyi, the Eze and Clan Head of Oboro community, of which the plaintiff and 1st defendant are members. Before the end of the trial in that Court, the Eze, who was the 2nd defendant, passed on to the greater beyond, leaving the respondent herein as the sole defendant.

[**3.**] The plaintiffs three heads of claim, as stated at the end of paragraph 29 of his amended statement of claim, read:

(1) Special damages: N40.00 extracted from the plaintiff by the defendants.
(2) General and exemplary damages: N100 000.00 for acts of intimidation, threat and coercion perpetrated on the plaintiff by the defendants.
(3) An injunction to restrain the defendants by themselves, their servants or agents or otherwise howsoever from continuing the said intimidation and coercion.

[**4.**] His case, in a nutshell, was that the defendants tried to make his wife, PW1, join an association of women in their village, or at least contribute to their community development efforts. She would do neither because her religious beliefs forbade her to. Seeing that they could not make her change her mind by gentle persuasion and other forms of gentle cajoling they employed the services of armed soldiers. The soldiers not only roughed him and PW1 up a bit but also let it be known to them that they were prepared to press their guns into service if the recalcitrant duo did not play ball. Fearing for their lives, and to avoid further molestation, the plaintiff paid the sum of N40 demanded by their tormentors. The amount was said to represent the levy imposed by the women association on every member and the fine imposed on the PW1 for her impertinence in refusing to join the associations community development efforts. Part of it was also said to be penalties imposed on the plaintiff and his wife for failing to participate in the villages sanitation exercise. The plaintiff wants his money back, plus a little something for the inconvenience he and his wife had been put through.

[**5.**] Because of the issues canvassed in the lower court and before us, I think it is pertinent to reproduce paragraphs 18, 28 and 29 of the amended statement of claim:

18. The 1st defendant by threats and unlawful means, demanded with menace the said sum of N40.00 from the plaintiff and pushed the plaintiff and his wife around, and threatened to ask the soldiers to use horse whips on them, or even shoot them if the plaintiff resisted payment. As a result of this intimidation, the plaintiff gave the sum of N40.00 to the 1st defendant at gun point in the presence of the fierce looking soldiers, with horse whips ready for action.
28. As a result of, and in consequence of the said intimidation, threat and coercion, the plaintiff has suffered considerable distress, anxiety, inconvenience and upset, and suffered loss and damage.
29. The defendants threaten and intend unless restrained by the Honourable court to continue to intimidate and coerce the plaintiff.

[**6.**] The learned trial Judge summarised the defendants case beautifully, I will, therefore, just borrow his words:

> It is the defendants case that the plaintiff is a religious fanatic of the sect called Jehovahs Witness and unreasonably opposes laudable development projects of the community on their religious grounds. It was only by pressure and persuasion that he contributes to levies for development purposes. The same is true of other members of the sect and their wives. These people refused to contribute to the Hospital/Maternity Project of the Community because as Jehovahs Witnesses they are opposed to it. The 2nd defendant who is the traditional ruler of the community would not permit members of the sect to ruin the development projects of the community and ordered the wives of the members of the sect including the plaintiffs wife to pay the levies and supported the penalty imposed by Isiala village women on defaulters. The levies amounted to N20.00. Defendants say that plaintiffs wife defiantly refused to obey the traditional ruler the 2nd defendant.
>
> 1st defendant admits writing to the plaintiffs wife demanding that she should pay as directed by the Traditional Ruler but he received an unsigned letter as a reply which was in fact written by a member of the sect of Jehovahs Witness and which intimated a refusal to comply.
>
> The defendants alleged that the women of Isiala village then decided to employ their traditional method of recovering development levies. Police was called in to ensure that there was no breach of peace but the Oboro women trooped to the Isiala Police Station in large numbers. At the Police Station the DPO and DCO addressed them and advised those who defaulted in paying for development levies to pay up and advised that they be given time to do so. The women left.
>
> The defendants pleaded that in order to collect development levies, the Oboro community had a Task Force. 1st defendant led the Task Force for Isiala village. The main responsibility was to collect development levies from defaulters and levies from persons who failed to take part in the clean up exercises of the village. In the Task Force were three soldiers provided by the Sole Administrator of Ikwuano/Umuahia Local Government who also provided vehicles whenever the Task Force went on drive see paragraph 14(i) and (ii) of the statement of defence.

[**7.**] In paragraphs 15(i) and 22 of their pleading, set out hereunder, the defendants met the case made by the plaintiff in paragraphs 18, 28 and 29 of his own pleading:

> (i) The 1st defendant denies paragraph 18 of the plaintiffs statement of claim and avers that all the defaulters in the payment of the said levies or other lawful penalties as stated above, paid up on demand by the said Task Force. The plaintiff just like all others who refused to pay the various sums of money due from them, paid N40.00 for himself and that of his wife. N20.00 was the levy and penalty imposed by the community for the failure of the plaintiff and his wife to participate on two separate occasions in the environmental cleaning up exercise which attracted a penalty of N5.00 each person per each occasion and thus N10.00 from the plaintiff and N10.00 from his wife. The other N20.00 was the said levy and penalty in respect of the plaintiffs wife as afore-said. The averments of threats, unlawful means, demands by menaces and the like alleged by the plaintiff are fabrications. The Task Force leader Mr. Ogbonnaya Osondu explained to each defaulter or defaulters their mission and demanded payment and emphasised the need of each member of Oboro community to contribute

to levies for the development of the community and the participation in keeping the community clean.

22. The defendants will contend at the trial that the levying of members of the community for development purposes and the imposition of penalties for non-participation in environmental clean up exercises or other communal activities, are in accordance with age long practice and custom not only of Oboro Community, but of the entire Ikwuano/Umuahia Local Government Area and in fact throughout Ibo land and therefore not illegal or unconstitutional or repugnant. At no time had the plaintiff and his wife been discriminated against in relation to the imposition of the said levies, penalties or participation in communal activities.

[**8.**] After taking all the evidence, the learned trial Judge listened to addresses by counsel for the parties. Both of them were agreed that the legality and constitutionality of the levies and penalties imposed on the plaintiff and his wife, and the method employed by the respondent in collecting them constituted the issue that the Judge had to resolve. The defendants counsel submitted that since what the plaintiff alleged against the defendants bordered on the offence of extortion the plaintiff should have, but did not, prove this allegation beyond reasonable doubt. For the plaintiff it was submitted that the available evidence showed beyond any doubt that the N40.00 that he paid was extorted from him.

[**9.**] The Judge delivered his judgment on 19 July 1991. In it he reviewed the cases made by the parties in their respective pleadings. He posed the question whether or not there was any evidence to show that the defendants had extorted money from the plaintiff. He then recapitulated on the evidence of the witnesses who testified on either side and answered the question it had posed in the negative. He accordingly came to the ultimate conclusion that:

> In light of my finding above, the plaintiff has not at all succeeded in proving any case of extortion and his action must fail and is hereby dismissed with costs fixed at N500.00.

[**10.**] The plaintiff was dissatisfied with the decision and has appealed to this Court. The notice of appeal contained only the omnibus ground of appeal. Counsel on behalf of the appellant later obtained leave of this Court and filed four additional grounds, numbered 2 5. Both counsel filed briefs of argument. Mr JH Igbikiberesima, for the appellant, formulated three issues for determination, which Chief IT Nwogu, for the respondent, adopted. The three issues are as follows:

1. Whether the learned trial Judge was right in holding that the plaintiff failed to prove his case.
2. Whether the learned trial Judge made a correct approach to the pleadings and evidence led on both sides.
3. Whether no legal relief/remedy can in any event be found on the case placed before the learned trial Judge.

[**11.**] The appellants brief was, with leave of Court, amended. In the original brief counsel argued the grounds of appeal rather than the issues

formulated there from. He however rectified this anomaly in the amended brief. The respondents counsel did not see fit to amend his clients brief.

[**12.**] I think the issues can be taken together. Although Mr Igbikiberesima argued them separately he repeated almost the same arguments each time he moved to the next issue.

[**13.**] The substance of counsels complaint on behalf of the appellant is that the learned trial Judge did not do justice to the evidence before him. Had he given the requisite attention to the evidence he would have seen that the appellant had established his case. He would have seen first, that neither the Eze nor the village women nor anybody for that matter in the village was legally competent to impose levies and fines on the plaintiff and his wife for community projects that their religious beliefs forbade. He would have seen also that the means employed by the respondent to get the appellant to perform what he perceived to be the latters civic obligation was contrary to the supreme law of the land.

[**14.**] Counsel submitted further that the

> mere restatement or summary of evidence which the learned trial Judge made on page 77 1.1 to page 96 1.23 is no evaluation of evidence nor could the learned Judges comments on page 96 1.24 page 99 1.30 be regarded as adequate evaluation of the totality of the evidence led.

[**15.**] The respondents brief, as I pointed out, was not amended to reflect the improvement made on the appellants original brief. Consequently arguments of Chief I Tagbo Nwogu on behalf of the respondent are based partly on the grounds of appeal rather than on the issues formulated there from and partly on the issues so formulated.

[**16.**] The submissions of counsel on ground 2, from which, along with others, issues 2 and 3 have been formulated, are quite interesting. They run thus:

> Ground two of the appeal, shorn of its particulars, reads as follows: 2)The learned trial Judge misdirected himself on the facts when in respect of the plaintiff he held thus: So he has come to court on a matter of principle based on his professed beliefs. Such intransigence amounts to foolhardiness and stupid bigotry.
>
> This is a mere comment, made in passing by the learned trial Judge, on the behaviour of the plaintiff/appellant and his wife . . . Before then, the learned Judge had meticulously considered and commented on the pleadings of the parties; set out in full the extensive correspondence exchanged by the parties before the intervention of the Task Force.
>
> The findings of fact of the learned Judge and the application of the law to such findings begin at page 96 lines 24 33; to pages 97 99 of the record of proceedings. The passage set out hereinabove on which ground two of the appeal is based is merely the impressions of the learned trial Judge. Even if such *impression is wrong it cannot be enough to fault impeccable findings of fact made by the Judge* . . . (original italics).
>
> It is necessary here to emphasise that the reference to forced labour . . . by the learned Judge was merely illustrative of the point of community development. It

was not necessary for the judgment and if that portion of the judgment is expunged, the judgment could not be affected in any material way. We, however, submit . . . that the statement of law on forced labour in the context is unimpeachable.

[**17.**] On issue 1, counsel submitted that the appellants counsel based his arguments on findings of fact made by the Judge at 99 11.10-18 regarding the circumstances in which the appellant paid the levies imposed on him and his wife.

[**18.**] It was his general conclusion that the Judges approach to the case could not be faulted.

[**19.**] Now, having myself read the record I have no hesitation in supporting the appellant in his complaints. I agree with his counsel that the learned trial Judge completely abandoned his responsibility as an impartial arbiter and allowed his sentiments to get the better of him. He so identified with the populist standpoint of the respondent that he could not bring himself to hear, let alone consider, the appellants minority view on the relationship of the populist standpoint to the constitutional provisions. Had the learned Judge set aside his prejudices in favour of what, to him, had become a way of life of the Igbos and which, to him, has even spread throughout the country, and played the role of a disinterested arbiter, he would have seen the real issue that the appellant was urging him to resolve. He would have seen that all that the appellant had asked of him was to consider whether or not, in view of the distance that the peoples of Nigeria have come since the days of Mazi Okonkwo, and the emergence of a strong republican constitutional government, some of the practices of yore could still apply. I will now set out in full the relevant portion of his judgment to make this point clearer. After recapitulating on the evidence of the two witnesses who testified on either side the learned Judge continued:

Now, to my assessment of the evidence.

The controversy in this case is clearly community levies and penalties for failure to pay. The plaintiff belongs to the sect of Jehovahs Witness and is resolutely opposed to any levy which does not accord with his religious beliefs. The culture of community projects is nothing new in these parts. It is a way of life for the Igbos and even now it has spread throughout the country. Only a community led by fools will wait for [g]overnment to do everything for them. Throughout Imo [s]tate, and is same for all other [s]tates of the Federation, [g]overnment encourages communities to embark on projects which are beneficial to their members. Many communities have built schools, hospitals, maternity homes, etc. through levies collect from their people and by forced labour. Yes, I said forced labour because there is nothing at all wrong or illegal about forced labour in the context. Chapter IV of the Constitution of the Federal Republic of Nigeria 1979 which deals with Fundamental Rights provides in section 31(1)(c) and (2)(d)(i), as follows:

31(1) Every individual is entitled to respect for the dignity of his person, and accordingly . . . (c) No person shall be required to perform forced or compulsory labour. (2) For the purposes of subsection (1)(c) of this section, forced or

compulsory labour does not include . . . (c) any labour or service that forms part of normal communal or other civic obligations for the well being of the community.

All the levies which the plaintiff objects to are definitely for the well being of his community. Will it be right to allow individuals to ruin development projects in their communities because of their religious tenets? My answer is clearly in the negative. The plaintiff is allowed to practice whatever religion he professes but there must be something fundamentally wrong with a tenet which renders its adherents odious before the people. Plaintiff says he and his wife have been ostracised. They belong to he sect of Jehovahs Witness and I find their resolute opposition to some of the levies in their community so unreasonable that I cannot commend their behaviours. He went to the police to report. Exhibit L is the extract from Police Crime Diary tendered by him and it reads as follows:

[**20.**] He sets it out and continued:

What crime can be inferred from the entry? The police found none and said so. I do not see any myself.

There is evidence which I believe that levies are collected without discrimination. Some of the levies amount to no more than N5.00. That the plaintiff is able to institute this action, paying a summons fee of N533.00 shows that he is not at all indigent. DW2 even told the court that he drives a car. So he has come to court on a matter of principle based on his professed religious beliefs. Such intransigence amounts to foolhardiness and stupid bigotry.

The payment of levies for development projects is a civic obligation and a good citizen does not wait until he is force to perform such obligation. Where a person in the circumstance is compelled to pay the levy, he cannot succeed to recover the levy. It does not, in my view, amount to extortion. I am satisfied from evidence that the Task Force led by DW2 collected the levies from plaintiff. Nobody beat him. He saw soldiers and may have been induced by fear to pay. In the case of Handie & Lane v Chilton [1928] 2 KB 306 it was held that money paid in consequence of an intimidation to do a lawful act is not paid under extortion, even though the intimidation is called a threat.

[**21.**] As can be seen, after setting out the cases of the parties on their respective pleadings and restating the evidence of the witnesses the learned Judge declared that he was embarking on an assessment of the evidence before him. It is obvious that from that point to the end of the judgment he did nothing of the sort. He just adopted the standpoint of the respondent that he had set out when reviewing the pleadings of the parties as if same had been established. He was supposed to be checking to see if in fact it had been established. Rather than do this, he just assumed that it had.

[**22.**] Assessment or evaluation of evidence, in my view, involves the following process. First you take a piece of evidence and consider whether in the natural order of things it is credible. If it is not intrinsically incredible then you check it against the pleadings of the party who is relying on it. This is to ensure its relevance to the matter in hand. Parties, as we know, are bound by their pleadings and evidence given on any point not pleaded goes to no issue. After that you check in the pleadings and the testimony on behalf of the opposing party to see if the fact stated in

evidence has been admitted, either expressly or impliedly. If it has, then the fact on which it was given has been proved. If there is no admission, then you check for what other contrary evidence there is from the opposing side. Then you place the two pieces of opposing evidence on the imaginary scale of justice. The piece that tilts the scale constitutes the findings of the court.

[**23.**] Thus one cannot, in my view, talk of a finding of fact by a judge when that judge has not evaluated the evidence before him in the manner I have outlined. Noting in the judgment of the learned Judge in the case on appeal before us can be properly labelled as a finding of fact. He did not prepare the ground for making any findings. At best whatever finding he may have made can only be a perverse one. For these reasons I must resolve issue 2 in favour of the appellant. The approach of the learned Judge to the case before him was not the correct one.

[**24.**] Now, on the evidence before the trial court, could the learned Judge be correct in holding that the appellant failed to establish a case of extortion against the respondent. I do not think he was right in his conclusion. The respondent clearly admitted in his pleading, and the Judge noted, that because he could not persuade the appellant and his wife he employed the services of armed soldiers to force them to comply. The three pertinent questions that the Judge should have answered, and which the appellant urged him to answer, were:

(1) whether or not the women who imposed the levy, or indeed any other person in the community, including the Eze (the 2nd defendant), could legally impose the levies and penalties that they imposed,
(2) whether or not the respondent or any other person in the community could legally storm the appellants house with armed soldiers to demand payment of the imposed levies and fines, and
(3) if (1) and (2) are in the negative, whether or not the appellant is entitled to any of the reliefs he sought.

[**25.**] As the learned Judge rightly pointed out, community development is a very laudable thing and ought to the encouraged. Governments have often encouraged it. Members of the community themselves recognised its value. I entirely agree with the learned Judge that only a community led by fools will wait for [g]overnment to do everything for them.

[**26.**] All this, however, is beside the point here. With the rise of Parliament, that is, since the beginning of participation of people in their own governance, the arbitrary power of the ruler to impose levies disappeared. Levies, which the people are obliged to pay, and which can be legally enforce against them, can now only be imposed by law. No community leader of the calibre of the defendants before the trial Court, much less the women of the plaintiffs village, have any legal powers to impose any levies on anybody in the community. They can only encourage the people to participate in community development either by direct labour (forced labour in this day and age, with all due respect to the learned Judge, is too strong) or by the

financial contribution towards same. Such financial contribution can, in my opinion, be only a voluntary thing. The community cannot, in my view, recover by legal process the levy agreed on towards such development. If it is not recoverable by legal process, it follows that it must be even less capable of recovery by self-help of the kind employed by the respondent.

[**27.**] An important point that the learned Judge would have seen, had he put aside his premature disapproval of the appellants perceived recalcitrance, was that the appellant and his wife were not averse to community development. They pleaded and led evidence, which was never challenged or contradicted, that they had all along voluntarily participated fully in community development. They tendered Exhibits F F2 and K K2, ie, receipts for payment of community development levies, to show such participation. Although the defendants pleaded that they were always forced to pay, they never proffered any evidence to that effect.

[**28.**] The evidence of the appellant and his wife, which the respondent admitted, was that they refused to pay the levies and penalties now in controversy because they were for purposes that their religious beliefs forbade them to participate in. The respondent admitted that this was their ground for declining to pay the levies and penalties. Considering the evidence before the court, the learned Judge was certainly most unfair and uncharitable to the appellant and his wife by labelling them as outlaws and anti-social elements who generally refused to perform their civic responsibilities of participating in or contributing towards the development of their community. The evidence did not justify such castigation. Had the Judge properly evaluated the evidence he would have seen this.

[**29.**] Even if the respondent or the Eze or the women of the village had properly imposed the levies and penalties, had the respondent employed the proper means of recovery?

[**30.**] This is not the first time this type of case has come before our courts. In Ajao v Ashiru (1973) 8 NSCC 525, the defendants would not allow the plaintiff, a pepper grinder, to carry on business in their ward because he was not a member of their local union. As he would not join them, but insisted on carrying on business in their ward, and to persuade him to join or move out, the defendants went with a policeman to his place of business. The policeman seized his pepper mill. The Chief Magistrate before whom the plaintiff took the matter dismissed the claim for damages for trespass and for the unlawful seizure of the mill. The High Court on appeal to it allowed the appeal and awarded the plaintiff £30 on the first head and £214 on the second. The Western Court of Appeal overturned this decision and restored that of the Chief Magistrate. The Supreme Court in its turn overruled the Western Court of Appeal and restored the High Court decision.

[**31.**] The Court, per Elias CJN, in condemning the conduct of the defendants observed and held at page 533:

> We are of the view that, even if the police have been shown to have removed the mill at the defendants instance, the defendants would nevertheless have been liable for the wrongful seizure of the mill since they would then have set in motion a ministerial act as opposed to a judicial one . . .
>
> It cannot be over emphasized to both high and low that every person resident in this country has right to go about his or her lawful business unmolested or unhampered by anyone else, be it a Government functionary or a private individual. *The courts will frown upon any manifestation of arbitrary power assumed by anyone over the life or the property of another even if that other is suspected of having breached some law or regulation. People must never take the law into their own hands by attempting to enforce what they consider to be their right or entitlement. It is, therefore, wrong, very wrong for a group of persons to go to the workshop of another in Bode, effect a forcible entry into it, beat up his employee and remove the mornings takings, all in the purported but misguided exercise of power on behalf, ostensibly, of a local branch of a trade union.* It is even more wrong for such persons to claim immunity for their action on the pretence that it was a police officer that they had employed to remove the pepper mill. The law of Nigeria is that those who set a ministerial rather than a judicial officer in motion in this way are as liable for the wrongful seizure of anothers property as if they had done it themselves. *Police officers must, therefore, be wary of being inveigled into a situation in which they find themselves becoming partisan agents of wrong-doers in the pursuit of a private vendetta. This kind of a show of power which is becoming too frequent in our society today must be discouraged by all those who set any store by civilized values.* The poor pepper mill owner is as entitled to his workshop and his humble means of livelihood as is the owner of a mansion and a share certificate not to be deprived of them even for one day. There will accordingly be judgment in favour of the mill owner for the loss of his earnings during the period when his mill was wrongfully withheld by the defendants. (Italics are mine.)

[**32.**] Agbai v Okogbue (1991) 7 NWLR (Pt.204) 391 is remarkable in more respect than one. In the first place, it was an appeal from the decision of the same Judge who has decided the case now on appeal before us. In the second place, the facts of that case are almost on all fours with the facts of the present case. The Judge expressed the same views there as he has expressed here, including the view about the employment of forced labour for community development. The decision of this court confirming that his views in that case were wrong was given on 14 July 1987. His decision in the case now on appeal before us was given on 19 July 1991, over five years after the said decision of this court. In the circumstances one would have expected that since the same point had come before him again for decision he would endeavour to see that the views of the higher courts on it had been on the previous occasion and whether they had agreed with his. That, I believe, is what the rule of stare decisis is all about.

[**33.**] In the third place, Chief I Tagbo Nwogu appeared in that case for the plaintiff. The same learned Counsel appears for the defendant in the present case and is urging on us the very standpoint against which he strenuously and industriously and, I must add, very successfully argued before this court and the Supreme Court. I am not saying this cannot and should not be done. As time goes by and one acquires newer knowledge one may find and become convinced that ones earlier views were wrong. I do not

see anything wrong in one moving over to the correct view. However, in a system like ours where the views of higher courts are binding on lower ones, I do not think it is a very honourable thing to do to mislead a lower court to a view that one knows has been firmly rejected by a higher court. It is of course important to win a case. It is, however, in my view, more important to win honestly and honourably. It is the duty of Chief Nwogu to see that this court is not misled. He has filed a brief of argument urging us to say that it is alright for a group of persons to take the law into their hand all in the name of following tradition, knowing, having himself successfully persuaded the Supreme Court to the view, that it is not. Counsel should have drawn our attention to Agbais case and told us why we should not follow it.

[**34.**] Be that as it may, as noted earlier on, the facts of Agbais case are not different from the facts of the one before us. The plaintiff and the defendants in that case were members of the same community. The defendants wanted the plaintiff to join the age group that they thought was for those within his age bracket. He would not hear of it because his religion forbade it. As no amount of gentle persuasion would make him change his mind the defendants decided on something more drastic, but more effective. They invaded his premises and took away his sewing machine determined not to return it until he not only joined the group but also paid up all levies payable by every member. Affirming the decision of this court that rejected the decision of Njiribeako J, the Supreme Court condemned in no uncertain terms any customary practices that derogate from the fundamental rights of individuals enshrined in the Constitution and that sanction the use of self-help as a means of settling disputes. Only such lawful practices that encourage community development, the court agreed, should be encouraged.

[**35.**] Wali J S C, made this abundantly clear when he said at 442 B:

> I have no hesitation in coming to the conclusion that any customary law that sanctions the breach of an aspect of the rule of law and contained in the fundamental rights provisions guaranteed to a Nigerian in the Constitution is barbarous and should not be enforced by our courts.

[**36.**] Nwokedi JSC, who read the lead judgment pointed out at 415 F-G that:

> Much as one would welcome development projects in the community there must be caution to ensure that the fundamental rights of a citizen are not trampled upon by popular enthusiasm. These rights have been enshrined in a legislation, that is, Constitution, which enjoys superiority over local custom. Freedom of association and of religion are enshrined in sections 24(1) and 36(1) of the 1963 Constitution as amended respectively which is applicable in this instance.

[**37.**] In his contribution, Karibi-Whyte JSC, said at 428 429 H-A:

> In my opinion, although the custom of age-grade cannot be described as repugnant to natural justice, equity and good conscience and is not contrary

to public policy, it is also not incompatible with any legislation in force, that part of the customary law which makes every member of the age-grade proprio vigore a member of the association is contrary to the Constitution.

[**38.**] On the learned Judges view on the employment of forced labour Wali JSC, had this answer at 442 B–D:

Under the 1963 Constitution, section 31 thereof states where citizens property, both moveable and immovable can be taken away from him without obtaining his consent. What the appellants were trying to do was to enforce the payment of a levy they imposed on the respondent by seizing his sewing machine until such a time he made good his default. They were not enforce communal labour envisaged in section 20(1)(d) of the 1963 Constitution. If the respondent had tried to resist the appellants bid, breach of peace would have resulted which could lead to skirmishes and physical injuries to the appellants . . . The peaceful and democratic way to execute the levy against the respondent, if he had joined the age grade, thus accepting their terms and conditions . . . is by resorting to court with jurisdiction in the matter.

[**39.**] Section 31(2)(d) of the 1979 Constitution is a verbatim re-enactment of section 20(3)(d) of the 1963 Constitution. Employing the services of armed soldiers to intimidate a person into paying out money is not the same thing as the forced labour envisaged in this provision. The kind of labour that I think is contemplated here is forcing every able-bodied member of the community to take part in manual labour, like clearing the bushes along community roads or generally keeping the village clean.

[**40.**] The learned Judge relied on Hardie & Lane v Chilton, supra. With respect, that decision does not support the learned Judges views. The circumstances there were different from what we have here. There the means used to make the plaintiff pay out money to the defendant were declared by the court not to be illegal. Therefore the money paid out was said not to have been obtained under duress and could, therefore, not be recovered by action. Here, the Supreme Court had in the cases I referred to declared the method used by the respondent to be illegal. Clearly, employing armed soldiers, the ultimate war machine of state, to make a person pay money that no law requires him to pay and which he has no wish to pay is to employ illegal means to achieve an illegal end.

[**41.**] A careful reading of the case reveals that the decision therein supports the opposite views to the learned Judges. The Court there made it clear that if the end sought to be achieved or the means of achieving it or both are illegal, then the person who was made to pay out the money for the illegal end and by the illegal means can recover his money by action.

[**42.**] And when can it be said, according to the Court in that decision, that the end or the means of its achievement is illegal?

[**43.**] It is when either the one or the other or both are not sanctioned by law. Scrutton LJ, at page 314 quoted Lord Dunedin in Sorrell v Smith (1925) AC 700, at 730, as saying this:

Expressing the matter in my own words, I would say that a threat is a pre-

intimation of proposed action of some sort. That action must be either per se a legal action or an illegal, i.e., a tortuous action. If the threat used to effect some purpose is of the first kind, it gives no ground for legal proceedings; if of the second, it falls within the description of illegal means, the right to sue of the person injured is established.

[**44.**] Barlier, at 313, he had taken note of the observation by Lord Cave, LC, to the effect that the use of unlawful means such as violence or the threat of violence or fraud will render the achievement of a lawful end an unlawful one.

[**45.**] On the same page he adopted the language of Holmes J in Vegelahn v Guntner (1986) 167 Mass 92, that the unlawfulness of threats depends on what you threaten, and of compulsion on how you compel.

[**46.**] I have expressed the view that the law does not sanction the arbitrary levying and action of moneys from citizens without any back-up law. We have seen that the courts have always regarded the use of self-help, especially vi et armis as not only unlawful and illegal, but also unconstitutional.

[**47.**] In the final analysis, therefore, I hold that the learned trial Judge was wrong in holding that the appellant had not made out a case of extortion against the respondent. Accordingly, I allow this appeal. I set aside the decision of the Judge dismissing the appellants claim before him. I make the following consequential orders in its place:

(1) The respondent shall pay to the appellant as special damages N40.00, which he extracted from the former by an unlawful and illegal means.
(2) The respondent is restrained, either by himself, his servants or agents or otherwise howsoever from continuing the intimidation and coercion of the appellant on account of the payment of levies and penalties that are not sanctioned by law.

[**48.**] As we have seen, in Ajao v Ashiru, supra, the Supreme Court approved the general damages awarded against the lawless defendants for the unlawful seizure of the plaintiffs property. I think that the treatment meted out to the appellant and his wife in this case by the lawless respondent deserves condemnation. Accordingly,

(3) For the acts of intimidation, threat and coercion perpetrated on the appellant by the respondent the latter shall pay N10,000.00 to the former as general damages.

[**49.**] The respondent shall pay costs of this appeal assessed at N3,000.00.

Pats-Acholonu JCA

[**50.**] I have read the illuminating judgment of Ikongbeh JCA and I agree with him. Time was when the law governing the native community was force of custom good or bad and whether repugnant or not. Now in the 21st century we are governed by a living law the Constitution fashioned after the Constitutions of older democracies.

[**51.**] No one can force or coerce any one to join a club, society or group that he does not intend or wish to be a member. It is an affront and infraction of his constitutional right to use old age custom that has now been relegated to moribundity to make one acquiesce or become a member to a body that he or she despises. It is atrophy.

[**52.**] The learned trial Judge who took the case failed to read the earlier judgment of the Court of Appeal which sat on his first judgment on this point. It is to be regretted that the court below has not learned its lesson as it proceeded to make another mistake.

[**53.**] The appeal succeeds and I abide by the order in the leading judgment.

Akpiroroh JCA

I agree.

SEYCHELLES

Leite v Government of Seychelles and Another

(2003) AHRLR (SyCC 2002)

Alfredo Hugo Kurt Leite v the Government of Seychelles and the Attorney-General
Constitutional Court, 11 June 2002, constitutional case 9 of 2001
Judges: Perera, Juddoo, Karunakaran

Property (expropriation 1, 2, 5, 22; public interest 12-16, 19; reasonable justification, democratic society, 17)
Shelter (public welfare, 6, 12, 16, 18, 21)
Equality, non-discrimination (discrimination on the grounds of political opinion, 9, 10)

Perera J

[**1.**] The petitioner has invoked the jurisdiction of this court under article 46(1) of the Constitution claiming that a notice of intended acquisition served on him by 1st respondent to acquire a part of his property bearing V 5126, amounts to a likely contravention of his right contained in article 26 of the Constitution. Article 26(1) provides that:

> Every person has a right to property and for the purpose of this Article this right includes the right to acquire, own, peacefully enjoy and dispose of property either individually or in association with others.

[**2.**] Section 7(1) of the acquisition of land in the Public Interest Act, 1996 (hereinafter referred to as 'the Act') provides that

> Any person who has an interest in the land specified in a notice of intended acquisition may, where the person claims that Article 26 of the Constitution has been or is likely to be contravened by the notice of intended acquisition, apply to the Constitutional Court for redress under Article 46 of the Constitution.

[**3.**] That section therefore gives an aggrieved person a right to obtain a declaration from this Court as regards the constitutionality of the intended acquisition. This is the first case of its kind.

[**4.**] Section 5(1) of the Act requires the Minister to serve a notice on the person on whom notice of intended acquisition had been served inviting that person to treat with him for the sale of the land to the Republic. The Act also makes provision for payment of monetary compensation or the giving of alternative land in exchange. If no agreement is reached at the negotiations not less than ten days before expiration of the period speci-

fied in the notice of acquisition, the Minister is empowered to compulsorily acquire the land, and publish such acquisition in the gazette and a local newspaper, and also serve notice on the owner of the property. Section 8 of the Act gives the aggrieved person a right of action to challenge the legality of the acquisition in the Supreme Court exercising original civil jurisdiction.

Facts

[**5.**] The petition before this Court is based on a notice of intended acquisition dated 20 September 2001, which the petitioner claims was served on him on 4 October 2001. The purpose of the proposed acquisition was stated therein as 'for housing development'. Admittedly, this notice was published in the official *Gazette* of 24 September 2001 and the *Nation* newspaper on 25 September 2001. The petition was filed on 24 October 2001. By that time no 'notice to treat' had been served on the petitioner under section 5(1) of the Act. However, as averred by Roy Cadence, Senior Technical Officer of the Ministry in his affidavit dated 15 January 2002, the notice of intended acquisition that is presently being challenged is not the first to have been served on the petitioner. According to the exhibits filed by the petitioner, a previous notice was gazetted on 4 January 2000 and a 'notice to treat' was sent on 20 March 2000. However, counsel for the petitioner had raised several objections as regards those notices not complying with the provisions of the Act. By letter dated 23 August 2000, the counsel for the petitioner was informed that the government did not wish to continue with the published acquisition, but was still interested in negotiating to purchase part of the petitioner's land. Procedure under the Act was recommenced with the said notice of intended acquisition dated 20 September 2001 as there was no response from the petitioner. In any event, in a previous letter dated 7 October 1999 (exhibit 5) the petitioner had in no uncertain terms expressed his objections to the proposed acquisition. In paragraph 4 of the present petition he avers that he does not wish to part with his property, which he claims has been reserved for his children. He also avers that he has no other land. In paragraph 5 of the petition he avers that the proposed acquisition is not in the public interest, is not genuine, and is not being carried out in good faith. The grounds of objections averred are as follows;

1. The proposed acquisition is not a necessity for the promotion of public welfare, namely housing development.
2. There is no reasonable justification for causing the petitioner any hardship.
3. The intended acquisition is politically motivated
4. There is abundant, suitable land in the vicinity of the petitioner's property for the development of housing land belonging to the government.

[**6.**] The 1st respondent, the government, denies those allegations. It is averred in the defence that:

1. The acquisition is necessary in the national interest for the promotion of public welfare, namely for the government to pursue a Housing Development

Project which is expected to consist of 12 units of one and two bedroom flats and 24 units of two and three bedroom semi-detached houses.

Gerard Renaud, Senior Quantity Surveyor of the Ministry avers in his affidavit that the first phase is anticipated to begin in the last quarter of the year 2002 and the second phase, after completion of the first phase. The estimated cost of the project is R10 530 000.

Simon Gill, the Director of Housing Administration avers that as at 10th January 2002 the Ministry had received more than 5000 applications for housing assistance, out of which 276 are from the Les Mamelles district, in which the petitioner's land is situated.

2. No hardship will be caused to the petitioner as the government proposes to acquire only 37.65% of the petitioner's property upon payment of full compensation, leaving approximately 9889 square metres (2 acres) of land to the petitioner, which is more than sufficient for the housing needs of the petitioner and his two children.

3. The acquisition is not politically motivated, but being carried out in good faith.

4. There is no other land in the vicinity belonging to the government, and that parcels V10545, V8351 and V4480 owned by the government have already been developed to maximum capacity by providing housing accommodation to the residents in the area.

[**7.**] Considering first ground 4 of the objections and the reply of the government, the maps produced by the petitioner (exhibits 9 and 10) depict the location of the petitioner's land in relation to the other lands owned by the government in the locality. Parcel V 8351 belonging to the government is along the Western boundary of Parcel V 5126 belonging to the petitioner. Parcel V 4480 is at the Southern tip of the petitioner's land. Parcel V 10545 however is not depicted in either of those maps. It was submitted by learned counsel for the petitioner that there is a large land bearing Parcel V 7117 to the East of his land. Hence the proverbial question, 'why me?'. Admittedly, that land does not belong to the government. The submission of learned Senior State Counsel that the three lands belonging to the government borders part of the petitioner's land sought to be acquired and that houses have already been constructed thereon is not being contested by the petitioner. Hence as submitted by learned Senior State Counsel, the acquisition of a part of Parcel V 5126 belonging to the petitioner would facilitate the extension of the housing project already completed on the three adjoining Parcels belonging to the government rather than the acquisition of Parcel V 7117 which would require construction of new approach roads and other utility facilities. Hence ground 4 has no factual basis.

[**8.**] Ground 3, as regards the allegation of political bias can also be disposed of at this stage. The basis of this allegation is that the intention to acquire the land is motivated by malice and politics and that Mr Brassel Adeline, member of the National Assembly of the majority party, representing the Les Mamelles district has threatened the petitioner that he would have the land acquired because he did not support him or his political party. In support of his allegation, the petitioner has produced

a letter dated 23 August 2000 (exhibit 8) sent to Mr Adeline, informing him of the withdrawal of the first notice and the intention of the government to negotiate with the petitioner. It was submitted that this showed the interest Mr Adeline had in the intended acquisition and his ulterior motives as alleged. The 1st respondent however avers that, that letter was sent in reply to a letter dated 26 July 2000 sent by Mr Adeline, with a copy to Mr Pardiwalla. In that letter (exhibit R1) Mr Adeline states,

> we refer to the Land Acquisition case against Mr Leite of Les Mamelles which was been going for more than two years now. We would be very grateful if you could update us on the progress, if any.

It would indeed be the legitimate interest of a member of the National Assembly to satisfy, *inter alia* the housing needs of the district he represents. The averment that there are 276 applications from the Les Mamelles district has not been challenged. There is also no averment by the petitioner that all those applicants are supporters of Mr Adeline's Political Party or that all the houses or flats already constructed in that district have been allocated to such supporters only.

[**9.**] In a similar case involving the allegation of political bias, the Supreme Court of Sri Lanka held in the case of *KD Perera v R Premadasa & Ors* (1979) FRD (1) — at 70 that 'the discrimination on the ground of political opinion must be deliberate on the part of the person or persons who had the power under the Land Acquisition Act to acquire lands for a public purpose' and that on the basis of the facts of that case, the petitioner had failed to prove that the decision to take possession of the lands 'was taken for the sole purpose of taking political revenge', as alleged.

[**10.**] In the present case, pursuant to section 3(1) of the Act, acquisition is based on the opinion of the Minister. Hence what is relevant in the acquisition would be the opinion of the Minister and not that of Mr Adeline, the member of the district. There is no allegation that the Minister was actuated by political bias against the petitioner. Hence the petitioner has failed to establish this allegation even on a *prima facie* basis.

[**11.**] Before the other grounds are considered, it is pertinent to consider the submission of Mr Pardiwalla that as the decision to acquire is based on the opinion of the Minister, an affidavit should have been filed by him and not by other officials of his Ministry. Basically, rule 3(1) of the Constitutional Court Rules (SI 33 of 1994) requires the petitioner to file a petition accompanied by an affidavit of facts in support thereof. However in respect of the respondent, Rule 9 envisages the filing of a defence, and not counter affidavit. Hence the filing of a defence with affidavit evidence as has been done in the present case cannot be faulted. In any event no prejudice has been caused to the petitioner as the Minister in the notice of intended acquisition clearly stated that the public interest was the 'the purpose of a Housing Development'. The officials of the Ministry involved in the project have in their respective affidavits furnished adequate information and facts to substantiate that purpose so as to enable this court to

determine the merits of the petition. Hence the submission of Mr Pardiwalla lacks merit.

[**12.**] In ground 1, the petitioner avers that the proposed acquisition is not a necessity for the promotion of public welfare as envisaged in article 26(3)(b) of the Constitution. The right to property recognised in article 26 is subject to nine limitations specified in sub-article (2)(a) to (i). Of those, the limitation relevant to the present matter is acquisition 'in the public interest', sub-article (3) provides that any law enacted for the purpose of compulsory acquisition of land should contain provisions for the following:

(1) That notice being given to the persons who have an interest or right over such property.
(2) That compulsory acquisition should be for the development or utilisation of the property to promote public welfare or benefit or for public defence, safety, order, morality or health or for town and country planning.
(3) That there should be reasonable justification for causing any hardship that may result to the person whose land is being acquired.
(4) That the state pays adequate and full compensation for the property.
(5) That there is provision of a right of access to the Supreme Court for the determination of the interest or right, the legality of the acquisition, or the amount of the compensation.

[**13.**] The Acquisition of land in the Public Interest Act 9 of 1996 makes provisions for all those objectives. The term 'acquire in the public interest' is defined in the Act as

> . . . the acquisition or taking possession of land for its development or utilisation to promote the Public Welfare or benefit or for public defence, safety, order, morality or health or for Town and Country Planning.

[**14.**] This definition must be distinguished from the meaning of the term public purpose as used for example in the Land Acquisition Act (1955) of Australia. In the case of *Clunies-Ross v Commonwealth of Australia* (1985) LRC 292, it was held that the power to compulsorily acquire land for a public purpose was

> limited to a power to acquire land for some purpose related to a need for or proposed use (be it active or passive) or application of the land to be acquired. It does not extend to the acquisition of land merely for the purpose of depriving the owner of it and thereby achieving *some purpose* in respect of which the parliament has power to make laws.

In this respect, where in the Land Acquisition Act of Antigua and Barbuda Section 3(1) thereof permitted the acquisition of land for a public purpose, it was held in the case of *Spencer v Attorney-General of Antigua and Barbuda* (1999) 2 CHRLD 184 that the stated purpose of development of tourism was clearly a public purpose.

[**15.**] The term public interest is therefore wider that the term public purpose in its scope and application. In terms of the definition of public interest in the Act, the acquisition to be of public interest should *inter*

alia be 'to promote the public welfare'. Mr Pardiwalla, learned counsel for the petitioner contended that the construction of 36 housing units to accommodate 36 families could not be considered as promoting public welfare. He submitted that an acquisition for the purpose of constructing a school or a hospital would fall into the category. *Black's Law Dictionary* (4th Edition) at 1396 defines 'public welfare' on the basis of an American decision in *Shaver v Starrett 4 6H10 state 499* as meaning 'the prosperity, well-being or convenience of the public at large, or of a whole community, as distinguished from the advantage of an individual or limited class'.

[**16.**] With respect, the fallacy in Mr Pardiwalla's submission lies in interpreting the concept of public welfare in numerical terms. Just as a doctor is needed by the sick and not the healthy, not all the inhabitants of the Les Mamelles district would be in need of housing assistance. It has been averred that there are 276 applications from that district. Hence for purposes of the concept of public interest, these applicants would constitute the public. In the case of *Post-Master General v Pearce* (1968) 2 QB 463, it was held that for the government to show that the refusal of a landowner to permit telephone lines to pass over his land was contrary to public interest, it was not necessary to show that a district or a large number of persons would thereby be deprived of telephone facilities. Further in the case of *Cartwright v Post Office* (1969) 2 QB 62, it was held that the scope of the term public interest should not be limited, and that it was contrary to public interest to deprive two farmers in a remote village telephone facilities, as a farmer could not farm efficiently without a telephone in his premises. Here what was considered relevant was not the two farmers, but the benefit that the public would derive from the success of their farming. Hence it was necessary for the promotion of public welfare (in the sense of, the dictionary definition (*supra*)) for 'the prosperity, well being or convenience of the public at large or of a whole community' and not limited to the two individual farmers. There is therefore no merit in Mr Pardiwalla's contention that the proposed acquisition is not a necessity to promote public welfare.

[**17.**] As regards the ground of hardship canvassed in ground 2, the respondents aver that only 37.65% of the petitioner's land is sought to be acquired. This is not an absolute justification. Pursuant to article 26(3)(c) of the Constitution, the state must show that there is *reasonable justification* for causing any hardship to the owner of the land. Such justification must be one that is acceptable in a democratic society. Article 49 defines democratic society as meaning 'a pluralistic society in which there is tolerance, proper regard for the fundamental human rights and freedoms and the rule of law and where there is a balance of power among the executive, legislature and judiciary'.

[**18.**] Article 46(8) provides that where the person alleging a contravention or a risk of contravention establishes a *prima facie* case, the burden of proving that there has not been a contravention or a risk, shall where

the allegation is against the state, be on the state. The acquisition by the state of land privately for public purposes or in the public interest or for a public use, is a necessary feature of a government based on principles of democracy. The spiritual or ethical view of private property was expressed in the Papal encyclical *Quadragesima Anno (1931*) as follows —

> The right to own private property has been given to man by nature, or rather by the creator himself, both in order that individual may be able to provide for their own needs and those of their families, and also that by means of it the goods which the creator has destined for the whole human race may truly serve this purpose.

[**19.**] This meant that man must take into account in this matter not only his own advantage but also the common good. The essence of this dogma is valid in the secular filed as well. Dennis Lloyd in *The Idea of Law* at 146 states thus:

> Although the inviolability of property still remains an important value in Western society, the fact remains that very important in roads have been made upon this principle. The nationalizations of whole industries, the extensive control by planning legislation of the uses that land and buildings can be put to, sweeping powers of compulsory acquisition enabling authorities to acquire land from private owners without their consent; these are accepted today as essential features of the state machinery for controlling the welfare of the community . . . At the present day the fundamental belief in the recognition of private property remain in the notion that property should not be arbitrarily acquired from private persons without adequate compensation.

[**20.**] Even among individual land owners, the Civil Code of Seychelles permits an owner whose property is enclaved to claim from his neighbour a right of way over his land to ensure the full use of his property for private or business use (article 682*).* Here, a land becomes subject to an easement in favour of his neighbouring landowner, whose peaceful enjoyment of his land becomes limited, and its value diminished.

[**21.**] The Court takes judicial notice of the fact that in Seychelles, the amount of buildable land is limited in relation to the social and economic needs of the community, so much so that the state has undertaken extensive land reclamation projects at considerable expense. The petitioner has averred in paragraph 4 of his affidavit that the land sought to be acquired is the only piece of land that he owns, that he had worked hard all his life, and that his only wish is to leave it to his children. Although this is a noble aspiration of a duty conscious father, modern social welfare states recognise limitations in the interest of the less fortunate members of the community. Thus, in terms of article 26(3)(c), the burden of proving, albeit on a balance of probabilities, that there is reasonable justification for causing hardship to the petitioner is on the state. Article 34 of the Constitution recognises the right of every citizen to adequate and decent shelter. Hence the Ministry in charge of housing has a public duty to assist those in need of housing. The averment in Mr Simon Gill's affidavit that there are 276 such applicants from the Les Mamelles district and the

averment in Mr Gerard Renaud's affidavit that the proposed project would provide 36 housing units remain unchallenged by the petitioner. Hence on a balance I am satisfied that the state has proved that there is reasonable justification for causing hardship to the petitioner by the proposed acquisition of 37.65% of his land, upon payment of full compensation, for the common good of the landless and houseless members of the district in which the petitioner's land is situated.

[**22.**] Hence on a consideration of all these circumstances, the state has discharged the burden of proving that the intended acquisition of a part of the petitioner's land, does not contravene or is likely to contravene the fundamental right to property guaranteed in article 26(1) of the Constitution.

[**23.**] Accordingly, the petition is dismissed with costs.

SOUTH AFRICA

Thebus and Another v The State

(2003) AHRLR (SACC 2003)

Abduraghman Thebus and Moegamat Adams v The State
Constitutional Court, 28 August 2003
Judges: Chaskalson, Langa, Ackermann, Goldstone, Madala, Mokgoro, Moseneke, Ngcobo, O'Regan and Yacoob
Extract: Moseneke and separate opinion of Goldstone and O'Regan; full text on www.chr.up.ac.za
Previously reported: 2003 (6) SA 505 (CC)

Constitutional supremacy (24, 29, 39)
Interpretation (development of common law, 25, 28, 31; international standards, 92)
Dignity (common purpose doctrine, 36)
Personal liberty (common purpose doctrine, 40)
Fair trial (presumption of innocence, common purpose doctrine, 42, 43; right to silence, 52-59, 65-68 79, 81-86, 84, 92, 93; cross-examination on why remained silent on alibi, 69, 70, 91; information on consequences of remaining silent, 87; effect of misdirection, 73, 74, 79; adversarial process, 83, 87)

Moseneke J

[**1.**] This is an appeal against the judgment and orders of the Supreme Court of Appeal (the SCA) handed down on 30 August 2002, confirming the convictions of both appellants in the Cape High Court on 14 September 2000 on one count of murder and two counts of attempted murder.

Factual background

[**2.**] On 14 November 1998, a group of protesting residents in Ocean View, Cape Town, gathered and approached the houses of several reputed drug dealers in the area, including the house of one Grant Cronje. They allegedly caused damage to the property of Cronje before moving on. The protestors drove through the area in a motorcade of about five to six vehicles. As the motorcade approached a road intersection Cronje opened fire on the group. In response, some members of the group alighted from their vehicles and returned fire. In the resulting crossfire, a seven-year-old

girl, Crystal Abrahams, was fatally shot and two others, Riaan van Rooyen and Lester September, were wounded.[1]

[**3**.] Thereafter, the two appellants were arrested on suspicion of having been part of the group involved in the shooting incident. After the arrest of the first appellant, Sergeant McDonald of the South African Police Services warned him that he was not obliged to make any statement and that if he did it may be used in evidence against him. In this regard Sergeant McDonald testified as follows:

> Tydens die onderhoudsverklaring . . . toe ek hom nou gewaarsku het van sy regte. Toe vra ek hom of hy vir my 'n verduideliking wil gee, toe sê hy ja. Hy het toe vir my sy weergawe gegee. Ek het dit, soos hy praat het ek dit genotuleer, maar hy wou nie hê dat, ek moes dit in 'n verklaringvorm sit nie. Dit wou hy nie gehad het nie.[2]

The first appellant readily admitted that after his arrest he was informed of the charges of which he was suspected and warned that he need not make a statement. He, nonetheless, made an oral statement before Sergeant McDonald. In this regard, his evidence is as follows:

> Ja. So met ander woorde mnr McDonald het vir u gesê daar is getuies wat sê u was betrokke, maar u het geweet dat u eintlik by u tweede vrou was daardie tyd. — Ja.
>
> Het u dit vir mnr McDonald gesê? — Ek het gesê die familie was in Hanover Park gewees. Maar ek het nie gesê waar ek was nie.
>
> Enige rede daarvoor? — Nee, ek het nie rede gehad nie.
>
> So met ander woorde u het vir mnr McDonald gesê die familie was in Hanover Park, maar u het niks sê van uself nie. — Van myself nie.
>
> En u sê daar was geen spesifieke rede daarvoor. — Nee.[3]

[**4**.] Thereafter, the first appellant refused to make a written statement to the police. Nearly two years passed before the appellants were brought to trial. Neither of the appellants disclosed his alibi defence until the trial before the High Court.

[**5**.] At the trial, the State led evidence placing both appellants in the vicinity of the shooting. A witness for the State, Gregory Edward Kiel

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[1] See *S v Abduraghman Thebus and Others*, unreported judgment of the Cape High Court delivered on 14 September 2000, case SS77/2000.

[2] During the interview statement . . . when I informed him of his rights. At that time I asked him if he wished to provide me with an explanation and he said yes. He then gave me his version. As he spoke I took down notes but he did not want me to record it in statement form. That he did not want. (My translation.)

[3] Yes. So in other words Mr McDonald told you that there are witnesses who say that you were involved but you knew that you were actually with your second wife at that time. — Yes.
Did you tell Mr McDonald? — I said the family was in Hanover Park but I did not say where I was.
Any reason for that? — No, I had no reason.
So in other words you told Mr McDonald that the family was in Hanover Park, but you said nothing about yourself. — About myself no.
And you say there was no specific reason for that? — No. (My translation.)

(Kiel), testified that he had seen the first appellant standing near a vehicle holding a pick-handle, while the second appellant was retrieving spent cartridges discharged from the firearms of other members of the group. He also testified that the second appellant held a firearm but that he had not seen him shooting. Mitchell AJ found Kiel to be an impressive and forthright witness, whose evidence concerning the first appellant was beyond reproach.

[**6**.] The first appellant testified in support of his alibi defence and called two witnesses. Both witnesses testified that on the date and at the time of the shooting, the first appellant was at a place other than the scene of the shooting. The trial Court rejected this alibi defence. It concluded that both appellants had been part of the protesting group and were present at the scene of the shooting. Applying what is commonly referred to as the doctrine of common purpose, Mitchell AJ found both appellants guilty of one count of murder and two counts of attempted murder.

[**7**.] The trial Court sentenced each of the two appellants to eight years' imprisonment, suspended for a period of five years on certain conditions. Both appellants were granted leave to appeal against their conviction and the State leave to appeal against the sentences.

[**8**.] In May 2002, the SCA heard both appeals. The majority of the SCA (per Lewis AJA and Olivier JA concurring) dismissed the appeal against the convictions and upheld the appeal of the State against the sentences. The SCA ordered that each of the sentences imposed by the High Court be replaced by a sentence of 15 years' imprisonment. In a separate judgment, Navsa JA concurred in some respects with and dissented in others from the majority judgment.

[**9**.] Thereafter, the appellants made an application in terms of Rule 20 for special leave to appeal to this Court against the judgment and order of the SCA. This Court granted leave to appeal and issued directions calling for argument on two constitutional issues. Firstly, in the case of both appellants, whether the SCA failed to comply with its duty in terms of s 39(2)[4] of the Constitution to develop and apply the common-law doctrine of common purpose so as to bring it in line with the constitutional rights to dignity,[5] freedom and security of the person[6] and the right to be presumed innocent.[7] Secondly, whether the SCA erred in drawing a negative

[4] Sec 39(2) states: 'When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.'

[5] Sec 10 guarantees that '(e)veryone has inherent dignity and the right to have their dignity respected and protected'.

[6] Sec 12(1)(a) states that: 'Everyone has the right to freedom and security of the person which includes the right . . . not to be deprived of freedom arbitrarily or without just cause.'

[7] Sec 35(3)(h) guarantees that: 'Every accused person has a right to a fair trial, which includes the right . . . to be presumed innocent, to remain silent, and not to testify during the proceedings.'

inference from the first appellant's failure to disclose an alibi defence prior to trial, in violation of his right to silence as contained in the Constitution.[8]

The High Court

[**10.**] The trial Court was persuaded that the State had made out a proper case to warrant a conviction of both appellants based on the common-law doctrine of common purpose as laid down in *S v Mgedezi and Others*.[9] In that regard the trial Court held that:

> (T)he events of that afternoon took place in a sequence which commenced with the gathering at the Raven's home. The evidence shows that some of those persons were armed and that there was no apparent attempt to conceal this from others in the group. The intent was to confront and intimidate persons alleged to be drug dealers. In these circumstances it can hardly be said that any member of the group did not appreciate the possibility that violence could erupt and persons could be killed by the use of the group's armaments. By participating in the further activities of the group, each member signified his acceptance of that possibility. Such possibility became a reality when the shooting took place. There is no doubt . . . that the shots which killed Crystal and wounded Riaan and Mr September came from . . . the group of which (the first appellant) and (the second appellant) were part.

Later in the judgment the trial Court observed that:

> They were present on the scene; they were aware that the shooting was taking place; they were throughout making common cause with the group, including the gunman, and they acted in association with him — (the first appellant) by standing guard and [the second appellant] by collecting the cartridge cases . . . they had the requisite intention, albeit by way of dolus eventualis, to commit murder . . . .

[**11.**] The first appellant denied having been present at the scene of the shooting. In support of his alibi defence, the first appellant testified that at approximately 13h00 on the day of the shooting he travelled by taxi from Ocean View to Fish Hoek train station. The purpose of the trip was to visit his second wife, Ms Faranaaz Jacobs, in Parkwood Estate. In the taxi, the first appellant met with a fellow resident of Ocean View, Ms Brenda Van Rooy. He and Ms Van Rooy took the 15h10 train to Wynberg. On arrival in Wynberg, the first appellant went to the local mosque where he led the afternoon prayers. On his version, the first appellant spent the rest of the afternoon and evening with his second wife. He returned to Ocean View only on the following day. In their evidence, Ms Van Rooy and Ms Jacobs corroborated the version offered by the first appellant.

[**12.**] Mitchell AJ rejected as untrustworthy the alibi evidence put up by the first appellant and his two witnesses. The trial Court took into account that both witnesses had claimed that they had not discussed their evidence

[8] Sec 35(1)(a) states that '(e)veryone who is arrested for allegedly committing an offence has the right . . . to remain silent'.
[9] 1989 (1) SA 687 (A).

with each other or with anybody else; that Ms Van Rooy was informed one month and Ms Jacobs, one week before the trial that they had to testify about events which had occurred nearly two years earlier and that these witnesses remembered with remarkable detail and accuracy the occurrences of the day in question. Mitchell AJ concluded that the close correlation between the evidence of the two witnesses and of the first appellant had cast doubt on its credibility.

[**13**.] The trial Court found that the evidence of the State witness, Kiel, placing the first appellant on the scene of the shooting was satisfactory and adequate to secure a conviction against first appellant. It rejected the first appellant's claim that he chose to disclose his alibi defence only during his trial and not at any time after his arrest. The trial Court reasoned that the first appellant was a man of considerable stature within the Ocean View community. He was the assistant Imam at the local mosque. He was arrested one month after the shooting incident and spent nearly a week in custody before he was granted bail. According to his second wife, the community had known of his arrest and that it concerned the shooting incident in which a young child had been killed. To the first appellant and his second wife these unfounded accusations should have amounted to an obvious error. The trial Court rejected the alibi as false and in doing so it took into account, amongst other factors, the unlikelihood that the first appellant would have preferred to remain silent rather than gainsay the 'false accusations'. The trial Court took the view that, before the trial, the first appellant could easily have dispelled the baseless accusations against him by disclosing his whereabouts to the police on the day of the shooting. Moreover, worshippers at the Wynberg mosque, present on the afternoon in question, would have had no conceivable difficulty in confirming that the appellant had led the afternoon prayers.

The Supreme Court of Appeal

[**14.**] Lewis AJA, writing on behalf of the majority of the SCA, held that the reliability of Kiel's identification of the first appellant had to be weighed carefully against his alibi and the testimony of the two witnesses who supported his alibi.[10] The SCA, as did the trial Court, held that the close correlation and the detailed precision of the evidence of the alibi witnesses, taken together with the evidence of the first appellant, attracted justified suspicion. The SCA found that the version put up by the first appellant and his two witnesses had been 'concocted' and 'carefully rehearsed'. The SCA reminded itself that such suspicion was not enough to dismiss the version as false beyond reasonable doubt. Following the reminder, Lewis AJA remarked that: 'What is more telling ... is that the version was raised only at the trial, some two years after the incident.' As a result, the majority concluded that:

[10] Reported as *S v Thebus and Another* 2002 (2) SACR 566 (SCA).

> The only inference that can be drawn from (the first appellant's) failure to advise the police, and from the other witnesses' failure to do so, is that the alibi had no truth in it at all.

[**15.**] The SCA held that the trial Court had properly rejected the alibi defence of the first appellant and that the appeal against his conviction had no merit. The majority of the SCA confirmed the convictions without reference to the basis of the conviction being common purpose. In his minority judgment, Navsa JA upheld the finding of the trial Court that the requirements of common purpose had been met. Navsa JA found that on the facts the members of the vigilante group who were at the scene were party to a common purpose that rendered them liable for the murder of the child and the attempted murder of two other persons. It was on this basis that Navsa JA confirmed the second appellant's conviction of murder and attempted murder. In this regard Navsa JA states, at 578d–f:

> By coming to Ocean View armed and behaving in the manner described earlier in this judgment members of the vigilante group were demonstrating that they were intent on confrontation and violence. By stopping and standing in the middle of a populated area, firearms blazing away wild-west style, members of the group placed themselves and others in the community in danger. It is clear that members of the vigilante group acted in concert as they went about their business in Ocean View. No member of the group, whether in motor vehicles or in the street, dissociated himself from violent actions perpetrated by others in the group.

[**16.**] The majority judgment accepted the findings of Navsa JA on common purpose. Navsa JA parted ways with the majority by holding that Kiel's identification of the first appellant on the scene of the shooting was not sufficient to found his conviction. Olivier JA and Lewis AJA accepted the testimony of Kiel as a reliable and compelling identification of the first appellant as a participant in the crimes of murder and attempted murder. They placed reliance on the fact that the first appellant and Kiel had known each other since their childhood and that Kiel had called him by his nickname. In contrast, Navsa JA reasoned that Kiel was a single witness and that his testimony was not 'satisfactory in all material respects'. Moreover, Kiel's identification of two other accused, whom he had claimed were at the scene of the shooting, had been discarded by the trial Court as open to doubt and erroneous. But these accused were not known to Kiel. The trial Court accepted that Kiel had made an honest but mistaken identification. In the case of the first appellant, however, there was no room for such a mistake as Kiel and the first appellant had known each other since they were children. Thus Kiel's identification of the first appellant carried considerable weight. Navsa JA, as did the majority judgment, held that the alibi defence of the first appellant was fabricated. However, the learned Judge reasoned that the rejection of the first appellant's alibi as fabricated did not redeem Kiel's testimony. Navsa JA concluded that the appeal of the first appellant against his conviction should succeed as there was a reasonable possibility that he had not been present at the scene of the shooting.

Issues

[**17.**] Two substantive constitutional issues fall to be decided in this appeal. The first issue is whether, in regard to both appellants, the SCA failed to develop the common-law doctrine of common purpose in conformity with the Constitution, as required by s 39(2) and thereby failed to give effect to their rights to dignity,[11] freedom of the person[12] and a fair trial,[13] which includes the right to be presumed innocent.[14] The second issue is whether the negative inference drawn from the first appellant's failure to disclose his alibi defence before trial has infringed his right to silence.[15]

Common purpose

[**18.**] The doctrine of common purpose[16] is a set of rules of the common law that regulates the attribution of criminal liability to a person who undertakes jointly with another person or persons the commission of a crime. Burchell and Milton[17] define the doctrine of common purpose in the following terms:

> Where two or more people agree to commit a crime or actively associate in a joint unlawful enterprise, each will be responsible for specific criminal conduct committed by one of their number which falls within their common design. Liability arises from their ''common purpose'' to commit the crime.

Snyman[18] points out that 'the essence of the doctrine is that if two or more people, having a common purpose to commit a crime, act together in order to achieve that purpose, the conduct of each of them in the execution of that purpose is imputed to the others'. These requirements are often couched in terms which relate to consequence crimes such as murder.[19]

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[11] Sec 10.
[12] Sec 12.
[13] Sec 35(3).
[14] Sec 35(3)(h).
[15] Sec 35(1)(a).
[16] Also known as 'common intent' or in Afrikaans as 'gemeenskaplike opset' or 'gemeenskaplike doel'. This doctrine is said to have been received into South African law from English law and recognised as part of the common law in *R v Garnsworthy and Others* 1923 WLD 17 at 19. In this regard see also Burchell and Milton *Principles of Criminal Law* 2nd ed at 393; Kriegler and Kruger *Suid-Afrikaanse Strafproses* (6th ed) at 404.
[17] FD Burchell and Milton at 393.
[18] Snyman *Criminal Law* (4th ed) at 261; see also *S v Safatsa and Others* 1988 (1) SA 868 (A) at 894, 896 and 901; *S v Mgedezi* n 9; *S v Banda and Others* 1990 (3) SA 466 (B) at 500–1.
[19] In practice the doctrine finds application in a variety of crimes other than murder and these include treason, public violence, robbery, housebreaking, unlawful possession of a firearm, assault, theft, fraud. For a catalogue of cases which exemplify such application, see Snyman n 18 at 262. It is, however, unnecessary to express an opinion, in the context of this case, on whether the principles of common purpose should be applied in a charge of culpable homicide. In *S v Nkwenja en 'n Ander* 1985 (2) SA 560 (A) and in *Magmoed v Janse van Rensburg and Others* 1993 (1) SA 777 (A) (1993 (1) SACR 67) at 818D–F (SA) and 102i–103b (SACR) it was held that the doctrine is applicable in culpable homicide cases provided the negligence of each accused is not imputed but determined independently.

[**19.**] The liability requirements of a joint criminal enterprise fall into two categories.[20] The first arises where there is a prior agreement, express or implied, to commit a common offence. In the second category, no such prior agreement exists or is proved. The liability arises from an active association and participation in a common criminal design with the requisite blameworthy state of mind.[21] In the present matter, the evidence does not prove any such prior pact.

[**20.**] The trial Court found that the first appellant was a party to an unlawful common enterprise during which the child was murdered. In convicting the accused the Court relied on the decision of *S v Mgedezi*, in which it was held that for the doctrine to be invoked:[22]

> In the first place, he must have been present at the scene where the violence was being committed. Secondly, he must have been aware of the assault on the inmates of room 12. Thirdly, he must have intended to make common cause with those who were actually perpetrating the assault. Fourthly, he must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of the others. Fifthly, he must have had the requisite *mens rea*; so, in respect of the killing of the deceased, he must have intended them to be killed, or he must have foreseen the possibility of their being killed and performed his own act of association with recklessness as to whether or not death was to ensue.

The appellants contended that the principles enunciated in *S v Mgedezi* should have been developed in accordance with the requirements of s 39(2) of the Constitution, and if this had been done, they would have been entitled to be acquitted.

[**21.**] The rules which make up the doctrine of common purpose deal with a number of different situations in which an accused person might be held liable for a crime committed in the course of a common enterprise. Since *S v Mgedezi*, the application of these rules have been refined and developed by various decisions of the SCA.[23] In the present case it is not necessary to consider all of these developments. We are concerned here with a case in which the accused were present at the scene of the crime. What needs to be decided is whether the principles applicable to such a case, as stated in *S v Mgedezi* and developed by the SCA in later cases, calls for further development. It is neither necessary nor desirable to consider other situations. This judgment therefore deals only with the existing law insofar as it is relevant to the facts of the present case.

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[20] *Magmoed v Janse van Rensburg and Others*, per Corbett CJ at 810G (SA) and 96e (SACR): '(A) common purpose may arise by prior agreement between the participants or it may arise upon an impulse without prior consultation or agreement.'

[21] See Kriegler and Kruger n 16 at 405; See also *S v Mgedezi* n 9 at 705–6 and *S v Ngobozi* 1972 (3) SA 476 (A).

[22] See n 9 at 705I–706B.

[23] *S v Petersen* 1989 (3) SA 420 (A); *S v Yelani* 1989 (2) SA 43 (A); *S v Jama and Others* 1989 (3) SA 427 (A); *Magmoed v Janse van Rensburg* n 19 above; *S v Motaung and Others* 1990 (4) SA 485 (A); *S v Khumalo en Andere* 1991 (4) SA 310 (A); *S v Singo* 1993 (2) SA 765 (A).

[**22.**] After *S v Mgedezi* there remains no doubt that where the prosecution relies on common purpose as a basis for criminal liability in a consequence crime such as murder, a causal connection between the conduct of each participant in the crime and the unlawful consequence caused by one or more in the group, is not a requirement.[24] Rules of criminal liability similar or comparable to common purpose are found in many common-law jurisdictions, including England,[25] Canada,[26] Australia,[27] Scotland[28] and the USA.[29] In all these legal systems, a causal nexus is not a prerequisite for criminal liability. In civil legal systems, such as France and Germany there appear to be no rules, which, in substance, approximate our rule of common purpose.[30]

Did the SCA fail to develop the doctrine of common purpose in accordance with s 39(2) of the Constitution?

[**23.**] The main thrust of the appellants' contention is that the pre-constitutional requirements of common purpose unjustifiably limit the appellants' rights to dignity, freedom and security of the person and a fair trial including the right to be presumed innocent. However, the appellants stopped short of asserting that the doctrine of common purpose is unconstitutional in its entirety. They submitted that the High Court and the SCA erred in failing to develop, apply and elucidate the following requirements that:

(a) there must be a causal connection between the actions of the appellants and the crime for which they were convicted;

[24] See *Magmoed v Janse van Rensburg* n 19 at 789G.

[25] In *R v Powell and Another*; *R v English* [1997] 4 All ER 545 (HL), the House of Lords held that the doctrine of joint enterprise liability still applies in English Law.

[26] Sec 21(2) of the Canadian Criminal Code reads: 'Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.'

[27] See Gillies *Criminal Law* (4th ed) (LBC, 1997) at 173–81.

[28] In Scotland there are three ways in which one may be 'art and part' of a crime: (1) by counsel or instigation; (2) by supplying materials for the commission of the crime and (3) by assisting at the time of the actual commission of the crime. In cases of agreement, guilt exists because of that agreement. Gordon *et al The Criminal Law of Scotland* 2000 at 158 para 5.19.

[29] See La Fave *Criminal Law* (West St Paul 2000) at 623–32.

[30] Sec 25 (perpetration), 27 (accessoryship), 29 (independent punishability of the participant) and 30 (attempted participation) of the *Strafgesetzbuch* (StGB) draw a clear line between a perpetrator, a co-perpetrator and an accessory. The StGB specifically provides that every participant shall be punished according to his or her own guilt irrespective of the guilt of the other. The French Penal Code (arts 121–1, 121–4, 121–6 and 121–7) permits the same punishment for a perpetrator, a co-perpetrator and an accomplice. The French Code provides that no one is criminally liable except for his own conduct (art 121–1). Perpetrators are defined according to their own conduct (art 121–4), however, an accomplice may be liable for the same punishment as the perpetrator (art 121–6). In both criminal codes, no provision akin to common purpose is discernible.

(b) the appellants must have actively associated themselves with the unlawful conduct of those who actually committed the crime; and
(c) the appellants must have had the subjective foresight that others in the group would commit the crimes.

[**24.**] Since the advent of constitutional democracy, all law must conform to the command of the supreme law, the Constitution, from which all law derives its legitimacy, force and validity.[31] Thus, any law which precedes the coming into force of the Constitution remains binding and valid only to the extent of its constitutional consistency.[32] The Bill of Rights enshrines fundamental rights which are to be enjoyed by all people in our country. Subject to the limitations envisaged in s 36, the State must respect, protect, promote and fulfil the rights in the Bill of Rights.[33] The protected rights therein apply to all law and bind all organs of State, including the Judiciary.[34]

[**25.**] It is in this context that courts are enjoined to apply and, if necessary, to develop the common law in order to give effect to a protected right, provided that any limitation is in accordance with s 36.[35] Section 39(2) makes it plain that when a court embarks upon a course of developing the common law it is obliged to 'promote the spirit, purport and objects of the Bill of Rights'.[36] In the *Pharmaceutical Manufacturers*[37] *case, Chaskalson P observes that:*

> The common law supplements the provisions of the written Constitution but derives its force from it. It must be developed to fulfil the purposes of the Constitution and the legal order that it proclaims — thus, the command that law be developed and interpreted by the courts to promote the 'spirit, purport and objects of the Bill of Rights''. This ensures that the common law will evolve within the framework of the Constitution consistently with the basic norms of the legal order that it establishes. There is, however, only one system of law and within that system the Constitution is the supreme law with which all other law must comply.[38]

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[31] Sec 2 of the Constitution provides that: 'This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.'

[32] Item 2(1) of Schedule 6 retains the validity of 'all law that was in force when the new Constitution took effect' subject to consistency with the Constitution.

[33] See secs 7(2) and 7(3) of the Constitution.

[34] See sec 8(1) of the Constitution.

[35] See sec 8(3)(a) and (b) of the Constitution.

[36] See also sec 173 which confers on all higher courts, including this Court, the inherent power to develop the common law taking into account the interests of justice; *Pharmaceutical Manufacturers Association of SA and Another*; *In re Ex parte President of Republic of South Africa and Others* 2000 (2) SA 674 (CC) (2000 (3) BCLR 241) at paras [46]–[49]; *Carmichele v Minister of Safety and Security and Another* 2001 (4) SA 938 (CC) (2001 (10) BCLR 995) at paras [33]–[36]; *Brisley v Drotsky* 2002 (4) SA 1 (SCA) (2002 (12) BCLR 1229) per Cameron JA at paras [88]–[89]; *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) at paras [27]–[29].

[37] *Id.*

[38] *Id at para [49].*

[**26.**] The appellants have urged this Court to develop the common-law doctrine of common purpose beyond the existing precedent. In Carmichele[39] this Court decided that, faced with such a task, a court is obliged to undertake a two-stage enquiry. The first enquiry is whether, given the objectives of s 39(2) of the Constitution, the existing common law should be developed beyond existing precedent. If it leads to a negative answer, that would be the end of the enquiry. If it leads to a positive answer, the next enquiry would be how the development should occur and whether this Court or the SCA should embark on that exercise.

[**27.**] Section 39(2) requires that 'when' every court develops the common law it must promote the spirit, purport and objects of the Bill of Rights. This section does not specify what triggers the need to develop the common law or in which circumstances the development of the common law is justified. In *Carmichele*[40] this Court recognised that there are notionally different ways to develop the common law under s 39(2), all of which might be consistent with these provisions. It was also held that the Constitution embodies an 'objective normative value system' and that the influence of the fundamental constitutional values on the common law is authorised by s 39(2). It is within the matrix of this objective normative value system that the common law must be developed.[41] Thus under s 39(2), concepts which are reflective of, or premised upon, a given value system 'might well have to be replaced, or supplemented and enriched by the appropriate norms of the objective value system embodied in the Constitution'.[42]

[**28.**] It seems to me that the need to develop the common law under s 39(2) could arise in at least two instances. The first would be when a rule of the common law is inconsistent with a constitutional provision. Repugnancy of this kind would compel an adaptation of the common law to resolve the inconsistency.[43] The second possibility arises even when a rule of the common law is not inconsistent with a specific constitutional provision but may fall short of its spirit, purport and objects. Then, the common law must be adapted so that it grows in harmony with the 'objective normative value system' found in the Constitution.[44]

[**29.**] When there is a constitutional challenge to legislation the test for its constitutional validity is in two parts. Kriegler J, in *In re S v Walters*[45] delineates the process thus:

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[39] *See n 36 at para [40].*
[40] Id at para [56].
[41] Id at para [54].
[42] Id at para [56].
[43] *Shabalala and Others v Attorney-General of Transvaal and Another* 1996 (1) SA 725 (CC) (1995 (2) SACR 761; 1995 (12) BCLR 1593); *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC) (2000 (1) BCLR 39).
[44] Compare *Carmichele and Afrox Healthcare Ltd* n 36 above.
[45] *Ex parte Minister of Safety and Security and Others: In re S v Walters and Another* 2002 (4) SA 613 (CC) (2002 (2) SACR 105; 2002 (7) BCLR 663).

> First, there is the threshold enquiry aimed at determining whether or not the enactment in question constitutes a limitation on one or other guaranteed right. This entails examining (a) the content and scope of the relevant protected right(s) and (b) the meaning and effect of the impugned enactment to see whether there is any limitation of (a) by (b). Subsections (1) and (2) of s 39 of the Constitution give guidance as to the interpretation of both the rights and the enactment, essentially requiring them to be interpreted so as to promote the value system of an open and democratic society based on human dignity, equality and freedom. If upon such analysis no limitation is found, that is the end of the matter. The constitutional challenge is dismissed there and then.
>
> If there is indeed a limitation, however, the second stage ensues. This is ordinarily called the limitations exercise. In essence this requires a weighing-up of the nature and importance of the right(s) that are limited together with the extent of the limitation as against the importance and purpose of the limiting enactment. Section 36(1) of the Constitution spells out these factors that have to be put into the scales in making a proportional evaluation of all the counterpoised rights and interests involved.[46]

(Footnotes omitted.)

[**30**.] Thus, if the impugned legislation indeed limits a guaranteed right, the next question is whether the limitation is reasonable and justifiable, regard being had to the considerations stipulated in s 36. If the impugned legislation does not satisfy the justification standard and a remedial option, through reading in, notional or actual severance is not competent,[47] it must be declared unconstitutional and invalid. In that event the responsibility and power to address the consequences of the declaration of invalidity resides, not with the Courts, but pre-eminently with the legislative authority.[48]

[**31**.] A different approach is required when a Court deals with a constitutional challenge to a rule of the common law. The common law is its law. Superior Courts are protectors and expounders of the common law. The Superior Courts have always had an inherent power to refashion and develop the common law in order to reflect the changing social, moral and economic make-up of society.[49] That power is now constitutionally

[46] Id at paras [26]–[27]. Also see *S v Makwanyane and Another* 1995 (3) SA 391 (CC) (1995 (1) SACR 1; 1995 (6) BCLR 665).

[47] For the test whether severance is competent see *Coetzee v Government of the Republic of South Africa; Matiso and Others v Commanding Officer, Port Elizabeth Prison, and Others* 1995 (4) SA 631 (CC) (1995 (10) BCLR 1382) at para [16] and paras [75]–[76]. See also *S v Coetzee and Others* 1997 (3) SA 527 (CC) (1997 (1) SACR 379; 1997 (4) BCLR 437) per Langa J at para [51].

[48] Sec 43 of the Constitution. In *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC) (1996 (1) BCLR 1) in para [183], Chaskalson P reminds us that '(t)here are functions that are properly the concern of the Courts and others that are properly the concern of the Legislature. At times these functions may overlap. But the terrains are in the main separate, and should be kept separate.'

[49] *Amod v Multilateral Motor Vehicle Accidents Fund* 1998 (4) SA 753 (CC) 1998 (10) BCLR 1207) in para [22].

authorised[50] and must be exercised within the prescripts and ethos of the Constitution.

[**32.**] In a constitutional challenge of the first type, referred to in para [28], to a common law rule, the Court is again required to do a threshold analysis, being whether the rule limits an entrenched right. If the limitation is not reasonable and justifiable, the Court itself is obliged to adapt, or develop the common law in order to harmonise it with the constitutional norm.

Causation

[**33.**] The appellants have criticised the doctrine of common purpose principally on the ground that it does not require a causal connection between their actions and the crimes of which they were convicted. During argument, the appellants correctly conceded that in a joint criminal activity, the action of an accused need not contribute to the criminal result in the sense that but for it the result would not have ensued. What was urged on us is to develop the common law by requiring that the action of the accused must be shown to facilitate the offence on some level. Such facilitation would occur when the act of the accused is a contributing element to the criminal result. This argument does not constitute a direct challenge to the principles set out in *S v Mgedezi*.

[**34.**] In our law, ordinarily, in a consequence crime, a causal nexus between the conduct of an accused and the criminal consequence is a prerequisite for criminal liability.[51] The doctrine of common purpose dispenses with the causation requirement. Provided the accused actively associated with the conduct of the perpetrators in the group that caused the death and had the required intention in respect of the unlawful consequence, the accused would be guilty of the offence. The principal object of the doctrine of common purpose is to criminalise collective criminal conduct and thus to satisfy the social 'need to control crime committed in the course of joint enterprises'.[52] The phenomenon of serious crimes committed by collective individuals, acting in concert, remains a significant societal scourge. In consequence crimes such as murder, robbery, malicious damage to property and arson, it is often difficult to prove that the act of each person or of a particular person in the group contributed causally to the criminal result. Such a causal prerequisite for liability would render nugatory and ineffectual the object of the criminal norm of common purpose and make prosecution of collaborative criminal enterprises intractable and ineffectual.

[50] Secs 173 and 8(3) of the Constitution.

[51] On requirements of factual and legal causation and theories of causation see Snyman n 18 at 73 *et seq*; Burchell and Milton n 16 at 115; *S v Daniëls en 'n Ander* 1983 (3) SA 275 (A) at 331C–D and *S v Mokgethi en Andere* 1990 (1) SA 32 (A) at 39.

[52] *R v Powell and Another*; *R v English* n 25 at 545H–I; also see *R v Logan* n 26 at 402–3.

[**35.**] The appellants argue that the doctrine of common purpose undermines the fundamental dignity[53] of each person convicted of the same crime with others because it de-individualises him or her. It de-humanises people by treating them 'in a general manner as nameless, faceless parts of a group'. On this contention, a crime like murder carries a stigma greater than a conviction on an alternative charge or competent verdict such as public violence, conspiracy, incitement, attempt and accomplice liability. The appellants claim that the doctrine of common purpose violates their right not to be deprived of freedom arbitrarily,[54] because this mode of criminal liability countenances the most tenuous link between individual conduct and the resultant liability. The appellants further argue that the doctrine of common purpose violates the presumption of innocence[55] by dispensing with or lowering the threshold of proof for certain elements of a crime. That, the appellants contend, is at odds with the rule that the State must prove all the elements of a crime beyond a reasonable doubt. In the last instance, the appellants submit that the violation of any of their constitutionally protected rights is not justifiable as the primary rationale for the doctrine of common purpose is convenience of proof in favour of the prosecution.[56]

[**36.**] I am unable to agree that the doctrine of common purpose trenches upon the rights to dignity and freedom. It is fallacious to argue that the prosecution and conviction of a person de-humanises him or her and thus invades the claimed rights. The entire scheme of ss 35 and 12(1) of the Bill of Rights authorises and anticipates prosecution, conviction and punishment of individuals, provided it occurs within the context of a procedurally and substantively fair trial and a permissible level of criminal culpability.[57] The essence of the complaint must be against the criminal norm in issue. The doctrine of common purpose sets a standard of criminal culpability. It defines the minimum elements necessary for a conviction in a joint criminal enterprise. The standard must be constitutionally permissible. It may not unjustifiably invade rights or principles of the Constitution. Put differently, the norm may only 'impose a form of culpability sufficient to justify the deprivation of freedom without giving rise to a constitutional complaint'.[58] However, once the culpability norm passes constitutional muster, an appropriate deprivation of freedom is permissible.

[**37.**] The definitional elements or 'the minimum requirements necessary to constitute a meaningful norm'[59] for a common-law crime are unique to

[53] See n 5.
[54] See n 6.
[55] See n 7.
[56] A similar criticism of the doctrine of common purpose is levelled by the writers Burchell and Milton n 16 at 406.
[57] Compare the remarks of Langa DP in *S v Boesak* 2001 (1) SA 912 (CC) (2001 (1) SACR 1; 2001 (1) BCLR 36) at para [37].
[58] Per O'Regan J in *S v Coetzee* n 47 at para [178].
[59] See Snyman n 18 at 31–9; Burchell and Milton n 16 at 29–37.

that crime and are useful to distinguish and categorise crimes. Common minimum requirements of common-law crimes are proof of unlawful conduct, criminal capacity and fault, all of which must be present at the time the crime is committed. Notably, the requirement of causal nexus is not a definitional element of every crime.[60]

[**38.**] Thus, under the common law, the mere exclusion of causation as a requirement of liability is not fatal to the criminal norm. There are no pre-ordained characteristics of criminal conduct, outcome or condition. Conduct constitutes a crime because the law declares it so. Some crimes have a common-law and others a legislative origin. In a constitutional democracy, such as ours, a duly authorised legislative authority may create a new, or repeal an existing, criminal proscription. Ordinarily, making conduct criminal is intended to protect a societal or public interest by criminal sanction. It follows that criminal norms vary from society to society and within a society from time to time, relative to community convictions of what is harmful and worthy of punishment in the context of its social, economic, ethical, religious and political influences.

[**39.**] In our constitutional setting, any crime, whether common-law or legislative in origin, must be constitutionally compliant. It may not unjustifiably limit any of the protected rights or offend constitutional principles. Thus, the criminal norm may not deprive a person of his or her freedom arbitrarily or without just cause. The 'just cause' points to substantive protection against being deprived of freedom arbitrarily or without an adequate or acceptable reason and to the procedural right to a fair trial. The meaning of 'just cause must be grounded upon and (be) consonant with the values expressed in s 1 of the Constitution and gathered from the provisions of the Constitution'.[61]

[**40.**] Common purpose does not amount to an arbitrary deprivation of freedom. The doctrine is rationally connected to the legitimate objective of limiting and controlling joint criminal enterprise.[62] It serves vital purposes in our criminal justice system. Absent the rule of common purpose, all but actual perpetrators of a crime and their accomplices will be beyond the reach of our criminal justice system, despite their unlawful and intentional participation in the commission of the crime. Such an outcome would not accord with the considerable societal distaste for crimes by common design. Group, organised or collaborative misdeeds strike more harshly at the fabric of society and the rights of victims than crimes perpetrated by individuals. Effective prosecution of crime is a legitimate, 'pressing social need'.[63] The need for 'a strong deterrent to violent

[60] In conduct crimes, a defined conduct is prohibited regardless of its result. Crimes of rape, perjury and incest come to mind. In a consequence crime, any conduct which causes a proscribed outcome is punishable. Murder and culpable homicide are such crimes.
[61] *S v Boesak*, per Langa DP n 57 at para [38].
[62] *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC) (1998 (7) BCLR 779) at para [23].
[63] *S v Zuma and Others* 1995 (2) SA 642 (CC) (1995 (1) SACR 568; 1995 (4) BCLR 401) at para [41].

crime'[64] is well acknowledged because 'widespread violent crime is deeply destructive of the fabric of our society'[65]. There is a real and pressing social concern about the high levels of crime.[66] In practice, joint criminal conduct often poses peculiar difficulties of proof of the result of the conduct of each accused, a problem which hardly arises in the case of an individual accused person. Thus there is no objection to this norm of culpability even though it bypasses the requirement of causation.

[**41.**] At a substantive level, the conduct of the appellants, as found by the trial Court, answers beyond a reasonable doubt to the prerequisites of the criminal liability norm set by the rule. Moreover, their complaint is not against the procedural fairness of their trial but against the substantive constitutional compatibility of the rule. It may be added that a person who knowingly, and bearing the requisite intention, participates in the achievement of a criminal outcome cannot, upon conviction in a fair trial, validly claim that his or her rights to dignity and freedom have been invaded.

Presumption of innocence

[**42.**] I now turn to the appellants' claim that their conviction under the doctrine of common purpose denied them the right to be presumed innocent. Section 35(3)(h) accords to every accused person the right to a fair trial, which includes the right to be presumed innocent. In *S v Bhulwana; S v Gwadiso*,[67] O'Regan J, speaking for the Court, held that:

> (T)he presumption of innocence is an established principle of South African law which places the burden of proof squarely on the prosecution. The entrenchment of the presumption of innocence in s 25(3)(c) must be interpreted in this context. It requires that the prosecution bear the burden of proving all the elements of a criminal charge. A presumption which relieves the prosecution of part of that burden could result in the conviction of an accused person despite the existence of a reasonable doubt as to his or her guilt. Such a presumption is in breach of the presumption of innocence and therefore offends s 25(3)(c).[68]

[**43.**] Of course, the doctrine of common purpose does not relate to a reverse onus or presumption which relieves the prosecution of any part of the burden. The appellants argued that the substantive effect of the

[64] See *S v Makwanyane* n 46 at para [117]. See also *S v Williams and Others* 1995 (3) SA 632 (CC) (1995 (2) SACR 251; 1995 (7) BCLR 861) at para [80].

[65] *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* 1999 (4) SA 623 (CC) (1999 (2) SACR 51; 1999 (7) BCLR 771) at para [67]. See also para [68], where the Court cautions that alarming levels of crime should not be exploited to justify inappropriate invasion of individual rights.

[66] *S v Mbatha; S v Prinsloo* 1996 (2) SA 464 (CC) (1996 (1) SACR 371; 1996 (3) BCLR 293) at para [16]–[18].

[67] 1996 (1) SA 388 (CC) (1995 (2) SACR 748; 1995 (12) BCLR 1579) at para [15].

[68] See also *S v Zuma and Others* n 63 at para [33]; *S v Ntsele* 1997 (2) SACR 740 (CC) (1997 (11) BCLR 1543) at paras [3]–[4]; *S v Manamela and Others* 2000 (3) SA 1 (CC) (2000 (1) SACR 414; 2000 (5) BCLR 491) at para [25]–[26].

doctrine of common purpose is to dispense with the requirement of a causal nexus between the conduct of the accused and the criminal result. As found earlier, the doctrine of common purposes sets a norm that passes constitutional scrutiny. The doctrine neither places an onus upon the accused, nor does it presume his or her guilt. The State is required to prove beyond a reasonable doubt all the elements of the crime charged under common purpose. In my view, when the doctrine of common purpose is properly applied, there is no reasonable possibility that an accused person could be convicted despite the existence of a reasonable doubt as to his or her guilt. In my view, the common purpose doctrine does not trench the right to be presumed innocent.

Active association

[**44**.] Some text writers[69] have raised two principal criticisms against the doctrine of common purpose. The first is that, in some cases, the requirement of active association has been cast too widely or misapplied. The second criticism is that there are less invasive forms of criminal liability short of convicting a participant in common purpose as a principal. The appellants echoed these complaints.

[**45**.] In my view, these criticisms do not render unconstitutional the liability requirement of active association. If anything, they bring home the duty of every trial court, when applying the doctrine of common purpose, to exercise the utmost circumspection in evaluating the evidence against each accused person. A collective approach to determining the actual conduct or active association of an individual accused has many evidentiary pitfalls. The trial court must seek to determine, in respect of each accused person, the location, timing, sequence, duration, frequency and nature of the conduct alleged to constitute sufficient participation or active association and its relationship, if any, to the criminal result and to all other prerequisites of guilt. Whether or not active association has been appropriately established will depend upon the factual context of each case.

[**46**.] It was submitted that the findings of the trial Court and the SCA were, on the facts, wrong. The appellants did not associate themselves actively with the crimes for which they were convicted. Both Courts, it was argued, ought to have found that the appellants took no action to support the members of the group who actually fired their weapons and that the first appellant was merely a bystander and the second appellant was not even present at the time of the fatal shooting. To the extent that these submissions deal only with the factual findings of the SCA, they have no merit. Where there is no other constitutional issue involved, a challenge to a decision of the SCA on the basis only that it is wrong on the facts is not a constitutional matter.[70]

[69] See Burchell and Milton n 16 above at 406–7.
[70] See *S v Boesak* n 57 at para [15].

[**47.**] The appellants also submitted that the SCA misapplied the liability requirement of active association as formulated in *S v Mgedezi*[71] and applied in subsequent case law.[72] On this argument, both Courts adopted too wide a concept of active association and failed to satisfy themselves that the first appellant was a party to the common purpose prior to the infliction of the fatal shot. There is no merit in this criticism. The trial Court and the SCA held that throughout the shooting both appellants were present on the scene and made common cause with the group, including the gunman. The appellants also complained that the legal requirements of active association were misapplied. The application of a rule by the SCA may constitute a constitutional matter if it is at variance with some constitutional right or precept.[73] No such case has been made out. There is no constitutional ground in the present case to justify interference by this Court with the credibility findings or application of the requirement of active association by the trial Court or the SCA.

[**48.**] The argument on the relative degree of the invasiveness of common purpose in comparison to other forms of liability such as accomplice liability and competent verdicts is, in essence, a proportionality argument. It rests on the assumption that common purpose invades a constitutionally protected right to a degree disproportionate to the need and objective of crime control. In the light of the finding in this judgment that the doctrine of common purpose does not limit any of the rights asserted by the appellants, this contention need not detain us.

Subjective fault

[**49.**] The appellants contend that the trial Court and the SCA omitted to apply the existing requirement that the State must prove that the appellants had the subjective foresight that others in the group would commit the crimes of which they were convicted. This complaint rests on the assertion that the evidence does not even prove that they were present and that neither Court made any attempt to determine the individual intention of the two appellants. I can find no merit in any of these submissions. This criticism of the factual findings of the trial Court and of the SCA is not borne out by the record. Moreover, the appellants have not advanced any need, nor could I find any, to adapt or elucidate the existing requirement of subjective fault. The common-law precedent is, in this regard, clear and consistent with the Constitution. It appears that that was the approach adopted by both the trial Court and the SCA. If the prosecution relies on common purpose, it must prove beyond a reason-

[71] See n 9 at 703I–J. Botha JA held that in a common purpose case: 'The trial Court was obliged to consider, in relation to each individual accused . . . the facts found proved by the State evidence against that accused liable on the ground of active participation in the achievement of a common purpose.'

[72] See n 23.

[73] *S v Boesak* n 57 at para 15.

able doubt that each accused had the requisite *mens rea* concerning the unlawful outcome at the time the offence was committed. That means that he or she must have intended that criminal result or must have foreseen the possibility of the criminal result ensuing and nonetheless actively associated himself or herself, reckless as to whether the result was to ensue.[74]

[**50.**] Despite the evocative history of the application of the doctrine of common purpose in political and other group prosecutions, I am of the view that the common-law doctrine of common purpose in murder, as set out in *S v Mgedezi* and cases considered in this judgment,[75] does pass constitutional muster and does not, in the context of this case, require to be developed as commanded by s 39(2).

Right to silence

[**51.**] In the present matter, the first appellant disclosed his alibi defence for the first time at trial. He now contends that the trial Court and the SCA drew an adverse inference from his failure to disclose his alibi defence until his trial and that such an inference constitutes an infringement of his right to silence as contained in s 35(1)(a)[76] of the Constitution.

[**52.**] The central issue raised by this appeal is whether an adverse inference may be drawn from a failure to disclose an alibi prior to trial. In this regard three questions arise, being whether it is permissible to: (a) draw an adverse inference of guilt from the pre-trial silence of an accused, (b) draw an inference on the credibility of the accused from pre-trial silence and (c) cross-examine the accused on the failure to disclose an alibi timeously, thus taking into account his or her responses.

Scope and objects of the right

[**53.**] The pre-trial right to silence under s 35(1)(a) must be distinguished from the right to silence during trial protected by s 35(3)(h). This Court has authoritatively pronounced on constitutional claims premised on the right to silence during trial.[77] From the various dicta it appears that the objective of the right is to secure a fair trial. Thus, though procedural, this protection is an integral part of the substantive right to a fair trial. The protection of pre-trial silence is buttressed by the constitutional requirement under s 35(1)(b) to inform an arrested person promptly of the right to remain silent and the consequences of not remaining silent.

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[74] See *S v Mgedezi* n 9 at 706A–B; *S v Khumalo en Andere* n 23 at 350; S v Singo n 23 at 772. See also *S v Coetzee and Others* n 47 at para 177 for a discussion on an appropriate level of criminal culpability under the Constitution and forms of intent under the common law.

[75] See n 23 above.

[76] See n 8.

[77] See, for example, *Osman and Another v Attorney-General, Transvaal* 1998 (4) SA 1224 (CC) (1998 (2) SACR 493; 1998 (11) BCLR 1362); *S v Dlamini and Others* n 65; *S v Manamela* n 68; *S v Boesak* n 57 above.

[**54**.] The rights to remain silent before and during trial and to be presumed innocent are important interrelated rights aimed ultimately at protecting the fundamental freedom and dignity of an accused person. This protection is important in an open and democratic society which cherishes human dignity, freedom and equality.

[**55**.] The protection of the right to pre-trial silence seeks to oust any compulsion to speak. Thus, between suspicion and indictment, the guarantee of a right to silence effectively conveys the absence of a legal obligation to speak. This 'distaste of self-incrimination,' as Ackermann J puts it, is a response to the oppressive and often barbaric methods of the Star Chamber[78] and indeed to our own dim past of torture and intimidation during police custody. It is therefore vital that an accused person is protected from self-incrimination during detention and police interrogation which may readily lend itself to intimidation and manipulation of the accused.[79]

[**56**.] In *S v Manamela*[80] this Court affirmed that: '(T)he right to silence, like the presumption of innocence, is firmly rooted in both our common law and statute', and 'is inextricably linked to the right against self-incrimination and the principle of non-compellability of an accused person as a witness at his or her trial'.

In *S v Boesak*,[81] Langa DP, speaking for the Court, pointed out that the right to remain silent has different applications at different stages of a criminal prosecution. On arrest a person cannot be compelled to make any confession or admission that may be used against her or him; later at trial there is no obligation to testify. The fact that she or he is not obliged to testify does not mean that no consequences arise as a result. If there is evidence that requires a response and if no response is forthcoming, that is, if the accused chooses to exercise her or his right to remain silent in the face of such evidence, the Court may, in the circumstances, be justified in concluding that the evidence is sufficient, in the absence of an explanation, to prove the guilt of the accused. This will, of course, depend on the quality of the evidence and the weight given to that evidence by the Court.[82] In *Osman*[83] Madala J held that

> the fact that an accused has to make such an election is not a breach of the right to silence. If the right to silence were to be so interpreted, it would destroy the fundamental nature of our adversarial system of criminal justice.'

[78] *Ferreira v Levin NO* n 48 at para 92.
[79] Frank Snyckers 'Criminal Procedure' in Chaskalson *et al Constitutional Law of South Africa* (Juta, Cape Town) at 27–44.
[80] See n 68 in para [35] where the Court confirmed the dicta contained in *Osman* n 77 in para [17].
[81] See n 57.
[82] Id at para [24].
[83] See n 77 at para [22].

Inference of guilt

[**57.**] In our constitutional setting, pre-trial silence of an accused person can never warrant the drawing of an inference of guilt. This rule is of common-law origin. In *R v Mashelele and Another*[84] Tindall JA, relying on the English decision of *R v Leckey*[85] formulated the rule thus:

> (I)f the silence of the accused could be used as tending to prove his guilt, it is obvious that innocent persons might be in great peril; for an innocent person might well, either from excessive caution or for some other reason, decline to say anything when cautioned. And I may add that an accused person is often advised by his legal advisers to reserve his defence at the preparatory examination. It would, also, in my opinion, have been a misdirection to say that the silence of the accused was a factor which tended to show that their explanation at the trial was concocted.[86]

[**58.**] It is well established that it is impermissible for a court to draw any inference of guilt from the pre-trial silence of an accused person. Such an inference would undermine the rights to remain silent and to be presumed innocent.[87] Thus, an obligation on an accused to break his or her silence or to disclose a defence before trial would be invasive of the constitutional right to silence. An inference of guilt from silence is no more plausible than innocence. The majority of the US Supreme Court in *Doyle v Ohio* reminds us that 'every post arrest silence is insolubly ambiguous'.[88] To hold otherwise, the mandatory warning under s 35(1)(b) will become a trap instead of a means for finding out the truth in the0 interests of justice.[89]

Inference of credibility and an alibi defence

[**59.**] A distinction may properly be made between an inference of guilt from silence and a credibility finding connected with the election of an accused person to remain silent. In the dissenting judgment in *Doyle v Ohio*[90] a comparable distinction is drawn between the 'permissibility of drawing an inference on the credibility of the accused from silence and the impermissibility of drawing a direct inference of guilt'. In the latter, the presumption of innocence is implicated. In the former, a court would have regard to the factual matrix within which the right to silence was exercised.

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[84] 1944 AD 571.
[85] [1943] 2 All ER 665 (CA).
[86] See n 84 at 583–4. See also *S v Zwayi* 1997 (2) SACR 772 (Ck) (1998 (2) BCLR 242). Compare *S v Brown en 'n Ander* 1996 (2) SACR 49 (NC) (1996 (11) BCLR 1480).
[87] For examples of foreign authorities on this point in common law jurisdictions see *Doyle v Ohio* 426 US 610 (1976) at 618; *Jenkins v Anderson* 447 US 231 (1980) at 238–45; *R v Noble* 114 CCC (3d) 385 (SCC) at 432–3; *Murray v United Kingdom* (1996) 22 EHRR 29 at 45–7 and 51–4; *Averill v United Kingdom* (2001) 31 EHRR 36 at 42–3.
[88] *Id* at 617.
[89] *R v Leckey* n 85 at 83.
[90] See n 87 at 635.

[**60.**] An alibi defence has often generated judicial debate on whether it is an exception to the right to silence. In *R v Cleghorn*[91] the peculiarity of an alibi defence is explained as follows:

> (T)here is good reason to look at alibi evidence with care. It is a defence entirely divorced from the main factual issue surrounding the *corpus delicti*, as it rests upon extraneous facts, not arising from the *res gestae*. The essential facts of the alleged crime may well be to a large extent incontrovertible, leaving but limited room for manoeuvre whether the defendant be innocent or guilty. Alibi evidence, by its very nature, takes the focus right away from the area of the main facts, and gives the defence a fresh and untrammelled start. It is easy to prepare perjured evidence to support it in advance.[92]

The minority in this case held that the requirement to disclose an alibi was an exception to the right to silence.[93]

[**61.**] More recently, the South African Law Commission[94] has recommended that legislation should be introduced to permit a court to draw an inference from the pre-trial silence of an accused person in certain circumstances. The draft legislation proposes that a court should be authorised to make an inference appropriate to that case from the failure of an accused person to disclose an alibi during or before plea proceedings. The approach to disclosure of an alibi defence in the proposed enactment is not dissimilar to the one adopted by the majority in *Cleghorn*.[95]

[**62.**] Canadian courts treat a failure to disclose an alibi timeously as being a factor which can properly be taken into account in the evaluation of the evidence as a whole:

> (T)he consequence of a failure to disclose properly an alibi is that the trier of fact may draw an adverse inference when weighing the alibi evidence heard at trial.[96]

[**63.**] That a failure to disclose an alibi timeously has consequences in the evaluation of the evidence as a whole is consistent with the views expressed by Tindall JA in *R v Mashelele*.[97] After stating that an adverse inference of guilt cannot be drawn from the failure to disclose an alibi timeously, Tindall JA goes on to say:

> But where the presiding Judge merely tells the jury that, as the accused did not

[91] 100 CCC (3d) 393 (SCC).
[92] *Id* at para [22] from the minority judgment per Major J, which appears not to be inconsistent, on this point, with the approach found in the majority judgment at para [4].
[93] *Id* at para [23].
[94] SA Law Commission Project 73: Fifth Interim Report on the Simplification of Criminal Procedure at 120–3. The Interim Report, at 28, relies on the decision of the European Court of Human Rights in the case of *Murray v United Kingdom* n 87, in which it was held that the right to silence is not absolute and that inferences from the silence could be drawn in appropriate instances, as well as on statutes in England and in several states in Australia and the USA.
[95] See n 91 at para [4].
[96] *Id.*
[97] See n 84, at 586.

disclose his explanation or the alibi at the preparatory examination, the prosecution has not had an opportunity of testing its truth and that therefore it may fairly be said that the defence relied on has not the same weight or the same persuasive force as it would have had if it had been disclosed before and had not been met by evidence specially directed towards destroying the particular defence, this does not constitute a misdirection.

[**64.**] As pointed out earlier, an arrested person has the right to remain silent. This, indeed, is part of the warning given to the person, including that if he or she chooses to say anything it may be used in evidence against him or her. Drawing an inference on credibility in these circumstances has the effect of compelling the arrested person to break his or her silence, contrary to the right to remain silent guaranteed by s 35(1)(a) of the Constitution. To this extent, drawing an adverse inference on credibility limits the right to remain silent.

[**65.**] The rule of evidence that the late disclosure of an alibi affects the weight to be placed on the evidence supporting the alibi is one which is well recognised in our common law.[98] As such, it is a law of general application. However, like all law, common law must be consistent with the Constitution. Where it limits any of the rights guaranteed in the Constitution, such limitation must be justifiable under s 36(1). Whether this rule is justifiable in terms of s 36(1) is a question to which I now turn.

[**66.**] I have already alluded to the importance of the right to remain silent. What is also important is that the accused receives no prior warning that his or her failure to disclose an alibi to the police might be used against him or her in evaluating the alibi defence. On the contrary, the accused is warned of his or her right to remain silent and that anything that he or she says might be used against him or her. The absence of a warning that his or her constitutional right to remain silent might be limited is a relevant consideration in the justification analysis. However, what weighs heavily with me is the extent of the limitation.

[**67.**] Firstly, the late disclosure of an alibi is one of the factors to be taken into account in evaluating the evidence of the alibi. Standing alone it does not justify an inference of guilt. Secondly, it is a factor which is only taken into consideration in determining the weight to be placed on the evidence of the alibi. The absence of a prior warning is, in my view, a matter which goes to the weight to be placed upon the late disclosure of an alibi. Where a prior warning that the late disclosure of an alibi may be taken into consideration is given, this may well justify greater weight being placed on the alibi than would be the case where there was no prior warning. In all the circumstances, and in particular, having regard to the limited use to which the late disclosure of the alibi is put, I am satisfied that the rule is justifiable under s 36(1).

[98] See *R v Mashelele* n 84 at 585; R v Patel 1946 AD 903 at 908; *S v Maritz* 1974 (1) SA 266 (NC) at 267G; Hoffmann and Zeffertt *The South African Law of Evidence* 4th ed at 179.

[**68.**] The failure to disclose an alibi timeously is therefore not a neutral factor. It may have consequences and can legitimately be taken into account in evaluating the evidence as a whole. In deciding what, if any, those consequences are, it is relevant to have regard to the evidence of the accused, taken together with any explanation offered by her or him for failing to disclose the alibi timeously within the factual context of the evidence as a whole.

Cross-examination

[**69.**] An election to disclose one's defence only when one appears on trial is not only legitimate but also protected by the Constitution. However, a related issue is whether it is permissible to cross-examine an accused on why she or he opted to remain silent on an alibi or indeed on any other defence. Such a line of enquiry is, in my view, permissible. It is quite proper, and often necessary, to probe, in cross-examination, the preference to remain silent. This goes to credit and would not unjustifiably limit the content of the right to remain silent. It may advance 'the truth-finding function of the criminal trial'[99] and test the veracity of a belatedly disclosed or fabricated defence.

[**70.**] However, there are limits to such cross-examination. An explanation that the accused chose to remain silent as of right may in a particular context be an adequate answer. Thus such cross-examination must be exercised always with due regard to fairness towards both the accused and the prosecution and without unduly encroaching upon the right to remain silent or limiting a proper enquiry for the delayed disclosure of a defence.

[**71.**] It seems to me that there is no reason why this Court should not have regard to the failure by the first appellant to mention the alibi when he responded to questions put to him by Sergeant McDonald. Had this been a trial before a jury, there may have been a level of concern about that line of cross-examination. Where a jury is concerned it may be difficult for its members to evaluate the nuances involved in credibility findings, if matters which may be prejudicial but capable of explanation are put before them. Moreover a jury is not obliged to deliver an open and reasoned judgment on its factual findings. But in a trial before a Judge, in my view, it is quite permissible to ask questions on why the alibi was not mentioned earlier and to take the response thereto into reckoning when evaluating the evidence as a whole. Ultimately it is a matter of what is fair and just in the light of the requirements of a fair trial.

Submissions of the first appellant

[**72.**] The foundational submission of the first appellant is that the majority

[99] *Jenkins v Anderson* n 87 at 238.

finding of the SCA rests entirely and precariously on an inference drawn from his silence regarding his alibi. This assertion is not without merit. The majority judgment of the SCA appears to have been premised on the reasoning that the mere suspicion about the version of the first appellant was not in itself enough; what justified his guilt was that 'the version was raised only at the trial, some two years after the incident'. The learned Judges of appeal then concluded that the appellant's failure to advise the police justified an inference that 'the alibi had no truth at all'. An inference of guilt from the disclosure of an alibi defence only at trial unjustifiably limited the appellant's right to pre-trial silence. Such an approach has, in effect, imputed guilt from pre-trial silence and thus trenched his constitutional guarantee to remain silent before his trial.

[**73.**] The resultant issue is whether this impermissible approach adopted by the SCA adversely prejudiced or undermined the substantive fairness of the trial. The full record of proceedings before the trial Court and the SCA is before us. This Court has had the benefit of full argument and is consequently in no different position from the trial Court or the SCA to consider facts which are connected or relevant to the proper adjudication of a constitutional issue. Such evidence, in my view, would itself be an issue connected to a decision on a constitutional matter.[100] Any further remission of this already protracted case would not serve the interests of justice. Moreover, both counsel were agreed that the matter should be brought to finality by this Court. It is thus competent and in the interests of justice for this Court to decide the matter.

Conclusion

[**74.**] In my view, the misdirection of the SCA would be relevant only if it would be an issue which materially alters the outcome of the trial[101] or compromises its substantive fairness, to which the appellant is entitled under s 35(3) of the Constitution. Put otherwise, the applicable test is whether, 'on the evidence, unaffected by the defect or irregularity, there is proof of guilt beyond reasonable doubt'.[102] If this Court were to find that such proof has been established, it must follow that the conviction must stand.

[**75.**] The credibility findings of the trial Court pose an insurmountable obstacle to the first appellant's case. The trial Court made it clear that the alibi evidence was not credible. Both the trial Court and the majority of the SCA correctly held that there was no reasonable possibility that Kiel's identification could be mistaken. The majority of the SCA held that

[100] Secs 167(3)(b) and (c) of the Constitution.
[101] Compare the earlier common-law test of whether by reason of the irregularity or misdirection 'a failure of justice has, in fact, resulted'. See *S v Harris* 1965 (2) SA 340 (A) at 364A–B. A lucid formulation of the test is offered by Holmes JA in *S v Bernadus* 1965 (3) SA 287 (A).
[102] *S v Bernadus* at 305B–F and Kriegler and Kruger n 16 at 831.

Kiel's identification of the appellant was beyond reproach and that his evidence was reliable and compelling. Both Courts, inclusive of the minority judgment of Navsa JA, rejected the alibi evidence as false.

[**76.**] After his arrest, the first appellant was confronted by the police with the allegation that he had been present at the scene of the shooting. After having been warned of his rights he was asked by the police, prior to his arrest, what he had to say about these allegations. He chose to proffer an explanation, albeit a truncated one. His response that the family was in Hanover Park is hardly consistent with the alibi subsequently asserted. The only explanation he could give was that he was referring to his family and not to himself. This disingenuous explanation for the failure to disclose the alibi when confronted with the evidence against him can legitimately be taken into account in the evaluation of the evidence. Having regard to the fact that a late disclosure of an alibi carries less weight than one disclosed timeously, the cogency of Kiel's evidence and the unsatisfactory nature of the first appellant's evidence, the trial Court was entitled to reject the evidence of the alibi, and to convict the first appellant.

[**77.**] The trial Court properly convicted the first appellant on a consideration of the totality of the evidence. The appellant's explanation of why he chose to remain silent, the lateness of the disclosure of his alibi defence, the unacceptable evidence which was tendered by two of his witnesses and the cogency of the evidence tendered by Kiel taken together, entitled the trial Court to return a verdict of guilt against the first appellant.

[**78.**] Such is the adversarial nature of our criminal process. Once the prosecution had produced sufficient evidence which established a *prima facie* case, the first appellant had no duty to testify. However, once he had chosen to testify it was quite proper to ask him questions about his alibi defence, including his explanation on his election to remain silent. When his evidence was found not to be reasonably possibly true, as did the trial Court, he ran the risk of a conviction. Thus, absent a credible version from the first appellant, the version advanced by the prosecution, if found credible, was likely to be accepted. In *S v Dlamini and Others*,[103] Kriegler J emphasised the importance of freedom of choice in a democracy. However, liberty to make choices brings with it a corresponding responsibility and 'often such choices are hard'.[104]

Order

The appeals of the first and second appellant are dismissed.

Chaskalson CJ and Madala J concurred in the judgment of Moseneke J.

[103] See n 65.
[104] *Id* in para [93].

Goldstone J et O'Regan J

[**79.**] We agree with the order made by Moseneke J, and with his reasons for rejecting the appellants' arguments in relation to the doctrine of common purpose. However, in our view, the Supreme Court of Appeal, in drawing an adverse inference from the first appellant's failure to disclose his alibi, breached his constitutional right to silence. Given that a judgment of the Supreme Court of Appeal is binding on all courts other than this, we think it important that the correct constitutional approach to the question of the drawing of adverse inferences from the silence of an accused be explored in this judgment even though, after careful consideration of the record, we consider that this breach makes no difference to the outcome of the appeal. On a conspectus of all the evidence,[105] but without drawing any adverse inference from his failure to disclose his alibi prior to the trial, we are satisfied that the first appellant was proved to have been guilty beyond a reasonable doubt of all three charges.

[**80.**] The right to silence is entrenched in s 35(1)(a) and (b) and s 35(3)(h) of I the Constitution as follows:

> 35(1) Everyone who is arrested for allegedly committing an offence has the right — (a) to remain silent; (b) to be informed promptly — (i) of the right to remain silent; and (ii) of the consequences of not remaining silent; . . .
> 35(3) Every accused person has a right to a fair trial, which includes the right — . . . (h) to be presumed innocent, to remain silent, and not to testify during the proceedings.

It is important to note that ss 35(1)(a) and (b) entrench not only the right to silence, but also the right to be informed of the consequences of not remaining silent.

[**81.**] This Court has acknowledged that the right to silence is firmly rooted in our common law.[106] The precise scope of the phrase, however, both in our law and that in other jurisdictions has remained uncertain.[107] As Lord Mustill noted in *R v Director of Serious Fraud Office, Ex parte Smith*,[108] the right to silence is best understood not as denoting a single right, but a disparate group of immunities. Lord Mustill identified six: an immunity from being compelled on pain of punishment to answer questions posed by anyone; an immunity from being compelled on pain of punishment to

[105] *R v Hlongwane* 1959 (3) SA 337 (A) at 340H.

[106] *Osman and Another v Attorney-General, Transvaal* 1998 (4) SA 1224 (CC) (1998 (2) SACR 493; 1998 (11) BCLR 1362) at para [17].

[107] There is a wealth of academic writing on the matter, both in South Africa and elsewhere. References to much of this debate can be found in three recently published South African articles: R W Nugent 'Self-incrimination in Perspective' (1999) 116 *South African Law Journal* 501; K van Dijkhorst 'The Right to Silence: Is the Game Worth the Candle?' (2001) 118 SALJ 26; and C Theophilopoulos 'The So-called Right to Silence and the Privilege Against Self-incrimination: A Constitutional Principle in Search of Cogent Reasons' (2002) 18 *SA Journal on Human Rights* 505.

[108] [1993] AC 1 (HL) at 30E–31B ([1992] 3 All ER 456 at 463j–464c), quoted with approval in Osman's case, above n 2, at para [18].

provide answers to questions when the answers may be self-incriminatory; a specific immunity from being compelled to answer, on pain of punishment, questions put by police officers when under suspicion of having committed an offence; the specific immunity of those accused from being compelled to give evidence in their trial; the specific immunity of those arrested from having questions put to them by police officers; and a specific immunity possessed by accused persons from having adverse comment made on their failure to answer questions before trial or to give evidence at trial. In addition, Lord Mustill noted that there are different underlying reasons for the different aspects or immunities contained within the right to silence.[109]

[**82.**] In each case in which a court considers a constitutional challenge based on the right to silence, it will need to consider which aspect of the right to silence is in issue and whether it falls within the right protected in our Constitution. We disagree therefore with Yacoob J (at para [104]) when he says there is only one right to silence, and that there is no difference between pre-trial silence and trial silence. In each case concerned with the right to silence, a court must identify the underlying purpose of the relevant aspect of the right to silence and consider whether it has been infringed in the case before it. In this case, we are concerned with the last immunity described by Lord Mustill — the specific immunity of an accused from having an adverse inference drawn from his or her silence. We must decide whether it is constitutionally acceptable to draw an adverse inference from the failure of an accused to disclose an alibi to the police or to the court in the period before the trial commences in circumstances where the accused was advised of his right to remain silent.

[**83.**] Various reasons are given for the principle that adverse inferences should not be drawn from an accused person's silence. One identified by Lord Mustill is the following:

> (T)he instinct that it is contrary to fair play to put the accused in a position where he is exposed to punishment whatever he does. If he answers, he may condemn himself out of his own mouth; if he refuses he may be punished for his refusal.[110]

In our view, this does not provide a valid foundation for the principle under our constitutional order. This Court has held that an adversarial system of criminal procedure necessarily forces hard choices on an accused, not by the operation of an unfair rule of law, but by the fundamental nature of the adversarial process itself. This Court has held that such choices which flow from the character of the adversarial system do not constitute an infringement of the right to silence.[111] Once the prosecution has produced evidence sufficient to establish a *prima facie* case against the accused, the accused faces the choice of staying silent, in

[109] *Id* at 31D–32D (AC) and 464e–465d (All ER).
[110] *Id* at 32B (AC) and 465b (All ER).
[111] See *Osman*'s case, above n 2 at para 22.

which event he or she may be convicted, or seeking to lead evidence which may or may not be incriminatory. This hard choice faced by the accused is the consequence not of an unfair rule of law, but of the operation of the adversarial system coupled with the absence of a valid defence. In an adversarial system there can be no immunity from facing such choices and having to make such a choice cannot offend the right to silence as entrenched in our Constitution.

[**84.**] Another explanation commonly given for the rule against adverse inferences is the principle that the State bears the onus of proving every element of an offence without the assistance of the accused. It is clear from our Constitution that the presumption of innocence implies that an accused person may only be convicted if it is established beyond a reasonable doubt that he or she is guilty of the offence. That, in turn, requires the proof of each element of the offence. However, our Constitution does not stipulate that only the State's evidence may be used in determining whether the accused person has been proved guilty. Indeed, our law has always recognised that the question of whether the accused has been proven guilty or not is one to be determined on a conspectus of all the admissible evidence, whatever its provenance. This principle, too, cannot therefore found a valid objection to the drawing of adverse inferences.

[**85.**] A third reason given for the rule against the drawing of adverse inferences is the importance of protecting arrested persons from improper questioning and procedures by the police. Unfortunately, in the past people arrested were coerced by improper police methods to confess (not infrequently, falsely) to crimes. Such practices need to be put firmly behind us. In our view, the need to reduce unconstitutional policing practices is of such importance in the light of our history, that the right to silence should protect an accused person from having an adverse inference drawn from pre-trial silence in the face of questioning from the police. This concern provides an important reason for not drawing adverse inferences from the silence of an arrested person in the face of police questioning. It is of no relevance to the silence of an accused in court.

[**86.**] A different but equally cogent reason for the rule against the drawing of adverse inferences from the silence of an arrested person relates to the warning given to people when they are arrested. Section 35(1)(b) requires the police to warn people when they are arrested that they have the right to remain silent and of the consequences of not remaining silent and thus a failure to give the warning will infringe s 35(1)(b). In our view, it is constitutionally impermissible to draw an adverse inference from an arrested person's silence once he or she has been informed of the right to remain silent. That warning, as currently formulated, clearly implies that the arrested person will not be penalised for silence. For the person arrested to be told that he or she may remain silent without more, and for that very silence thereafter to be used to discredit the person, in our view is

unfair. We are not persuaded therefore by Yacoob J's reliance on s 35(5) of the Constitution.[112] Nor are we persuaded that it can ever be fair to warn a person arrested and give him or her the impression that there is a right to remain silent without qualification, and then to draw an adverse inference from that silence.

[**87.**] The adversarial process imposes many hard choices upon the accused. This is inevitable and appropriate. What is neither inevitable nor appropriate, is that the accused should be misinformed of the implications of the course of action he or she adopts. As this Court stated in *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat*:

> Each and every one of those choices (relating to what the accused should do in bail proceedings) can have decisive consequences and therefore poses difficult decisions. As was pointed out in *Osman*'s case '(t)he choice remains that of the accused. The important point is that the choice cannot be forced upon him or her.' It goes without saying that an election cannot be a choice unless it is made with proper appreciation of what it entails. It is particularly important in this country to remember that an uninformed choice is indeed no choice.'[113]

An accused person needs to understand the consequences of remaining silent. If the warning does not inform the accused that remaining silent may have adverse consequences for the accused, the right of silence as understood in our Constitution will be breached.

[**88.**] Moreover, in many cases, the fact of the warning itself will render the silence by the accused ambiguous. It will not be clear whether the accused remained silent because he or she is relying on the right to remain silent, or for another reason, whether legitimate or not. To the extent that the silence is ambiguous, of course, it will have little value in the process of inferential reasoning, especially where guilt must be proved beyond a reasonable doubt.

[**89.**] In this case, the first appellant was warned of his right to remain silent. Thereafter he made a brief statement to the police stating that at the time of the offence his family was at Hanover Park, but when asked if he wished to have that statement reduced to writing, he demurred, as he was entitled to do. Thereafter he said nothing prior to trial. In our view, to use this silence against the first appellant either as confirmation of his guilt, as the majority judgment in the Supreme Court of Appeal did, or to discredit him as a witness, is unfair to him and constitutes a breach of his right to silence and his right to a fair trial. We do, however, consider it acceptable to use the statement that he made to the police after being warned concerning his family's presence at Hanover Park. Using such statement to evaluate his evidence does not constitute a breach of his

[112] In paras [108]–[109] of his judgment. Section 35(5) of the Constitution provides that: 'Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice'.

[113] 1999 (4) SA 623 (CC) (1999 (2) SACR 51; 1999 (7) BCLR 771) at para 94.

right to silence. Indeed the first appellant was duly warned that any statement he might make may be used against him in his trial.

[**90.**] One further point needs to be made. It should be clear from what we have said that we do not see that a valid distinction can be drawn in this context between adverse inferences going to guilt, and adverse inferences going to credit. There is of course a conceptual difference between inferences going to credit and inferences going to guilt. But in the context of an alibi, the practical effect of the adverse inference to be drawn for the purposes of credit, namely, that the alibi evidence is not to be believed, will often be no different to the effect of the inference to be drawn with respect to guilt,[114] namely that the late tender of the alibi suggests that it is manufactured and that the accused is guilty.[115] We disagree therefore with the distinction drawn by Moseneke J between an adverse inference to credit on the one hand and an adverse inference to guilt. Whether an adverse inference is drawn going to guilt or credit, in our view, the accused has been treated unfairly in the light of the warning given.

[**91.**] Moseneke J comes to the related conclusion that it is permissible for an accused person to be cross-examined 'on why she or he opted to remain silent on an alibi or indeed any other defence . . .'[116] We do not agree. In the first place, we are of the opinion that no accused person should have to account for the exercise of a right entrenched in the Constitution. This is especially so where that account may be used against the accused. Secondly, it would be unfair to allow such cross-examination in the light of the accused person having been informed of the right to silence without at the same time being informed that she or he might be requested to account for the positive exercise of the right at the trial.

[114] The fact that a court concludes that the accused is lying and that the alibi is false does not mean that the accused is guilty and must automatically be convicted. *S v Mtsweni* 1985 (1) SA 590 (A) at 593I says, '(v)eral moet daar gewaak word teen 'n afleiding dat, omdat 'n beskuldigde 'n leuenaar is, hy daarom waarskynlik skuldig is'.

[115] As Mason CJ reasoned in *Petty v The Queen*; *Maiden v The Queen* (1991) 173 CLR 95 (HC) at 100–1: 'We acknowledge that there is a theoretical distinction between the two modes of making use of the accused's ealier silence. However, we doubt that it is a distinction which would be observed in practice by a jury, even if they understand it. And, what is of more importance, the denial of the credibility of that late defence or explanation by reason of the accused's earlier silence is just another way of drawing an adverse inference (albeit less strong that an inference of guilt) against the accused by reason of his or her exercise of the right of silence. Such an erosion of the fundamental right should not be permitted. Indeed, in a case where the positve matter of explanation or defence constitutes the real issue of the trial, to direct the jury that it was open to them to draw an adverse inference about its genuineness from the fact that the accused had not previously raised it would be to convert the right to remain silent into a source of entrapment.'

See also *R v Gilbert* (1978) 66 Cr App R 237 (CA) at 244 where the distinction between an adverse inference to guilt and to credit was rejected, and also the rejection of that distinction by Rupert Cross 'The Evidence Report: Sense or Nonsense' [1973] *Criminal Law Review* 329 at 333. All these sources consider the distinction in the context to the one we are considering. Notwithstanding the difference in context, however, the reasoning remains valid in our context.

[116] At para [69].

We must emphasise that we are concerned only with cross-examination relating to the pre-trial silence of the accused. Nothing we have said should be understood as precluding other lines of cross-examination designed to test the veracity of the alibi.

[**92.**] The foregoing should make it plain that the constitutional position would be different were there to be a law of general application permitting the drawing of an adverse inference in circumstances where the accused has been properly informed of the consequences of a failure to raise an alibi timeously. No such rule presently exists at common law in South Africa.[117] In our view, such a rule if properly tailored and, in particular, if accompanied by an appropriate revision to the warning issued to arrested persons would still limit the right to silence, but would pass constitutional muster under s 36 of the Constitution.[118] In this case, were the first appellant to have been duly warned that his failure to disclose an alibi timeously could result in an adverse inference being drawn, the common law could have been developed to permit the drawing of an adverse inference by the Supreme Court of Appeal and such development would have been a justifiable limitation of his right to silence and to a fair trial. It should be noted that a rule requiring timeous disclosure of an alibi defence has existed at common law in Canada for many years and according to a majority of the Supreme Court of Canada it 'has been adapted to conform to Charter norms'.[119] Limits on the right to silence have also recently been adopted in the United Kingdom.[120] The European Court of Human Rights has also held that an adverse inference from silence is not necessarily incompatible with art 6 of the European Convention on Human Rights.[121]

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[117] In *R v Mashelele and Another* 1944 AD 571 at 585 the Appellate Division (per Tindall JA) held that it was permissible for a judge to inform a jury when an explanation or alibi is only disclosed at trial, that the prosecution has not had the opportunity of testing it and therefore it does not have the same weight or persuasive force as if it had been disclosed earlier. The Court specifically held that it was impermissible to use the late disclosure of an alibi to infer a guilty mind on the part of the accused or that the alibi is false.

[118] Section 36 of the Constitution states that: '(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including — (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose. (2) Except as provided in ss (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.'

[119] See *R v Cleghorn* 100 CCC (3d) 393 (SCC) at para [4], per Iacobucci J. The common law rule discussed in Cleghorn stems back to the decision of *Russell v The King* (1936) 67 CCC 28 (SCC) at 32. The rule establishes that the failure of an accused to disclose an alibi prior to the trial is relevant to the weight and credibility to be attached to the alibi. See the discussion in John D R Craig 'The Alibi Exception to the Right to Silence' (1996) 39 *Criminal Law Quarterly* 227.

[120] See s 34 of the Criminal Justice and Public Order Act, 1994.

[121] See *Murray v United Kingdom* (1996) 22 EHRR 29; *Condron v United Kingdom* (2001) 31 EHRR 1 and also the discussion by Ian Dennis 'Silence in the Police Station: the Marginalisation of section 34' [2002] *Criminal Law Review* 25.

It appears that rules of this nature are proposed by the SA Law Reform Commission.[122]

[**93.**] We conclude, however, that the right to silence was breached in this case, because an adverse inference was drawn from the failure of the first appellant to disclose an alibi after being informed of his right to remain silent. Nevertheless we are persuaded that the appeal of the first appellant should be dismissed for the record establishes his guilt beyond a reasonable doubt without reliance upon any adverse inference from his silence. The High Court found Kiel's evidence cogent and persuasive, while rejecting that of the two alibi witnesses as false. There is no basis for rejecting these findings. Moreover, the first appellant, when initially questioned by the police, said that his family had been at Hanover Park at the time of the offence, which is inconsistent with the alibi he subsequently raised. At best for the accused, his statement that 'the family was at Hanover Park' is ambiguous and evasive. It is not consistent with the alibi tendered later to the effect that he was with his second wife at Parkwood Estate, which is nowhere near Hanover Park. In the light of the rejection of the evidence of the two defence witnesses and the prior inconsistent statement made by the first appellant, the alibi evidence does not in the context of all the evidence in the case (particularly the strong evidence of Kiel) raise a reasonable doubt as to the innocence of the first appellant.

Ackermann J and Mokgoro J concurred in the judgment of Goldstone J and O'Regan J.

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[122] See SA Law Commission Project 73: Fifth Interim Report on the Simplification of Criminal Procedure (A more inquisitorial approach to criminal procedure — police questioning, defence disclosure, the role of judicial officers and judicial management of trials) August 2002, chap 8, proposed new s 207A.

J and Another v Director-General, Department of Home Affairs and Others

(2003) AHRLR (SACC 2003)

J and D v Director-General Genera,: Department of Home Affairs, Minister of Home Affairs, President of the Republic of South Africa
Constitutional Court, 28 March 2003
Judges: Chaskalson, Langa, Ackermann, Goldstone, Madala, Mokgoro, Moseneke, O'Regan, Yacoob
Previously reported: 2003 (5) SA 621 (CC)

Equality, non-discrimination (discrimination on the grounds of sexual orientation, 13–15, 19)
Relief (suspension of court order, 21, 22)

Goldstone J

Introduction

[**1**.] The Children's Status Act of 1987[1] (the Status Act) deals with, amongst other matters, the status of children conceived by artificial insemination. The challenged provisions apply to children so conceived within the context of a heterosexual marriage.

[**2**.] Since 1995, the two applicants have been partners in a same-sex life partnership. In August 2001 the second applicant gave birth to twins, a girl and a boy. They were conceived by artificial insemination. The male sperm was obtained from an anonymous donor. The female ova were obtained from the first applicant. In order to protect the identity of the twins, the applicants have been referred to in these proceedings only as 'J' and 'B'.

[**3**.] It is the wish of both applicants that they be registered and recognised as the parents of the twins. There was no legal impediment with regard to the second applicant, as the 'birth-mother', being registered as the mother of the children under the regulations made in terms of s 32 of the Births and Deaths Registration Act of 1992[2] (the regulations). However, the regulations and the forms annexed to them make provision for the registration only of one male and one female parent.

[**4**.] When the first applicant was unsuccessful in her attempt to be registered as a parent of the children, the applicants approached the Durban High Court for appropriate constitutional relief. They sought an order requiring the first respondent (the Director General in the Department

[1] Act 82 of 1987.
[2] Act 51 of 1992.

of Home Affairs) to issue to both of the applicants birth certificates in respect of each of the children and to register their births reflecting the second applicant as their mother and the first applicant as their parent. They also sought an order requiring the second respondent to amend the form annexed to the regulations to allow for the recordal of a person in the position of the first applicant as the parent of the child, ie where such person is the donor of a gamete used in the conception of the child.

[**5.**] The applicants also sought to have s 5 of the Status Act declared constitutionally invalid on the grounds that it was inconsistent with rights entrenched in the Bill of Rights. Section 5 reads as follows:

> (1)(a) Whenever the gamete or gametes of any person other than a married woman or her husband have been used with the consent of both that woman and her husband for the artificial insemination of that woman, any child born of that woman as a result of such artificial insemination shall for all purposes be deemed to be the legitimate child of that woman and her husband as if the gamete or gametes of that woman or her husband were used for such artificial insemination. (b) For the purposes of para (a) it shall be presumed, until the contrary is proved, that both the married woman and her husband have granted the relevant consent.
>
> (2) No right, duty or obligation shall arise between any child born as a result of the artificial insemination of a woman and any person whose gamete or gametes have been used for such artificial insemination and the blood relations of that person, except where — (a) that person is the woman who gave birth to that child; or (b) that person is the husband of such a woman at the time of such artificial insemination.
>
> (3) For the purposes of this section —
>
> 'artificial insemination', in relation to a woman — (a) means the introduction by other than natural means of a male gamete or gametes into the internal reproductive organs of that woman; or (b) means the placing of the product of a union of a male and a female gamete or gametes which have been brought together outside the human body in the womb of that woman, for the purpose of human reproduction;
>
> 'gamete' means either of the two generative cells essential for human reproduction.

[**6.**] At the request of the applicants, the High Court appointed Advocate AA Gabriel as the *curatrix ad litem* to represent the interests of the children. She prepared a full and helpful report for the High Court. This Court also had the benefit of that report. We are additionally grateful to Advocate Gabriel for the oral submissions she made in this Court.

[**7.**] The High Court made the following order:[3]

> 1. That the first respondent is ordered to: (a) issue to the applicants a birth certificate for each of the minor children . . .; and (b) register the birth of each of the said minor children in the population register reflecting: (i) the second applicant as their mother; (ii) the first applicant as their parent; (iii) their surname as being the surname of the second applicant.

[3] The judgment of Magid J was delivered on 31 October 2002 and is as yet unreported.

2. That the second respondent is ordered to cause annexure 1A of the Regulations in terms of s 32 of the Births and Deaths Registration Act 51 of 1992 to be amended so as to allow for the recordal of a non-anonymous donor of a gamete used in artificial insemination as contemplated in s 5 of the Children's Status Act 82 of 1987 from which a child is born, as a parent of that child.

3. That it is declared that for all relevant purposes the first applicant is a natural parent and guardian of the aforesaid minor children.

4. That in s 5 of the Children's Status Act 82 of 1987 the word 'married' be struck out wherever it appears as being constitutionally invalid and that the section be read as including the words 'or permanent same-sex life partner' after the word 'husband' wherever it appears, save that the relief in this paragraph is suspended pending confirmation thereof by the Constitutional Court.

5. That the respondents, jointly and severally, pay the costs of the application.

6. That the rule nisi in the first order prayed be confirmed.

[**8**.] The applicants have approached this Court for confirmation of the order relating to s 5 of the Status Act. This application is made under the provisions of s 172(2)(a) of the Constitution which, insofar as now relevant, provides that:

> The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament . . . but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.

The relief granted in para 2 of the order of Magid J ordering the second respondent to cause annexure 1A of the regulations to be amended is not an issue before us. The extent to which the relief granted in respect of the regulations is appropriate in the light of the relief granted in terms of s 5 is also not an issue in this appeal. Those issues were not raised in argument in this Court, and I express no opinion on their constitutionality or appropriateness.

The judgment of the High Court

[**9**.] In the High Court, Magid J held that the provisions of s 5 of the Status Act constitute discrimination on the ground of marital status 'and probably sexual orientation'. As far as the children are concerned, the learned Judge held that the statutory provision amounts to discrimination on the listed grounds of social origin and birth. He went on to hold that the presumption of unfair discrimination created by s 9(5) of the Constitution[4] applies. Because the government did not seek to justify the discrimination

[4] Sec 9(5) provides that: 'Discrimination on one or more of the grounds listed in ss (3) is unfair unless it is established that the discrimination is fair.'

under s 36 of the Constitution,[5] Magid J held the section to be constitutionally invalid.

[**10**.] With regard to appropriate relief, Magid J found this to be a proper case for both striking out and reading in to cure the unconstitutionality of s 5. He struck out the word 'married' where it appears in ss (1)(a) and (b). And he read in the words 'or permanent same-sex life partner' after the word 'husband' where it appears in ss (1)(a) and (b) and (2)(b) of s 5. Treated in this way, ss (1) and (2) of s 5 read as follows:

> (1)(a) Whenever the gamete or gametes of any person other than a married woman or her husband or permanent same-sex life partner have been used with the consent of both that woman and her husband or permanent same-sex life partner for the artificial insemination of that woman, any child born of that woman as a result of such artificial insemination shall for all purposes be deemed to be the legitimate child of that woman and her husband or permanent same-sex life partner as if the gamete or gametes of that woman or her husband or permanent same-sex life partner were used for such artificial insemination. (b) For the purposes of para (a) it shall be presumed, until the contrary is proved, that both the married woman and her husband or permanent same-sex life partner have granted the relevant consent.
>
> (2) No right, duty or obligation shall arise between any child born as a result of the artificial insemination of a woman and any person whose gamete or gametes have been used for such artificial insemination and the blood relations of that person, except where — (a) that person is the woman who gave birth to that child; or (b) that person is the husband or permanent same-sex life partner of such a woman at the time of such artificial insemination.

The attitude of the respondents

[**11**.] The respondents are not opposing the confirmation of the order of constitutional invalidity granted by Magid J with regard to s 5 of the Status Act. They have not appealed against the orders he made relating to the regulations. On behalf of the respondents it was submitted that:

(a) in order not to discriminate unfairly against unmarried heterosexual couples, the words 'or permanent life partner' should be read into s 5 of the Status Act rather than the words 'or permanent same-sex life partner';
(b) the order of invalidity should be suspended for one year in order to allow the Legislature to amend the statute.

[5] Sec 36 provides that: '(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including — (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.
(2) Except as provided in ss (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.'

The issues in this Court

[**12.**] The issues in this Court are thus the following:

(a) whether this Court should confirm the order of invalidity, striking out and reading in made by the High Court;
(b) whether the terms of the order should also include unmarried heterosexual permanent life partners;
(c) whether the order of suspension sought by the respondents should be granted.

Confirmation of the order

[**13.**] The provisions of s 5 of the Status Act do not permit the first applicant to become a legitimate parent of the children. This unfairly discriminates between married persons and the applicants as permanent same-sex life partners. The section is accordingly inconsistent with s 9(3) of the Constitution[6] which prohibits the State from discriminating directly or indirectly against anyone on the ground of sexual orientation.

[**14.**] An analogous differentiation was held by this Court to be unconstitutional in *Du Toit and Another v Minister of Welfare and Population Development and Others*.[7] The Child Care Act[8] (the Child Care Act) precluded partners in a permanent same-sex life partnership from adopting children. Skweyiya AJ pointed out that 'the applicants' status as unmarried persons which currently precludes them from joint adoption of the siblings is inextricably linked to their sexual orientation.[9] The same applies in the present case with regard to the inability of the first applicant to be recognised as a parent and legal guardian of the children. It is unfairly discriminatory to deprive the first applicant of such recognition. In my opinion, the provisions of s 5 of the Status Act are clearly in conflict with the provisions of s 9(3) of the Constitution.

[**15.**] Because the respondents did not attempt to justify the limitation of the applicants' rights in s 5 of the Status Act, Magid J did not embark upon a limitations inquiry under the provisions of s 36 of the Constitution.[10] As Skweyiya AJ pointed out in the *Du Toit* case[11] the failure by the government to support the limitation of a right contained in the Bill of Rights does not relieve a Court from considering whether such a limitation is justifiable.[12] In my opinion it cannot be justified. An effect of s 5 of the

[6] Sec 9(3) provides that: 'The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.'
[7] 2003 (2) SA 198 (CC) (2002 (10) BCLR 1006).
[8] Act 74 of 1983.
[9] Para [26].
[10] Above n 5.
[11] Above n 7.
[12] Id para [31] and the cases cited in n 32 of that judgment.

Status Act is to legitimate children born to married couples in consequence of artificial insemination. It does not do so in respect of permanent same-sex life partners. In the *Du Toit* case,[13] Skweyiya AJ said the following with regard to the impugned provisions of the Child Care Act:

> In this regard, they are not the only legislative provisions which do not acknowledge the legitimacy and value of same-sex permanent life partnerships. It is a matter of our history (and that of many countries) that these relationships have been the subject of unfair discrimination in the past. However, our Constitution requires that unfairly discriminatory treatment of such relationships cease. It is significant that there have been a number of recent cases, statutes and government consultation documents in South Africa which broaden the scope of concepts such as 'family', 'spouse' and 'domestic relationship', to include same-sex life partners. These legislative and jurisprudential developments indicate the growing recognition afforded to same-sex relationships. (Footnotes omitted.)

The same considerations apply in the present case. Given that s 5 is unconstitutional on these grounds, it is not necessary to consider the other grounds raised by the applicants.

[**16**.] The finding by the High Court that the impugned provisions of the Status Act are unconstitutional must be upheld. As far as the remedy is concerned, I am of the view that the approach of Magid J is fully in accord with that adopted by Ackermann J on behalf of a unanimous Court in *National Coalition for Gay and Lesbian C Equality and Others v Minister of Home Affairs and Others.*[14] It was not suggested to the contrary on behalf of the respondents. It is clear from the report of the *curatrix ad litem* that the order made by Magid J also meets the interests of the two children of the applicants in this case as s 28(2) of the Constitution requires.[15]

[**17**.] During argument the Court's attention was drawn to the concluding words of s 5(1)(a) of the Status Act. Prior to any order requiring words to be read into the statute, the clause reads as follows: '. . . as if the gamete or gametes of that woman or her husband were used for such artificial insemination'. The effect of these words in s 5(1)(a) is merely clarificatory. They make plain that if a husband consents to the process of artificial insemination, it does not matter whose gametes are used to conceive the child, the child will nevertheless be the legitimate child of the woman bearing the child and her husband. The applicants propose that the words 'or permanent same-sex life partner' be read in after the word 'husband' in this portion of this section as elsewhere. If such words were to be introduced into the subsection, it would read as follows: '. . . as if the gamete or gametes of that woman or her husband or her permanent same-sex life partner were used for such artificial insemination'. The deeming provision

[13] Above n 7, para [32].
[14] 2000 (2) SA 1 (CC) (2000 (1) BCLR 39) paras [61]–[88].
[15] Sec 28(2) provides that: 'A child's best interest are of paramount importance in every matter concerning the child.'

has reference to the legitimacy of a child born to a married couple. A child born by artificial insemination is deemed to be legitimate in a situation where the common law would not recognise such legitimacy. In the case of a child born by artificial insemination in the context of a permanent same-sex life partnership, the deeming provision is inappropriate as a child could not be conceived using the gametes only of the same-sex life partners. Furthermore, the legitimacy of such a child at common law could not arise.

[**18**.] This Court set out the principles that should be followed when reading words into a statute in the case of *National Council for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*.[16] One of those principles is that the Court should interfere with the laws adopted by the Legislature as little as possible. However in this case, were words to be read into the concluding words of s 5(1)(a) as the applicants proposed, the effect would be inappropriate; as mentioned in the preceding paragraph, it would incorrectly assume the common law legitimacy of a child of same-sex partners. It seems to me that, given that the concluding words of s 5(1)(a) play no substantive role in themselves, but merely repeat or clarify the earlier substantive portions of the subsection, it would be proper for this Court to sever the concluding words. In so doing, I acknowledge that at times where either the tools of severance or reading in are employed to achieve a constitutional result, a consequential severance may be required to ensure that the statutory provision is clear and achieves its purpose. In such circumstances, the Court will always be astute to ensure, on the one hand, that the laws adopted by the Legislature are interfered with as little as possible, and on the other, that a constitutional result is achieved.

Should the order include permanent heterosexual life partners?

[**19**.] The submission on behalf of the respondents is that, in the form it was made by Magid J, the order unfairly discriminates against permanent heterosexual life partners. The provisions of s 5 of the Status Act would have the same consequences for such partners as they have for same-sex partners. It was submitted that the words 'permanent life partner' should be read into s 5 rather than the words 'permanent same-sex life partner'. A similar submission was made in this Court in *Satchwell v President of the Republic of South Africa and Another*.[17] It was disposed of as follows by Madala J:

> This Court is not at large to grant any relief under its power to grant 'appropriate relief' — it cannot import matters that are remote to the case in question — otherwise it will be intruding too far into the legislative sphere. The intended accommodation of heterosexuals cannot be introduced via the backdoor into

[16] Above n 14, paras [62]–[76].
[17] 2002 (6) SA 1 (CC) (2002 (9) BCLR 986).

this case. It was not properly before us, nor did we hear argument on the complexities involved.[18]

The same applies in the present case and the respondents' submission must be rejected.

Should the order be suspended?

[**20**.] The respondents' further submission was that this Court should suspend the confirmation of the whole order of constitutional invalidity for a period of one year to enable Parliament to pass legislation to cure the constitutional deficiencies in s 5 of the Status Act. This submission was based upon the 'wide-ranging' issues involved and the current investigation of these and related issues by the South African Law Reform Commission.[19] In my opinion, this submission is also without merit for the reasons which follow.

[**21**.] The suspension of an order is appropriate in cases where the striking down of a statute would, in the absence of a suspension order, leave a lacuna. In such cases, the Court must consider, on the one hand, the interests of the successful litigant in obtaining immediate constitutional relief and, on the other, the potential disruption of the administration of justice that would be caused by the lacuna. If the Court is persuaded upon a consideration of these conflicting concerns that it is appropriate to suspend the order made, it will do so in order to afford the Legislature an opportunity 'to correct the defect'.[20] It will also seek to tailor relief in the interim to provide temporary constitutional relief to successful litigants.

[**22**.] Where the appropriate remedy is reading in words in order to cure the constitutional invalidity of a statutory provision, it is difficult to think of an occasion when it would be appropriate to suspend such an order. This is so because the effect of reading in is to cure a constitutional deficiency in the impugned legislation. If reading in words does not cure the unconstitutionality, it will ordinarily not be an appropriate remedy. Where the unconstitutionality is cured, there would usually be no reason to deprive the applicants or any other persons of the benefit of such an order by suspending it. Moreover the Legislature need not be given an opportunity to remedy the defect, which has by definition been cured.[21] In the present case, the effect of the order is not to leave a lacuna but to remedy the

[18] Id para [33]. See too *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*, above n 14, para [87].

[19] Project 118.

[20] Sec 172(1)(b)(ii) provides that: '(1) When deciding a constitutional matter within its power, a court — . . . (b) may make any order that is just and equitable, including — . . . (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.'

[21] As mentioned in para [26] below the Legislature is free thereafter to amend such a statutory provision in any way consistent with the Constitution.

constitutional defect complained of by the applicants by a combination of reading in and striking down. Under the circumstances, it is not an appropriate case for our order to be suspended.

[**23**.] Comprehensive legislation regularising relationships between gay and lesbian persons is necessary. It is unsatisfactory for the Courts to grant piecemeal relief to members of the gay and lesbian community as and when aspects of their relationships are found to be prejudiced by unconstitutional legislation. The legal consequences of marriage are many and complex. This Court[22] has previously referred to a South African common-law marriage as creating 'a consortium *omnis vitae*' which was described in the following passage from *Peter v Minister of Law and Order*[23] as

> . . . an abstraction comprising the totality of a number of rights, duties and advantages accruing to spouses of a marriage. . . . These embrace intangibles, such as loyalty and sympathetic care and affection, concern . . . as well as the more material needs of life, such as physical care, financial support, the rendering of services in the running of the common household or in a support-generating business. . . .

Similarly, the mutual relationship between parent and child is complex, valuable and multi-faceted. There is also the relationship between children and members of their extended family which merits consideration.

[**24**.] Where a statute is challenged on the ground that it is under-inclusive and for that reason discriminates unfairly against gays and lesbians on the grounds of their sexual orientation, difficult questions may arise in relation to the determination of the particular relationships entitled to protection, and the appropriate relief. The precise parameters of relationships entitled to constitutional protection will often depend on the purpose of the statute. For instance in *Satchwell*[24] where the issue was pensions and related benefits, a mutual duty of support was an essential element. In the present case, where the rights of children are implicated, this was not an essential element, though it might have been an appropriate one.

[**25**.] The State is required by s 7(2) of the Constitution to 'respect, protect, promote and fulfil the rights in the Bill of Rights'. And, by s 8(1) of the Constitution, '(t)he Bill of Rights . . . binds the Legislature, the Executive, the Judiciary and all organs of State'. The Executive and Legislature are therefore obliged to deal comprehensively and timeously with existing

[22] *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*, above n 14, para [46].
[23] 1990 (4) SA 6 (E) at 9G–H.
[24] Above n 17.

unfair discrimination against gays and lesbians.[25] Moreover, Courts considering unfair discrimination cases of this sort need carefully to evaluate the context and nature of the discrimination and, where unfair discrimination is found, remedies must be carefully tailored to that context.

[**26**.] It is not appropriate for Courts to determine the details of the relationship between partners to same-sex (or for that matter heterosexual) partnerships. So, too, it is not for the Courts to work out the details of the relationship between any such partners and their children. In the present case, for example, this Court has heard no argument and has not considered the respective duties which might arise between the applicants in respect of the children. Those are matters for the Legislature to consider when drafting comprehensive legislation to regulate such relationships. I would also add that the nature and detail of remedies which the Courts fashion in cases of unfair discrimination do not bind the Legislature. It is at large to fashion what it considers to be appropriate consequences of personal relationships in any way consistent with the provisions of the Constitution.

Costs

[**27**.] There is no reason to deprive the applicants of the costs of the confirmation proceedings. They were successful in the High Court and had no option but to approach this Court for confirmation of the order made by it.

[25] See the remarks of Madala J in *Satchwell v President of the Republic of South Africa and Another*, above n 17, para [29], and of Skweyiya AJ in the passage from the Du Toit judgment quoted in para 15 above. Numerous European countries have passed comprehensive legislation granting legal recognition to same-sex partnerships. Denmark was the pioneer in this area, passing the first law permitting same-sex couples to legally register their partnerships in 1989, Registered Partnership Act, 7 June 1989, 372. Several other Scandinavian countries have followed suit and passed legislation based on Denmark's example. See Registered Partnership Act, 30 April 1993, 40 (Norway); Registered Partnership Act, 23 June 1994, SFS 1994:1117 (Sweden); Confirmed Cohabitation Act, 12 June 1996, 87 (Iceland). More recently, Germany joined this trend passing the Law of 16 February 2001 on Ending Discrimination Against Same-Sex Associations: Life Partnerships, [2001] 9 *Bundesgesetzblatt* 266. In addition to establishing a separate legal category for same-sex partnerships, as these countries have done, Belgium has passed legislation offering the status of legal marriage to same-sex couples: Act of 13 February 2003, *Moniteur Belge*, Ed 3 at 9880. The Netherlands has achieved the same result in a series of statutes: Act of 21 December 2000 authorising marriage for same-sex partners, *Staatsblad* 2001, 9; Act of 21 December 2000 on adoption by same-sex partners, Staatsblad 2001, 10; Act of 13 December 2000 on various matters including the further equality between marriage and partnership registration, *Staatsblad* 2001, 11; Act of 8 March 2001 adjusting various other laws as a result of authorising marriage and adoption, *Staatsblad* 2001, 128.

The order

[**28**.] The following order is made:

(a) Paragraph 4 of the order of the High Court is set aside.
(b) (i) Section 5 of the Children's Status Act 82 of 1987 is declared to be inconsistent with the Constitution to the extent that the word 'married' appears in that section and to the extent that the section does not include the words 'or permanent same-sex life partner' after the word 'husband' wherever it appears in that section.
(ii) In s 5 of the Children's Status Act 82 of 1987 the word 'married' is struck out wherever it appears in that section.
(iii) In s 5 of the Children's Status Act 82 of 1987 the words 'or permanent same-sex life partner' are read in after the word 'husband' wherever it appears in that section.
(iv) The words in s 5(1)(a) 'as if the gamete or gametes of that woman or her husband were used for such artificial insemination' are struck out.
(c) The respondents are ordered, jointly and severally, to pay the costs of the confirmation proceedings including the costs of the *curatrix ad litem*.

TANZANIA

Dibagula v The Republic

(2003) AHRLR (TzCA 2003)

Hamisi Rajabu Dibagula v The Republic
Court of Appeal, 14 March 2003 (Criminal Appeal 53 of 2001)
Judges: Samatta, Mroso, Munuo
Conscience/religion (freedom to preach, 8, 10, 15-17; religious intolerance, 31)
Fair trial (judgment should provide reasons, 19, 26, 27; right to be heard, 24)

Samatta CJ

[**1.**] This is an appeal from a decision of the High Court (Chipeta, J, as he then was) affirming, while exercising revisional jurisdiction, a conviction for uttering words with the intent to wound religious feelings. The appellant, Hamisi Rajabu Dibagula, had been convicted of that offence by the District Court of Morogoro, which sentenced him to 18 months' imprisonment. The learned Judge set aside that sentence and substituted therefore such sentence as was to result in the immediate release of the appellant from custody. The appeal raises one or two questions of considerable public importance concerning the limits, if any, of the right to freedom of religion, guaranteed under article 19 of the Constitution of the United Republic of Tanzania, 1977, hereinafter referred to as 'the Constitution'.

[**2.**] It is necessary, before we embark upon the task of examining the merits or otherwise of the appeal, to state the facts of the case. They are, happily, uncomplicated. They may, we think, be outlined as follows. In the afternoon of March 16, 2000, the appellant, a member of an Islamic organisation known as Almallid, and some of his colleagues organised a religious public meeting at Chamwino in Morogoro town. They had secured a 'permit', issued by the police officer commanding [the] district, to organise the meeting. Acting on some information he had received from a member of the public, the regional CID officer of Morogoro region proceeded to the place where the meeting was taking place. He found the appellant addressing the meeting. At that point in time the appellant was saying 'Yesu si Mwana wa Mungu, ni jina la mtu kama mtu mwingine tu' [translation: Jesus is not the son of god, it is a name like any other — eds].

[**3.**] The CID officer had no doubt that the utterance constituted a criminal offence under section 129 of the Penal Code. He proceeded to arrest the appellant (his colleagues took to their heels and vanished into thin air) and

took him to a police station. Four days later the appellant was taken before the District Court where a charge under the aforementioned section was laid at his door. It was alleged in the particulars of offence that the appellant

> on the 16th day of March 2000 at about 18.00 hrs at Chamwino area within the Municipality, District and Region of Morogoro, with deliberate intention did utter words to wit *YESU si mwana wa MUNGU bali ni jina*, words which are wounding (sic) the religious feelings of Christian worshippers.

[**4.**] Section 129 of the Penal Code provides:

> Any person who, with the deliberate intention of wounding the religious feelings of any person, utters any word, or makes any sound in the hearing of that person, or makes any gesture in the sight of that person, or places any object in the sight of that person, is guilty of a misdemeanour, and is liable to imprisonment for one year.

[**5.**] The appellant protested his innocence. He denied to have preached 'against the Christian religion'. One Athuman Abdallah, his only witness, told the trial magistrate that the appellant had urged non-muslim to embrace Islamic faith and pronounce that Jesus Christ is not the Son of God. At the end of the trial the learned magistrate entertained no doubt of reasonable kind that the evidence laid before her proved the appellant's alleged guilt. After entering a conviction, as already pointed out, she sentenced the appellant to 18 months' imprisonment. The High Court, upon becoming aware of the decision, and in exercise of its powers under section 372 of the Criminal Procedure Act, 1985, hereinafter referred to as 'the Act', called for the record of the case for the purpose of satisfying itself as to the correctness of the decision. The Court later proceeded to conduct a revisional proceeding in respect of the case. Only the Director of Public Prosecutions was given opportunity to be heard at that proceeding. At the end of it the learned Judge was satisfied that the appellant has been rightly convicted. He was, however, of the opinion, a correct one in our view, that the sentence of eighteen months' imprisonment was illegal because it exceeded the maximum sentence of twelve months' imprisonment fixed by law for the offence. He set it aside and, as already stated, substituted therefor such sentence as was to result in the appellant's immediate release from custody. Consequently, the appellant regained his personal liberty. He believed, however, that the learned Judge's decision did not constitute a complete triumph for justice. Hence the instant appeal.

[**6.**] The learned Judge's decision is impugned on the following five grounds:

1. The revising Judge erred in law and in fact by holding that the prosecution in [the] Lower Court did prove its case beyond reasonable doubt.
2. The revising Judge erred in law by agreeing with the submission of the State Attorney that the Prosecution in the trial Court proved the case beyond

reasonable doubt without valuating the evidence tendered in the lower court and assigning reasons therefor.

3. The revising Judge erred in law by not considering the fact that the nature of the offence the Appellant was convicted of presupposes the existence of a person who was was directly wounded by the words uttered by the Appellant or that the prosecution should be able to prove who and how a person would have his feelings injured.
4. The revising Judge erred in law in embarking on revisional proceedings in the presence of the Republic but in the absence of the accused person whose legal interests were being looked into by the court.
5. The court erred in law by holding that there was a judgment of the trial Court while in fact the so-called judgment was in law not judgment.

[**7.**] Speaking through his advocate, Mr Taslima, who was assisted by Prof Safari, the appellant has strongly urged us to quash his conviction. Mr Mlipano, State Attorney, declined to support it.

[**8.**] Is Jesus Christ the Son of God? Millions of persons would sharply disagree as to the correct answer to this question. Some would entertain no doubt whatsoever that an answer in the affirmative is the correct one; to others, 'No' would, without the slightest doubt, be the correct answer. Whichever is the correct answer, the question is a purely religious one and, therefore, cannot fall for determination by a court of law. It is not, therefore, one of the questions which the instant appeal can possibly answer. The pivotal issue before us is whether merely making an utterance in the hearing of another person that Jesus Christ is not the Son of God constitutes a criminal offence under section 129 of the Penal Code.

[**9.**] Before we proceed to examine the merits or otherwise of the arguments addressed to us by the learned advocates, we deem it useful to state some of the general principles governing the enjoyment of the freedom of religion in this country. The right to that freedom is guaranteed under article 19 of the Constitution, which reads:

(1) Every person has the right to the freedom of thought or conscience, belief or faith, and choice in matters of religion, including the freedom to change his religion or faith.
(2) Without prejudice to the relevant laws of the United Republic the profession of religion, worship and propagation of religion shall be free and a private affair of an individual; and the affairs and management of religious bodies shall not be part of the activities of the state authority.
(3) In this Article reference to the word 'religion' shall be construed as including reference to religious denominations, and cognate expressions shall be construed accordingly.

[**10.**] The freedom enshrined in this article includes the right to profess, practise and propagate religion. Since profession, practice or propagation of religious faith, belief or worship is also a form or manifestation of a person's expression, it must be correct to say, as we do, that freedom of religion is also impliedly guaranteed under article 18(1) of the Constitution. That freedom, like other freedoms, is not an absolute right. The exercise of it, just as the exercise of other freedoms, is subject to the

requirements of public peace, morality and good order, which are requisites of the common good of society. As was pointed out by the Supreme Court of India in *The Chairman, Railway Board and Others v Mrs Chandrima Das and Others*, I SCR 480, at 501 -502, primacy of the interest of the nation and security of state must be read into every provision dealing with fundamental rights. The freedom to transmit or spread one's religion or to proselytise has to be exercised reasonably, that is to say, in a manner which recognises the rights, including religious rights, of other persons. It must be exercised in a manner which demonstrates respect for the freedoms of persons belonging to other religions, atheists and agnostics. In a human society, rights may be in conflict; they must, therefore, be subject to law. As far as human rights and freedoms are concerned, this legal position is succinctly stated in article 30(1) of the Constitution, which provides:

> The human rights and freedoms, the principles of which are set out in this Constitution, shall not be exercised by a person in a manner that causes interference with or curtailment of the rights and freedoms of other persons or of the public interest.

[**11.**] Having stated these principles, we propose now to deal with the arguments addressed to us. But before we do so, we desire to observe that the charge which was laid at the door of the appellant in this case was not a model of accuracy or elegance in charge drafting. Some vital words of section 129 of the Penal Code concerning *mens rea* were omitted from the particulars of offence. It leaps to the eye that the words 'of wounding the religious feelings of any person' are missing there. Did this omission occasion any miscarriage of justice? We think not. First, the wording of the statement of offence, section and law in the charge reasonably informed the appellant of the requisite *mens rea* of the offence he was charged with. Secondly, judging from the tenor of his defence during cross-examination of the regional CID officer and PW 4, D/Cpl Zeno, and his own testimony, it is patently clear that the appellant was aware that it was the case against him that, in uttering the alleged words, his intention, a deliberate one, was to wound the religious feelings of those hearing him. Rightly, his counsel before this Court did not appear to think that any arguable point arose from the omission.

[**12.**] Having made that observation, we proceed to deal with the first ground of appeal. It was forcefully contended by Mr Taslima that the learned Judge erred in law because, as the learned advocate put it, he did not direct himself on the vital question of *mens rea* in the case. The learned advocate went on to submit that even the learned trial magistrate did not address her mind to that issue. Mr Taslima draw our attention to *Surah* 9:88-91 of the *Qur'an*, and then proceeded to submit that when he told his audience that Jesus Christ is not the Son of God the appellant was doing no more than preaching his religion. The four verses read as follows:

> 88. They say: The Most Gracious

Has betaken a son!
89. Indeed ye have put forth
A thing monstrous!
90. At it the skies are about
To burst, the earth
To split asunder, and
The mountains to fall down
In utter ruin,
91. That they attributed
A son to The Most Gracious

[**13.**] With respect to the learned Judge, we are clearly of the opinion that Mr Taslima's criticisms are unanswerable. No offence is committed under section 129 of the Penal Code where the deliberate intention of the perpetrator of the alleged misconduct was other than wounding the religious feelings of those on the scene. Neither the learned trial magistrate nor the learned Judge appears to have addressed her/his mind to the question of *mens rea* in this case. In the course of her judgment the learned trial magistrate said:

> In this case [there is] no dispute that the accused person was at Chamwino preaching Islamic religion. The questions in this case are: 1. Whether the accused got permit to preach. 2. Whether the accused used abusive words to abuse (sic) another religion.

[**14.**] Nowhere in the judgment is there evidence which shows that the learned trial magistrate was aware that the prosecution had the *onus* to prove that the appellant had the *deliberate* intention to wound the religious feelings of those within the hearing range. The issues she posed were clearly irrelevant. She made no attempt to consider, among other things, whether, in making the utterance complained against, the appellant did more than exercise his constitutional right to freedom of religion. The learned Judge, on his part, discussed the validity or otherwise of the conviction only in three sentences, two of which are fairly short, when he said:

> I now turn to the case at hand. I respectfully agree with the learned state attorney that the prosecution's evidence proved the offence against the accused beyond reasonable doubt. The conviction, therefore was justified.

[**15.**] The learned Judge's attention was apparently not drawn to the need for him to be satisfied that the requisite *mens rea* was proved in the case. We have examined the record of the case with great care and have found neither direct nor circumstantial evidence to justify the conclusion or inference that the deliberate intention of the appellant when he uttered the words in question was to wound the religious feelings of those who were to hear him. On the contrary, the evidence clearly demonstrates, in our opinion, that the appellant was, at the material time, on a mission to propagate his religion, Islam. At the time the regional CID officer arrived at the public meeting the appellant was merely repeating what the *Quar'an* unequivocally states in several *surahs*, including *Surah* 19, which

we have already quoted from, and *Surah* 5, which, again, Mr Taslima drew our attention to. Verse 75 of that *Surah* reads:

> Christ the son of Mary
> Was no more than
> A Messenger: many were
> The Messenger that passed away
> Before him . . .

[**16.**] It is neither possible nor desirable to list all situations which may manifest the deliberate intention of wounding religious feelings. That intention may be manifested by the speaker declaring it in so many words, or by the circumstances surrounding the making of the utterance, sound or gesture. If, for example, a non-Christian were to preach in church grounds that Jesus Christ is not the Son of God, or if he were to interrupt a Christian appellant made the utterance, and the nature of the meeting had, among other things, to be taken into account in determining what the appellant's deliberate intention was.

[**17.**] The provisions of section 129 of the Penal Code were not intended to, and do not, frown upon sober or temperate criticisms of other persons' religions even if those criticisms are made in a strong or powerful language. It should always be remembered that what is regarded as truth in one religion may not be so regarded in another. Even if some sections of society consider the spreading of certain religious messages, in an area where those messages are taken too be unwanted, as being an irresponsible, insensitive or provocative action it would not constitute a violation of section 129 of the Penal Code to spread those messages there if the deliberate intention of the speaker was to propagate his religion or religious views, and not to wound the religious feelings of those hearing him. The enactment of the provision was not intended to license an unreasonable abridgment or restriction of the right to propagate one's religion or religious views. It was primarily intended to safeguard public order. Freedom of religion is not so wide as to authorise the outrage of religious feelings of others, with a deliberate intention.

[**18.**] For the reasons we have given, we agree with Mr Taslima that in this case the prosecution failed to prove the requisite *mens rea*. Consequently, we find merit in the first ground of appeal. These findings are sufficient to dispose of the appeal, but, bearing in mind the novelty and importance of the case, we deem it useful to deal with the other grounds of appeal, albeit briefly in each case.

[**19.**] We proceed, therefore, to examine the merits or otherwise of the second ground of appeal. It was the contention of Mr Taslima here that the learned Judge erred in law in not evaluating the evidence laid in the scales at the trial and assigning reasons for agreeing with the findings arrived at by the learned trial magistrate. We have no doubt that this complaint has merit. We have already pointed out, when dealing with the first ground of appeal, that the learned Judge, when he turned to a

consideration of the validity or otherwise of the appellant's conviction, merely said that he agreed with the learned state attorney's submission that the prosecution had proved their case beyond reasonable doubt. He made no attempt to consider how the evidence proved each ingredient of the offence the appellant was convicted of, and he gave no reasons for holding that the learned state attorney's submission was well-founded. The necessity for courts to give reasons cannot be over-emphasized. It exists for many reasons, including the need for the courts to demonstrate their recognition of the fact that litigants and accused persons are rational beings and have the right to be aggrieved. And as was pointed out by MK Mukherjee, J, in *Rupan Deol Bajaj and Another v Kanwar Pal Singh Gill and Another* [1995] Supp 4 SCR 237, at 258, 'Reasons introduce clarity and minimise chances of arbitrariness'.

[**20.**] Nowhere in his judgment in the instant case does the learned Judge appear to have noted that not only did the learned trial magistrate frame irrelevant issues but she also made no attempt to discuss those issues. Bearing in mind what we have said, we are driven to the conclusion that the complaint in the second ground of appeal has merit. That conclusion brings us face to face with the third ground of appeal.

[**21.**] This ground of appeal can, we hasten to think, be dealt with very briefly. It was Mr Taslima's submission that to prove a charge under section 129 of the Penal Code the prosecution must adduce evidence from someone whose religious feelings were wounded by the alleged utterance, sound or gesture, to the effect that his said feelings were wounded. We can find no warrant for thinking that there is merit in this contention. It would be doing great violence to the language of the section to hold that such proof is required. It is enough if it is proved that the accused's deliberate intention was to wound someone's religious feelings. Of course, if a witness testifies that his religious feelings were wounded, and eventually the charge is proved beyond a reasonable doubt, the proof of wounding may be relevant in the assessment of sentence to be imposed on the accused. The offence is complete once the utterance is made. It follows that, in our opinion, Mr Taslima's argument is misconceived in law.

[**22.**] We turn now to the fourth ground of appeal. As will be recalled, the criticism here is that the learned Judge denied the appellant the opportunity to be heard when the revisional proceeding was conducted. It was contended by Prof Safari, on behalf of the appellant, that the omission to give him that opportunity violated the provisions of article 13(6)(a) of the Constitution and section 373(2) of the Criminal Procedure Act, 1985. The constitutional provision reads as follows:

> (6) To ensure equality before the law, the state authority shall make procedures which are appropriate or which take into account the following principles:
>
> (a) when the rights and duties of any person are being determined by the court or any other agency, that person shall be entitled to a fair hearing and to

> the right of appeal or other legal remedy against the decision of the court or of the other agency concerned; . . .

[**23.**] In order to grasp fully what is prohibited by subsection (2) of section 373 of the Act, it is necessary, we think, to quote the preceding subsection of the section also. This is how the two subsections read:

> (1) In the case of any proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High court may (a) in the case of conviction, exercise any of the powers conferred on it as a court of appeal by sections 366, 368 and 369 and may enhance the sentence; (b) in the case of any other order other than an order of acquittal, alter or reverse such order, save that for the purposes of this paragraph a special finding under subsection (1) of section 219 of this Act shall be deemed not to be an order of acquittal. (c) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence; save that an order reversing an order of a magistrate made under section 129 shall be deemed not to have been made to the prejudice of an accused person within the meaning of this sub-section.

[**24.**] In the instant case it is not in dispute that the learned Judge conducted the revisional proceeding in the absence of the appellant, who was given no opportunity to be heard in his own defence. There can be no doubt whatsoever that the omission to provide that opportunity to the appellant was a very serious error. It offended the provisions of sub-section (2) of section 373 of the Act we have quoted a short while ago. The decision of the learned Judge affirming the conviction did in the circumstances prejudice the appellant. Very rightly, Mr Mlipano, the learned state attorney, conceded before us that the learned Judge's error is fatal to his decision. The importance of the right to be heard has been commented upon by many eminent judges over the centuries. Nearly three centuries ago, in *R v University of Cambridge*, 1723, 1 Stra 557, cited with approval by Megarry, J, in *John v Rees and Others*, [1969] 2 All ER 274, Vortescue, J, used the following celebrated words to emphasise the importance:

> The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man upon such an occasion that even God himself did not pass sentence upon Adam before he was called upon to make his defen7Ee. Adam (says God) where art thou? Hast thou not eaten of the tree whereof I commanded thee that thou shouldst not eat? And the same question was put to Eve also.

[**25.**] We are satisfied, for the reasons we have given, that there is merit in the complaint in the fourth ground of appeal.

[**26.**] Finally, we proceed to deal with the fifth ground of appeal. It was submitted on behalf of the appellant that no judgment was in law delivered by the learned magistrate in this case. It is common ground that although she framed two issues in the case, she dealt with only one of them, and the one which was considered was dealt with perfunctorily. Another criticism levelled at the learned trial magistrate's judgment is that

it scarcely contained any reasons justifying the final conclusions arrived at on the case. We have already discussed the importance of giving reasons in decision making. We will not revert to that point. We will confine ourselves at this stage to determining whether the learned trial magistrate fully complied with the requirements of section 312(1) of the Act, which reads:

> Every judgment under the provisions of section 311 shall, except as otherwise expressly provided by this Act, be written by, or reduced to writing under the personal direction and superintendence of the presiding judge or magistrate in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by such presiding officer as of the date on which it is pronounced in open court.

[**27.**] While we are hesitant to travel the whole distance with counsel for the appellant and say that the judgment delivered by the trial court in this case is no judgment in law, we have no hesitation in holding, as we do, that the said judgment did not sufficiently meet the requirements of the subsection we have just quoted. We wish to draw attention to what this Court said in *Lutter Symphorian Nelson v (1) The Hon Attorney General. (2) Ibrahim Said Msabaha*, Civil Appeal 24 of 1999 (unreported) on what a judgment should contain:

> . . . A judgment must convey some indication that the judge or magistrate has applied his mind to the evidence on the record. Though it may be reduced to a minimum, it must show that no material portion of the evidence laid before the court has been ignored. In *Amirali Ismail v Regina*, 1 TLR 370, Abernethy, J, made some observations on the requirements of judgment. He said: 'A good judgment is clear, systematic and straightforward. Every judgment should state the facts of the case, establishing each fact by reference to the particular evidence by which it is supported; and it should give sufficiently and plainly the reasons which justify the finding. It should state sufficient particulars to enable a Court of Appeal to know what facts are found and how' .

[**28.**] The failure to comply with the relevant statutory provisions as to the preparation of a judgment will be fatal to a conviction where there is insufficient material on the record to enable the appeal court to consider the appeal on its merits: see *Willy John v R* (1956) 23 EACA 509. In the instant case the learned Judge erred, in our opinion, in not holding that the learned trial magistrate's judgment fell short of meeting the requirements of section 312(1) of the Act.

[**29.**] We have clearly demonstrated, we think, that the learned Judge should not have affirmed the appellant's conviction and that, therefore, this appeal must succeed. We desire, before we make resultant orders, to make two observations.

[**30.**] The first one concerns revisional powers. No one can doubt the usefulness of these powers, but they should be exercised in appropriate cases. Save in cases where justice requires an obviously improper conviction or illegal sentence to be at once quashed or rectified, revisional

powers should not be exercised before inquiry has been made whether an appeal has been or is likely to be lodged: see *(T) Lobozi s/o Katabaro v R*, (1956) 23 EACA. 583. In the instant case the revisional proceeding was conducted before the expiry of the period within which an appeal against the district court's decision could be lodged. On August 6, 2001, the appellant had, through the officer-in-charge of Morogoro Prison, given a notice of appeal. No inquiry appears to have been made as to whether an appeal was likely to be lodged. This should have been done.

[**31.**] The second matter we desire to comment upon is religious intolerance. Religions can, and should, be a solid foundation of peace. In countries where they have not been given a chance to play that vital role, they have launched many wars, caused endless streams of blood and rolling of thousands of heads. Religious intolerance is a vice which must not be permitted to find a place in the hearts of our people. It must be repressed by every lawful method. When a person embracing a religious faith or view is told by another person, whose religious faith or view is different, something concerning religion which he considers to be untrue, he should be able to answer him by echoing the wise words of Voltaire, the 18th century French philosopher: 'I disagree profoundly with every word that you say but I shall defend unto the death your right to say it'. In the holy books of almost all major religions in the world one finds passages directly or indirectly exhorting people to religious tolerance. In the *Qur'an*, for example, there are the following verses, in *Surah* 109:

1. Say (O Muhamad to these Mushrikun and Kafirun): 'O A1-Kafirun (disbelievers in Allah, in His Oneness, in His Angels, in His Books, in His Messengers, in the Day of Resurrection, and in Al-Qadar)!
2. I worship not that which you worship,
3. Nor will you worship that which I worship.
4. And I shall not worship that which you are worshipping.
5. Nor will you worship that which I worship.
6. To you be your religion, and to me my religion.

[**32.**] The Constitution of the United Republic of Tanzania and other relevant laws oblige the people of this country to live together with mutual respect and tolerance. It is one of the principal obligations of good citizenship.

[**33.**] For the reasons we have given, we allow the appeal, quash the conviction and set aside the sentence imposed thereon.