AFRICAN HUMAN RIGHTS LAW REPORTS 2006

Pretoria University Law Press
PULP

2008

African human rights law reports
2006

Published by:

Pretoria University Law Press (PULP)

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ISSN: 1812-2418

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The seventh volume of the *African Human Rights Law Reports* covers cases decided in 2006. The *Reports* include cases decided by the United Nations human rights treaty bodies, the African Commission on Human and Peoples' Rights and domestic judgments from different African countries. The *Reports* are a joint publication of the African Commission on Human and Peoples' Rights and the Centre for Human Rights, University of Pretoria, South Africa. PULP also publishes the French version of these *Reports, Recueil Africain des Décisions des Droits Humains.*

The *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 at www.chr.up.ac.za. Hard copies of the *Reports* can be obtained from the Centre for Human Rights.

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 related to presentation. Quotes and references have, where possible, been checked against the original. Corrections which may affect the meaning are indicated by square brackets.

We wish to thank the persons who helped us obtain cases published in the *Reports:* Robert Eno, Sanji Monageng and Korir Singoei.

Cases from national courts 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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University of Pretoria, Pretoria 0002
South Africa
Fax: + 27 12 362-5125
E-mail: ahrlr@up.ac.za

USER GUIDE

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

The *Subject index* is divided into two parts — general principles or procedural issues, and substantive rights. Decisions dealing with a specific article in an international instrument are to be found in the list of *International instruments referred to*. A table that lists *International case law considered* is also included. In these tables case references are followed by the numbers of the paragraphs in which the instruments or cases are cited.

A headnote, to be found at the top of each case, provides the full original title of the case as well as keywords noting the primary issues in the case. These are liked to the keywords in the *Subject index*. Keywords are followed by the numbers of the paragraphs in which a specific issue is dealt with. In instances where the original case contains no paragraph numbers these have been added in square brackets.

The date at the end of a case reference refers to the date 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
BwHC	High Court, Botswana
CCPR	International Covenant on Civil and Political Rights
GaHC	High Court, The Gambia
HRC	United Nations Human Rights Committee
KeHC	High Court, Kenya
SAHC	High Court, South Africa
ZwSC	Supreme Court, Zimbabwe

CASE LAW ON THE INTERNET

Case law concerning human rights in Africa 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

Centre for Human Rights, University of Pretoria
www.chr.up.ac.za

International Law in Domestic Courts (ILDC)
www.oxfortdlawreports.com

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www.interights.org

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www.accpuf.org

Commonwealth Legal Information Institute
www.commonlii.org

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ALGERIA

Bousroual v Algeria

(2006) AHRLR 3 (HRC 2006)

Communication 1085/2002, *Louisa Bousroual (on behalf of Salah Saker) v Algeria*

Decided at the 86th session, 15 March 2006, CCPR/C/86/D/1085/2002

Forced disappearance

Admissibility (domestic remedies unduly prolonged, 8.3)
Personal liberty and security (forced disappearance, 9.2, 9.3, 9.5; *incommunicado* detention, 9.6; *habeas corpus*, 9.7)
Evidence (burden of proof, 9.4)
Cruel, inhuman or degrading treatment (effect of forced disappearance on spouse, 9.8)
Life (forced disappearance, 9.10, 9.11)
Remedies (duty to investigate and persecute, 9.12, 11)

1. The author of the communication, dated 9 February 2000, is Mrs Louisa Bousroual, an Algerian national residing in Constantine (Algeria). She submits the communication on behalf of her husband, Mr Salah Saker, an Algerian national born on 10 January 1957 in Constantine (Algeria) who has been missing since 29 May 1994. The author claims that her husband is a victim of violations by Algeria of articles 2(3), 6,(1), 9(1), (3) and (4), 10(1) and 14(3) of the International Covenant on Civil and Political Rights (the 'Covenant'). The author is represented by counsel. The Covenant and the Optional Protocol to the Covenant entered into force for the state party on 12 December 1989.

The facts as presented by the author

2.1. Mr Saker, a teacher, was arrested without a warrant on 29 May 1994 at 18:45 at his home, as part of a police operation carried out by agents of the Wilaya of Constantine (administrative division of the town of Constantine). At the time of his arrest, Mr Saker was a member of the *Front Islamiste de Salut* (Islamic Salvation Front), a prohibited political party for which he had been elected in the annulled legislative elections of 1991.

2.2. In July 1994 the author wrote to the Director of Public Prosecutions (*Procureur de la République*) and requested to be informed about the reasons for her husband's arrest and continued detention. At the time of his arrest, the longest pretrial detention authorised by Algerian law was 12 days, for persons suspected of the most serious offences provided for in the Algerian criminal code, namely, terrorist or subversive acts.[1] Further, the law required that the police officer responsible for the questioning of the suspect allows him contact with his family.[2]

2.3. The author did not receive a satisfactory reply from the Director of Public Prosecutions and, on 29 October 1994, wrote to the President of the Republic, the Minister of Justice, the Minister of the Interior, the Security Officer of the President of the Republic (*Délégué à la Sécurité auprès du Président de la République*), and the head of Military Area 5.

2.4. As none of these persons replied, the author lodged a complaint with the Director of Public Prosecutions of the Tribunal of Constantine on 20 January 1996 against the security services of Constantine for the arbitrary arrest and detention of Mr Saker. She requested that the persons responsible be brought to justice, pursuant to article 113(2) of the Criminal Procedure Code. By letter of 25 January 1996, the author alerted the Ombudsman of the Republic (*Médiateur de la République*). She also requested information about her husband from the Director General of National Security on 28 January 1996.

2.5. As none of these bodies replied, the author wrote to the President of the National Observatory for Human Rights (*Observatoire National des Droits de l'Homme*) on 27 September 1996 to inform him of the difficulties which she was facing in obtaining information about her husband. She also requested legal aid and assistance.

2.6. On 27 February 1997 the author received a letter from the judicial police section of the security of Constantine (*Service de la Police judiciaire de la Sûreté de la Wilaya de Constantine*), forwarding a copy of Decision 16536/96 of the Director of Public Prosecutions of the Tribunal of Constantine dated 4 September 1996. This decision relates to the complaint which the author had lodged a year earlier; it informed her that her husband was wanted and had been arrested by the judicial police section of the security of Constantine, then transferred to the Territorial Centre for Research and Investigation (*Centre Territorial de Recherches et d'Investigation,* the 'Territorial Centre') of Military Area 5 on 3 July 1994, as evidenced by a receipt of handover 848 of 10 July 1994. The author highlights that this decision does not indicate the reasons for

1 Article 22 of the Law of 30 September 1992 relating to the fight against terrorism.
2 Article 21(3) of the Criminal Procedure Code.

her husband's arrest, nor does it clarify what steps, if any, were taken pursuant to her complaint of 20 January 1996, such as investigating the actions of the Territorial Centre.

2.7. On 10 December 1998 the National Observatory for Human Rights informed the author that, according to information received from the security services, Mr Saker had been kidnapped by a non-identified armed group while in the custody of the Territorial Centre, and that the authorities did not have any other information as to his whereabouts. The letter from the Observatory does not clarify the grounds on which her husband was arrested and detained. The author understood the letter as informing her of her husband's death.

2.8. Lastly, the author states, on the one hand, that she has not been informed of either her husband's fate or his whereabouts and, on the other, that he underwent prolonged *incommunicado* detention; these allegations could raise issues under article 7 of the Covenant.

The complaint

3.1. The author claims that Mr Saker is a victim of a violation of articles 2(3), 6(1), 9(1), (3) and (4), 10(1) and 14(3) of the Covenant, in view of his alleged arbitrary arrest and detention; because the Algerian authorities did not conduct a thorough and in-depth investigation; nor instigate any proceedings, despite the author's numerous requests. The author's husband was not promptly brought before a judge, nor was he granted contact with his family, nor was he granted rights associated with detention (in particular access to a lawyer, the right to be informed promptly of the reasons for his arrest, and trial without undue delay). The author also claims that the authorities failed to protect Mr Saker's right to life.

3.2. The author claims to have exhausted all domestic remedies: remedies before judicial authorities, before independent administrative bodies responsible for human rights (the Ombudsman and the National Observatory for Human Rights), as well as the highest state authorities. She argues that her request for an investigation into the arrest, detention and disappearance of her husband was not acceded to. She claims that the judicial remedies which she initiated are manifestly unavailable and ineffective as, to her knowledge, no steps have been taken against the security services (police or Territorial Centre), which in her view are responsible for the arrest and disappearance of her husband. The author claims that the scarce responses and information she has received from the authorities aim to further delay the legal proceedings.

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

4.1. By *note verbale* of 31 January 2002, the state party contests the admissibility of the communication for non-exhaustion of domestic remedies. Of the various bodies seized by the author, only the Director of Public Prosecutions of the Tribunal of Constantine has the power to open a preliminary inquiry and to refer the case to the competent judicial authority, namely the investigating magistrate (*juge d'instruction*). The author, in having done so, has availed herself of only one of three remedies which Algerian law provides for in such circumstances.

4.2. The author could have referred the case directly to the investigating magistrate of the Tribunal of Constantine, had the Director of Public Prosecutions failed to act (the latter has a discretion as to whether or not to pursue any matter before it).[3] This direct referral is provided for in articles 72[4] and 73[5] of the Criminal Procedure Code, and would have resulted in the initiation of a public action (*action publique*). Further, any decisions of the investigating magistrate pursuant to those articles may be appealed to the Indictment Division (*Chambre d'accusation*).[6]

4.3. Further, the author could have lodged an action founded on tort against the state party (*contentieux relatif à la responsabilité civile de l'Etat*)[7] which grants victims the right, independently of any decision in the criminal action, to submit a case to the competent administrative authorities and obtain damages and interest. The state party concludes that the most relevant domestic remedies have

3 Article 36(1) of the Criminal Procedure Code.

4 Article 72 of the Criminal Procedure Code: '*Toute personne qui se prétend lésée par une infraction, peut, en portant plainte, se constituer partie civile devant le juge d'instruction compétent.*'

5 Article 73 of the Criminal Procedure Code: '*Le juge d'instruction ordonne communication de la plainte au Procureur de la République, dans un délai de cinq jours, aux fins de réquisitions. Le Procureur de la République doit prendre des réquisitions dans les cinq jours de la communication. Le réquisitoire peut être pris contre personne dénommée ou non dénommée. Le Procureur de la République ne peut saisir le juge d'instruction de réquisition de non informé, que si, pour des causes affectant l'action publique elle-même, les faits ne peuvent légalement comporter une poursuite, ou si, à supposer ces faits démontrés, ils ne peuvent admettre aucune qualification pénale. Dans le cas où le juge d'instruction passe outre, il doit statuer par une ordonnance motivée. En cas de plainte insuffisamment motivée ou insuffisamment justifiée, le juge d'instruction peut aussi être saisi de réquisitoires tendant à ce qu'il soit provisoirement informé contre toutes personnes que l'information fera connaître. Dans ce cas, celui ou ceux qui se trouvent visés par la plainte peuvent être entendus comme témoins par le juge d'instruction, sous réserve des dispositions de l'article 89 dont il devra leur donner connaissance, jusqu'au moment où pourront intervenir les inculpations ou, s'il y a lieu, de nouvelles réquisitions contre personnes dénommées*'.

6 Articles 170 to 174 of the Criminal Procedure Code.

7 Article 7 of the Civil Procedure Code.

not been exhausted, that these remedies are frequently used, and lead to satisfactory results.

4.4. Subsidiarily, the state party submits some information on the merits of the case. Mr Saker was arrested in June 1994 by the judicial police of the Wilaya of Constantine, on suspicion that he was a member of a terrorist group which had perpetrated a number of attacks in the region. After he had been heard, and as it had not been possible to confirm that he belonged to the terrorist group, the judicial police released him from custody and transferred him to the military branch of the judicial police for further questioning. Mr Saker was released after one day by the military branch of the judicial police. He is wanted in connection with an arrest warrant issued by the investigating magistrate of Constantine, in an investigation against 23 persons, including Mr Saker, who all allegedly belong to a terrorist group. This arrest warrant remains valid as Mr Saker is a fugitive. A judgment *in absentia* was rendered against him and his co-accused on 29 July 1995 by the criminal division of the Court of Constantine.

5.1. By letter of 22 April 2002, counsel contends that the requirement to exhaust domestic remedies has been fulfilled.

5.2. Further to the petition lodged by the author on 20 January 1996, the author was summoned on 20 March 1999 by the investigating magistrate of the 3rd chamber of the Tribunal of Constantine. During the hearing with the judge, she was informed that the matter of the disappearance of her husband had been registered (case 32/134) and was being investigated. The judge proceeded to question her as to the circumstances of Mr Saker's arrest. Since that day the public action (*action publique*) has been pending. According to the author, the opening of this investigation precludes her from using the procedure highlighted by the state party and provided for in articles 72 and 73 of the Criminal Procedure Code.

5.3. Further, the author is precluded from lodging an action founded on tort against the state party until the criminal judge rules on the petition against the security services of the Wilaya of Constantine: the Criminal Procedure Code states that civil actions are stayed until a decision is reached in the public action.[8] In any event, the author claims that the referral of the matter to an administrative body, when the matter is principally criminal in nature (in this instance punishable by the Criminal Procedure Code (article 113(2)), is inappropriate.

5.4. Some of the other bodies which the author appealed to have judicial powers, including the Minister of Justice who can request that the Director of Public Prosecutions initiate an action or instruct

[8] Article 4(2) of the Criminal Procedure Code: '*tant qu'il n'a pas été prononcé définitivement sur l'action publique lorsque celle-ci a été mise en mouvement*'.

the competent authority to do so,[9] whereas other bodies are mandated to investigate and search for the truth. These include the Ombudsman and the National Observatory for Human Rights. As none of these bodies replied, the author concludes that domestic remedies were neither adequate nor effective. The author recalls that she waited for 19 months after her hearing with the investigating magistrate for any information on the petition which she had lodged almost five years earlier.

5.5. The author contends that certain elements submitted by the state party confirm the arbitrary nature of Mr Saker's detention and the unlawfulness of the warrant against him. His conviction was handed down in secret (no member of his family was informed of the trial or of the judgment of the court) on 29 July 1995 by the Court of Constantine. Further, the state party has not clarified the date, time or place when Mr Saker was allegedly released from detention.

5.6. The author highlights that the issue of disappearances and prolonged secret detentions in Algeria are of great concern to human rights activists. The author also refers to the Committee's concluding observations on Algeria during the consideration of the state party's second periodic report. The Committee had urged the state party to ensure that independent mechanisms be set up to investigate all violations of the right to life and security of the person, and that offenders should be brought to justice. The author submits that no such mechanisms have been put into place and that offenders enjoy complete impunity.

Further state party observations and author's comments

6. On 17 November 2003 the state party reiterated that the author has not exhausted domestic remedies, and submitted further information on the merits. Mr Saker was taken in for questioning on 12 June 1994 by the police. After being held for three days he was handed over to the military branch of the judicial police for further questioning on 15 June 1994. As soon as that questioning ended, Mr Saker was released. Finally, the judgement of 29 July 1995, pronounced *in absentia*, sentenced Mr Saker to death.

7. By letter of 5 February 2004 the author refutes the state party's version of events and reiterates her own version. The author also highlights the contents of the letter dated 26 February 1997 from Salim Abdenour (judicial police officer) confirming the date on which Mr Saker was handed over to the Territorial Centre for further questioning. The author explains that the letter does not specify the

[9] Article 30(2) of the Criminal Procedure Code: '*d'engager ou de faire engager des poursuites ou de saisir la juridiction compétente de telles réquisitions écrites qu'il juge opportunes*'.

date of arrest as this would have clearly shown that the length of detention (33 days) had exceeded the legal maximum of 12 days.[10]

Issues and proceedings before the Committee

Admissibility considerations

8.1. Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its Rules of Procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

8.2. The Committee notes that the same matter is not being examined under any other international procedure, in line with the requirements of article 5(2)(a), of the Optional Protocol.

8.3. The Committee also notes that the state party maintains that the author has not exhausted available domestic remedies. On this point, the Committee takes note of the author's claim that her complaint lodged on 20 January 1996 remains under consideration, and that this exempts her from exhausting the civil party remedies highlighted by the state party. The Committee considers that the application of domestic remedies has been unduly prolonged in relation to the complaint introduced on 20 January 1996. It has not been demonstrated by the state party that the other remedies it refers to are or would be effective, in light of the serious and grave nature of the allegation, and the repeated attempts made by the author to elucidate the whereabouts of her husband. Therefore, the Committee considers that the author exhausted domestic remedies in conformity with article 5(2)(b), of the Optional Protocol.

8.4. As to the alleged violation of article 14(3), the Committee considers that the author's allegations have been insufficiently substantiated for purposes of admissibility. On the question of the complaints under articles 2(3), 6(1), 7, 9 and 10, the Committee considers that these allegations have been sufficiently substantiated. The Committee therefore concludes that the communication is admissible under articles 2(3), 6(1), 7, 9 and 10 of the Covenant and proceeds to their consideration on the merits.

Consideration of the merits

9.1. The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided for in article 5(1) of the Optional Protocol.

9.2. The Committee recalls the definition of enforced disappearance in article 7(2)(i) of the Rome Statute of the International Criminal Court: Enforced disappearance of persons means the arrest, detention or abduction of persons by, or with the

[10] Article 51(3) of the Criminal Procedure Code.

authorization, support or acquiescence of, a state or a political organisation, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time. Any act of such disappearance constitutes a violation of many of the rights enshrined in the Covenant, including the right to liberty and security of the person (article 9), the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment (article 7), and the right of all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person (article 10). It also violates or constitutes a grave threat to the right to life (article 6).

9.3. With regard to the author's claim of the disappearance of her husband, the Committee notes that the author and the state party have submitted different accounts, dates and outcome of events. While the author contends that her husband was arrested without a warrant on 29 May 1994, and according to a letter from the judicial police (referring to Decision 16536/96 of the Director of Public Prosecutions of the Tribunal of Constantine) he was handed over to the Territorial Centre on 3 July 1994, the state party contends that Mr Saker was arrested on 12 June 1994, handed over to the military branch of the judicial police on 15 June 1994, and released some time thereafter. The Committee also recalls that according to the National Observatory for Human Rights, the author's husband was 'kidnapped' by an unidentified military group, this according to information received from the security forces. The Committee notes that the state party has not responded to the sufficiently detailed allegations exposed by the author, nor submitted any evidence such as arrest warrants, release papers, records of interrogation or detention.

9.4. The Committee has consistently maintained[11] that the burden of proof cannot rest alone on the author of the communication, especially considering that the author and the state party do not always have equal access to the evidence and that frequently the state party alone has access to the relevant information. It is implicit in article 4(2) of the Optional Protocol that the state party has the duty to investigate in good faith all allegations of violation of the Covenant made against it and its authorities and to furnish to the Committee the information available to it. In cases where the allegations are corroborated by evidence submitted by the author and where further clarification of the cases depends on information exclusively in the hands of the state party, the Committee may

[11] Communication 146/1983, *Baboeram-Adhin and others v Suriname*, views adopted on 4 April 1985, para 14.2; communication 139/1983, *Conteris v Uruguay*, views adopted on 17 July 1985, para 7.2; communication 202/1986, *Graciela Ato del Avellanal v Peru*, views adopted on 31 October 1988, para 9.2; communication 30/1978, *Bleier v Uruguay*, views adopted on 29 March 1982, para 13.3.

consider the author's allegations as substantiated in the absence of satisfactory evidence and explanation to the contrary submitted by the state party.

9.5. As to the alleged violation of article 9(1), the evidence before the Committee reveals that Mr Saker was removed from his home by state agents. The state party has not addressed the author's claims that her husband's arrest was made in the absence of a warrant. It has failed to indicate the legal basis on which the author's husband was subsequently transferred to military custody. It has failed to document its assertion that he was subsequently released, even less how he was released with conditions of safety. All these considerations lead the Committee to conclude that the detention as a whole was arbitrary, nor has the state party adduced evidence that the detention of Mr Saker was not arbitrary or illegal. The Committee concludes that, in the circumstances, there has been a violation of article 9(1).[12]

9.6. As to the alleged violation of article 9(3), the Committee recalls that the right to be brought 'promptly' before a judicial authority implies that delays must not exceed a few days, and that *incommunicado* detention as such may violate article 9(3).[13] It takes note of the author's argument that her husband was held incommunicado for 33 days by the judicial police before being transferred to the Territorial Centre on 3 July 1994, without any possibility of access to a lawyer during that period. It concludes that the facts before it disclose a violation of article 9(3).

9.7. As to the alleged violation of article 9(4), the Committee recalls that the author's husband had no access to counsel during his *incommunicado* detention, which prevented him from challenging the lawfulness of his detention during that period. In the absence of any pertinent information on this point from the state party, the Committee finds that Mr Saker's right to judicial review of the lawfulness of his detention (article 9(4)) has also been violated.

9.8. The Committee notes that while not specifically invoked by the author, the communication appears to raise issues under article 7 of the Covenant in relation to the author and her husband. The Committee recognises the degree of suffering involved in being held indefinitely without contact with the outside world. In this context, the Committee recalls its general comment 20 (44) on article 7 of the Covenant, which recommends that states parties should make provision against *incommunicado* detention. In the circumstances, the Committee concludes that the disappearance of the author's

[12] Communication 778/1997, *Coronel et al v Colombia*, views adopted on 24 October 2002, para 9.4; communication 449/1991, *Barbarín Mojica v Dominican Republic*, views adopted on 10 August 1994, para 5.4.

[13] Communication 1128/2002, *Rafael Marques de Morais v Angola*, views adopted on 29 March 2005, para 6.3. See also general comment 8 (16), para 2.

husband and the prevention of contact with his family and with the outside world constitute a violation of article 7 of the Covenant.[14] The Committee also notes the anguish and stress caused to the author by the disappearance of her husband and the continued uncertainty concerning his fate and whereabouts. The Committee is therefore of the opinion that the facts before it reveal a violation of article 7 of the Covenant with regard to the author's husband as well as the author[15] herself.

9.9. In light of the above findings, the Committee does not consider it necessary to address the author's claims under article 10 of the Covenant.

9.10. As to the alleged violation of article 6(1) of the Covenant, the Committee notes that according to the letter from the judicial police (referring to Decision 16536/96 of the Director of Public Prosecutions of the Tribunal of Constantine), the author's husband was handed to government agents on 3 July 1994, and that the author has not heard from her husband since then. The Committee also notes that the author understood the letter from the National Observatory for Human Rights as informing her of his death.

9.11. The Committee refers to its General Comment 6 (16) concerning article 6 of the Covenant, which provides *inter alia* that states parties should take specific and effective measures to prevent the disappearance of individuals and establish facilities and procedures to investigate thoroughly, by an appropriate impartial body, cases of missing and disappeared persons in circumstances which may involve a violation of the right to life.[16] In the present case, the Committee notes that the state party does not deny that the author's husband has been unaccounted for since at least 29 July 1995, when the judgement *in absentia* was handed down by the criminal division of the Court of Constantine. As the state party has not provided any information or evidence relating to the victim's release from the Territorial Centre, the Committee is of the opinion that the facts before it reveal a violation of article 6(1) in that the State party failed to protect the life of Mr Saker.

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[14] Communication 540/1993, *Celis Laureano v Peru*, views adopted on 25 March 1996, para 8.5; communication 458/1991, *Mukong v Cameroon*, views adopted on 24 July 1994, para 9.4; communication 440/1990, *El-Megreisi v Libyan Arab Jamahiriya*, views adopted on 23 March 1994, para 5.

[15] Communication 107/1981, *Quinteros v Uruguay*, views adopted on 21 July 1983, para 14; communication 950/2000, *Sarma v Sri Lanka*, views adopted on 31 July 2003, para 9.5.

[16] General comment 6 (16), para 4; communication 540/1993, *Celis Laureano v Peru*, views adopted on 16 April 1996, para 8.3; communication 563/1993, *Federico Andreu v Colombia*, views adopted on 13 November 1995, para 8.3; communication 449/1991, *Barbarín Mojica v Dominican Republic*, views adopted on 10 August 1994, para 5.5.

9.12. The author has invoked article 2(3) of the Covenant, which requires that in addition to effective protection of Covenant rights, states parties must ensure that individuals also have accessible, effective and enforceable remedies to vindicate those rights. The Committee attaches importance to states parties establishing appropriate judicial and administrative mechanism for addressing claims of rights violations under domestic law. It refers to its General Comment 31 (80) on the nature of the general legal obligation imposed on states parties to the Covenant, which provides *inter alia* that a failure by a state party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant.[17] In the present case, the information before the Committee indicates that the author did not have access to such effective remedies, and concludes that the facts before it disclose a violation of article 2(3) of the Covenant in conjunction with articles 6(1), 7 and 9.

10. 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 before it reveal violations by the state party of articles 6(1), 7 and 9(1), (3) and (4) of the Covenant in relation to the author's husband as well as article 7 in relation to the author, violations in conjunction with article 2(3) of the Covenant.

11. In accordance with article 2(3) of the Covenant, the state party is under an obligation to provide the author with an effective remedy, including a thorough and effective investigation into the disappearance and fate of the author's husband, his immediate release if he is still alive, adequate information resulting from its investigation transmitted to the author, and appropriate levels of compensation for the violations suffered by the author's husband, the author and the family. The state party is also under a duty to prosecute criminally, try and punish those held responsible for such violations. The state party is also under an obligation to take measures to prevent similar violations in the future.

12. Bearing in mind that, by becoming a 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 and that, pursuant to article 2 of the Covenant, that state party has undertaken to ensure all individuals within its territory and subject to its jurisdiction the rights recognised in the Covenant and to provide an effective and enforceable remedy in case 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.

[17] General comment 31 (80), para 15.

Tarighat and Others v Algeria

(2006) AHRLR 14 (HRC 2006)

Communication 1196/2003, *Abdelhamid Tarighat, Ahmed Touadi, Mohamed Remli and Amar Yousfi v Algeria*

Decided at the 86th session, 30 March 2006, CCPR/C/86/D/1196/2003

Lengthy pre-trial detention on corruption charges

Personal liberty and security (release on bail, 8.2, 8.3)

Fair trial (trial within reasonable time, 8.4)

1. The authors of the communication, dated 5 January 1999, are Abdelhamid Tarighat, Ahmed Touadi, Mohamed Remli and Amar Yousfi, Algerian citizens residing in Algeria. They claim to be victims of violations by Algeria of article 7, article 9(1) and (3), article 10(1), article 14(1), (2) and (3)(c); and articles 16 and 17 of the International Covenant on Civil and Political Rights. The authors are represented by counsel. The Optional Protocol entered into force for Algeria on 12 December 1989.

The facts as submitted by the authors

2.1. On 9 March 1996, Abdelhamid Tarighat, Ahmed Touadi, Mohamed Remli and Amar Yousfi, respectively chairman of the board of directors, general manager, financial director and director of supplies of the state-owned company COSIDER, were charged with misappropriation of public funds, forgery and use of forged documents and placed in pretrial detention. On 30 March 1996, the investigating judge appointed an expert to review the management of COSIDER within one month. By order of the investigating judge on 12 May 1996, the bank accounts of all the authors were blocked. By a further order of the investigating judge on 8 June 1996, Abdelhamid Tarighat's property assets were seized.

2.2. Several requests for provisional release were submitted. The application by Abdelhamid Tarighat on 29 June 1996 for provisional release was refused by the investigating judge in an order of 30 June 1996, confirmed by a decision of the Indictments Chamber of 16 July 1996. A second application, dated 19 November 1996, was refused in a decision of the Indictments Chamber of 17 November 1996. A third application, dated 28 March 1998, went unanswered. A fourth application was again refused in a decision of the Indictments

Chamber of 2 August 1998. A further application for the provisional release of all the authors was rejected in a decision of the Indictments Chamber of 30 December 1998. The authors add that several more applications for release, dates unspecified, were submitted by Ahmed Touadi, Mohamed Remli and Amar Yousfi. The authors were released provisionally under court supervision in a decision of the Indictments Chamber of 7 September 1999. In the case of Abdelhamid Taright, court supervision was lifted in a judgment of 27 December 1999.

2.3. With regard to the expert opinions, on 17 November 1996 the Indictments Chamber dismissed as inaccurate and confused the report of the first expert delivered on 5 August 1996, and appointed a panel of three experts. In a decision of 10 February 1998 the Indictments Chamber decided to relieve the experts of their mission on the grounds that their fees were excessive and to entrust the mission to the General Inspectorate of Finance (IGF). In a decision of 2 August 1998 it ordered an additional expert opinion from the IGF. On 6 January 1999, the authors filed a complaint alleging forgery on the part of the experts, which was dismissed on 24 March 1999.

2.4. As far as the confiscation of the authors' property was concerned, the application of 16 September 1996 to lift the seizure concerning Abdelhamid Taright was refused by the investigating judge in an order of 28 September 1996. The appeal against the order was rejected by the Indictments Chamber in a decision of 17 November 1996.

2.5. In a decision of 30 December 1998 the Indictments Chamber referred the accused to the criminal courts (for embezzlement of public property and placing of contracts contrary to the company's interests). On 31 January 1999 the authors filed an appeal on points of law. On 8 June 1999 the Supreme Court quashed the judgement in question for failure to comply with the rights of the defence and referred the case back to the Indictments Chamber. On 27 February 2001 the Indictments Chamber once again handed down a referral to the criminal courts. The authors then appealed once more on points of law on 7 April 2001. On 29 April 2002 the Supreme Court this time confirmed the referral order. The authors appeared before the Algiers criminal court in October 2002 and were acquitted on 16 July 2003.

The complaint

3.1. The authors consider that in their case justice was exploited for the purposes of a so-called morality and anti-corruption political campaign. They assert that their complaints concern their arbitrary detention, the failure to comply with their right to a trial within a reasonable time and the forfeiture of all their civil rights.

3.2. With regard to the first complaint, the authors explain that their pretrial detention from 9 March 1996 to 7 September 1999, lasting 3 years and 6 months, is a flagrant violation of article 125 of the Algerian Code of Criminal Procedure, according to which such detention must not exceed 16 months. Several applications for provisional release had been rejected, although magistrates were alone responsible for the excessive delays in the investigation proceedings. The authors submit that this constitutes a violation of article 9(1) of the Covenant.

3.3. Concerning the second complaint, the authors were not tried and acquitted until 16 July 2003, although they had been charged on 9 March 1996, without any responsibility being attributable to them for the accumulated delays in proceedings, since it was the Indictments Chamber which had changed experts several times. In the authors' opinion, the various expert reports reveal neither embezzlement nor misappropriation but merely report losses due to alleged mismanagement. Lastly, they consider that the presumption of innocence was breached and that, more generally, the conditions for the right to a fair trial were impaired. The authors allege violations of articles 9(3) and 14(1), (2) and (3)(c).

3.4. With regard to the third complaint, the authors consider that the confiscation of Abdelhamid Tarighat's property assets and the blocking of all their bank accounts contravene article 84 of the Algerian Code of Criminal Procedure and the relevant case law, which permits the seizure only of property directly related to the offence, excluding personal property. They add that the applications from counsel to have the seizure lifted were unsuccessful. The authors therefore find that they were deprived of recognition as persons before the law (article 16 of the Covenant) and subjected to forfeiture of their civil rights, which in their view constitutes cruel and inhuman treatment (article 7 of the Covenant) and impairment of the inherent dignity of the human person (article 10(1)) and of their honour and reputation (article 17).

3.5. With regard to their appeals to domestic courts, where the first complaint was concerned, after recalling their appeals to the investigating judge and the Indictments Chamber, the authors point out that under article 495(a) of the Algerian Code of Criminal Procedure, no appeal on points of law may be brought against judgments of the Indictments Chamber concerning pretrial detention. With regard to the second complaint, the authors submit that the excessive delay in respect of a judgment was to be blamed on the judicial authorities in Algiers. As for the third complaint, apart from the appeals mentioned above, the authors state that they did not appeal on a point of law against the judgment of the Indictments Chamber of 17 November 1996 partly because, since the seizure was a provisional measure on which the trial court was required to take a

decision, an appeal had no chance of success, and partly because the appeal would have had the effect of suspending the entire proceedings for approximately a year pending a ruling by the Supreme Court.

The state party's submissions on admissibility and merits

4.1. In a *note verbale* of 11 July 2002 the state party begins by questioning the admissibility of the communication. It takes the view that the authors have not exhausted the domestic remedies available under Algerian law and that they themselves acknowledge that the case was still under investigation and still pending before the Indictments Chamber when they submitted it to the Committee on 5 January 1999. The state party adds that the authors continued to pursue domestic remedies which had not yet been exhausted after submitting the case to the Committee. They in fact appealed on points of law against the decision of the Indictments Chamber of 30 December 1998, which had referred the case back to the criminal courts.

4.2. The state party retraces the timing of events and points out that the investigating judge, deeming the facts to be sufficiently serious and after informing the authors of the charges brought against them and taking their statements, ordered that they should be placed in pretrial detention, in accordance with the Algerian Code of Criminal Procedure. It notes that the complexity of the case required a series of judicial expert opinions and recalls that when the criminal court was ready to try the case, the authors chose to appeal on two occasions on points of law, which prolonged the proceedings.

4.3. The state party considers not only that domestic remedies have not been exhausted, as the case was still before the courts,[1] but also that the authors' appeals produced results insofar as they led to the annulment of the first referral judgement, a modification of the charges and a lower estimate of the damage. The appeals also enabled the authors to be released before their trial although the Indictments Chamber was allowed by law to keep them in custody until the criminal court hearing. Consequently, since the authors have not exhausted all domestic remedies, their communication is inadmissible.

4.4. With regard to the validity of the communication, the state party insists that the interim protective or investigative measures were ordered by an investigating judge apprised of the case in accordance with the law, as part of a judicial investigation. It considers that the authors benefited from all the guarantees set forth in the Covenant in respect of their arrest, detention and indictment.

[1] The state party's submissions date from November 2002.

4.5 With reference to the pretrial detention, the state party recalls that it was ordered on 9 March 1996 as part of a criminal investigation, which allows the investigating judge to keep the accused in custody for a period of not more than 16 months under article 125 of the Code of Criminal Procedure. It notes that the investigating judge closed the file by a transmission order to the principal state prosecutor within the deadline established in the Code of Criminal Procedure. It explains that the custody of the authors was extended beyond the 16-month period under article 166 of the Code of Criminal Procedure, which stipulates that:

> If the investigating judge considers that the facts constitute an offence classed as a crime by law, he shall order the file of the proceedings and the evidence to be transmitted without delay by the public prosecutor to the Principal State Prosecutor at the Court for examination as set out in the chapter concerning the Indictments Chamber. The arrest warrant or detention order shall be enforceable until the Indictments Chamber hands down its decision.
>
> The state party notes that the Indictments Chamber had deemed the investigation incomplete, had ordered additional information to be provided and had kept the authors in custody pending its decision on the merits, handed down on 30 December 1998. After they were referred to the criminal court, the authors remained in custody until they appeared before the trial court, in accordance with article 198 of the Code of Criminal Procedure, which provides that:
>
> The Indictments Chamber shall furthermore issue an arrest warrant for any accused prosecuted for a crime specified by the Chamber. Such warrant is immediately enforceable. [...] It shall continue to be enforceable in respect of the accused held in custody until the criminal court hands down its judgement.

4.6. The state party emphasises that the authors would have been tried early in 1999 if they had not filed so many appeals on points of law. It notes that the Indictments Chamber nevertheless used the prerogatives allowed by law to order the release of the authors before they appeared before the criminal court and gave one of them permission to leave the national territory for health reasons. The state party therefore considers unfounded the allegations of a violation of articles 9 and 14.

4.7. In any case, and should the trial court decide to acquit the authors,[2] the state party points out that they will be entitled to appeal to the Compensation Commission in the Supreme Court for compensation for the injury sustained as a result of their pretrial detention, in accordance with article 137 *bis et seq* of the Code of Criminal Procedure.

4.8. With regard to the alleged forfeiture of civil rights and the violation of articles 7, 10 and 16 of the Covenant, resulting from the decision of the investigating judge to seize land belonging to Abdelhamid Tarighat and to block the bank accounts of all the authors, the state party specifies that, while this was an interim measure of protection, it did not affect all the authors' property; it was taken by

[2] The state party's submissions date from November 2002.

the investigating judge to safeguard the rights of the parties and the treasury, and in any case it is the responsibility of the trial court to take a decision as to its legality and the appropriate follow-up.

Authors comments and state party's observations

5. In a letter of 17 March 2003, counsel stated that he did not wish to comment on the state party's submissions.

6. In a *note verbale* of 12 November 2003, the state party notified the Committee that it had no further submissions to make.

Issues and proceedings before the Committee

Consideration of admissibility

7.1. Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its Rules of Procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

7.2. As required under article 5(2)(a) of the Optional Protocol, the Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

7.3. Concerning the requirement that domestic remedies should be exhausted, the Committee has taken note of the state party's arguments that the authors had not exhausted domestic remedies when the case was submitted to the Committee and that they then continued to make use of domestic remedies that had not yet been exhausted. The Committee recalls that its position is that the issue of exhaustion of domestic remedies is to be assessed at the time of its consideration of the case, save in exceptional circumstances,[3] which do not arise in this communication.

7.4. As to the complaint of a violation of article 9(1) and (3), the Committee has taken note of the authors' arguments that the decisions of the Indictments Chamber concerning pretrial detention cannot be appealed against on points of law, according to article 495(a) of the Code of Criminal Procedure. Since the state party has not contested this information and in view of the fact that the authors were released on 7 September 1999 by order of the Indictments Chamber, the Committee considers that domestic remedies have been exhausted.

7.5. With regard to the complaint of a violation of article 14(3)(c), the Committee notes that the problem of the failure to respect the right to a trial within a reasonable time was raised by the authors in

[3] See communication 925/2000, *Kuok Koi v Portugal*, decision of inadmissibility adopted on 22 October 2003, para 6.4.

the domestic courts on numerous occasions. It further notes that on 26 January 1998 the authors lodged an application protesting against the delay incurred by the three experts appointed on 17 November 1996, ie 14 months earlier. The Committee accordingly finds that with regard to a possible violation of article 14(3)(c), the communication is admissible.

7.6. Concerning the authors' arguments that the confiscation of their property is a violation of articles 7, 10(1), 16 and 17 of the Covenant, the Committee considers that those allegations are insufficiently substantiated for the purposes of admissibility.

7.7. As to the complaints of a violation of article 14(1) and (2), the Committee considers that the authors' allegations are insufficiently substantiated for the purposes of admissibility.

7.8. The Committee finds that the authors' complaints of violations of articles 9(1) and (3) and 14(3)(c), have been sufficiently substantiated and are admissible. Accordingly, it proceeds with the examination of the merits.

Consideration of the merits

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

8.2. As regards the complaints of violations of article 9(1) and (3), the Committee notes that the authors' allegations concern the duration and the arbitrary nature of their detention. The Committee observes that the authors were held in pretrial detention for three and a half years from 9 March 1996 to 7 September 1999. The Committee has taken note of the information provided by the state party concerning the charges brought against the authors, the legal bases for holding them and the procedural requirements stemming from the Code of Criminal Procedure. It has furthermore noted the state party's assertion that the complexity of the case had required a series of expert reports, leading up to the decision of the Indictments Chamber of 30 December 1998 to refer the accused to the trial court, and that this procedure, and consequently the detention of the authors, had also been prolonged by the latter's appeal on points of law on 31 January 1999.

8.3. The Committee reaffirms its prior jurisprudence that pretrial detention should be the exception and that bail should be granted, except in situations where the likelihood exists that the accused would abscond or destroy evidence, influence witnesses or flee from the jurisdiction of the state party. The drafting history of article 9(1) confirms that 'arbitrariness' is not to be equated with 'against the law', but must be interpreted more broadly to include elements of

inappropriateness, injustice, lack of predictability and illegality. Further, continued pretrial detention following legal arrest must not only be lawful, but also reasonable in all respects. The Committee is of the view, however, that the state party has not sufficiently justified its arguments, either concerning the reasons for placing the authors in pretrial detention or concerning the complexity of the case such that it might justify keeping them in custody.

8.4. The Committee further considers that the authors' responsibility for delays in the procedure due to their appeals has not been shown. It is of the view that the succession of expert reports was solely the result of a decision by the authorities and in the case of some of them on grounds that cannot be regarded as reasonable. It notes the decision of the Indictments Chamber in its ruling of 10 February 1998 to relieve the panel of three experts of their mission because of their excessive fees, although these experts had been appointed by the Chamber itself in a decision of 17 November 1996, following its rejection of the report of the first expert appointed on 30 March 1996. The Committee also notes that the first appeal by the authors on points of law led the Supreme Court to refer the case back to the Indictments Chamber because of violations of the rights of the defence relating to the expert reports. In the absence of further information or sufficiently convincing justification as to the need and reasonableness of keeping the authors in custody for three years and six months, the Committee finds that there was a violation of article 9(1) and (3).

8.5. Concerning the complaint of a violation of article 14(3)(c), the Committee notes that although the authors were charged with a number of criminal offences on 9 March 1996, the investigation and consideration of the charges did not lead to a judgment of first instance until 16 July 2003, in other words seven years and three months after the charges had been brought. Under article 14(3)(c), everyone has the right 'to be tried without undue delay'. In the Committee's opinion, the arguments put forward by the state party cannot justify excessive delays in judicial procedure. The Committee also considers that the state party has not demonstrated that the complexity of the case and the appeal by the authors on points of law were such as to explain that delay. It therefore finds a violation of article 14(3)(c).

9. 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 before it reveal violations of article 9(1) and (3) and article 14(3)(c) of the Covenant.

10. In accordance with article 2(3)(a), of the Covenant, the state party is under an obligation to provide the authors with appropriate reparation. The state party is also under an obligation to take measures to prevent similar violations in the future.

11. Bearing in mind that, by becoming a party to the Optional Protocol, the state party has recognised the competence of the Committee to determine whether or not there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, that state party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the Covenant and to provide an effective and enforceable remedy in the event that 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.

BURKINA FASO

Sankara v Burkina Faso

(2006) AHRLR 23 (HRC 2006)

Communication 1159/2003, *Mariam Sankara et al v Burkina Faso*

Decided at the 86th session, 28 March 2006, CCPR/C/86/D/1159/2003

Right of family to know truth about alleged extra-judicial execution

Admissibility (continuous violation, 6.2, 6.3; exhaustion of local remedies, 6.4-6.8)
Cruel, inhuman or degrading treatment (right to know, prompt and impartial investigation, 12.2, 12.4)
Fair trial (equal treatment, 12.5; trial within reasonable time, 12.6)

1.1. The authors, Ms Mariam Sankara (born on 26 March 1953 and residing in France) and her sons Philippe (born on 10 August 1980 and residing in France) and Auguste Sankara (born on 21 September 1982 and residing in France) are, respectively, the wife and children of Mr Thomas Sankara, former President of Burkina Faso, who died on 15 October 1987. The authors state that they are acting on behalf of Mr Thomas Sankara and as victims themselves. They allege violations by Burkina Faso of: article 6(1) of the Covenant in connection with Thomas Sankara; articles 2(1) and (3)(a) and (b), 14(1), 17, 23(1), and 26 of the Covenant in connection with Ms Sankara and her children; and also article 16 of the Covenant in the case of Auguste Sankara. The authors are represented by counsel, Vincent Valai and M Milton James Fernandes, of the *Collectif Juridique Internationale Justice pour Sankara*.

1.2. The Covenant and the Optional Protocol thereto entered into force for Burkina Faso on 4 April 1999.

Facts as submitted by the authors

2.1. On 15 October 1987, Thomas Sankara, President of Burkina Faso, was assassinated during a *coup d'état* in Ouagadougou.

2.2. From 1987 to 1997, the authorities did not, according to the authors, conduct any inquiry into this assassination. Moreover, on 17 January 1988, a death certificate was issued, falsely stating that Thomas Sankara had died of natural causes.

2.3. On 29 September 1997, within the 10-year statute of limitations, Ms Mariam Sankara, in her capacity as spouse and on behalf of her two minor children, lodged a complaint with the senior examining judge in the Ouagadougou *Tribunal de Grande Instance* against a person or persons unknown for the assassination of Mr Thomas Sankara and also for the falsification of administrative documents. On 9 October 1997, the authors deposited a bond of 1 million CFA francs, in accordance with the Code of Criminal Procedure.

2.4. On 29 January 1998, the Procurator-General of Faso issued a direction not to commence a judicial investigation, challenging the jurisdiction of the ordinary courts on the grounds that the alleged events occurred in a military establishment among members of the armed forces and non-combatant personnel, and that the death certificate had been issued by the armed forces health service and signed by a physician who had the rank of Commander, and was hence a member of the armed forces.

2.5. On 23 March 1998, by order 06/98, the examining judge decided, on the contrary, that the Ouagadougou *Tribunal de Grande Instance* was the ordinary court competent to examine the case.[1]

[1] The examining judge considered that, in accordance with article 51 of the Code of Criminal Procedure, the examination division of the Ouagadougou *Tribunal de Grande Instance* had jurisdiction in the light of the location of the crime and the fact that it was not time-barred. '[…] Considering that, in the present case, it was not reported that the crime of premeditated murder in question had taken place in a military establishment; that even if this were true, it should be noted that the perpetrator or perpetrators of this crime have not been identified to date; that this, moreover, is the reason why the complaint was lodged against a person or persons unknown; that consequently, in the present circumstances, it would be very hazardous, without having previously identified the perpetrators, to conclude that they were members of the armed forces; that even if the person responsible for issuing a false administrative document had military status, it should be pointed out that this second offence is subsidiarily linked to the first, namely premeditated murder, in the sense that its existence depends on the existence of the first, which is the principal offence; that, moreover, it is a general principle of law that the accessory follows the principal […]; that it follows that the military status of the person responsible for the false document could not serve as legal justification for the referral of the perpetrator or perpetrators of the principal offence, namely premeditated murder, to the military courts […].'

2.6. On 2 April 1998, the Procurator of Faso appealed against this decision.[2]

2.7. On 10 December 1999, in the absence of a decision by the Court of Appeal's indictment division, counsel for the authors formally requested the Minister of Justice and the Higher Council of the Judiciary to take all necessary measures in order to ensure the impartiality of justice.

2.8. On 26 January 2000, by decision 14, the Ouagadougou Court of Appeal set aside order 06/98 of 23 March 1998 and declared the ordinary courts incompetent.

2.9. According to the authors, despite Court of Appeal decision 14 and their own application of 27 January 2000, the Procurator of Faso refused or omitted to report the case to the Minister of Defence so that the Minister could institute proceedings.

2.10. On 27 January 2000, counsel challenged decision 14 by lodging an appeal with the judicial division of the Supreme Court.

2.11. On 19 June 2001, by decision 46, the Supreme Court declared the appeal inadmissible on the grounds that no bond had been deposited.[3]

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2 '[…] it is no secret that the events on which the complaint is based took place on the evening of 15 October 1987 in the *Conseil de l'Entente* barracks. In other words, the acts in question were perpetrated not only in a military establishment, but also by persons with military status. In no respect does this involve an ordinary offence. The false document mentioned in the complaint is an accessory following the principal, the outcome of which is linked to the principal action. Therefore: The indictment division is requested to declare the examining judge incompetent, in accordance with article 34 of the Code of Military Justice […]'. Article 34 of the Code of Military Justice: 'The military courts are competent to examine and pass judgement on ordinary offences committed by members of the armed forces, or equivalent non-combatant personnel in service, in military establishments or where they are accommodated, as well as the military offences established under this Code in accordance with the rules of procedure which apply thereto […]'.

3 It emerges from the Supreme Court decision that the authors stated in the Court that, at the time they lodged their complaint on 9 October 1997, pursuant to article 85 of the Code of Criminal Procedure, they had paid to the examining judge a bond of 1 million CFA francs, and that, furthermore, they had not paid the security to the Supreme Court registrar as the latter had omitted to read out the provisions of article 110 of order 91-0051/PRES of 26 August 1991 relating to the composition, organization and functioning of the Supreme Court ('the plaintiff is required, on pain of inadmissibility, to pay a sum of 5 000 francs as security before the end of the month following his or her notice of intent to appeal. The security is payable either directly to the chief registrar of the Supreme Court or by a money order addressed to the chief registrar. The registrar receiving the notice of intent shall read out to the plaintiffs the provisions of the foregoing two paragraphs and mention this formality in the record'). The Supreme Court considered that the deposits of security provided for under article 85 of the Code of Criminal Procedure and article 110 of the above-mentioned order were separate, and that the payment of the security provided for in the first provision did not obviate payment of that required under the second provision. The

2.12. On the same day, counsel requested the Prosecutor-General attached to the Supreme Court to report the case to the Minister of Defence so that the Minister could institute proceedings.[4] Also on the same day, in anticipation of a notification from the Procurator's Office, counsel requested the Minister of Defence to issue an order to initiate proceedings.

2.13. On 19 June 2001, during an interview on *Radio France Internationale* focusing largely on the Sankara case, the President of Burkina Faso stated that the Minister of Defence should not have to deal with court cases.[5]

2.14. On 25 June 2001, a further application was addressed to the Procurator of Faso.

2.15. On 23 July 2001, the Procurator of Faso replied to counsel, stating that their request related to acts categorised as offences committed on 15 October 1987, in other words, over 13 years and 8 months previously, and that, in its decision of 26 January 2000, the Court of Appeal had declared itself incompetent and had instructed the parties to refer the matter to a different court.

Supreme Court also considered that in failing to inform the plaintiffs of the obligation to pay security the registrar was not, in law, liable to any procedural penalty, and that the authors could not, therefore, be exempted from this obligation as a result of the aforesaid omission.

4 Arguing that Court of Appeal decision 14 had become final as a result of Supreme Court decision 46 and that consequently the ordinary courts were incompetent, the authors, on the strength of article 71(3) of the Code of Military Justice, asked the Prosecutor-General to report the criminal act to the Minister of Defence, who would then be required to issue a prosecution order (article 71: 'If the case involves an offence within the competence of the military courts, the Minister of Defence shall determine whether or not it is necessary to refer the case to the military justice system. No proceedings may take place, on pain of invalidity, without a prosecution order issued by the Minister of Defence. In all cases where the offence has been reported by a civilian examining judge, a Procurator of Faso or a Procurator-General, the Minister of Defence is required to issue the prosecution order. The said prosecution order cannot be appealed; it must make specific reference to the acts to which the proceedings will relate, characterize them and indicate the applicable legislation'). The authors recalled that, on 27 January 2000, they had also, unsuccessfully, addressed such a request to the Procurator of Faso. However, according to the authors, in a similar case (*Public Prosecutor v Kafando Marcel et al*, which was the subject of referral order 005/ TMO/CCI of 17 July 2000), the Procurator of Faso in the *Ouagadougou Tribunal de Grande Instance* had, in communication 744/99, reported to the Government Commissioner to the Military Court acts categorised as serious and ordinary offences that appeared to have been committed on *Conseil de l'Entente* premises. Moreover, according to the authors, the Minister of Defence, after a preliminary inquiry, had issued a prosecution order.

5 'It's all very well to keep harping on one particular aspect of the Sankara case. But it should not be forgotten that there are certainly many cases before the courts. The Minister of Defence is not there to deal with justice-related issues; he certainly has other concerns. But I can assure you that, in all matters relating to all legal cases, there will be nothing to prevent cases from proceeding from start to finish in our country. We have chosen the rule of law and we intend to meet our responsibilities in this regard.'

2.16. On 25 July 2001, counsel challenged the reply provided by the Procurator of Faso,[6] and once again requested that the case should be brought before the military courts, in accordance with article 71(3) of the Code of Military Justice, since a claimant for criminal indemnification may not lodge an appeal. To date, no reply from the Procurator, and hence no referral to the Minister of Defence, have been reported.

The complaint

3.1. The authors consider that the failure to organise a public inquiry and legal proceedings to determine the identity and civil and criminal responsibilities of Thomas Sankara's assassins, and also the failure to correct his death certificate, constitute a serious denial of justice in terms of their protection as members of the Sankara family, in breach of articles 17 and 23(1) of the Covenant. They consider, moreover, that the failure to conduct an inquiry, and hence the failure to uphold guarantees relating to equality before the law, and also the Procurator's refusal to refer the case to the Minister of Defence, thus preventing their complaint from being resolved, are attributable to their political opinions, in breach of articles 2(1) and 26 of the Covenant.

3.2. The authors maintain that the state party has failed to comply with its obligations (a) to provide them with an effective remedy for the violations they suffered, in accordance with article 2(3)(a) and (b) of the Covenant, and (b) to guarantee the impartiality of justice as required under article 14(1) of the Covenant. In this regard, the authors explain that the purpose of the decision taken by the court of first instance to declare the military courts competent and to require an abnormally high bond (1 million CFA francs) was to obstruct the examination of their complaint and, consequently, constituted a violation of the 'equality of arms' principle. Similarly, the fact that

[6] The authors claim, first, that the statute of limitations was interrupted (neither the judicial examination order nor the Court of Appeal decision challenged the admissibility of the complaint. Similarly, the predecessor of the current Procurator of Faso had not invoked the statute of limitations, but article 34 of the Code of Military Justice. Lastly, the Supreme Court's decision on inadmissibility applies only to the non-payment of security and not to the statute of limitations). Secondly, the authors claim that the Court of Appeal decision instructed the parties, not only the claimant but also the prosecuting authorities, to take proceedings in another court. In accordance with this decision, the authors explain that they were unable, under the provisions of the Code of Military Justice, to bring the case directly before the Minister of Defence (who is the only person with authority to issue the prosecution order in connection with an offence within the jurisdiction of the military courts), and were thus obliged to refer the case to the Procurator in accordance with article 71(3) of the Code of Military Justice. Once again, reference is made to the *Public Prosecutor v Kafando Marcel et al* case.

their counsel were obliged to make a formal request to the Court of Appeal to issue a decision falls into the above category of violations. The authors consider that this also applied to the procedure before the Supreme Court, in particular because the President of the Supreme Court is a supporter of both the ruling party and the serving President, and because the decision to rule the appeal inadmissible on the grounds that no bond had been paid was in fact a pretext for not ruling on the merits of the case.

3.3. The authors consider that, as a minor, Auguste Sankara should have been exempted from the deposit of a bond under the legislation in force. However, by its decision of 19 June 2001, the Supreme Court refused to recognise him as a minor, in breach of article 16 of the Covenant.

3.4. Lastly, the authors maintain that the authorities' refusal to correct Thomas Sankara's death certificate constitutes a continuing violation of article 6(1) of the Covenant.

Observations of the state party on the admissibility of the communication

4.1. In its observations of 1 April 2003, the state party contests the admissibility of the communication.

4.2. The state party conducts what it terms a historical review, focusing primarily on the conditions under which Captain Thomas Sankara came to power on 4 August 1983 and the consequences of this development in terms of human rights violations. The state party describes what it calls a process of democratisation and national reconciliation under way since 1991. It also describes the remedies available in Burkina Faso.

4.3. The state party considers that the authors have abused the procedure afforded by the Optional Protocol. In this regard, it points out that, on 30 September 2002, the authors lodged with the senior examining judge in the Ouagadougou *Tribunal de Grande Instance* a complaint against a person or persons unknown for failure to produce the corpse, accompanied by an application for criminal indemnification. On 16 October 2002, without awaiting the results of this application, the authors submitted a complaint to the Committee. On 16 January 2003, the Procurator of Faso issued a direction not to commence a judicial examination, invoking the previous complaint by the claimant concerning the death of Thomas Sankara. On 3 February 2003, the examining judge in the Ouagadougou *Tribunal de Grande Instance* issued an order declaring the complaint unfounded, given that the same claimant had, in September 1997, lodged a complaint concerning the assassination of the same person, whose death had been confirmed by the evidence. In the state party's opinion, therefore, the authors had brought the

matter before the Committee even though proceedings were pending in the national courts.

4.4. The state party also considers the authors' complaint inadmissible on the grounds that the events in question occurred prior to Burkina Faso's accession to the Covenant and the Optional Protocol, namely, 15 years ago. Furthermore, the state party is of the view that the authors cannot claim a denial of justice in connection with these events, given that there has been no such denial.

4.5. In the state party's opinion, the condition that domestic remedies must have been exhausted has not been met.

4.6. The state party explains that, following the Supreme Court's inadmissibility decision of 19 June 2001 on the grounds of non-payment of the bond, the authors refrained from making use of non-contentious remedies, and consequently cannot claim that the system for the protection of human rights in Burkina Faso is inadequate or that their constitutional right of access to the courts has been violated. The state party asserts, in this regard, that no appeals have been made to:

- The *médiateur* (ombudsman) of Faso (as the allegations were linked to the operation of the machinery of the state, the complainant could, under articles 11 and 14 of Act 22/94/ADP of 17 May 1994 instituting the office of ombudsman, have brought the case before him for the purposes of state mediation);

- The *collège des sages* (panel of elders): the complainant could, like victims of the events of 15 October 1987, have brought the case before this *collège*, which was established on 1 June 1999;

- The National Reconciliation Commission (having taken over from the *collège des sages*, the Commission had competence to identify economic crimes and crimes of violence committed in Burkina Faso since it became independent in 1960, with a view to proposing recommendations conducive to national reconciliation);

- The Compensation Fund for Victims of Political Violence (despite the fact that the death of Thomas Sankara was attributed to a situation of political violence, the complainant did not approach the Fund, unlike victims of the events of 15 October 1987).

4.7. Similarly, in the state party's view, not all contentious remedies have been exhausted. In respect of complaints of denial of justice, a remedy is available for anyone who considers that he or she is a victim of such a violation under article 4 of the Civil Code,[7] article 166 of the Penal Code[8] and article 281 of order 91-51 of 26 August 1991 relating to the organisation and functioning of the Supreme

[7] Article 4: 'Any judge who, invoking the silence, obscurity or inadequacy of the law, refuses to deliver a judgment may be prosecuted for denial of justice'.

[8] Article 166: 'Any judge who, on whatever pretext, including the silence or obscurity of the law, refuses to render the justice he owes to the parties after being requested to do so, and who persists in his refusal after a warning or order from his superiors, shall be liable to imprisonment for a term of two months to one year and a fine of 50 000 to 300 000 francs. A judge found guilty of this offence may, furthermore, be barred from any judicial function for a period of not more than five years'.

Court. However, Ms Sankara has not made use of these remedies. As to the complaint relating to the President of the Supreme Court, in conformity with articles 648-658 of the Code of Criminal Procedure and articles 291 and 292 of order 91-51, any party to proceedings who harbours legitimate suspicions about a judge who will be called upon to rule on his or her interests may apply for disqualification of the judge. The author has not in fact used this remedy. Similarly, she has not made use of articles 283 and 284 of order 91-51 providing for penalties in the event of denial of justice.

4.8. In the opinion of the state party, the author also, through negligence or ignorance, committed procedural errors which prevented her application from being examined on the merits. The state party refers to the tardy lodging of the complaint, namely on 29 September 1997, whereas the statute of limitations expired on 15 October 1997, ie 10 years after the alleged events. The author was thus running the risk of her complaint being time-barred in the event of referral to a court which lacked jurisdiction. In the state party's view, referral to the *Tribunal de Grande Instance*, in lieu of the military court, constitutes a procedural error attributable to the author. Given the victim's status (Thomas Sankara was a Captain in the regular army of Burkina Faso) and the location where the events occurred (the premises of the *Conseil de l'Entente*, classed as a military zone during the revolutionary period), the author should quite naturally, in accordance with the law, have brought the matter before the military courts. In the opinion of the state party, the time-barring of the proceedings, which was related to the tardy referral to the courts, and the procedural error, invalidated any proceedings before the military court. Consequently, the author cannot blame the Procurator for having refused to refer the case to the Minister of Defence, in conformity with the provisions of the Code of Military Justice. Furthermore, in its view, the author cannot invoke the dismissal of the appeal to the Supreme Court for non-payment of the bond as a ground for denial of justice, since it was incumbent on her to conform to the procedures provided for by law.

4.9. Lastly, the state party claims inadmissibility as to substance in view of the political nature of the complaint. In its view, the late referral of her husband's death to the national courts indicates the author's clear lack of interest in establishing the truth through the law. The state party considers that the facts of the case are fundamentally political since they occurred in a particularly troubled national context which was linked, first, to the aberrations of the revolutionary regime and the risks of instability in the country, and secondly to the military coup which was rendered necessary by circumstances. Lastly, the author's quest for justice is fundamentally political in nature and constitutes an abuse of law. In the state party's view, the author has set herself the goal of avenging her dead husband. Since her decision to go into exile immediately after the

events in question, she has persisted in taking numerous initiatives aimed at damaging the country's image. In its opinion, despite the steps taken to facilitate her return to the country, the author has stubbornly remained abroad, where she has the status of a political refugee. Her complaint, therefore, does not fall within the competence of the Committee.

The authors' comments on admissibility

5.1. In their comments of 30 August 2003, the authors contest the state party's arguments on admissibility.

5.2. In the first place, the authors stress that their complaint must be also viewed from the standpoint of article 7 of the Covenant, in that the authorities' refusal to conduct a proper inquiry and to establish the facts surrounding the death of Thomas Sankara may be regarded as cruel, inhuman and degrading treatment inflicted on them. Thus, the authorities prevented them from finding out the circumstances of the victim's death and the precise place where his remains were officially buried. Lastly, the unlawful conduct of the state has had the effect of intimidating and punishing the Sankara family, who have been unjustly left in a state of uncertainty and mental distress.[9]

5.3. The authors consider that the state party's arguments on inadmissibility of the complaint *ratione materiae* and its allegedly political character are without legal basis. In their view, the Committee is competent to consider the facts of the present communication, which admittedly pre-date Burkina Faso's accession to the Optional Protocol, but represent a continuing violation of the Covenant and produce effects which themselves constitute violations of the Covenant to this day, account being taken of the acts of the government and decisions of the courts since the Covenant's entry into force.

5.4. The authors maintain that the communication as a whole is admissible in that Burkina Faso has failed to comply with its obligations under the Covenant. Citing communication 612/1995 (*Vicente v Colombia*, views of 29 July 1997), the authors refer, first, to the fact that the state party did not fulfil its obligation to conduct an inquiry into the death of Thomas Sankara. Secondly, the state party has never denied its failure to fulfil that obligation under the Covenant, a violation which occurred before and after accession to the Optional Protocol. They further note that Thomas Sankara's death certificate falsely attributed his death to natural causes, and that the state party refused or wilfully omitted to rectify it before and after it acceded to the Optional Protocol. Thirdly, the authors consider that, in its observations, the state party made an admission of legal

[9] Communication 886/1999, *Schedko et al v Belarus*, views of 3 April 2003.

significance, namely that the state authorities were fully aware that Thomas Sankara had not died of natural causes, but did nothing about it.

5.5. The authors emphasise that the acts and wilful omissions on the part of the state party have continued since its accession to the Optional Protocol, and have constituted continuing violations of the Covenant. They recall that they initiated judicial proceedings on 29 September 1997, within the 10-year statute of limitations, because of the authorities' refusal to respect their obligations, and draw attention to the attitude of the authorities, who endeavoured to obstruct or delay their appeals.

5.6. The authors consider that the Court of Appeal was tardy in handing down its decision of 26 January 2000, after their counsel had served a notice to perform. They recall that following that decision declaring the ordinary courts incompetent, the authorities concerned refused or omitted to refer the case to the Ministry of Defence in order that proceedings might be brought in the military courts, as provided for in article 71(1) and (3) of the Code of Military Justice. On 27 January 2000, therefore, the authors lodged an appeal with the Supreme Court challenging the validity of the decision of the Court of Appeal.

5.7. According to the authors, when they lodged the appeal with the Supreme Court on 27 January 2000, the Registrar refused or wilfully omitted to give the counsel formal notification of the requirements laid down in article 110 of order 91-0051/PRES of 26 August 1991. He also omitted to ascertain whether article 111 of that order[10] applied, in other words to ascertain the age of Auguste Sankara in order to determine whether he was a minor. By its decision of 19 June 2001, the Supreme Court refused or wilfully omitted to remedy the Registrar's violations and to verify *proprio motu* the age of Auguste Sankara, who, having been born on 21 September 1982, was in fact a minor when the appeal was lodged - thus committing two separate violations of Auguste Sankara's rights under article 16 of the Covenant. In addition, the authors draw attention to the fact that counsel were not allowed to pay 5 000 CFA francs when making their application, and that the Supreme Court refused to examine the case on the merits, on the sole grounds that payment of 5 000 CFA francs[11] was required, and hence to permit continuation of the proceedings.

5.8. The authors again refer to the authorities' wilful failures to act at various stages of the proceedings, namely, their failure to refer the matter to the Minister of Defence in order that proceedings might go

[10] Article 111 of order 91-0051/PRES of 26 August 1991: 'The following are nevertheless exempted from payment of a bond: persons sentenced to ordinary imprisonment or light imprisonment; persons who are in receipt of, or have requested, legal aid; minors under the age of 18'.

[11] Equivalent to approximately 7.6 euros, according to the authors.

ahead before a military court, when in fact such an action is required under the above-mentioned article 71(3).

5.9. As to the exhaustion of domestic remedies, the authors, referring to the Committee's jurisprudence,[12] state that the Covenant requires criminal proceedings to be initiated at the national level in the case of serious violations, and in particular unlawful deaths. As the state wilfully omitted or refused to initiate any form of inquiry or civil, criminal or military proceedings, the authors explain that they then lodged a complaint against a person or persons unknown in connection with the death of Thomas Sankara and the rights of his family, insofar as that was the only domestic remedy available in respect of the alleged violations. They recall that they were unable to initiate such proceedings before the military courts under article 71(3) of the Code of Military Justice. On the basis of the Committee's jurisprudence,[13] the authors maintain that none of the remedies mentioned by the state party may be regarded as effective, given their purely disciplinary or administrative nature, and the fact that they are not legally binding on the public authorities (in the case of non-contentious remedies) and cannot provide an effective remedy for alleged serious violations (in the case of contentious remedies). As to domestic remedies for denial of justice, the authors, citing the Committee's jurisprudence,[14] consider that it is incumbent on the Committee to determine whether the Supreme Court violated its obligations of independence and impartiality, and that they could not, at the time of their appeal, know in advance what action the Court would take. In their opinion, the application for disqualification of the President of the Supreme Court could not constitute an effective recourse in that it would not remedy the irreversible effects of the Court's decision, which is not appealable. With regard to the appeal of 20 September 2002 concerning the failure to produce the body of Thomas Sankara, the authors state that the purpose of that appeal was to obtain direct evidence concerning the circumstances of the victim's death, and that the appeal could not remedy the alleged violations vis-à-vis the members of his family. The authors add that the only effective and adequate remedy for the family members was exhausted by the Supreme Court decision of 19 June 2001. Lastly, in conformity with the Committee's jurisprudence,[15] the authors consider that they could not be required to apply for *habeas corpus*.

5.10. The authors made further submissions concerning the merits of the communication. They point out that, in its observations, the state party officially admitted that the authorities knew the death of

[12] Communications 563/1993, *Nydia Bautista de Arellana v Colombia*, views of 27 October 1995, 612/1995, *Vicente v Colombia*, views of 29 July 1997, and 778/1997, *Coronel v Colombia*, views of 24 October 2002.

[13] Communication 612/1995, *Vicente v Colombia*, views of 29 July 1997.

[14] Communication 886/1999, *Schedko et al v Belarus*, views of 3 April 2003.

[15] Communication 30/1978, *Bleier v Uruguay*, views of 29 March 1982.

Thomas Sankara on 15 October 1987 was not due to natural causes. From that they conclude that the appeal lodged on 30 [*sic*] September 2002 is no longer necessary. They further note that the then Minister of Justice, now the President of Burkina Faso, did not institute proceedings despite being aware that the victim did not die a natural death. Similarly, the Procurator of Faso and the Minister of Defence did not ensure that the Supreme Court's decision was referred to the military courts. The authors again refer to the statement made by the President of Burkina Faso on *Radio France Internationale* on 19 June 2001 and consider it to be in breach of article 71(1) and (3) of the Code of Military Justice, which establishes, among the duties of the Minister of Defence, his exclusive competence to order proceedings in the military courts. The authors stress that whenever a violation has been reported by a civilian examining judge, Procurator of Faso or Procurator-General, the Minister of Defence has ordered proceedings to be brought. According to the authors, who refer to a statement in *Le Pays*,[16] the Minister of Defence personally refused to exercise the powers conferred on him by article 71(3) of the Code of Military Justice. They again stress that all the judicial authorities, including the Procurator of Burkina Faso and the Procurator-General, have either refused to allow, or wilfully prevented or omitted to initiate, proceedings in the military courts.

Decision on admissibility

6.1. At its 80th session, the Committee examined the admissibility of the communication.

6.2. The Committee noted the state party's arguments concerning the inadmissibility of the communication *ratione temporis*. Having also noted the authors' arguments, the Committee considered that a distinction should be drawn between the complaint relating to Mr Thomas Sankara and the complaint concerning Ms Sankara and her children. The Committee considered that the death of Thomas Sankara, which may have involved violations of several articles of the Covenant, occurred on 15 October 1987, hence before the Covenant and the Optional Protocol entered into force for Burkina Faso.[17] This part of the communication was therefore inadmissible *ratione temporis*. Thomas Sankara's death certificate of 17 January 1988, stating that he died of natural causes - contrary to the facts, which

[16] 'At this juncture, matters must not be confused. To date, the Minister of Defence has not been called upon to intervene as such in the Thomas Sankara case. I have no judicial document or a document from a claimant calling on me to act. If one day this problem arises, courageously and with the President of Burkina Faso as the supreme chief of the armed forces, we shall ensure that a solution is found to the problem. Thomas Sankara was in fact one of our brothers in arms. There is no reason why any problem raised concerning him cannot be solved.' *Le Pays*, 2,493, 22 October 2001.

[17] Communication 345/1998, *RAVN et al v Argentina*, decision of 26 March 1990 on inadmissibility.

are public knowledge and confirmed by the state party (paras 4.2 and 4.7) - and the authorities' failure to correct the certificate during the period since that time, must be considered in the light of their continuing effect on Ms Sankara and her children.

6.3. In conformity with its jurisprudence,[18] the Committee was of the view that it could not consider violations which occurred before the entry into force of the Optional Protocol for the state party unless those violations continued after the Protocol's entry into force. A continuing violation is to be interpreted as an affirmation, after the entry into force of the Optional Protocol, by act or by clear implication, of previous violations by the state party. The Committee took note of the authors' arguments concerning, first, the failure of the authorities to conduct an inquiry into the death of Thomas Sankara (which was public knowledge) and to prosecute those responsible - allegations which are not in fact challenged by the state party. These constitute violations of their rights and of the obligations of states under the Covenant.[19] Secondly, it was clear that in order to remedy this situation, the authors initiated judicial proceedings on 29 September 1997, ie within the limits of the 10-year statute of limitations, and these proceedings continued after the Covenant and the Optional Protocol entered into force for Burkina Faso. Contrary to the arguments of the state party, the Committee considered that the proceedings were prolonged, not because of a procedural error on the part of the authors, but because of a conflict of competence between authorities. Consequently, insofar as, according to the information provided by the authors, the alleged violations resulting from the failure to conduct an inquiry and prosecute the guilty parties have affected them since the entry into force of the Covenant and the Optional Protocol because the proceedings have not concluded to date, the Committee considered that this part of the communication was admissible *ratione temporis*.

6.4. As to the exhaustion of domestic remedies, and the state party's argument of inadmissibility based on failure to make use of non-contentious remedies,[20] the Committee recalled that domestic remedies must be not only available but also effective, and that the term 'domestic remedies' must be understood as referring primarily to judicial remedies. The effectiveness of a remedy also depended, to a certain extent, on the nature of the alleged violation.[21] In the

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18 Communications 24/1997, *S Lovelace v Canada*, views of 30 July 1981, 196/1985, *I Gueye v France*, views of 3 April 1989, 516/1992, *J Simunek et al v Czech Republic*, views of 19 July 1995, 520/1992, *E and AK v Hungary*, decision of 7 April 1994 on inadmissibility, and 566/1993, *Ivan Somers v Hungary*, views of 23 July 1996.

19 Communication 612/1995, *Vicente v Colombia*, views of 29 July 1997.

20 *Médiateur du Faso*, *Collège des sages*, National Reconciliation Commission, and Compensation Fund for Victims of Political Violence.

21 Communication 612/1995, *Vicente v Colombia*, views of 29 July 1997.

present case, the alleged violation concerned the right to life, and was linked primarily to the alleged failure to conduct an inquiry and to initiate proceedings against the guilty parties, and secondarily to the alleged failure to correct the victim's death certificate, as well as to the failure of the appeals initiated by the authors in order to remedy the situation. In these circumstances, the Committee considered that the non-contentious remedies mentioned by the state party in its submission could not be considered effective for the purposes of article 5(2)(b) of the Optional Protocol.[22]

6.5. With regard to the state party's claims relating to the non-use of certain contentious remedies concerning the denial of justice, the Committee noted that the state party had confined itself to a mere recital of remedies available under Burkina Faso law, without providing any information on the relevance of those remedies in the specific circumstances of the case or demonstrating that they would have constituted effective and available remedies. With particular regard to the application for disqualification of the President of the Supreme Court, the Committee considered that the authors could not know the Court's decision in advance, and that it would be for the Committee to determine, in the examination of the merits, whether the President's decision had been arbitrary or constituted a denial of justice.

6.6. On the question of the claim of inadmissibility on the ground that the authors had lodged a complaint with the Committee when proceedings were pending before the national courts, the Committee could not accept this argument in that the additional remedy introduced by the authors in connection with the complaint of 30 September 2002 against a person or persons unknown had been exhausted at the time the communication was examined.

6.7. As to the state party's claim concerning prescription resulting from the tardy and procedurally incorrect referral of the case to the courts, the Committee considered it unfounded as set out above (cf para 6.3). Moreover, the Committee cannot accept this argument in support of the state party's assertion that the Procurator could not be blamed for having refused to refer the case to the Minister of Defence. In this connection, the Committee found that the grounds for refusal adduced by the Procurator on 23 July 2001 were manifestly unfounded since (a) as set forth above, that statute of limitations could not be applied (and had not in fact been applied by the various authorities throughout the proceedings), and (b) the authors could not themselves bring the case before the military courts (the only competent jurisdiction, the Court of Appeal's decision 14 having become final following decision 46 of the Supreme Court). Only the Minister of Defence, after referral by the Procurator, could issue the

[22] Communications 612/1995, *Vicente v Colombia*, views of 29 July 1997, and 778/1997, *Coronel et al v Colombia*, views of 24 October 2002.

order to initiate proceedings, failing which it would be invalid. Hence the Procurator wrongly halted the proceedings initiated by the authors and, furthermore, did not respond to their appeal of 25 July 2001, a fact which has not been commented on by the state party.

6.8. Lastly, the Committee considered that the authors exhausted domestic remedies in conformity with article 5(2) (b) of the Optional Protocol.

6.9. As to the state party's argument about the allegedly political character of the complaint, the Committee considered that this in no way affected the admissibility of the communication and, in fact, fell within the scope of the examination of the communication on the merits.

6.10. Regarding the complaints of violations of articles 17 and 23 of the Covenant, the Committee considered that the authors' allegations concerning the consequences, where their protection in particular was concerned, of the failure to conduct an inquiry into the death of Thomas Sankara and to identify those responsible did not fall within the scope of the articles mentioned, but did raise issues with respect to article 7[23] and article 9(1)[24] of the Covenant.

6.11. Concerning the complaint of a violation of article 16 of the Covenant, the Committee considered that the authors' allegations did not fall within the scope of this article, but might raise issues with regard to article 14(1).

6.12. On the question of the complaints under article 14(1) and article 26 of the Covenant (cf para 3.1), the Committee considered that these allegations had been sufficiently substantiated for purposes of admissibility. The Human Rights Committee therefore decided that the communication was admissible under articles 7, 9(1), 14(1), and 26 of the Covenant.

State party's observations on the merits

7.1. On 27 September 2004, the state party forwarded its observations on the merits. It considers that in its decision on admissibility, the Committee, by recharacterising some of the authors' allegations, prejudged its decision on the merits and ignored the principle of the presumption of innocence. The state party reiterates that the use of domestic remedies by the author was characterised by wilful omissions which constitute an abuse of the procedure under the Optional Protocol.

7.2. Concerning the allegation under article 2(1) and article 26 of the Covenant, the state party considers that the authors have not

[23] Communications 950/2000, *Sarma v Sri Lanka*, views of 16 July 2003, and 886/1999, *Schedko v Belarus*, views of 3 April 2003.

[24] Communication 821/1998, *Chongwe v Zambia*, views of 25 October 2000.

demonstrated that the Sankara family suffered discrimination because of their political views. The authors cannot cite their lack of success in the judicial proceedings as evidence of such discrimination since they are not active in any political party in Burkina Faso, do not live there and play no direct part in national political life. In any event, in the view of the state party, the authors cannot validly claim a violation of article 2(1) of the Covenant because at the time the Covenant and the Optional Protocol entered into force for Burkina Faso in April 1999, the state party could no longer legally institute an investigation into the death of Thomas Sankara. The state party maintains that, since all legal action regarding this matter has been time-barred since 15 October 1997, no continuing violation of the Covenant can be alleged, unless it were to be considered that domestic law became invalid on the entry into force of the Covenant for Burkina Faso, which is not the case.

7.3. With regard to the alleged violation of article 2(3) of the Covenant, the state party considers that the Committee has indicated a preference for contentious remedies (para 6.4), whereas the possibility of the use of non-contentious remedies cannot be ruled out. The state party explains that in practice these procedures can often prove more effective than contentious procedures. It enumerates the non-contentious remedies available in Burkina Faso, which are effective remedies, and which have in most cases proved more important and more effective than contentious remedies, but which the authors refused to pursue (cf para 4.6). The state party holds that contentious remedies are also effective, but that the Sankara family expected 'special justice' because of its history, in breach of the principle of equality before the law and justice.

7.4. Concerning the alleged violation of article 6(1) of the Covenant, the state party explains that legally Thomas Sankara's death certificate is an administrative document, and that it was incumbent on the Sankara family, in keeping with the current legislation, to apply to the competent administrative court to have it cancelled or corrected. The state party also considers that the failure to correct the death certificate does not in itself constitute a violation of the right to life.

7.5. Concerning the alleged violation of article 14(1) of the Covenant, the state party outlines its legislation guaranteeing the independence of the judicial system. It also maintains that in the present case the authors have not demonstrated that the judges were biased. Thus the judge in the court of first instance has discretion to set the amount of the bond in the light of the circumstances of the case. Setting the amount at 1 million CFA francs cannot by itself indicate bias in the judge's decision, since the amount varies with the importance of the case and the parties involved. The state party claims that this amount is in no way exceptional in the context of the

customary practice of courts in Burkina Faso.[25] As for the deposit of security at the appeal stage, which stands at 5 000 CFA francs, payment is legally mandatory for all persons lodging an appeal, failing which the application is inadmissible. According to the state party, the authors, having omitted to comply with this formality, cannot allege or presume bias on the part of the judges. The state party also considers that citing the political links of the President of the Appeal Court cannot stand up to examination, in view of the fact that the Appeal Court's decisions are in any event collective, and that the complainant was free to apply for the disqualification of the President of the Appeal Court in accordance with the current legislation,[26] but did not do so. In any event, in the state party's view, losing a case constitutes insufficient grounds for describing a judge as partisan or a court as biased.

7.6. With regard to the alleged violation of article 16 of the Covenant, which the Committee preferred to recategorise in terms of article 14(1) of the Covenant, the state party holds that, contrary to the authors' claims, exempting minors from the requirement to deposit a bond, in accordance with article 111 of order 91-0051/PRES of 26 August 1991, cannot be regarded as mandatory, so that it was not incumbent on the Supreme Court to note *proprio motu* Auguste Sankara's status as a minor. Moreover, Auguste Sankara's application is not separate from those of the other members of the family, and consequently cannot be considered separately.

7.7. Concerning the alleged violation of article 17 of the Covenant, which the Committee preferred to recategorise in terms of articles 7 and 9(1) of the Covenant, the state party explains that the failure to hold an inquiry into the death of Thomas Sankara and identify those responsible are not admissible, in view of the fact that the events pre-dated the entry of the Covenant into force for Burkina Faso. The state party maintains that article 7 of the Covenant cannot be invoked insofar as the authors have never been harassed, and have never suffered from treatment to which this provision refers. Moreover, such an allegation would involve a physical impossibility, insofar as the authors have not lived in Burkina Faso since the events of 1987. Similarly, according to the state party, article 9(1) of the

[25] As an example, the state party mentions a bond in the amount of 1.5 million CFA francs deposited in the case *Fonds Chrétien de l'Enfance Canada (FCC) v Batiano Célestin* in 1997.

[26] Under articles 648-658 of the Code of Criminal Procedure and articles 291 and 292 of order 91-51 of 26 August 1991 on the organization and functioning of the Supreme Court, any party in court proceedings who entertains legitimate suspicions regarding a judge who is to rule on his or her interests may prevent the judge from doing so by applying for disqualification. However, according to the state party, the author did not make use of this opportunity. Nor did she make use of the appeal against judicial misconduct provided for in articles 283 and 284 of order 91-51, under which denial of justice may be punished.

Covenant cannot be invoked since the authors no longer live in Burkina Faso.

7.8. Concerning the allegation that article 23 of the Covenant was violated, which the Committee ruled inadmissible, the state party, after referring to its legislation recognising and guaranteeing the rights of the family, points out that the authors cannot accuse Burkina Faso of not having protected them, since they no longer live in the country and voluntarily removed themselves from the supervision of the Burkina Faso authorities by seeking refugee status abroad, though they were in no way at risk, or being harassed.

7.9. The state party reiterates its position that the authors' complaint constitutes an abuse of process, insofar as it pursues purely political aims. According to the state party, it would be difficult to subject the facts alleged by the complainant to a legal assessment in the light of Burkina Faso's international human rights commitments, owing to their political nature. What are involved are incidents closely related to the country's political life which occurred in a troubled national context that was linked to the aberrations of the revolutionary regime and the risks of instability in the country and to the military coup which was rendered necessary by circumstances. Hence these incidents cannot be dissociated from the events of 15 October 1987, and the Committee cannot evaluate them independently of their context. The state party claims that the Committee would be exceeding its authority if it were nevertheless to examine all of these incidents. It explains that Ms Sankara has set herself the goal of seeking revenge for her dead husband, and harming the image of the country and the government.

7.10. Lastly, the state party calls on the Committee to reject the communication and rule that there has been no violation since the Covenant entered into force. It adds that, at the express request of the parties concerned, the government is nonetheless prepared to check Thomas's death certificate and, if necessary, to have it corrected, in keeping with the applicable laws and regulations in force in Burkina Faso. In any event, according to the state party, there is nothing to prevent the authors from returning to Burkina Faso or living there. The state party maintains that it guarantees security and protection to all persons living on its territory or subject to its jurisdiction. Furthermore, if the authors consider themselves to be under threat or lacking security, it is for them to seek special protection from the competent authorities. However, according to the state party, Burkina Faso cannot effectively guarantee protection for its nationals living in a foreign state. In addition, according to the state party, it remains true that the security of the authors has never been disturbed at the hands of Burkina Faso in the various countries where they have chosen to live (Gabon, France, Canada).

Authors' comments

8.1. In their comments dated 15 November 2004, the authors state that they are presenting new elements which would warrant a partial revision of the Committee's decision on admissibility. They consider that, in its observations on the merits, the state party acknowledged that Thomas Sankara did not die a natural death and that a number of public figures were aware of the circumstances surrounding the events of 15 October 1987.

8.2. Consequently, the authors first request the Committee to declare admissible the allegation under article 6 of the Covenant, a provision which obliges the state party to investigate and prosecute those responsible for violations of Thomas Sankara's right to life, and to respect and guarantee Thomas Sankara's right to life.[27] According to the authors, the state party's obligation to protect the human dignity of Thomas Sankara continues after his death.[28] The failure to comply with the obligation to establish the circumstances of the acknowledged extrajudicial death of an individual is an affront to human dignity. In the light of the evidence that Mr Sankara did not experience a natural death, notwithstanding his death certificate, but was in fact assassinated during a *coup d'état*, the authors deem it vital for the state party to protect his dignity by embarking on a judicial investigation and determining the circumstances of his death, and then correcting the death certificate.

8.3. Secondly, the authors call on the Committee to declare admissible the allegation under article 16, on the grounds that the state party did not supply a copy of Supreme Court decision 46 of 19 June 2001, or did not recognise the authenticity of the copy they themselves submitted. The authors reiterate that the Supreme Court arbitrarily denied Auguste Sankara's right to be recognised as a person before the law. According to the authors, since the provisions of article 111 of order 91-0051/PRES of 26 August 1991 relating to minors are mandatory, it was incumbent on the Supreme Court to note *proprio motu* the status of Auguste Sankara as a minor, to grant him exemption from the bond requirement and thus to grant him the right of access to the courts. In addition, the authors point out that when the right of a person to be recognized by the law is violated, article 14 of the Covenant is necessarily violated.

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27 The authors cite communications 161/1983, *Herrera Rubio v Colombia*, views of 2 November 1987, and 778/1997, *Coronel et al v Colombia*, views of 24 October 2002.

28 The authors refer to communications 1024/2001, *Sanlés Sanlés v Spain*, decision of 30 March 2004 on inadmissibility, and 717/1996, *Acuña Inostroza et al v Chile*, decision of 23 July 1999 on inadmissibility, and to the individual opinions on communication 718/1996, *Vargas Vargas v Chile*, decision of 26 July 1999 on inadmissibility.

8.4. The authors also reiterate their comments relating to violations of articles 7 and 9(1) by the state party. They emphasise that the state party's response to the above-mentioned new elements relating to the role played by President Blaise Compaoré in the death of Thomas Sankara will be vital in throwing light on the events of 15 October 1987.

8.5. The authors point out that the state party violated article 26 of the Covenant, protecting the right to equality before the law and to freedom from discrimination based on political opinions. Contrary to the state party's observations, the authors explain that a person may have a political opinion, even if he or she no longer lives in Burkina Faso, and is not involved in politics. The authors consider that the state party has not presented sufficient legal arguments to refute their detailed allegations. Moreover, the state party had noted that the surviving members of the Sankara family had been granted refugee status abroad. The granting of that status, in the authors' view, constitutes *prima facie* proof of the existence of discrimination based on political opinions in the country of origin. According to the authors, the state party's allegations that the Sankara family wished to benefit from special treatment in the Burkina Faso courts demonstrated a failure to understand the nature of the discrimination they had suffered, namely, the deliberate unfair treatment suffered by the authors in their dealings with a variety of official bodies in Burkina Faso.

8.6. In relation to article 14(1) of the Covenant, the authors point out that the Supreme Court was guilty of a denial of justice in adopting its decision 46 of 19 June 2001, which the state party has still not supplied. The Committee's jurisprudence confirms that a decision taken by a country's highest court can in itself be the source of an alleged denial of justice.[29] The authors acknowledge that the Committee has no independent machinery which could conduct an investigation, and is generally not in a position to review the evidence and the facts as assessed by domestic courts. However, the authors refer to the exception to that rule set out in the case *Griffin v Spain*.[30] In the authors' view, the Supreme Court displayed a lack of logic when it invoked the failure to pay the modest sum of 5 000 CFA francs in refusing to consider the merits of a case.

[29] Communication 718/1996, *Vargas Vargas v Chile*, decision of 26 July 1999 on inadmissibility, para 6.7.

[30] Communication 493/1992, *Griffin v Spain*, views of 4 April 1995: '… unless it can be ascertained that the proceedings were manifestly arbitrary, that there were procedural irregularities amounting to a denial of justice, or that the judge manifestly violated his obligation of impartiality' (para 9.6).

Supplementary observations by the state party on the authors' comments

9.1. In its supplementary observations of 15 October 2005, the state party reiterates its observations concerning inadmissibility. According to the state party, neither the failure to conduct an investigation, nor the alleged failure to correct the death certificate, nor the invoking of the violation of Thomas Sankara's dignity, can justify applying the provisions of the Covenant in respect of him retroactively, since there is no continuity in the events over time, and to do so would run totally counter to the principles of public international law. The state party maintains the argument of prescription to justify the fact that no investigation has been held since the Covenant entered into force. Furthermore, in bringing the case before a court which was manifestly incompetent to consider it, the authors brought on prescription by their own actions, since referral to an incompetent court does not interrupt the statute of limitations. In that way, it was not incumbent on the state party to institute proceedings after the Covenant had entered into force. In the present case, since the author of the communication had not indicated any act attributable to the state party which had been committed subsequently or had continued after the entry into force of the Covenant, the Committee could not validly rule on the facts without ignoring its own jurisprudence and a well-established international rule. Regarding the author's allegations that the last investigative action was taken on 29 September 1997, providing grounds for suspending the statute of limitations, the state party considers this to be a 'pernicious interpretation' of article 7 of the Code of Criminal Procedure: the institution of proceedings is not an investigative act, because it is not brought before a competent court.

9.2. Concerning the allegations that the state party omitted or refused to correct Thomas Sankara's death certificate, before and after acceding to the Optional Protocol, the state party explains that the death certificate is no more than an act of recording by an expert, and not a civil registration document. A document prepared by an expert can be rectified or corrected only by an expert, a role the state party could not play, and the responsibility of an expert is and remains an individual and personal responsibility. Hence the failure to correct the death certificate cannot bring into play the responsibility of the state party.

9.3. The state party maintains that the authors' assertions regarding violation of the dignity of Thomas Sankara, allegedly constituting a continuing violation, are not substantiated and do not point to violations of the provisions of the Covenant. Sympathisers regularly visit Thomas Sankara's grave to pay tribute, he himself has been officially rehabilitated and honoured as a national hero, a number of political parties which are still represented in the National Assembly

bear his name, and a heroes' monument is under construction in Ouagadougou, partly celebrating Thomas Sankara. In addition, according to the state party, the protection of dignity under the Covenant guarantees only the rights of living persons, and not the dead. Consequently, the allegation that Thomas Sankara's right to dignity has been violated is manifestly unfounded.

9.4. Concerning the alleged admissions of legal significance made by the state party in connection with Thomas Sankara's status as a victim, the state party notes the flimsiness of these observations and considers that the Committee should reaffirm its initial position regarding the inadmissibility of this part of the complaint.

9.5. In the view of the state party, the authors' observations demonstrate that the requirements for admissibility before the Committee have not all been met in this case, in relation to the Committee's partial decision on admissibility. The state party requests the Committee to reconsider its admissibility decision. Not only have not all remedies been exhausted in relation to all their allegations, but in addition the allegations reflect an abuse of rights and abuse of process and are manifestly incompatible with the provisions of the Covenant.

9.6. The state party reaffirms that it has demonstrated the effectiveness of non-contentious remedies in the specific case of Burkina Faso, in the prevailing political and social context. The authors have not denied that these remedies are effective, and do not explain their steadfast refusal to make use of non-contentious remedies. The state party also reiterates that the authors have failed to use certain contentious remedies. It refers to its observations on admissibility, and in particular to article 123 of the Personal and Family Code, under which they could secure correction of the death certificate. Lastly, the state party maintains that Ms Sankara, through negligence or ignorance, committed procedural errors which prevented consideration of the substance of her complaint, and it refers to its observations on admissibility.

9.7. In relation to abuse of process, the state party maintains that the complaints raised by the authors are more political than legal in nature, and are in fact directed at the country's President.

9.8. The state party puts forward the following arguments as to the merits. Regarding the alleged violation of article 2, the state party considers that these violations cannot have occurred in the present case, but if the Committee were to acknowledge such an obligation, the state party is prepared to present relevant arguments. Concerning the alleged violation of article 7, the state party holds that any accusation of cruel, inhuman and degrading treatment cannot be validly upheld in fact or in law, owing to the efforts made by the state party, which met with a categorical refusal on the part

of Ms Sankara. The state party refers to the efforts it has made to achieve reconciliation vis-à-vis Thomas Sankara, and in particular the fact that the location of his grave is public knowledge. The Sankara family cannot claim intimidation of any kind, insofar as its members no longer live in Burkina Faso. The state party considers that the authors have not demonstrated any act attributable to the state party which has caused either physical suffering or mental suffering such as to substantiate a violation of article 7.

9.9. Concerning the alleged violation of article 9(1) the state party indicates that the authors have put forward the same arguments as for article 7, and that they have failed likewise to supply any specific arguments to back up the allegations. The authors have not been the victims of arrest or arbitrary detention, nor has their security been disturbed. Accordingly, the state party calls on the Committee to reject the allegation.

9.10. Concerning article 14(1), the state party refers to its observations on the merits, in relation to the amount of the bond, which cannot alone indicate bias on the part of the judge. In addition, and citing the Committee's jurisprudence,[31] the state party maintains that the authors did not raise any irregularity before the judicial division of the Supreme Court. Moreover, concerning the authors' arguments based on *Griffin v Spain*, the state party notes that they have not demonstrated the arbitrary and unfair nature of the proceedings in the Supreme Court, that they have not demonstrated any procedural irregularity, and that the only procedural obstacles which may be cited in the present case are attributable to the failure to deposit a bond, for which the authors have only themselves to blame.

9.11. Concerning article 26, the state party refers to its observations, adding that articles 1 and 8 of Burkina Faso's Constitution protect citizens against all forms of discrimination and guarantee freedom of expression. Discrimination is forbidden by the new 1996 Criminal Code, which lays down severe punishment. According to the state party, the authors have not demonstrated that they have political opinions which gave rise to discriminatory measures on the part of the authorities. Benefiting from refugee status in a foreign country does not in itself constitute proof of discrimination based on the political opinions of the beneficiary. According to the state party, the criteria used by each state in granting refugee status are in practice sometimes subjective, and the Sankara family members still living in Burkina Faso are not harassed

[31] Communication 811/1998, *Mulai v Republic of Guyana*, views of 20 July 2004: 'where attempts at jury tampering come to the knowledge of either of the parties, these alleged improprieties should have been challenged before the court' (para 6.1).

in any way because of their political views. The state party calls on the Committee to reject the allegation that article 26 was violated.

Authors' comments on the state party's observations

10. In their comments of 15 January 2006, the authors reaffirm their earlier observations. Concerning the time bar, they explain that no court has called this matter into question, and that in relation to article 7 of the Code of Criminal Procedure[32] and the applicable case law, there has never been a time bar.

Request for reconsideration of the admissibility decision

11. The Committee has taken note of the request for reconsideration of its decision on admissibility, made both by the state party and by the authors. It points out that most of the arguments advanced in support of the request for reconsideration relate to parts of the communication which had already been thoroughly examined during consideration of the issue of admissibility, and that the other arguments must be analysed as part of the consideration of the merits. Consequently, the Committee decides to proceed to consider the merits of the communication.

Consideration of the merits

12.1. The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5(1) of the Optional Protocol.

12.2. Concerning the alleged violation of article 7, the Committee understands the anguish and psychological pressure which Ms Sankara and her sons, the family of a man killed in disputed circumstances, have suffered and continue to suffer because they still do not know the circumstances surrounding the death of Thomas Sankara, or the precise location where his remains were officially buried.[33] Thomas Sankara's family have the right to know the circumstances of his death,[34] and the Committee points out that any complaint relating to acts prohibited under article 7 of the Covenant must be investigated rapidly and impartially by the competent authorities.[35] In addition, the Committee notes, as it did during its deliberations on admissibility, the failure to correct Thomas Sankara's death

[32] 'In criminal matters, prosecution is time-barred 10 years after the date on which the offence was committed, if no act of investigation or prosecution has taken place in that interval. If such acts have taken place during that interval, prosecution shall be time-barred only 10 years after the latest such act. The same applies even to persons who were not affected by the act of investigation or prosecution.'

[33] Communications 886/1999, *Schedko v Belarus*, views of 3 April 2003, para 10.2, and 887/1999, *Staselovich v Belarus*, views of 3 April 2003, para 9.2.

[34] Communication 107/1981, *Quinteros v Uruguay*, views of 21 July 1983, para 14.

[35] General comment 20, para 14.

certificate of 17 January 1988, which records a natural death contrary to the publicly known facts, which have been confirmed by the state party. The Committee considers that the refusal to conduct an investigation into the death of Thomas Sankara, the lack of official recognition of his place of burial and the failure to correct the death certificate constitute inhuman treatment of Ms Sankara and her sons, in breach of article 7 of the Covenant.

12.3. Concerning the alleged violation of article 9(1) of the Covenant, the Committee recalls its jurisprudence to the effect that the right to security of person guaranteed in article 9(1) of the Covenant applies even outside the context of formal deprivation of liberty.[36] The interpretation of article 9 does not allow a state party to ignore threats to the personal security of non-detained persons within its jurisdiction.[37] In the present case, individuals shot and killed Thomas Sankara on 15 October 1987, and, fearing for their safety, his wife and children left Burkina Faso shortly thereafter. However, the arguments put forward by the authors are not sufficient to reveal a violation of article 9(1) of the Covenant.

12.4. Concerning the alleged violation of article 14(1) of the Covenant, while the authors' request for public inquiry and legal proceedings do not need to be determined by a court or tribunal, the Committee considers, however, that whenever, as in the present case, a judicial body is entrusted with the task of deciding on the start of such inquiry and proceedings, it must respect the guarantee of equality of all persons before the courts and tribunals as enshrined in article 14(1) and the principles of impartiality, fairness and equality of arms implicit in this guarantee.[38]

12.5. The Committee notes the authors' arguments regarding the non-respect of the guarantee of equality by the Supreme Court when it rejected the appeal on the grounds of failure to deposit security of 5 000 CFA francs, and its refusal to take into account Auguste Sankara's status as a minor. It appears, firstly, that the state party did not contest the claim that, contrary to article 110 of order 91-51 of 26 August 1991, the Registrar failed to inform counsel of the obligation to deposit the sum of 5 000 CFA francs as security; and secondly, that the Supreme Court ruling stating that the authors provided no evidence in support of an exemption for Auguste Sankara, as a minor, was unwarranted since the authors were unaware that security was required precisely because of the registrar's failure to inform them of the fact - a key point of which the Court was fully

[36] Communications 195/1985, *Delgado Páez v Colombia*, views of 12 July 1990, para 5.5, and 711/1996, *Carlos Dias v Angola*, views of 20 March 2000, para 8.3.

[37] Communications 821/1998, *Chongwe v Zambia*, views of 25 October 2000, para 5.3, and 468/1991, *Bahamonde v Equatorial Guinea*, views of 20 October 1993, para 9.2.

[38] Communication 1015/2001, *Perterer v Austria*, decision of 20 July 2004 on inadmissibility, para 9.2.

aware. The Committee accordingly considers that the Supreme Court failed to comply with the obligation to respect the guarantee of equality of all persons before the courts and tribunals as enshrined in article 14(1) of the Covenant and the principles of impartiality, fairness and equality of arms implicit in this guarantee.

12.6. The Committee notes that after the Supreme Court adopted decision 46 of 19 June 2001, confirming decision 14 in which the Appeal Court declared the ordinary courts incompetent, the relevant authorities refused or omitted to refer the case to the Minister of Defence so that proceedings could be instituted in the military courts in accordance with article 71(1) and (3) of the Code of Military Justice. The Committee also refers to its deliberations on admissibility and the conclusion it reached that the Procurator wrongly halted the proceedings instituted by the authors and in addition failed to respond to their appeal of 25 July 2001. Lastly, the Committee notes that after the ordinary courts were declared incompetent, almost five years passed, but no judicial proceedings were instituted by the Minister of Defence. The state party was unable to explain these delays, and on this point the Committee considers that, contrary to the state party's arguments, no time bar could invalidate proceedings in a military court, and consequently the failure to refer the matter to the Minister of Defence should be attributed to the Procurator, who alone had the power to do so. The Committee considers that this inaction since 2001, despite the various remedies sought subsequently by the authors, constitutes a violation of the obligation to respect the guarantee of equality of all persons before the courts and tribunals as enshrined in article 14(1) and the principles of impartiality, fairness and equality of arms implicit in this guarantee.

12.7. Concerning the alleged violation of article 26 of the Covenant, the Committee considers that the arguments put forward by the authors concerning the authorities' discrimination against them for their political opinions are insufficient to reveal a violation.

13. The Human Rights Committee, acting under article 5(4) of the Optional Protocol, is of the view that the facts before it disclose a violation of articles 7 and 14(1) of the Covenant.

14. The Committee recalls that in acceding to the Optional Protocol, the state party recognised the competence of the Committee to determine whether the Covenant had been breached and that, under article 2 of the Covenant, it undertook to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the Covenant, and to guarantee an effective and enforceable remedy when a violation has been established. Under article 2(3)(a), of the Covenant, the state party is required to provide Ms Sankara and her sons an effective and enforceable remedy in the form, *inter alia*, of official recognition of the place where Thomas

Sankara is buried, and compensation for the anguish suffered by the family. The state party is also required to prevent such violations from occurring in the future.

15. Bearing in mind that, by acceding to the Optional Protocol, states parties recognise the competence of the Committee to determine whether there has been a violation of the Covenant, and that, under article 2 of the Covenant, they undertake to ensure to all individuals within their territory and subject to their jurisdiction the rights recognised in the Covenant, and to guarantee an effective and enforceable remedy when a violation has been established, the Committee wishes to receive from the state party, within 90 days following the submission of these views, information about the measures taken to give effect to them. The state party is also requested to publish the Committee's views.

DEMOCRATIC REPUBLIC OF THE CONGO

Ilombe and Another v Democratic Republic of the Congo

(2006) AHRLR 50 (HRC 2006)

Communication 1177/2003, *Willy Wenga Ilombe and Nsii Luanda Shandwe v Democratic Republic of the Congo*

Decided at the 86th session, 17 March 2006, CCPR/C/86/D/1177/2003

Human rights defenders detained by order of a military court

Personal liberty and security (reasons for arrest, 6.2; no legal remedies to challenge detention, 6.3, 6.4; arbitrary detention, 6.5)

1. The authors of the communication are Willy Wenga Ilombe and Nsii Luanda Shandwe, citizens of the Democratic Republic of the Congo. They claim to be victims of violations by the Democratic Republic of the Congo of paragraphs 2 to 5 of article 9, and of article 14 of the International Covenant on Civil and Political Rights. The case also appears to raise issues under article 9(1) of the Covenant. The authors are represented by counsel. The Optional Protocol came into force for the Democratic Republic of the Congo on 1 November 1976.

Factual background

2.1. On 20 February 2002, Willy Wenga Ilombe, a lawyer and member of the African Centre for Peace, Democracy and Human Rights (ACPD), a human rights non-governmental organisation, was arrested. He was taken to the Office of the Public Prosecutor of the Military Court (*Parquet Général près la Cour d'Ordre Militaire*). After 48 hours in detention, he was informed that he had been arrested for breach of state security. According to the Office of the Public Prosecutor, he had been in constant contact with Major Bora Uzima Kamwanya in January 2001. Major Bora is suspected to have taken part in the assassination of the former President of the Democratic Republic of the Congo, Laurent-Désiré Kabila, on 16 January 2001. It

was claimed that the Major's telephone number appeared twice on the telephone bill of Willy Wenga Ilombe.

2.2. On 19 April 2002, Nsii Luanda Shandwe, president of the Committee of Human Rights Observers (CODHO), a human rights non-governmental organisation, was also arrested. After seven days in detention at the Office of the Public Prosecutor of the Military Court, he was transferred to the Penitentiary and Re-education Centre of Kinshasa. He was accused of providing accommodation to Michel Bisimwa, a student suspected of spying for Rwanda. As a result, he was accused of breach of state security and spying for a foreign power.

2.3. On 27 January 2003, the authors were released after 9 and 11 months of detention, respectively, without ever being tried by a court.

The complaint

3.1. The authors allege a violation of article 9(2), arguing that at the time of their arrest for breach of state security, they were neither informed, nor received notification of the charges made against them. They argue that according to the jurisprudence of the Committee, it is not sufficient to inform the person who is detained that he was arrested on the basis of security measures without any indication of the substance of the complaint against him.[1] Moreover, they suggest that the concept of 'national security' should be clearly defined by law, that police and security officers should be required to state in writing why a person has been arrested, and that such information should be made available to the public and should be reviewable by the courts.[2]

3.2. They also claim a violation of article 9(3) because they were not brought before a competent judge, nor tried, during the time of their detention, and were detained for 9 and 11 months, respectively. They invoke a decision of the Committee in which a delay of one week was found to be a breach of article 9(3),[3] as well as a judgment of the European Court of Human Rights in which a delay of four days and six hours was considered to be excessive.[4] In the present case, the authors remained in detention until 27 January 2003, without being brought before a judge or being granted bail. Their release was not decided according to the applicable rules of criminal procedure, as

1 See communication 43/1979, *Drescher Caldas v Uruguay*, views adopted on 21 July 1983, para 13.2.

2 See concluding observations of the Human Rights Committee: Sudan, CCPR/C/79/Add.85, 19 November 1997, para 13.

3 See communication 702/1996, *McLawrence v Jamaica*, views adopted on 18 July 1997, para 5.6.

4 See *Brogan and others v United Kingdom*, judgment of 29 November 1984, Series A 145-B, para 62.

there was no judicial decision acquitting them, nor a decision to grant them bail. Their release appears to have resulted from international and national public pressure. The authors were simply taken from their cells and told to go home. This form of release creates insecurity for the authors, since they can be re-arrested at any time. At the time of their release, the public prosecutor told the authors that the investigation was still under way, that they could thus be called upon at any time and that they should not leave the area.

3.3. The authors claim a violation of article 9(4) because they were deprived of the right to take proceedings before a court, in order that the court may decide without delay on the legality of their detention. They refer to the *décret-loi* of 23 August 1997 creating a military court in the Democratic Republic of the Congo (*Cour d'Ordre Militaire*), and in particular to article 5 which provides that the decisions of this court can neither be opposed, nor appealed against, except in an extraordinary procedure before the President of the Republic by way of a presidential pardon.

3.4. They finally claim a violation of article 14, because they were arrested and detained by the Office of the Public Prosecutor of a special military court (*juridiction militaire d'exception*) created to deal exclusively with crimes committed by the military.

3.5. Since the authors consider themselves victims of arbitrary and unlawful detention, they request the Committee to order compensation for the harm they have suffered.

3.6. With regard to the exhaustion of domestic remedies, the authors argue that there are no remedies available for the violations they claim. They refer to article 200 of the Code of Military Justice, which confers on the Military Prosecutor the power to 'decide to extend the detention for one month and then month after month, for as long as required by public interest'. As mentioned above, it is not possible to appeal the decisions of the military court, except in an extraordinary procedure before the President of the Republic. The authors had requested several times to be released on bail or brought before a competent judge.

3.7. The Committee considers that the authors' allegations also raise issues under article 9(1) of the Covenant.

State party's failure to cooperate

4. On 23 May 2003, 14 January and 23 September 2004, and 16 June 2005, the state party was requested to submit to the Committee information on the admissibility and the merits of the communication. The Committee notes that this information has not been received. The Committee regrets the state party's failure to provide any information with regard to admissibility or the substance of the authors' claims. It recalls that under the Optional Protocol, the

state party concerned is required to submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that it may have provided. In the absence of a reply from the state party, due weight must be given to the authors' allegations, to the extent that these have been properly substantiated.

Issues and proceedings before the Committee

Consideration of admissibility

5.1. Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its Rules of Procedures, decide whether or not it is admissible under the Optional Protocol to the Covenant.

5.2. 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(2)(a) of the Optional Protocol.

5.3. In light of the authors' arguments concerning the exhaustion of domestic remedies and the lack of cooperation from the state party, the Committee considers that the provisions of article 5(2)(b) of the Optional Protocol do not preclude the examination of the communication.

5.4. With regard to article 14, the Committee considers that the authors have not sufficiently substantiated for the purposes of admissibility what specific charges, if any, fell to be determined in accordance with paragraph 1 thereof. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

5.5. The Committee considers that, in the absence of any information from the state party, the complaints of violations of article 9, paragraphs 2 to 4, as well as issues arising under article 9(1), are admissible.

Consideration of the merits

6.1. The Human Rights Committee has considered the present communication in the light of all the information made available to it, as provided for in article 5(1) of the Optional Protocol.

6.2. With regard to the alleged violation of article 9(2), the Committee takes note of the authors' claim that they were not informed, at the time of arrest, of the reasons for their arrest. It observes that it was not sufficient simply to inform the authors that they were being arrested for breach of state security, without any indication of the substance of the complaint against them.[5] In the

[5] See also communication 43/1979, *Drescher Caldas v Uruguay*, views adopted on 21 July 1983, para 13.2.

absence of any pertinent information from the state party which would contradict the authors' allegations, the Committee considers that the facts before it reveal a violation of article 9(2) of the Covenant.

6.3. As to the alleged violation of article 9(3), the Committee takes note of the authors' claim that they were detained for 9 and 11 months, respectively, without ever being brought before a judge. It recalls that article 9(3) provides that anyone arrested or detained on a criminal charge has to be brought promptly before a judge or other officer authorized by law to exercise judicial power, and that pursuant to general comment 8 (16), such delays must not exceed a few days. In the absence of any reply from the state party which would challenge the authors' allegations, the Committee concludes that the facts as submitted reveal a violation of article 9(3) of the Covenant.

6.4. On the alleged violation of article 9(4) of the Covenant, the Committee takes note of the authors' claim that they were deprived of the right to challenge the legality of their detention, because decisions of the Military Court can neither be opposed, nor appealed. In the absence of any information from the state party on this issue, the Committee considers that the facts before it reveal a violation of article 9(4) of the Covenant.

6.5. In general, the detention of civilians by order of a military court for months on end without possibility of challenge must be characterised as arbitrary detention within the meaning of article 9(1) of the Covenant.

7. 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 before it reveal violations by the state party of article 9, paragraphs 1 to 4, of the Covenant.

8. In accordance with article 2(3) of the Covenant, the state party is under an obligation to provide the authors with an effective remedy, including appropriate compensation. The state party is also under an obligation to take measures to prevent similar violations in the future.

9. Bearing in mind that, by becoming a 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 and that, pursuant to article 2 of the Covenant, that state party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the Covenant and to provide an effective and enforceable remedy in case 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.

SENEGAL

Guengueng and Others v Senegal

(2006) AHRLR 56 (CAT 2006)

Communication 181/2001, *Suleymane Guengueng et al v Senegal*

Decided at the 36th session, 17 May 2006, CAT/C/36/D/181/2001

Decision not to prosecute former Chadian President for torture committed in Chad violated the Convention against Torture

Admissibility (universal jurisdiction, potential complainants, 6.4)
Torture (failure to ensure universal jurisdiction, 9.3 - 9.6; duty to prosecute or extradite, 9.7, 9.10)
State responsibility (duty to give effect to convention rights in national law, 9.8)

Decision of the Committee against Torture under article 22 of the Convention[1]

1.1. The complainants are Suleymane Guengueng, Zakaria Fadoul Khidir, Issac Haroun, Younous Mahadjir, Valentin Neatobet Bidi, Ramadane Souleymane and Samuel Togoto Lamaye (hereinafter 'the complainants'), all of Chadian nationality and living in Chad. They claim to be victims of a violation by Senegal of article 5(2) and article 7 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter 'the Convention').

1.2. Senegal ratified the Convention on 21 August 1986 and made the declaration under article 22 of the Convention on 16 October 1996.

1.3. In accordance with article 22(3) of the Convention, the Committee brought the communication to the attention of the state party on 20 April 2001. At the same time, the Committee, acting under article 108(9) of its Rules of Procedure, requested the state party, as an interim measure, not to expel Hissène Habré and to take all necessary measures to prevent him from leaving the territory other than under an extradition procedure. The state party acceded to this request.

[1] In accordance with rule 103 of the Committee's Rules of Procedure, Mr Guibril Camara did not take part in the Committee's deliberations on this case.

The facts as submitted by the complainants

2.1. Between 1982 and 1990, during which period Hissène Habré was President of Chad, the complainants were purportedly tortured by agents of the Chadian state answerable directly to President Hissène Habré. The acts of torture committed during this period formed the subject of a report by the National Commission of Inquiry established by the Chadian Ministry of Justice; according to that report 40 000 political murders and systematic acts of torture were committed by the Habré regime.

2.2. The complainants have submitted to the Committee a detailed description of the torture and other forms of ill-treatment that they claim to have suffered. Moreover, relatives of two of them, Valentin Neatobet Bidi and Ramadane Souleymane, have disappeared: on the basis of developments in international law and the case law of various international bodies, the complainants consider this equivalent to torture and other inhuman and degrading treatment, both for the disappeared persons and, in particular, for their relations.

2.3. After being ousted by the current President of Chad, Idriss Déby, in December 1990, Hissène Habré took refuge in Senegal, where he has since resided. In January 2000, the complainants lodged a complaint against him with an examining magistrate in Dakar. On 3 February 2000, the examining magistrate charged Hissène Habré with being an accomplice to acts of torture, placed him under house arrest and opened an inquiry against a person or persons unknown for crimes against humanity.

2.4. On 18 February 2000, Hissène Habré applied to the Indictment Division of the Dakar Court of Appeal for the charge against him to be dismissed. The complainants consider that, thereafter, political pressure was brought to bear to influence the course of the proceedings. They allege in particular that, following this application, the examining magistrate who had indicted Hissène Habré was transferred from his position by the Supreme Council of Justice and that the President of the Indictment Division before which the appeal of Hissène Habré was pending was transferred to the Council of State.

2.5. On 4 July 2000, the Indictment Division dismissed the charge against Hissène Habré and the related proceedings on the grounds of lack of jurisdiction, affirming that 'Senegalese courts cannot take cognizance of acts of torture committed by a foreigner outside Senegalese territory, regardless of the nationality of the victims: the wording of article 669 of the Code of Criminal Procedure excludes any such jurisdiction'. Following this ruling, the Special Rapporteurs on the question of torture and on the independence of judges and

lawyers of the United Nations Commission on Human Rights expressed their concerns in a press release dated 2 August 2000.[2]

2.6. On 7 July 2000, the complainants filed an appeal with Senegal's Court of Cassation against the ruling of the Indictment Division, calling for the proceedings against Hissène Habré to be reopened. They maintained that the ruling of the Indictment Division was contrary to the Convention against Torture and that a domestic law could not be invoked to justify failure to apply the Convention.

2.7. On 20 March 2001, the Senegalese Court of Cassation confirmed the ruling of the Indictment Division, stating, *inter alia*, that 'no procedural text confers on Senegalese courts a universal jurisdiction to prosecute and judge, if they are found on the territory of the Republic, presumed perpetrators of or accomplices in acts [of torture] … when these acts have been committed outside Senegal by foreigners; the presence in Senegal of Hissène Habré cannot in itself justify the proceedings brought against him'.

2.8. On 19 September 2005, after four years of investigation, a Belgian judge issued an international arrest warrant against Hissène Habré, charging him with genocide, crimes against humanity, war crimes, torture and other serious violations of international humanitarian law. On the same date, Belgium made an extradition request to Senegal, citing, *inter alia*, the Convention against Torture.

2.9. In response to the extradition request, the Senegalese authorities arrested Hissène Habré on 15 November 2005.

2.10. On 25 November 2005, the Indictment Division of the Dakar Court of Appeal stated that it lacked jurisdiction to rule on the extradition request. Nevertheless, on 26 November, the Senegalese Minister of the Interior placed Hissène Habré 'at the disposal of the President of the African Union' and announced that Hissène Habré would be expelled to Nigeria within 48 hours. On 27 November, the Senegalese Minister for Foreign Affairs stated that Hissène Habré would remain in Senegal and that, following a discussion between the presidents of Senegal and Nigeria, it had been agreed that the case would be brought to the attention of the next Summit of Heads of

[2] According to the press release, '[t]he Special Rapporteur on the independence of judges and lawyers, Mr Dato Param Cumaraswamy, and the Special Rapporteur on the question of torture, Sir Nigel Rodley, have expressed their concern to the government of Senegal over the circumstances surrounding the recent dismissal of charges against Hissène Habré, the former President of Chad. […] The Special Rapporteurs reminded the government of Senegal of its obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, to which it is party. They also draw its attention to the resolution adopted this year by the Commission on Human Rights on the question of torture (resolution 2000/43), in which the Commission stressed the general responsibility of all states to examine all allegations of torture and to ensure that those who encourage, order, tolerate or perpetrate such acts be held responsible and severely punished'.

State and Government of the African Union, which would be held in Khartoum on 23 and 24 January 2006.

2.11. At its sixth ordinary session, held on 24 January 2006, the Assembly of the African Union decided to set up a committee of eminent African jurists, who would be appointed by the Chairman of the African Union in consultation with the Chairman of the African Union Commission, to consider all aspects and implications of the Hissène Habré case and the possible options for his trial, and report to the African Union at its next ordinary session in June 2006.

The complaint

3.1. The complainants allege a violation by Senegal of article 5(2) and article 7 of the Convention and seek in this regard various forms of compensation.

Violation of article 5(2) of the Convention

3.2. The complainants point out that, in its ruling of 20 March 2001, the Court of Cassation stated that 'article 79 of the Constitution [which stipulates that international treaties are directly applicable within the Senegalese legal order and can accordingly be invoked directly before Senegalese courts] cannot apply when compliance with the Convention requires prior legislative measures to be taken by Senegal' and 'article 669 of the Code of Criminal Procedure [which enumerates the cases in which proceedings can be brought against foreigners in Senegal for acts committed abroad] has not been amended'. They also note that, while the state party has adopted legislation to include the crime of torture in its Criminal Code in accordance with article 4 of the Convention, it has not adopted any legislation relating to article 5(2) despite the fact that this provision is the 'cornerstone' of the Convention, referring in this connection to the *travaux préparatoires*.

3.3. Moreover, the complainants point out, whereas the Court of Cassation states that 'the presence in Senegal of Hissène Habré cannot in itself justify the proceedings', it is precisely the presence of the offender in Senegalese territory, that constitutes the basis under article 5 of the Convention for establishing the jurisdiction of the country concerned.

3.4. The complainants consider that the ruling of the Court of Cassation is contrary to the main purpose of the Convention and to the assurance given by the state party to the Committee against Torture, that no internal legal provision in any way hinders the prosecution of torture offences committed abroad.[3]

[3] See the second periodic report of Senegal to the Committee against Torture, CAT/C/17/Add 14, para 42.

3.5. The complainants note that, irrespective of article 79 of the Constitution, under which the Convention is directly an integral part of internal Senegalese legislation, it was incumbent on the authorities of the state party to take any additional legislative measures necessary to prevent all ambiguities such as those pointed out by the Court of Cassation.

3.6. The complainants observe that members of the Committee regularly emphasise the need for states parties to take appropriate legislative measures to establish universal jurisdiction in cases of torture. During its consideration of the second periodic report submitted by the state party under article 19 of the Convention, the Committee underlined the importance of article 79 of the Senegalese Constitution, stressing that it should be implemented unreservedly.[4] The state party had, moreover, expressly affirmed in its final statement that it 'intended to honour its commitments, in the light of the Committee's conclusions and in view of the primacy of international law over internal law'.[5]

3.7. The complainants therefore consider that the state party's failure to make its legislation comply with article 5(2) of the Convention constitutes a violation of this provision.

Violation of article 7 of the Convention

3.8. On the basis of several concordant opinions expressed by members of the British House of Lords in the *Pinochet* case, the complainants argue that the essential aim of the Convention is to ensure that no one suspected of torture can evade justice simply by moving to another country and that article 7 is precisely the expression of the principle *aut dedere aut punire*, which not only allows but obliges any state party to the Convention to declare it has jurisdiction over torture, wherever committed. Similarly, the complainants refer to Cherif Bassiouni and Edward Wise, who maintain that article 7 expresses the principle *aut dedere aut judicare*.[6] They also cite a legal opinion according to which 'the Convention's main jurisdictional feature is thus that it does not impose a solely legislative and territorial obligation, in the manner of previous human rights conventions, drawing as it does on the models of collective security of Tokyo and The Hague, dominated by the principle of jurisdictional freedom, *aut dedere aut prosequi*, as well as by the obligation to prosecute'.[7]

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4 See the concluding observations of the Committee against Torture, A/51/44, para 117.

5 CAT/C/SR 249, para 44.

6 C Bassiouni and E Wise, *Aut dedere aut judicare: The duty to extradite or prosecute in international law* (1997) 159.

7 M Henzelin, *Le principe de l'universalité en droit pénal international. Droits et obligations pour les Etats de poursuivre et de juger selon le principe de l'universalité* (2000) 349.

3.9. The complainants stress that the Committee itself, when considering the third periodic report of the United Kingdom concerning the *Pinochet* case, recommended 'initiating criminal proceedings in England, in the event that the decision is made not to extradite him. This would satisfy the state party's obligations under articles 4 to 7 of the Convention and article 27 of the Vienna Convention on the Law of Treaties of 1969'.[8]

3.10. While in its second periodic report to the Committee it described in detail the mechanism for implementing article 7 in its territory, the state party has neither prosecuted nor extradited Hissène Habré, and this the complainants consequently regard as a violation of article 7 of the Convention.

Compensation

3.11. The complainants state that they have been working for over ten years to prepare a case against Hissène Habré and that the latter's presence in the state party together with the existence of international commitments binding upon Senegal have been decisive factors in the institution of proceedings against him. The decision by the authorities of the state party to drop these proceedings has therefore caused great injury to the complainants, for which they are entitled to seek compensation.

3.12. In particular, the complainants request the Committee to find that:

- By discontinuing the proceedings against Hissène Habré, the state party has violated article 5(2) and article 7 of the Convention;
- The state party should take all necessary steps to ensure that Senegalese legislation complies with the obligations deriving from the above-mentioned provisions. The complainants note in this connection that, while the findings of the Committee are only declaratory in character and do not affect the decisions of the competent national authorities, they also carry with them 'a responsibility on the part of the state to find solutions that will enable it to take all necessary measures to comply with the Convention',[9] measures that may be political or legislative;
- The state party should either extradite Hissène Habré or submit the case to the competent authorities for the institution of criminal proceedings;
- If the state party neither tries nor extradites Hissène Habré, it should compensate the complainants for the injury suffered, by virtue *inter alia* of article 14 of the Convention. The complainants also consider that, if necessary, the state party should itself pay this compensation in lieu of Hissène Habré, following the principle established by the European Court of Human Rights in the case of *Osman v the United Kingdom*;[10]

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8 Concluding observations of the Committee against Torture, 17 November 1998, A/54/44, para 77(f).

9 Communication 34/1995 *Seid Mortesa v Switzerland*, CAT/C/18/D/34/1995, para 11.

10 ECHR/87/1997/871/1083, 28 October 1998.

- The state party should compensate the complainants for the costs they have incurred in the proceedings in Senegal; and
- Pursuant to article 111(5) of the Committee's Rules of Procedure, the state party should inform the Committee within 90 days of the action it has taken in response to the Committee's views.

The state party's observations on admissibility

4. On 19 June 2001, the state party transmitted to the Committee its observations on the admissibility of the communication. It maintains that the communication could be considered by the Committee only if the complainants were subject to the jurisdiction of Senegal. The torture referred to by the complainants was suffered by nationals of Chad and is presumed to have been committed in Chad by a Chadian. The complainants are not, therefore, subject to the jurisdiction of the state party within the meaning of article 22(1) of the Convention since, under Senegalese law, in particular article 699 of the Code of Criminal Procedure, a complaint lodged in Senegal against such acts cannot be dealt with by the Senegalese courts, whatever the nationality of the victims. The state party is consequently of the opinion that the communication should be declared inadmissible.

The complainants' comments

5.1. In a letter dated 19 July 2001, the complainants first stress that, contrary to what is indicated by the state party, the substance of the alleged violation by Senegal is not the torture they underwent in Chad but the refusal of the Senegalese courts to act upon the complaint lodged against Hissène Habré. The incidents of torture were presented to the Committee solely for the purpose of describing the background to the complaints lodged in Senegal.

5.2. The complainants go on to observe that the state party's interpretation of the expression 'subject to its jurisdiction', appearing in article 22 of the Convention, would effectively render any appeal to the Committee on Torture meaningless.

5.3. In this connection, the complainants point out that article 1 of the Optional Protocol to the International Covenant on Civil and Political Rights is drafted in the same terms as article 22 of the Convention and has on several occasions been discussed by the Human Rights Committee, which has interpreted the clause in an objective, functional manner: an individual should be considered subject to the jurisdiction of a state if the alleged violations result from an action by that state. It matters little whether the author of the communication is, for example, a national of that state or resides

in its territory.[11] In the *Ibrahima Gueye et al v France* case, the complainants, of Senegalese nationality and living in Senegal, were found by the Human Rights Committee to be subject to French jurisdiction in the matter of pensions payable to retired soldiers of Senegalese nationality who had served in the French army prior to the independence of Senegal, although the authors were not generally subject to French jurisdiction.[12] The fact of being subject to the jurisdiction of a state within the meaning of article 22 of the Convention must be determined solely on the basis of consideration of the facts alleged in the complaint.[13]

5.4. It follows, in the present case, that the complainants should be considered subject to the jurisdiction of the state party inasmuch as the facts alleged against Senegal under the Convention concern judicial proceedings before the Senegalese courts. Thus, contrary to the contention of the state party, it matters little that the torture occurred in another country or that the victims are not Senegalese nationals. To establish that the complainants are subject to Senegalese jurisdiction in the present instance, one has only to establish that the communication concerns acts that fell under Senegal's jurisdiction, since as only Senegal can decide whether to continue with the legal proceedings instituted by the complainants in Senegal. By instituting proceedings in the Senegalese courts, the complainants came under the jurisdiction of the state party for the purposes of those proceedings.

5.5. The complainants also make the subordinate point that, under Senegalese law, foreigners instituting judicial proceedings in the state party must accept Senegalese jurisdiction. This shows that, even if Senegal's restrictive interpretation is accepted, the complainants do indeed come under the state party's jurisdiction.

5.6. Lastly, the authors argue that the state party cannot invoke domestic law to claim that they are not subject to its jurisdiction since that would be tantamount to taking advantage of its failure to comply with article 5(2) of the Convention, under which states parties are obliged to take such measures as may be necessary to establish their jurisdiction over the offences referred to in article 4 of the Convention. In invoking this argument, the state party is disregarding both customary law and international law. The principle of *nemo auditur propriam turpitudinem allegans* is applied in most legal

11 See *Primo Jose Essono Mika Miha v Equatorial Guinea*, communication 414/1990 submitted to the Human Rights Committee, A/49/40, vol II (1994), annex IX, part O (pp 96-100). The complainants also point out that the nationality of the author of a communication is not sufficient to establish that the author is subject to that state's jurisdiction (see *HvdP v the Netherlands*, communication 217/1986, A/42/40 (1987), annex IX, part C (pp 185-186), para 3.2.

12 Communication 196/1985, A/44/40 (1989), annex X, part B (pp 189-195).

13 See *Sophie Vidal Martins v Uruguay*, communication 57/1979, A/37/40 (1982), annex XIII (pp 157-160).

systems and prevents anyone asserting a right acquired by fraud. Moreover, under article 27 of the Vienna Convention on the Law of Treaties, 'a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'. The complainants point out that the Vienna Convention thus reaffirms the principle that, regardless of the arrangements under internal law for the implementation of a treaty at the national level, such arrangements cannot detract from the state's obligation at an international level to ensure the implementation of and assume international responsibility for the treaty.

The Committee's decision on admissibility

6.1. At its twenty-seventh session, the Committee considered the admissibility of the complaint. It ascertained that the matter had not been and was not being examined under another procedure of international investigation or settlement, and considered that the communication did not constitute an abuse of the right to submit such communications and was not incompatible with the provisions of the Convention.

6.2. The Committee took note of the state party's argument that the communication should be found inadmissible since the complainants are not subject to Senegal's jurisdiction within the meaning of article 22 of the Convention.

6.3. To establish whether a complainant is effectively subject to the jurisdiction of the state party against which a communication has been submitted within the meaning of article 22, the Committee must take into account various factors that are not confined to the author's nationality. The Committee observes that the alleged violations of the Convention concern the refusal of the Senegalese authorities to prosecute Hissène Habré despite their obligation to establish universal jurisdiction in accordance with article 5(2) and article 7 of the Convention. The Committee also observes that the state party does not dispute that the authors were the plaintiffs in the proceedings brought against Hissène Habré in Senegal. Moreover, the Committee notes, the complainants in this case accepted Senegalese jurisdiction in order to pursue the proceedings against Hissène Habré which they instituted. On the basis of these elements, the Committee is of the opinion that the authors are indeed subject to the jurisdiction of Senegal in the dispute to which this communication refers.

6.4. The Committee also considers that the principle of universal jurisdiction enunciated in article 5(2) and article 7 of the Convention implies that the jurisdiction of states parties must extend to *potential* complainants in circumstances similar to the complainants'.

6.5. Accordingly, the Committee against Torture declared the communication admissible on 13 November 2001.

The state party's observations on the merits

7.1. The state party transmitted its observations on the merits by *note verbale* dated 31 March 2002.

7.2. The state party points out that, in accordance with the rules of criminal procedure, judicial proceedings in Senegal opened on 27 January 2000 with an application from the public prosecutor's office in Dakar for criminal proceedings to be brought against Hissène Habré as an accessory to torture and acts of barbarism and against a person or persons unknown for torture, acts of barbarism and crimes against humanity. Hissène Habré was charged on both counts on 3 February 2000 and placed under house arrest. On 18 February 2000, Hissène Habré submitted an application for the proceedings to be dismissed on the grounds that the Senegalese courts were not competent, that the charges had no basis in law, and that the alleged offences were time-barred.

7.3. On 4 July 2000, the Indictment Division of the Court of Appeal dismissed the proceedings. On 20 March 2001, the Court of Cassation rejected the appeal lodged by the complainants (plaintiffs). That ruling, handed down by the highest court in Senegal, thus brought the proceedings to an end.

7.4. Regarding the allegations that the executive put pressure on the judiciary, in particular by transferring and/or removing the judges trying the case, namely the chief examining magistrate and the President of the Indictment Division, the state party reminds the Committee that the President of the Indictment Division is *primus inter pares* in a three-person court and is thus in no position to impose his or her views. The other two members of the Indictment Division were not affected by the reassignment of judges, which in any case was an across-the-board measure.

7.5. It is also important to bear in mind that any country is free to organise its institutions as it sees fit in order to ensure their proper functioning.

7.6. The independence of the judiciary is guaranteed by the Constitution and the law. One such guarantee is oversight of the profession and rules of conduct of the judiciary by the Higher Council of the Judiciary, whose members are judges, some of them elected and others appointed. Appeals may be lodged when the appointing authority is accused of having violated the principle of the independence of the judiciary.

7.7. A basic element of judicial independence is that judges may appeal against decisions affecting them, and that the executive is

duty-bound not to interfere in the work of the courts. Judges' right of appeal is not merely theoretical.

7.8. The Council of State did indeed revoke a number of judges' appointments on 13 September 2001, considering that they failed to apply a basic safeguard designed to protect trial judges and thereby ensure their independence, namely the obligation to obtain people's prior consent before assigning them to new positions, even by means of promotion.

7.9. It must be acknowledged that the Senegalese judiciary is genuinely independent. Criminal proceedings necessarily culminate in decisions which, unfortunately, cannot satisfy all the parties. The judicial investigation is a component of criminal procedure and, by its very nature, is subject to all the safeguards provided for in international instruments. In the present case, the parties benefited from conditions recognizsed as ensuring fair dispensation of justice. Where no legal provision exists, proceedings cannot be pursued without violating the principle of legality; that was confirmed by the Court of Cassation in its ruling of 20 March 2001.

On the violation of article 5(2) of the Convention

7.10. In its ruling on the Hissène Habré case, the Court of Cassation considered that 'duly ratified treaties or agreements have, once they are published, an authority higher than that of laws, subject to implementation, in the case of each agreement or treaty, by the other party', and that the Convention cannot be applied as long as Senegal has not taken prior legislative measures. The Court adds that ratification of the Convention obliges each state party to take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4, or to extradite perpetrators of torture.

7.11. Proceedings were brought against Hissène Habré. However, since the Convention against Torture is not self-executing, Senegal, in order to comply with its commitments, promulgated Act 96-16 of 28 August 1996 enacting article 295 of the Criminal Code. The principle *aut dedere aut judicare* comprises the obligation to prosecute or to extradite in an efficient and fair manner. In this regard, Senegalese legislators have endorsed the argument of Professor Bassiouni, according to whom '[t]he obligation to prosecute or extradite must, in the absence of a specific convention stipulating such an obligation, and in spite of specialists' arguments to this effect, be proved to be part of customary international law'.

7.12. Pursuant to article 4 of the Convention, torture is classified in the Senegalese Criminal Code as an international crime arising from *jus cogens*. It should be noted that Senegal is aware of the need to

amend its legislation; however, under the Convention a state party is not bound to meet its obligations within a specific time frame.

On the violation of article 7 of the Convention

7.13. Since the Convention is not self-executing, in order to establish universal jurisdiction over acts of torture it is necessary to pass a law establishing the relevant procedure and substantive rules.

7.14. While the Committee has stressed the need for states parties to take appropriate legislative measures to ensure universal jurisdiction over crimes of torture, the manner in which this procedure is accomplished cannot be dictated. Senegal is engaged in a very complex process that must take account of its status as a developing state and the ability of its judicial system to apply the rule of law.

7.15. The state party points out that the difficulty of ensuring the absolute application of universal jurisdiction is commonly acknowledged. It is therefore normal to provide for different stages of its application.

7.16. However, the absence of domestic codification of universal jurisdiction has not allowed Hissène Habré complete impunity. Senegal applies the principle *aut dedere aut judicare*. Any request for judicial assistance or cooperation is considered benignly and granted insofar as the law permits, particularly when the request relates to the implementation of an international treaty obligation.

7.17. In the case of Hissène Habré, Senegal is applying article 7 of the Convention. The obligation to extradite, unless raised at another level, has never posed any difficulties. Consequently, if a request is made for application of the other option under the principle *aut dedere aut judicare*, there is no doubt that Senegal will fulfil its obligations.

On the request for financial compensation

7.18. In violation of the principle *electa una via non datur recursus ad alteram* (once a course of action is chosen, there is no recourse to another), the complainants have also instituted proceedings against Hissène Habré in the Belgian courts. The state party believes that, in the circumstances, to ask Senegal to consider financial compensation would be a complete injustice.

7.19. The Belgian Act of 16 June 1993 (as amended by the Act of 23 April 2003) relating to the suppression of serious violations of international humanitarian law introduces significant departures from Belgian criminal law in both procedure and substance. A Belgian examining magistrate has been assigned, and pretrial measures have been requested, just as they had been in Senegal. The state party

maintains that it is advisable to let these proceedings follow their course before considering compensation of any kind.

Observation of the complainants on the merits

8.1. In a letter dated 1 July 2002, the complainants submitted their observations on the merits.

On the violation of article 5(2) of the Convention

8.2. With regard to the state party's argument that there is no specific time frame for complying with its obligations under the Convention, the complainants' principal contention is that the state party was bound by the Convention from the date of its ratification.

8.3. According to article 16 of the Vienna Convention on the Law of Treaties (hereinafter 'the Vienna Convention'), 'unless the treaty otherwise provides, instruments of ratification, acceptance, approval or accession establish the consent of a state to be bound by a treaty upon: […] (b) their deposit with the depositary […]'. The *travaux préparatoires* relating to this provision confirm that the state party is immediately bound by the obligations arising from the treaty, from the moment the instrument of ratification is deposited.

8.4. According to the complainants, the state party's arguments call into question the very meaning of the act of ratification and would lead to a situation in which no state would have to answer for a failure to comply with its treaty obligations.

8.5. With regard to the specific legislative measures that a state must take in order to meet its treaty obligations, the complainants maintain that the manner in which the state in question fulfils its obligations is of little importance from the standpoint of international law. Moreover, they believe that international law is moving towards the elimination of the formalities of national law relating to ratification, on the principle that the norms of international law should be considered binding in the internal and international legal order as soon as a treaty has entered into force. The complainants add that the state party could have taken the opportunity to amend its national legislation even before it ratified the Convention.

8.6. Finally, the complainants recall that article 27 of the Vienna Convention prohibits the state party from invoking the provisions of its internal law as a justification for its failure to perform its treaty obligations. This provision has been interpreted by the Committee on Economic, Social and Cultural Rights as an obligation for states to 'modify the domestic legal order as necessary in order to give effect to their treaty obligations'.[14]

[14] General comment 9, 3 December 1998, E/C.12/1998/24, para 3.

8.7. As a subsidiary argument, the complainants maintain that, even if one considers that the state party was not bound by its obligations from the moment the treaty was ratified, it has committed a violation of article 5 by not adopting appropriate legislation to comply with the Convention within a reasonable time frame.

8.8. Article 26 of the Vienna Convention establishes the obligation of parties to perform their obligations under international treaties in good faith; the complainants point out that, since it ratified the Convention against Torture on 21 August 1986, the state party had 15 years before the submission of the present communication to implement the Convention, but did not do so.

8.9. In this regard, the Committee, in its concluding observations on the second periodic report of Senegal, had already recommended that 'the state party should, during its current legislative reform, consider introducing explicitly in national legislation the following provisions: (a) The definition of torture set forth in article 1 of the Convention and the classification of torture as a general offence, in accordance with article 4 of the Convention, which would, *inter alia*, permit the state party to exercise universal jurisdiction as provided in articles 5 *et seq* of the Convention; […]'.[15] The state party has not followed up this recommendation and has unreasonably delayed adoption of the legislation necessary for implementing the Convention.

On the violation of article 7 of the Convention

8.10. With regard to the argument that article 7 has not been violated because the state was prepared, if necessary, to extradite Hissène Habré, the complainants maintain that the obligation under article 7 to prosecute Hissène Habré is not linked to the existence of an extradition request.

8.11. The complainants appreciate the fact that Senegal was prepared to extradite Hissène Habré and in this connection point out that on 27 September 2001 President Wade had stated that 'if a country capable of holding a fair trial - we are talking about Belgium - wishes to do so, I do not see anything to prevent it'. Nevertheless, this suggestion was purely hypothetical at the time of the present observations since no extradition request had yet been made.

8.12. On the basis of a detailed examination of the *travaux préparatoires*, the complainants refute the argument that the state party appears to be propounding, namely that there would be an obligation to prosecute under article 7 only after an extradition request had been made and refused. They also condense long

[15] See A/51/44, para 114.

passages from an academic work[16] to demonstrate that the state's obligation to prosecute a perpetrator of torture under article 7 does not depend on the existence of an extradition request.

On the request for financial compensation

8.13. The complainants reject the state party's claim that they have instituted proceedings in Belgian courts. It is, in fact, other former victims of Hissène Habré who have applied to the Belgian courts. The complainants are not parties to those proceedings.

8.14. The complainants also maintain that there is no risk of double compensation because Hissène Habré can be tried only in one place.

The Committee's considerations on the merits

9.1. The Committee notes, first of all, that its consideration on the merits has been delayed at the explicit wish of the parties because of judicial proceedings pending in Belgium for the extradition of Hissène Habré.

9.2. The Committee also notes that, despite its *note verbale* of 24 November 2005 requesting the state party to update its observations on the merits before 31 January 2006, the state party has not acceded to that request.

9.3. On the merits, the Committee must determine whether the state party violated article 5(2) and article 7 of the Convention. It finds - and this has not been challenged - that Hissène Habré has been in the territory of the state party since December 1990. In January 2000, the complainants lodged with an examining magistrate in Dakar a complaint against Hissène Habré alleging torture. On 20 March 2001, upon completion of judicial proceedings, the Court of Cassation of Senegal ruled that 'no procedural text confers on Senegalese courts a universal jurisdiction to prosecute and judge, if they are found on the territory of the Republic, presumed perpetrators of or accomplices in acts [of torture] … when these acts have been committed outside Senegal by foreigners; the presence in Senegal of Hissène Habré cannot in itself justify the proceedings brought against him'. The courts of the state party have not ruled on the merits of the allegations of torture that the complainants raised in their complaint.

9.4. The Committee also notes that, on 25 November 2005, the Indictment Division of the Dakar Court of Appeal stated that it lacked jurisdiction to rule on Belgium's request for the extradition of Hissène Habré.

[16] M Henzelin, *Le principe d'universalité en droit pénal international. Droit et obligation pour les Etats de poursuivre et juger selon le principe de l'universalité*, (2000).

9.5. The Committee recalls that, in accordance with article 5(2) of the Convention, 'each state party shall […] take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him […]'. It notes that, in its observations on the merits, the state party has not contested the fact that it had not taken 'such measures as may be necessary' in keeping with article 5(2) of the Convention, and observes that the Court of Cassation itself considered that the state party had not taken such measures. It also considers that the reasonable time frame within which the state party should have complied with this obligation has been considerably exceeded.

9.6. The Committee is consequently of the opinion that the state party has not fulfilled its obligations under article 5(2) of the Convention.

9.7. The Committee recalls that, under article 7 of the Convention, 'the state party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution'. It notes that the obligation to prosecute the alleged perpetrator of acts of torture does not depend on the prior existence of a request for his extradition. The alternative available to the state party under article 7 of the Convention exists only when a request for extradition has been made and puts the state party in the position of having to choose between (a) proceeding with extradition or (b) submitting the case to its own judicial authorities for the institution of criminal proceedings, the objective of the provision being to prevent any act of torture from going unpunished.

9.8. The Committee considers that the state party cannot invoke the complexity of its judicial proceedings or other reasons stemming from domestic law to justify its failure to comply with these obligations under the Convention. It is of the opinion that the state party was obliged to prosecute Hissène Habré for alleged acts of torture unless it could show that there was not sufficient evidence to prosecute, at least at the time when the complainants submitted their complaint in January 2000. Yet by its decision of 20 March 2001, which is not subject to appeal, the Court of Cassation put an end to any possibility of prosecuting Hissène Habré in Senegal.

9.9. Consequently and notwithstanding the time that has elapsed since the initial submission of the communication, the Committee is of the opinion that the state party has not fulfilled its obligations under article 7 of the Convention.

9.10. Moreover, the Committee finds that, since 19 September 2005, the state party has been in another situation covered under article 7,

because on that date Belgium made a formal extradition request. At that time, the state party had the choice of proceeding with extradition if it decided not to submit the case to its own judicial authorities for the purpose of prosecuting Hissène Habré.

9.11. The Committee considers that, by refusing to comply with the extradition request, the state party has again failed to perform its obligations under article 7 of the Convention.

9.12. The Committee against Torture, acting under article 22(7) of the Convention, concludes that the state party has violated article 5(2) and article 7 of the Convention.

10. In accordance with article 5(2) of the Convention, the state party is obliged to adopt the necessary measures, including legislative measures, to establish its jurisdiction over the acts referred to in the present communication. Moreover, under article 7 of the Convention, the state party is obliged to submit the present case to its competent authorities for the purpose of prosecution or, failing that, since Belgium has made an extradition request, to comply with that request, or, should the case arise, with any other extradition request made by another state, in accordance with the Convention. This decision in no way influences the possibility of the complainants' obtaining compensation through the domestic courts for the state party's failure to comply with its obligations under the Convention.

11. Bearing in mind that, in making the declaration under article 22 of the Convention, the state party recognised the competence of the Committee to decide whether or not there has been a violation of the Convention, the Committee wishes to receive information from the state party within 90 days on the measures it has taken to give effect to its recommendations.

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

CAMEROON

Open Society Justice Initiative (on behalf of Njawe Noumeni) v Cameroon

(2006) AHRLR 75 (ACHPR 2006)

Communication 290/2004, *Open Society Justice Initiative (on behalf of Pius Njawe Noumeni) v Cameroon*

Decided at the 39th ordinary session, May 2006, 20th Activity Report
Rapporteurs: Dankwa, Melo

Amicable settlement of complaint with regard to refusal to grant licence to operate a radio station

Provisional measures (12-14)
Amicable settlement (22, 23)

1. The complaint is lodged by the NGO, Open Society Justice Initiative on behalf of a Cameroonian citizen, Pius Njawe Noumeni, against the government of Cameroon (a state party to the African Charter).

2. The communication was submitted in accordance with article 55 of the African Charter on Human and Peoples' Rights and the complainant alleges that in November 1999 the *Messager* Group based in Douala, Cameroon and headed by Mr Pius Njawe began operating a radio station in Douala whilst an illegal decision banning the operation of private radio stations was in place.

3. The complainant maintains that following the formal liberalisation of air waves in April 2000, the *Messager* Group submitted an application with the Ministry of Communications of Cameroon for a license to operate a radio station. After the six months period required under the law, the Ministry of Communication did not respond favourably to the request, arguing that the application was still being considered.

4. The complainant, moreover, maintains that the Ministry of Communications of Cameroon was in the habit of processing applications for operational licenses in an arbitrary, illegal and discriminatory manner and had on many occasions refused to grant statutory license to operators of radio stations, and on the contrary

resorting to the practice of informally issuing temporary authorisation to operate on some frequencies, which did not provide any legal cover to the operators of radio stations but only placed them in a situation of uncertainty since the informal authorisation could at any given time be withdrawn. In addition, the complainant maintains that by refusing to process applications for operating licenses or providing reasons for refusal to grant licenses, the Ministry of Communications tends to ban, in an arbitrary, discriminatory and politically motivated manner, existing operators from continuing to operate.

5. Taking into consideration that the Ministry of Communications did not respond within the legally prescribed period to the *Messager* Group's request and in view of the practice of arbitrarily refusing to grant operating licenses for stations, the complainant further maintains that the *Messager* announced in mid May 2003 that it will begin broadcasting programs on Radio Freedom FM on 24 May 2003. But on 23 May 2003, even before Freedom FM began broadcasting, the Ministry of Communications took the decision to ban the broadcasting of the said programs and the police and the army sealed the premises of the radio station.

6. In September 2003, the *Messager* took the matter to court requesting for a break of the seals. After five months of consecutive adjournments, the court of first instance of Douala decided that the matter came under the competence of the administrative court and took three months to deliver a written judgment which should have enabled the *Messager* to appeal. Whilst the Court of Appeal should be considering this appeal, equipment worth $110,000 continue to daily depreciate because of inadequate storage conditions.

7. As the procedure in the civil court followed its course, the Ministry of Communications took Mr Pius Njawe and the *Messager* Group to court for having 'set up and operated' without a license a radio broadcasting company.

The complaint

8. The complainant maintains that the facts stated above constitute a violation by Cameroon of articles 1, 2, 9 and 14 of the African Charter on Human and Peoples' Rights and consequently request the African Commission to consider as such and request Cameroon to pay adequate compensation to the victims for multiple violations of their rights and freedoms.

9. The complainant, moreover, requests the African Commission, in accordance with article 111 of its Rules of Procedure to request Cameroon to adopt provisional measures with a view to:

> (a) Immediately lifting the ban affecting the programs of Freedom FM and authorize it to operate whilst awaiting the outcome of the African Commission's decision on the complaint;

(b) Break the seal on the premises of Freedom FM so that the equipments could undergo proper maintenance whilst awaiting the African Commission's decision on the complaint;

(c) Undertake a quick review of the legislative framework and administrative practices on issuing licenses for operating radio stations with a view to harmonizing them with the provisions of article 9 of the African Charter and the 2002 Declaration of Principles.

Procedure

10. The complaint was received at the Secretariat of the African Commission on 28 June 2004.

11. By a letter ref ACHPR/COMM 290/2004/RK addressed to the complainant, the Secretariat of the African Commission acknowledged receipt of this communication on 5 July 2004 and indicated that the seizure of the complaint will be considered by the African Commission at its 36th ordinary session (23 November to 7 December 2004, Dakar, Senegal).

12. By a letter ref ACHPR/GOV/COMM/3/RK of 15 July 2004, the Chairperson of the African Commission sent an urgent request for the adoption of provisional measures in accordance with the provisions of article 111 of the African Commission's Rules of Procedure, to HE Mr Paul Biya, President of the Republic of Cameroon requesting that provisional measures be taken to ensure that no irreparable damage is done to the equipment of Radio Freedom FM.

13. By a letter of 16 November 2004, the complainant informed the Chairperson of the African Commission, Commissioner Sawadogo, that the request for provisional measures had not been complied with and that further the complainant had received death threats over the matter.

14. During the 36th ordinary session held in Dakar, Senegal from 23 November to 7 December 2004, the African Commission considered the communication and decided to be seized of it. The complainants made oral submissions on the failure of the state to comply with the request for provisional measure. The state delegates indicated that they had not been made aware of the request and the head of delegation, Minister Joseph Dion Ngute, offered his good offices with a view to facilitating an amicable solution of the matter.

15. On 22 December 2004, the Secretariat informed the parties that the African Commission had been seized of the communication and requested them to submit arguments on admissibility in three months from the date of notification.

16. On 22 February 2005, the Secretariat reminded the state through a *note verbale* to submit its arguments on admissibility within one month from the date of the reminder.

17. On 22 March 2005, the complainant submitted further arguments on admissibility, which were transmitted to the respon-

dent state on 29 March 2005 through the embassy of the respondent state.

18. At its 37th ordinary session, which was held from 27 April to 11 May 2005 in Banjul, The Gambia, the African Commission considered the case and heard oral submissions from the parties. The African Commission subsequently deferred its decision on admissibility of the case pending receipt of arguments of the respondent state on the same.

19. On 8 December 2005, the respondent state sent to the Secretariat a letter informing it that amicable settlement was underway in the matter.

20. On 4 October 2005, the Secretariat informed the complainant of the above letter and forwarded the attached documentation and requested them to send in their comments on the same.

21. At its 38th ordinary session held from 21 November to 5 December 2005 in Banjul, The Gambia, the African Commission deferred its decision on the matter awaiting comments of the complainant on the outcome of the said amicable settlement

22. On 28 April 2006, the Secretariat received a note from the complainant informing it that:

> (1) The government of Cameroon dropped the criminal charges against the Freedom FM director and released the equipment of the radio;
>
> (2) The government committed itself to grant Radio Freedom FM a provisional authorization to broadcast, and process its application for a full license in a fair and equitable manner;
>
> (3) Freedom FM, for its part, agreed to discontinue the communication before the Commission, and settle the case;
>
> (4) The ongoing negotiations between the parties on the compensation issue have now produced a mutually acceptable compromise, with the government of Cameroon agreeing to re-open the discussions with Radio Freedom FM in relation to the compensation of the damages suffered by the radio, with a view to reaching a fair, comprehensive and final settlement of the case; and
>
> (5) The government has reiterated its commitment to grant Freedom FM a provisional authorization as soon as consideration of the current communication is discontinued – as well as process the Radio's application for a broadcasting license in a fair, transparent, and expeditious manner.

23. In consideration of the above, the Open Society Justice Initiative, acting on behalf of Mr Pius Njawe and *Groupe le Messager*, requested the African Commission to discontinue the consideration of communication 290/04 against the Republic of Cameroon and that the amicable settlement be registered in its lieu.

24. At its 39th ordinary session held from 11 to 25 May 2006 in Banjul, The Gambia, the African Commission considered the communication and decided to close the file.

Decision

25. The African Commission takes note of the above request and decides to close the file.

26. The African Commission also requests the parties to forward to the Secretariat the written copy of the said amicable settlement for inclusion in the file.

CONGO

Bissangou v Republic of Congo

(2006) AHRLR 80 (ACHPR 2006)

Communication 253/2002, *Antoine Bissangou v Republic of Congo*

Decided at the 40th ordinary session, November 2006, 21st Activity Report
Rapporteur: Sawadogo

Refusal of the state to pay debt in accordance with the judgment of a domestic court

Admissibility (exhaustion of local remedies, 57, 59, 61)
Equality, non-discrimination (rights guaranteed in Charter, 69)
Equal protection of the law (discrimination in execution of judgments against the state, 70-72)
Fair trial (right to be heard, non-execution of judgment against the state, 75)
Property (non-execution of judgment against the state, 76)

1. On 14 March 1995 the complainant brought a case against the Republic of Congo and the Municipal Office of Brazzaville before the Court of First Instance of Brazzaville, sitting on civil matters, with a view to obtaining the recognition of the responsibility of the Congolese republic, as well as reparation for the damage caused to his personal property and real estate following barbaric acts carried out by soldiers, armed bands and uncontrolled elements of the Congolese National Police Force, during the socio-political upheavals that took place in the country in 1993.

2. On 18 February 1997 the civil division of the Court of First Instance passed a ruling ordering the Congolese republic and the Municipal Office of Brazzaville to pay the following amounts:

Principal amount for all the damage caused:	180,000,000 FCFA
Damages:	15,000,000 FCFA
Amount representing legal costs:	7,000 FCFA
Total amount:	195,037,000 FCFA

That is the equivalent of 297,333.98 Euros, the whole being immediately enforceable.

3. On 19 March 1997, the ruling became legally binding and a certificate of no-appeal was issued to the complainant (see file).

4. In a letter dated 20 May 1999, the Minister of Justice asked the Minister of Economy, Finance and Budget of Congo to enforce the ruling. However, in a letter dated 30 December 1999, the Minister of Economy, Finance and Budget refused to execute the ruling, for no apparent reason.

Complaint

5. The complainant alleges the violation of articles 2, 3 and 21(2) of the African Charter. The complainant is asking the African Commission to recommend to the Republic of Congo Brazzaville to comply with the ruling which has been passed on behalf of the Congolese people, and to comply at the same time with the provisions of the Charter to which it is signatory.

Procedure

6. The complaint was received by the Secretariat of the African Commission on 27 June 2002.

7. On 1 August 2002, the Secretariat wrote to the complainant informing him that the complaint was registered and that it would be considered at the Commission's 32nd ordinary session, which was scheduled to take place from 17 to 31 October 2002 in Banjul, The Gambia.

8. 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.

9. On 30 October 2002 the Secretariat communicated the above decision to the parties and requested them to submit in writing, their observations on the matter of exhaustion of local remedies. The Secretariat also sent a copy of the communication to the respondent state.

10. The complainant sent his comments on admissibility to the Secretariat in a letter dated 17 December 2002.

11. On 24 March 2003 a reminder was sent by *note verbale* to the respondent state, requesting its comments on admissibility to be sent to the Secretariat of the Commission.

12. On 25 March 2003, the Secretariat sent the complainant's observations to the respondent state and reminded the latter to send its observations concerning the exhaustion of local remedies before 15 April 2003.

13. During the 33rd ordinary session held from 15 to 29 May 2003 in Niamey, Niger, the African Commission considered the communication and deferred its decision on admissibility to the 34th ordinary session. The parties were requested to send further information on the procedure to be followed for the recovery of the debt.

14. On 23 June 2003, the Secretariat informed the parties of this decision and requested the respondent state to submit its observations on the admissibility of the communication within three months from the date of the receipt of this note, and to include the details of Congo's legislation on the matter of debt recovery.

15. On 22 September 2003, the Secretariat again contacted the parties involved in the communication and requested them to submit their written observations on admissibility.

16. On 6 October 2003, the Secretariat received written submissions from the complainant.

17. The Secretariat acknowledged receipt of the complainant's submissions on 15 October 2003 and on the same date forwarded the said submissions to the respondent state reminding it to forward its written submission with regard to admissibility and to provide more information on all the local remedies available in the context of debt recovery in Congolese legislation.

18. On the 4 November 2003, the Secretariat of the African Commission received written observations from the respondent state.

19. During the 34th ordinary session of the African Commission held from 6 to 20 November 2003 in Banjul, The Gambia, the respondent state made an oral presentation of its grounds of defence on the admissibility of the Communication.

20. After consideration of the communication during its 34th ordinary session, the African Commission decided to defer its decision to the 35th ordinary session in order to allow the plaintiff time to submit his written observations on the admissibility of the communication, taking into account the observations of the respondent state.

21. On 7 December 2003, the Secretariat notified the parties of the decision of the African Commission and sent to the complainant a copy of the observations submitted by the respondent state.

22. On 9 March 2004, the Secretariat of the African Commission informed the parties that consideration of the admissibility of the communication was scheduled for the 35th ordinary session. The complainant was requested to send his reaction to the written observations submitted by the respondent state.

23. On 30 March and 5 April 2004, the Secretariat of the African Commission received the observations from the complainant on the matter of admissibility. These observations were forwarded by DHL to the respondent state on the 30 April 2004.

24. During the 35th ordinary session held in Banjul from 21 May to 4 June 2004, the African Commission heard oral submissions from the

respondent state. After having considered the communication, the African Commission declared it admissible.

25. On 18 June 2004, the Secretariat of the African Commission informed the parties of the Commission's decision and requested them to submit more information on the merits of the communication.

26. A reminder was sent to both parties on 6 September 2004.

27. On the 28 October 2004, the Secretariat of the Commission received the written observations from the complainant on the merits of the communication and acknowledged receipt thereof.

28. During the 36th ordinary session held from 23 November to 7 December 2004 in Dakar, Senegal, the African Commission considered the communication and deferred its consideration on the merits to the 37th ordinary session.

29. By correspondence of 20 December 2004, the Secretariat of the Commission informed parties to the communication of the above decision.

30. On 10 March 2005, the Secretariat of the Commission conveyed the comments of the complainant to the respondent state reminding it to send its written arguments as early as possible.

31. During the 37th ordinary session held from 27 April to 11 May 2005 in Banjul, the Gambia, the African Commission considered the communication and decided to defer its consideration on the merits to the 38th ordinary session.

32. By correspondence dated 28 June 2005, the Secretariat of the African Commission informed the parties of the decision of the African Commission and requested the respondent state to submit its arguments on the merits of the case within two months.

33. The Secretariat of the Commission sent a reminder to the respondent state on 10 October 2005.

34. At its 38th ordinary session held from 21 November to 5 December 2005, the African Commission decided to defer its decision on the merits to the 39th ordinary session.

35. On 15 December 2005, the Secretariat of the Commission conveyed this decision on deferment to the parties.

36. At its 39th ordinary session held in Banjul, The Gambia from 11 to 25 May 2006, the African Commission considered the communication and decided to defer its decision on the merits to its 40th ordinary session.

37. By *note verbale* of 14 July 2006 and by letter of the same date, both parties were notified of the Commission's decision.

38. At its 40th ordinary session held from 15 to 29 November 2006 in Banjul, The Gambia, the African Commission considered the communication and took a decision on the merits.

Admissibility

39. The admissibility of communications submitted in conformity with article 55 of the Charter is governed by the conditions spelt out by article 56 of the same Charter. According to paragraph 56(5), communications can only be considered if they are submitted 'after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged'.

40. According to article 56(2), communications brought before the African Commission shall be 'compatible with the Charter of the Organization of African Unity or with the present Charter', and in terms of article 56(5), communications will not be examined unless they 'are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged.'

41. The complainant has submitted evidence that he brought an action before the Court of First Instance which delivered a ruling on 18 February 1997, condemning the respondent state to pay to him the amount of 195,037,000 FCFA, namely the equivalent of 297,333.98 Euros. This judgment was not contested by the respondent state. A certificate of no appeal had been delivered to the complainant by the Registrar of the Court.

42. The complainant added the certificate of no appeal to the case file, which means that the judgment is final and should be executed. He produced supporting documents certifying that the file had been forwarded by the Ministry of Justice to the Ministry of the Economy, Finances and Budget for execution. The complainant alleges that despite several notices sent requesting it to honour its debt, the respondent state has refused to comply.

43. The complainant alleges that the ruling, in relation to which execution is being called for is final and binding. He contends that the certificate of no appeal added to the case file legally establishes that there are no other remedies to be brought against the said ruling.

44. The complainant alleges that in a country where the rule of law exists, the fact that an administrative officer refuses to execute a decision of the court against which there are no more legal remedies, is a constitutive case of criminal offence.

45. The respondent state, in making an oral presentation of its grounds of defence before the African Commission during its 34th ordinary session, did not contest the facts of the complaint. It, however, raised a plea of inadmissibility regarding the complainant's request on the grounds that the rule of exhaustion of local remedies had not been observed.

46. Regarding the incompatibility with the Charter, the Congolese state alleges that the object of the communication does not fall under the jurisdiction devolving on the Commission in terms of article 45 of the Charter, that is to promote and protect human and peoples' rights in Africa. According to the state:

> The African Charter on Human and Peoples' Rights has established a non-jurisdictional mechanism to guarantee rights and freedoms, the decisions of the latter having just a moral significance and are not binding. Therefore, the Commission could not turn into a jurisdiction to consider requests for the payment of money against states.

47. The Commission observes that the communication is based on allegations of violation of provisions of the Charter which it has the mandate to promote and protect. As the state itself acknowledged in its submission, the African Commission 'controls the conformity of state parties' actions to African Charter on Human and Peoples' Rights'. The Commission finds that in the case under consideration, in seizing the Commission, the complainant does not have any other intention than to request the latter to play its role by controlling the conformity to articles 2, 3 and 21(2) of the Charter of an action (the refusal to enforce a court decision in favour of the complainant) of a state party (the Republic of Congo). The Commission concludes that the object of the communication falls under its mandate and, as a result, finds that the communication is compatible with the Charter.

48. Regarding the exhaustion of local remedies, the respondent state contends that the complainant had a remedy against the refusal of the Minister of the Economy, Finances and Budget to execute this ruling in accordance with the provisions of articles 405 to 409 of the Code of Civil, Commercial, Administrative and Financial Procedure. These articles stipulate that:

> Any citizen who is qualified and so wishes has the right to bring an appeal for annulment against any regulatory or individual decision by an administrative authority. Such an appeal must be brought within two months from the date of the publication or notification of the grievance on the one hand, and exceptionally within four months in case of silence from the administration which is interpreted as an implicit dismissal, on the other ...

49. Article 410 of the same Code adds:

> Nonetheless, before applying for the annulment of an administrative decision, the interested party may present, within two months, an appeal to a higher or the same administrative authority to cancel the said decision. In such a case, the application for annulment will only be effective either from the date of the notification of the dismissal of the administrative appeal, or on the expiry of the four months stipulated in article 408 mentioned above.

50. The respondent state alleges that in the case under consideration, starting from the date of the notification of the unjustified dismissal of his case by the Minister for Economy, Finance and Budget, the complainant should have, within two months, brought an appeal either to the same administrative authority, or to the head of government as a higher administrative authority.

51. The respondent state contends that such an early administrative appeal would have allowed the complainant to have the negative decision annulled. Otherwise, the complainant should have secured the real grounds for the dismissal of his claims to allow him make a submission for an annulment at the expiry of the above mentioned deadlines.

52. The respondent state alleges that since the refusal of the Minister was an administrative decision, the Administrative Chamber of the Supreme Court was competent to deal with its annulment, in accordance with the provisions of article 3 of Law 17-99 of 15 April 1999 modifying and supplementing certain provisions of Law 025-92 of 20 August 1992 and Law 30-94 of 18 October 1994 governing the organisation and functioning of the Supreme Court. This article stipulates that 'the Supreme Court shall rule on appeals relating to abuses of power lodged against decisions from various authorities'.

53. Finally the respondent state stresses that the complainant, an attorney by profession, is hardly ignorant of the procedural subtleties of Congolese law and that under the circumstances, he should have submitted his grievances beforehand to the Congolese courts which have primacy over subsidiary international appeals.

54. The respondent state concluded that the complainant did not resort to any internal remedy after the administrative decision rejecting his case and, in consequence, did not comply with one of the essential rules governing the admissibility of communications before the African Commission, namely that of exhaustion of local remedies.

55. All the conditions laid down by article 56 have been fulfilled by this communication. However, the rule stipulating the exhaustion of local remedies as a requirement for the submission of a communication before the African Commission assumes that the respondent state should first of all have the opportunity to compensate, by its own means and within the context of its system of domestic law, for any prejudice that may have been caused to an individual.

56. The African Commission, in communications 48/90, 50/91, [52/91] and 89/93 *Amnesty International and Others v Sudan* [(2000) AHRLR 297 (ACHPR 1999)], ruled that all local remedies, if they exist, if they are of a legal nature, are effective and are not subordinate to the discretionary power of the public authorities, should be exhausted.

57. The Commission is of the view that the complainant has exhausted all local remedies in endeavouring to assert his right to compensation for the prejudice suffered and rejects the respondent state's claims that he should have appealed against the decision of the Minister before seizing the Commission.

58. The Commission notes that no strict legal provision grants the Minister responsible for the budget any authority to refuse to pay damages which are legally granted. The execution of the judgments made against the respondent state therefore appears to be subject to the regular procedure provided for in the Administrative Procedure Code (article 293 and the following ones).

59. Under these circumstances, the question which arises is whether the complainant should have initiated the procedures of forced execution against the respondent state as provided for by the Administrative Procedure Code. The Commission considers that it is unreasonable to require from a citizen who has won the case of a payable debt against the state at the end of legal proceedings to institute procedures of seizure against it (assuming that it is possible to resort to this means of imposition against the public authorities). As it happened, the complainant, having duly notified his judgment to the competent authorities in accordance with the relevant articles of the Administrative Procedure Code, he had a right to expect the immediate execution of his judgment.[1]

60. The Commission is of the view that the Minister had no right to hinder or delay the execution of a final judgment without legitimate reason. The Commission observes that the decision of the Minister was unjustified and that the respondent state did not, at any time try to clarify to the Commission the reasons for the refusal by its officer. In this context, the Commission supports the position of the European Court according to which even the inability of the respondent state to pay could not justify the refusal by the Minister to execute a final judgment.[2]

61. Furthermore, the Commission considers that the appeal provided for in article 402 of the Administrative Procedure Code does not constitute a legal remedy which can be used by the complainant. The Commission reiterates that local remedies, if any, should be legal, effective and not subject to the discretionary powers of the public authorities. Concerning the appeal for annulment provided for in article 410 of the Administrative Procedure Code, the Commission is not convinced that it would have allowed the complainant to gain satisfaction. Even a ruling by the Supreme Court setting aside the unjustified decision of the Minister would have given the complainant the power to demand the execution of his judgment without, however, providing him with any means to enforce this ruling. Under these circumstances, the Commission considers this remedy as ineffective.

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1 See the decision of the European Court of Human Rights in the case *Metaxas v Greece*, 8415/02, 27 May 2004, para 19.

2 *Burdov v Russia*, 59498/03, 7 May 2002, para 34 and *Ruianu v Romania*, 34647/97, 17 June 2003.

62. In conclusion, even assuming that the above-mentioned appeals had enabled the complainant to recover his debt, the Commission observes that the complainant had not been informed of the reasons underlying the decision of the Minister, a decision about which, moreover, he does not appear to have been notified.

63. For these reasons and considering the fact that the complainant had duly exhausted all local remedies, the African Commission declares the communication admissible.

Merits

64. The complainant alleges the violation of article 2 of the African Charter which stipulates that: 'Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter …' and the violation of article 3 of the African Charter which stipulates that: '1. Every individual shall be equal before the law; 2. Every individual shall be entitled to equal protection of the law'.

65. The complainant contends that the respondent state does not treat its citizens in the same manner and does not guarantee the total equality of its citizens before the law by leaving it to the discretion of the Minister of the Economy, Finances and the Budget to choose which judgments to honour. In support of his allegations, he alludes to the letter of the Permanent Secretary of the Minister dated 30 December 1999 which rejects, without justification, the request for execution of his judgment and those of two other people.

66. It is important to point out here that a judgment rendered in the presence of both parties had jointly and severally condemned the Republic of Congo and the Mayor's Office of Brazzaville to pay the complainant the amounts of 180,000,000 FCFA representing principal and 15,000,000 FCFA representing damages and interest, in compensation for the prejudice caused to his personal assets and property by the soldiers and officers of the national police force during the socio-political upheavals of 1993. Neither the Republic of Congo, nor the Brazzaville Mayor's Office lodged an appeal against the judgment, so that the latter became final on the 19 March 1997. On the 30 December 1999, with no apparent reason, the Permanent Secretary of the Minister of the Economy, Finances and Budget informed the Minister of Justice about his refusal to execute the judgment of the complainant.

67. The respondent state does not oppose the facts alleged in this communication but refutes the allegations of discrimination. It retorts that the three individuals affected by the Minister's refusal do not come from the same ethnic group or region nor do they share the same religion or political opinion. One of the individuals concerned is even said to be a former minister of the government who was actually

holding office at the time of the rejection. Under the circumstances, the Congolese state contends that the communication constitutes an abuse of rights in terms of rule 144(c) of the African Commission's Rules of Procedure.

68. The two provisions cited by the complainant repose, on the one hand, on the principle of non-discrimination and on the other, on that of equality. These principles mean that citizens should be treated in a fair and equitable manner before the law and have the right to enjoy, with no distinction whatsoever, the rights guaranteed by the Charter. The right to equality is all the more important since it determines the possibility for the individual to enjoy many other rights.

69. Like article 14 of the European Convention, article 2 does not stipulate a general banning of discrimination; it only prohibits discrimination where it affects the enjoyment of a right or freedom guaranteed by the Charter. The Commission considers that the complainant has not adequately supported his claims of discrimination to show that this article has been violated; besides, his not having proven how the enjoyment of one of the rights guaranteed by the Charter had been hindered in a discriminatory manner, his complaint is not based on any of the grounds of discrimination listed out in article 2 or on grounds similar to the latter.

70. Nonetheless, the Commission notes that article 3 of the African Charter contains a general guarantee of equality which supplements the ban on discrimination provided for in article 2. In this regard, the African Charter differs from the European Convention and draws inspiration from the Covenant on Civil and Political Rights. Equality before the law, protected by article 3(1), relates to the status of individuals before the law. Equal protection by the law guaranteed in paragraph 2 relates to the implementation of the law and is applicable where the rights of the complainant are implemented unequally.

71. The Commission further notes that for article 3 to be applicable, the inequality alleged by the complainant should follow from the 'law'. In this context, the legislative or regulatory Act constitutes the most unambiguous form of law. It is obvious, however, that member states could easily circumvent the Charter if the term 'law' were to be restricted to these formal methods of legislating. The Commission is of the opinion that the member states would violate article 3 if they were to exercise a power or judgment conferred by a law in a discriminatory manner. As it happens, the refusal by the Minister of the Economy, Finances and the Budget is not based on any specific legislative authority. Nevertheless, the Commission feels that it was incumbent on the Minister to honour the judgment by virtue of the rule of law and of the principle of the *res judicata*.

72. In this context the Commission observes that the complainant was unjustifiably refused the implementation of a legal ruling which had the character of *res judicata*. The Minister of the Economy, Finances and the Budget rejected his request for execution as well as that of two other individuals for no apparent reason. In its claims before the African Commission, the respondent state did not put forward any argument to explain the decision of the Minister in rejecting the complainant's claim. Moreover, in its submissions dated 30 March 2004 in reaction to the complainant's arguments, the state has quoted victims of the same violent events who have been compensated. The Minister thereby transformed the right of the complainant to an effective remedy before the Courts into an illusion and denied him the right to fair legal compensation. Under these circumstances, the Commission is of the view that the decision of the Minister arbitrarily deprived the complainant of the protection of the law accorded to other citizens in accordance with the provisions of article 3 of the Charter.

73. Furthermore, although the complainant does not specifically mention this article of the Charter, the examination of the facts shows a violation of article 7 of the Charter concerning the right to fair trial. The effective exercise of this right by individuals requires that: 'All state institutions against which an appeal has been lodged or a legal ruling has been pronounced conform fully with this ruling or this appeal'.[3]

74. The Commission notes that in similar instances, the European Court of Human Rights declared that the right to access to a court guaranteed by article 6(1) of the European Human Rights Convention would be illusory if the domestic laws of a state allowed a final and binding legal ruling to remain ineffective to the detriment of one party. The Court therefore ruled that the execution of a judgment, no matter from what jurisdiction, should be considered as being an integral part of the 'proceedings' in accordance with article 6. The Court further recognised that the effective protection of the person to be tried and the re-establishment of legality constituted an obligation for the state to comply with a judgment or ruling pronounced by the highest court in the land. In consequence, by virtue of this article, the execution of a legal ruling can neither be unduly prevented, nullified nor delayed.[4]

75. The Commission is also of the view that the right to be heard guaranteed by article 7 of the African Charter includes the right to the execution of a judgment. It would therefore be inconceivable for this article to grant the right for an individual to bring an appeal

3 See the Guidelines and Principles on the Right to a Fair Trial and Legal Assistance in Africa.

4 See, among others, the rulings on *Hornsby v Greece* of 19 March 1997, 1997-II, 510-511, para 40, *Burdov v Russia*, cited above.

before all the national courts in relation to any act violating the fundamental rights without guaranteeing the execution of judicial rulings. To interpret article 14 any other way would lead to situations which are incompatible with the rule of law. As a result, the execution of a final judgment passed by a tribunal or legal court should be considered as an integral part of 'the right to be heard' which is protected by article 7.

76. Furthermore, the Commission considers that the refusal by the Minister to honour the judgment passed in favour of the Complainant also constitutes a violation of article 14 of the Charter. Although the complainant only alluded to this article at the moment of his argument, the Commission considers that his initial claims sufficiently supported a claim of violation of the right to property. Drawing inspiration from the jurisprudence of the European Court under article 1 of Protocol 1 of the European Convention,[5] the Commission considers that a monetary compensation granted by judgment having acquired the authority of *res judicata* should be considered as an asset. Therefore, the unjustified refusal of the respondent state to honour the final judgment passed in favour of the complainant hindered the enjoyment of his assets.

77. The African Commission appreciates the fact that in spite of the situation which was then prevailing in the Republic of Congo during the period under review, the Court had been able to act rapidly and firmly in pronouncing the judgments in a bid to restore the rule of law.

78. The African Commission nonetheless remains conscious of the fact that without a system of effective execution, other forms of private justice can spring up and have negative consequences on the confidence and credibility of the public in the justice system.

79. Finally, the Commission wishes to make some comments with regard to the claims of the complainant based on article 21(2) of the Charter. This article stipulates that '[i]n case of spoliation the dispossessed people shall have the right to the lawful recovery of their property as well as to an adequate compensation'. The complainant contends that the respondent state violated this article in refusing to honour a judgment of the Brazzaville High Court upholding the total responsibility of the respondent state and that of the Brazzaville Mayor's Office in relation to the looting of his assets by the soldiers and the unruly elements of the national police force.

80. The African Charter does not provide a definition of the concept of 'people' that is found in articles 19 to 24. This concept nonetheless defines third generation rights whose recognition constitutes the main distinctive feature of the African Charter.

[5] See *Burdov*, cited above and *Stran Greek Refineries and Stratis Andreadis v Greece*, judgment of 9 December 1994, series A 301-B, 84.

Article 21 of the Charter is one of these rights; it guarantees to all peoples the right to freely dispose of their wealth and natural resources. Under the terms of this article, a people stripped of their wealth and natural resources has the right to the recovery of its property and to adequate compensation.

81. In communication 159/96 *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* [(2001) AHRLR 60 (ACHPR 2001)], the African Commission recalled in the following terms, the origin of article 21 [para 56]:

> The origin of this provision may be traced to colonialism, during which the human and material resources of Africa were largely exploited for the benefit of outside powers, creating tragedy for Africans themselves, depriving them of their birthright and alienating them from the land.

Considering its nature and its objective, this article can only be referred to in the *exclusive* interest of a people that has the legitimate right to an adequate compensation as well as to the recovery of its assets in case of spoliation.

82. In this case, the movable and immovable property of the complainant that had been destroyed during the socio-political events which shook the country in 1993 does not constitute the wealth and natural resources of a people but rather individual assets. It is important to point out that in the present communication the complainant is acting on his own behalf and [not] on behalf of a group of individuals or of a population living in a given territory. Under these circumstances, the African Commission does not find any violation of article 21(2) of the African Charter.

83. The complainant also requests the Commission to prescribe the respondent state to pay him damages and a daily penalty for delay in payment of the sum granted to him by a court ruling, which he estimates at 200.000.000 FCFA and 50.000.000 FCFA respectively.

84. The Commission, although admitting that the complainant suffered some loss due to the delay in the payment of the sum granted by Congolese courts, does not consider itself in a position to put a figure to the loss. This is the reason why, relying on its jurisprudence, especially its decision on communication 59/91,[6] the Commission recommends that the amount of the compensation be determined according to Congolese legislation.

For these reasons, the African Commission:

1. Observes that the Republic of Congo is in violation of articles 3, 7 and 14 of the African Charter;

2. Says that there was no violation of articles 2 and 21(2) of the African Charter;

[6] Communication 59/91 *Embga Mekongo v Cameroon* [(2000) AHRLR 56 (ACHPR 1995)] para 2.

3. Urges the Republic of Congo to harmonise its legislation with that of the African Charter;

4. Requests the Republic of Congo to compensate the complainant as required by paying him the amount fixed by the High Court of Brazzaville, namely the global amount of 195,037,000 FCFA equivalent to 297,333.00 Euros;

5. Further requests the Republic of Congo to pay compensation for the loss suffered by the complainant, the amount of which shall be determined in accordance with Congolese legislation.

EGYPT

Interights and Another v Egypt

(2006) AHRLR 94 (ACHPR 2006)

Communication 312/2005, *Interights & the Egyptian Initiative for Personal Rights v Egypt*

Decided at the 39th ordinary session, May 2006, 20th Activity Report
Rapporteur: El-Hassan

Complaint about arbitrary arrest withdrawn

Admissibility (withdrawal)

1. The complaint is filed by the International Centre for Human Rights (Interights),[1] and the Egyptian Initiative for Personal Rights pursuant to articles 55 and 56 of the African Charter on Human and Peoples' Rights (African Charter).

2. The authors allege that the victim under the present communication is a religious training Egyptian graduate of Al-Azhar University in Cairo, Egypt, who continuously sought to challenge the legality of his arrest after being arrested at his home on 18 May 2003 with being given no reason but due to presumably his unpublished religious researches refuting the often held opinions of the 'duty of Muslims to kill converts from Islam to other religions' and 'prohibition on Muslim women marrying non-Muslim men' which was distributed widely. Despite his several appeals and official complaints and the repeated release orders of the Emergency Court, the victim still continues to be in prison. The authors further alleged that the applicant had been made subject to assaults and harassments consequent to his arrest and his complaints to get protection and investigation proved to be futile.

3. The authors submit that the applicant's rights have been violated under articles 2, 5, 6, 7(1)(d), 8 and 9(2) of the Charter as he was discriminated against in his enjoyment of Charter rights on the basis of his religious beliefs; inhumanely detained and denied the protection and respect of the right to dignity, arbitrarily arrested and

[1] International Centre for Human Rights (Interights) is a non-government organisation which was granted observer status with the African Commission during the 18th ordinary session in October 1990.

detained and denied effective judicial remedy, and arbitrarily restricted from exercising his freedom to express his religious thoughts.

4. It is further alleged that the violations of the applicant's rights have been made possible by the respondent state's state of emergency which the African Commission has had, on a number of occasions, the opportunity to consider, [stressing] that the Charter does not permit states to derogate from their responsibilities during states of emergency, and that this is 'an expression of the principle that the restriction of human rights is not a solution to national difficulties'.

5. The authors averred that each time the Emergency Court has ordered the applicant's release the Minister for Interior, Mr Habib El-Adli, has issued a new administrative detention decree under article 3 of the Emergency Law which allows the President, or the Minster for the Interior to order, orally or in writing, the arrest and detention of those who 'pose a threat to public security'.

6. The authors also alleged that the applicant has appealed his detention several times before the State Security Emergency Court, the only and final judicial body designated for that purpose under the Emergency Law, and that the same court has passed seven orders for his release but none of them have been implemented. In addition, the authors alleged that the applicant has submitted five complaints to the State Security Prosecutor's Office and ten complaints to the National Council of Human Rights but that no response has been received.

The complaint

7. The authors of this communication contend that applicant's arbitrary arrest and detention, his subsequent treatment under detention, the failure of the government of Egypt to provide the former with adequate and effective judicial remedy, and the manner in which the 24-year long State of Emergency has been applied in practice violates articles 2, 5, 6, 7(1)(d), 8 and 9(2) of the Charter.

Procedure

8. The present communication was received by the Secretariat of the African Commission on the 22 November 2005.

9. The Secretariat of the Commission acknowledged receipt of the communication to the contact persons of Interights and the Egyptian Initiative for Personal under letter ACHPR/LPROT/COMM/ 312/2005/ RK of 29 November 2005, and informed the same that the communication would be on the Commission's agenda for consideration at seizure stage at the 38th ordinary session of the

Commission from 21 November 2005 to 5 December 2005 in Banjul, The Gambia.

10. During its 38th ordinary session, the African Commission considered the communication and decided to be seized thereof.

11. On 19 December 2005, the Secretariat informed the parties of this decision, transmitted a copy of the complaint to the respondent state and requested both parties to send in their arguments on admissibility.

12. On 16 February 2006, the complainant forwarded its arguments on admissibility of the case.

13. On 29 March 2006, the Secretariat acknowledged receipt of the arguments and forwarded them to the respondent state whose rejoinder was requested within three months.

14. By letter dated 19 May 2006, the complainant informed the African Commission that the alleged victim, Mr Methwalli Ibrahim Methwalli, was released and was requesting that the complaint be withdrawn.

15. During its 39th ordinary session that took place from 11 to 25 May 2006 in Banjul, The Gambia, the African Commission considered the complaint and heard the parties. On that occasion, the complainant reiterated his wish to withdraw the complaint.

Consequently, the African Commission decided to strike out this communication.

ETHIOPIA

Anuak Justice Council v Ethiopia

(2006) AHRLR 97 (ACHPR 2006)

Communication 299/05, *Anuak Justice Council v Ethiopia*
Decided at the 39th ordinary session, May 2006, 20th Activity Report
Rapporteurs: Dankwa, Malila, Nyanduga

Complaint about massacre of members of ethnic group declared inadmissible due to non-exhaustion of local remedies

Provisional measures (request for, 13)
Admissibility (exhaustion of local remedies, 48, 50-52, 58; massive violations, 60, 61; pending before national courts, 62)

1. The communication submitted by the Anuak Justice Council, through Obang Metho, the Director for International Advocacy, Anuak Justice Council was prepared by the International Human Rights Clinic, Washington College of Law in Washington, DC in the United States of America against the Federal Democratic Republic of Ethiopia, the respondent state, a party to the African Charter on Human and Peoples' Rights since 1998.

2. The complainant avers that the respondent through its agents, the Ethiopian Defence Forces, has been engaged in massive discrimination resulting in serious human rights abuses and violations of the people of Anuak ethnicity. They claim that the abuses by the Ethiopian Defence Forces include the massacre of over 424 civilians, the wounding of over 200 civilians and the disappearance of over 85 civilians in the Gambella region in the three-day period of 13-15 December 2003. The complainant states that the abuses have continued against the Anuak since that period, including extra-judicial killing, torture, detention, rape and property destruction throughout the Gambella region, resulting in 1000 Anuak deaths, and that over 51,000 Anuak have been displaced within the Gambella region.

3. The complainant adds that the Republic of Ethiopia has violated its legal obligations to uphold the rights and principles of all Ethiopian citizens, and has violated its obligation to uphold the rights and protections enshrined in the African Charter under articles 4, 5, 6, 12, 14 and 18.

4. The Anuak Justice Council requests the African Commission on Human and People's Rights to grant provisional measures and declare them binding on the Ethiopian government.

5. The complainant states that the Anuak are an indigenous minority group living in south-western Gambella region of Ethiopia and that despite their dominance in the region, the Ethiopian government has a long history of marginalising, excluding and discriminating against them. The complainant claims that due to Gambella's natural resources, the Ethiopian government has resettled over 60,000 highlanders who had almost completely destroyed the Anuak way of life within Gambella.

6. The complainant avers that the Anuak believe that the oil in the region should belong to them, while the Federal Government argues that under the Federal Constitution all mineral resources belong to the Ethiopian state. The complainant adds that the Ethiopian Defence Forces are stationed throughout the Gambella in order to identify and destroy disparate groups of armed Anuak known collectively as 'shifta' that have attacked highlander civilians.

7. The complainant submits that the December 2003 massacre was sparked by the killing of eight highlander refugee camp officials and propelled the Ethiopian Defence Forces into a broad-based assault on Gambella's Anuak community. The complainant states that despite the fact that nobody was immediately found responsible for the deaths of the eight people, there is no indication that the Ethiopian government had undertaken an official investigation into the ambush of the refugee camp officials, thus blaming the Anuak community for the attacks.

8. The complainant avers that the violence in the Gambella region has continued since December 2003 and remains a serious threat to Anuak citizens as well as other ethnic groups in the region. The complainant alleges that the Ethiopian Defence Forces' search for 'shifta' has become the pretext for bloody and destructive raids on numerous Anuak villages since the December 2003 massacre on the Gambella town. The complainant further alleges that unarmed Anuak within Gambella are currently being killed by Ethiopian Defence Forces without due process or the use of judicial proceedings without even making an effort to distinguish Anuak civilians from the 'shifta' they claim to be looking for.

9. The complainant further alleges that many Anuak have been detained in prison without charge, both in Gambella and Addis Ababa, which amounts to about 1000 detained to this day. The complainant also adds that a substantial group of Gambella's educated Anuak have been imprisoned or forced into exile and that many have been charged with offences relating to alleged collaboration with Anuak

insurgents and put on trial but none of the leaders are yet to be convicted.

10. The complainant further alleged that in rural areas the Ethiopian military continues to burn homes, destroy crops, burn food stores, disrupt planting cycles, and destroy agricultural equipment of the Anuak to prevent them from sustaining themselves. The complainant asserts that as recently as January 2005, the Ethiopian government threatened Anuak elders in Gambella that anyone attempting to tarnish the reputation of the Ethiopian government over the massacres would be dealt with.

11. The complainant claims that the Ethiopian government's response to the December massacre has been grossly inadequate and disingenuous. The complainant states that the government's initial position that no soldiers had taken part in the massacre had become impossible to defend and adds that the Commission of Inquiry set up by the government was biased and ineffectual and did not investigate the behaviour of the Ethiopian Defence Forces as an organisation despite numerous reports.

The complaint

12. The complainant states that crimes against humanity, such as extra-judicial killing, torture, and rape, crimes that take place against the Anuak civilians, are in violation of international law as well as a violation of articles 4, 5, 6, 12, 14 and 18 of the African Charter. The Anuak Justice Council urges the African Commission on Human and Peoples' Rights to intervene to prevent further human rights abuses of the Anuak by the Ethiopian government.

13. The complainant further makes an urgent request for provisional measures under rule 111 of the Rules of Procedures of the African Charter that the African Commission may intervene to 'avoid irreparable damage being caused to the victim of the alleged violation'.

Request for provisional measures – summary

14. The complainant requests for provisional measures by the African Commission on Human and Peoples' Rights pursuant to rule 111 of the Rules of Procedures of the Commission. The complaint relates to the alleged actions of the Defence Forces of the Federal Democratic Republic of Ethiopia. These actions, according to the complainant, reveal a pattern of serious and massive human and peoples' rights violations by the Ethiopian Defence Forces. That, bound by the African Charter on Human and Peoples' Rights, the Federal Democratic Republic of Ethiopia has and continues to violate articles 4, 5, 6, 12, 14, and 18 of the African Charter.

15. The Anuak Justice Council therefore seeks the Commission's intervention and issuance of provisional measures, requesting that the Ethiopian government stops the human rights abuses of the Anuak pending a decision of the African Commission on the concurrent communication and is also seeking an in-depth study of the treatment of the Anuak by the African Commission pursuant to article 58 of the Charter.

16. The Anuak Justice Council notes that it does not request the Commission to evaluate the merits of this case rather, in this provisional measures submission, the Anuak Justice Council merely asks that the Commission request that the Ethiopian government immediately stops the series of serious and massive violations of human and peoples' rights of the Anuak people prior to the issuance of a decision by the African Commission on the merits.

17. The Commission has jurisdiction to issue provisional measures under rule 111 of the Rules of Procedure of the African Charter of Human and Peoples' Rights. (See *Registered Trustees of the Constitutional Rights Project v the President of the Federal Republic of Nigeria and Five Others*). Similar to the Nigeria case, many Anuak have also been and continue to be sentenced to death. The Commission should therefore find the Anuak situation as even more serious and compelling than the Nigeria case and grant provisional measures.

18. The complainant notes further that while the African Commission on Human and Peoples' Rights has not decided whether grants of provisional measures should be binding on state parties, other international and regional human rights bodies have declared that provisional measures be binding on states including the European Court of Human Rights, Inter-American Commission, the International Court of Justice and the UN Human Rights Committee. Due to the severity of the situation that the Anuak find themselves subject to in the Gambella, in prisons throughout Ethiopia and as refugees in Sudan and Kenya, petitioners plead that the African Commission grant provisional measures and declare them binding on the Ethiopian government.

19. The complainant seeks the Commission's intervention and issuance of provisional measures requesting that the Ethiopian government stop human rights abuses of the Anuak, pending the decision of this Commission on the Anuak Justice Council's concurrent communication to the African Commission on Human and Peoples' Rights on the merits of this claim and further urges the Commission to find that its order of provisional measures in this case be binding upon the Ethiopian government.

Procedure

20. The communication was received at the Secretariat of the African Commission on 4 April 2005

21. By letter of 20 April 2005 the Secretariat acknowledged receipt thereof informing the complainant that the communication has been registered as communication 299/05 - Anuak Justice Council/Ethiopia and that the communication will be considered on seizure at the 37th ordinary session of the African Commission.

22. At its 37th ordinary session held in Banjul, The Gambia from 27 April to 11 May 2005, the African Commission considered the communication and decided to be seized thereof.

23. By *note verbale* of 24 May 2005 the Secretariat of the African Commission notified the state of the Commission's decision and forwarded the complaint to the state with a request for the latter to make its submission on the merits within three months of the notification. By letter of 24 May 2005, the Secretariat of the African Commission informed the complainant of the Commission's decision.

24. On 23 August 2005, the Secretariat received the respondent state's submissions on admissibility.

25. On 25 August 2005, the Secretariat transmitted the respondent state's submission on admissibility to the complainant, requesting the latter to respond thereto before 25 September.

26. On 21 [September] complainant wrote to the Secretariat informing the latter that the legal representative of the Anuak Justice Council had changed, adding that they received the Secretariat's letter of 25 August only on 9 September and would like the deadline for the submission of their arguments on admissibility to be moved to 9 October 2005. The complainant also requested for provisional measures to be taken by the Commission.

27. On 10 October 2005, the Secretariat received the complainant's response on the respondent state submissions on admissibility.

28. On 19 October 2005, the Secretariat transmitted the complainant's response to the respondent state with a request to the latter to make its comments, if any, before 31 October 2005.

29. At its 38th ordinary session, the African Commission deferred consideration on the admissibility of the communication and to enable the Secretariat to get additional information from the parties.

30. By *note verbale* of 19 January 2006 and by letter of the same date, the Secretariat of the African Commission notified the parties of the African Commission's decision.

31. At its 39th ordinary session held in Banjul, The Gambia from 11 to 25 May 2006, the African Commission considered the communication and decided to declare it inadmissible.

32. By *note verbale* of 29 May 2006 and by letter of the same date, both parties were notified of the African Commission's decision.

Complainant's submission on admissibility

33. The complainant submits that article 56(5) of the African Charter requires that complainants exhaust domestic remedies before a case is considered by the African Commission. The complainant notes further that if the potential domestic remedies are unavailable or unduly prolonged, the Commission may nevertheless consider a communication, adding that this is especially true when the country against which the complaint is lodged has committed vast and varied scope of violations and the general situation in the country is such that domestic exhaustion would be futile.

34. The complainant argue that in the *Anuak Justice Council* case pursuing domestic remedies would be futile due to the lack of an independent and impartial judiciary, a lack of an efficient remedy, the significant likelihood of an unduly prolonged domestic remedy, and most importantly, the potential for violence against the Anuak or those supporting them within the legal system.

35. Anuak Justice Council alleges that it cannot seek exhaustion of domestic remedies because of its inability to receive an independent and fair hearing, as a direct consequence of the fact that the aggressor is the government of Ethiopia. The complainant notes that in spite the protection in article 78 of the respondent state's Constitution guaranteeing the independence of the judiciary, it is perceived by individuals both at home and abroad that the executive has considerable and even undue influence on the judiciary.

36. The complainant quotes a World Bank Report entitled 'Ethiopia: Legal and Judicial Sector Assessment' (2004) which concluded that '… of the three branches of government, the judiciary has the least history and experience of independence and therefore requires significant strengthening to obtain true independence'. According to the complainant, the report notes that the interference in the judiciary is more flagrant at state level where there are reports of administrative officers interfering with court decisions, firing judges, dictating decisions to judges, reducing salaries of judges and deliberately refusing to enforce certain decisions of the courts.

37. The complainant also alleges that bringing the case before Ethiopian courts would unduly prolong the process as the Ethiopian judiciary suffer from a complex system of multiple courts that lack coordination and resources, including 'dismal conditions of service, staff shortages, lack of adequate training, debilitating infrastructure

and logistical problems'. The complainant claims court proceedings take years to yield results, and concludes that the respondent state's judicial system is so under-resourced that prosecutions would be nearly impossible, noting that to date, no action had been taken to prosecute any of the Ethiopian Defence Force or government officials for the atrocities they committed against the Anuak.

38. The complainant also alleges that the Anuak fear for their safety in bringing the case in Ethiopia, adding that there are no Anuak trained as lawyers who could bring the case before Ethiopian courts. The complainant notes that the overwhelming sentiment in the Gambella region and of the Anuak who have fled the country is that non-Anuak lawyers within Ethiopia would be unwilling to take the case due to the potential persecution they would face, as well as the insurmountable odds of achieving a just remedy. The complainant adds that Anuak who remain in the Gambella region continue to suffer from extra-judicial executions, torture, rape and arbitrary detention from the authorities of the respondent state adding that several of them have been threatened and warned specifically against pursuing a case against the respondent state. The complainant notes that as recently as January 2005, the respondent state threatened Anuak leaders, declaring that anyone attempting to tarnish the reputation of the respondent state would be dealt with. The complainant concludes by stating that to bring the case within the respondent state would only further endanger the lives of the remaining Anuak in the Ethiopia.

39. The complainant adds that the respondent state had been given notice and adequate time to remedy the human rights violations against the Anuak but has utterly failed to do so; that the respondent state received notice of the violations but chose not to take action to halt the atrocities or to make its forces accountable. The complainant adds that the respondent state's response to the massacres in December 2003 in the Gambella region was inadequate and disingenuous. That under international pressure, the respondent state established a Commission of Inquiry to investigate the killings, however, according to the complainant the inquiry was biased and ineffectual and did not meet international standards of an independent investigation.

Respondent state's submissions of admissibility

40. The respondent state claims that the cases of those involved in the alleged violations that took place in the Gambella region are currently pending before the Federal Circuit Court and the respondent, therefore, argue that domestic remedies have not yet been exhausted. The state provided a list of about nine such cases including their file numbers and previous and future dates of adjournments.

41. The respondent state argues that the rule that local remedies be exhausted is not limited to individuals and also applies to organisations, including those in no way subject to the jurisdiction of the respondent state. According to the respondent, the complainant could have sought redress from the domestic courts, the Judicial Administration Office, the Commission of Inquiry or the Human Rights Commission but did not. The complainant has not, argued the state, shown the existence of any impediment to the use of these remedial processes or that such were unduly long.

42. Without indicating the status of the proceedings, the state argued that all those [accused] of human rights offences associated with the Gambella incident of December 2003 were brought before the Federal Circuit Court. The state indicated that three domestic remedies were available to the complainants – the competent courts, the Judicial Administration Office and the Human Rights Commission - but the complainants failed to approach any of them.

Provisional measures

43. The Republic of Ethiopia argues that the complainant has sought only to present what it claims is *prima facie* evidence of violations and has not shown that if such alleged violations continue there will be 'irreparable injury', as required. Finally, the respondent submits that the government has presented sufficient evidence that it has taken adequate measures to rectify the situation and that the situation in general has stabilised and does not warrant any provisional measures from the Commission. The respondent state submits as follows:

- In February 2004, the Office of the Prime Minister issued instructions to federal institutions to assist the regional administration in safeguarding the security of the people and institutions and preventing further violence; soliciting the support of elders, the youth and civil servants in the effort towards sustainable peace, democracy and development; rehabilitating victims of the violence and internally displaced people; and bringing to justice those responsible for committing the violence and the destruction of property.
- The Defence Forces, once deployed, protected the civilian population and allowed humanitarian assistance and rehabilitation.
- The Federal government, in cooperation with international agencies, coordinated humanitarian assistance to alleviate the suffering of the victims of violence and the displaced.
- A Commission of Inquiry has been established to investigate the circumstances surrounding the crisis. Charges have been filed against several individuals as a result.
- The government has organised various consultations and workshops with the participation of the local population which have proposed concrete solutions aimed at resolving the problems facing the region and have identified the root causes of the crisis.
- The federal police have recently graduated more than three hundred police officers from the Gambella region to aid in maintaining law and order in the region once the situation has stabilised.

Admissibility

44. The current communication is submitted pursuant to article 55 of the African Charter which allows the African Commission to receive and consider communications, other than from states parties. Article 56 of the African Charter provides that the admissibility of a communication submitted pursuant to article 55 is subject to seven conditions. The African Commission has stressed that the conditions laid down in article 56 are conjunctive, meaning that if any one of them is absent, the communication will be declared inadmissible.

45. The complainant in the present communication argued that it has satisfied the admissibility conditions set out in article 56 of the Charter and as such, the communication should be declared admissible. The respondent state on the other hand submitted that the communication should be declared inadmissible because, according to the state, the complainant has not complied with article 56(5) of the African Charter. As there seems to be agreement by both parties as to the fulfilment of the other requirements under article 56, this Commission will not make any pronouncements thereof.

46. Article 56(5) of the African Charter provides that communications relating to human and peoples' rights shall be considered if they 'are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged'.

47. Human rights law regards it as supremely important for a person whose rights have been violated to make use of domestic remedies to right the wrong, rather than address the issue to an international tribunal. The rule is founded on the premise that the full and effective implementation of international obligations in the field of human rights is designed to enhance the enjoyment of human rights and fundamental freedoms at the national level. In *Free Legal Assistance Group v Zaire* and *Rencontre Africaine pour la Défense de Droits de l'Homme v Zambia*, this Commission held that 'a government should have notice of a human rights violation in order to have the opportunity to remedy such violations before being called before an international body.'[1] Such an opportunity will enable the accused state to save its reputation, which would be inevitably tarnished if it were brought before an international jurisdiction.

48. The rule also reinforces the subsidiary and complementary relationship of the international system to systems of internal protection. To the extent possible, an international tribunal, including this Commission, should be prevented from playing the role of a court of first instance, a role that it cannot under any circumstances arrogate to itself. Access to an international organ

[1] See communications 25/89, 47/90, 56/91, 100/93 [(2000) AHRLR 74 (ACHPR 1995)], para 36 and communication 71/92 [(2000) AHRLR 321 (ACHPR 1996)] para 11.

should be available, but only as a last resort - after the domestic remedies have been exhausted and have failed. Moreover, local remedies are normally quicker, cheaper, and more effective than international ones. They can be more effective in the sense that an appellate court can reverse the decision of a lower court, whereas the decision of an international organ does not have that effect, although it will engage the international responsibility of the state concerned.

49. The African Charter states that the African Commission shall consider a communication after the applicant has exhausted local remedies, 'if any, unless it is obvious that this procedure is unduly prolonged.' The Charter thus recognises that, though the requirement of exhaustion of local remedies is a conventional provision, it should not constitute an unjustifiable impediment to access to international remedies. This Commission has also held that article 56(5) 'must be applied concomitantly with article 7, which establishes and protects the right to fair trial.'[2] In interpreting the rule, the Commission appears to take into consideration the circumstances of each case, including the general context in which the formal remedies operate and the personal circumstances of the applicant. Its interpretation of the local remedies criteria can therefore not be understood without some knowledge of that general context.

50. A local remedy has been defined as 'any domestic legal action that may lead to the resolution of the complaint at the local or national level.'[3] The Rules of Procedure of the African Commission provide that '[t]he Commission shall determine questions of admissibility pursuant to article 56 of the Charter.'[4] Generally, the rules require applicants to set out in their applications the steps taken to exhaust domestic remedies. They must provide some *prima facie* evidence of an attempt to exhaust local remedies.[5] According to the Commission's guidelines on the submission of communications, applicants are expected to indicate, for instance, the courts where they sought domestic remedies. Applicants must indicate that they have had recourse to all domestic remedies to no avail and must supply evidence to that effect. If they were unable to use such remedies, they must explain why. They could do so by submitting evidence derived from analogous situations or testifying to a state policy of denying such recourse.

51. In the jurisprudence of this Commission, three major criteria could be deduced in determining the rule on the exhaustion of local

2 *Amnesty International and Others v Sudan* [(2000) AHRLR 297 (ACHPR 1999)] para 31.

3 See communication 60/91, *Constitutional Rights Project (in respect of Akamu and Others) v Nigeria* [(2000) AHRLR 180 (ACHPR 1995)].

4 Rule 116 of the Commission's Rules of Procedures.

5 *Ceesay v The Gambia* [(2000) AHRLR 101 (ACHPR 1995)].

remedies, namely: that the remedy must be available, effective and sufficient.'[6] According to this Commission, a remedy is considered to be available if the petitioner can pursue it without impediments[7] or if he can make use of it in the circumstances of his case.[8] The word 'available' means 'readily obtainable; accessible'; or 'attainable, reachable; on call, on hand, ready, present; ... convenient, at one's service, at one's command, at one's disposal, at one's beck and call.'[9] In other words, 'remedies, the availability of which is not evident, cannot be invoked by the state to the detriment of the complainant'.[10]

52. A remedy will be deemed to be effective if it offers a prospect of success.[11] If its success is not sufficiently certain, it will not meet the requirements of availability and effectiveness. The word 'effective' has been defined to mean 'adequate to accomplish a purpose; producing the intended or expected result,' or 'functioning, useful, serviceable, operative, in order; practical, current, actual, real, valid.'[12] Lastly, a remedy will be found to be sufficient if it is capable of redressing the complaint.[13] It will be deemed insufficient if, for example, the applicant cannot turn to the judiciary of his country because of a generalised fear for his life 'or even those of his relatives.'[14] This Commission has also declared a remedy to be insufficient because its pursuit depended on extrajudicial considerations, such as discretion or some extraordinary power vested in an executive state official. The word 'sufficient' literally means 'adequate for the purpose; enough'; or 'ample, abundant; ... satisfactory.'[15]

53. In the present communication, the author of the communication is based in Canada, alleging human rights violations in the respondent state following an incident that occurred in the country. The complainant does not hide the fact that local remedies were not attempted but argued that pursuing domestic remedies in the respondent state would be futile 'due to the lack of an independent and impartial judiciary, a lack of an efficient remedy, the significant likelihood of an unduly prolonged domestic remedy, and most importantly, the potential for violence against the Anuak or those supporting them within the legal system'. The complainant argued that the violations that took place in Gambella were massive

6 Communications 147/95, 149/96, *Jawara v The Gambia* [(2000) AHRLR 107 (ACHPR 2000)] para 31.
7 As above, para 32.
8 As above, para 33.
9 Longman synonym dictionary 82 (1986).
10 *Jawara*, para 33.
11 As above, para 32.
12 Longman above.
13 *Jawara* para 32.
14 As above, para 35.
15 Longman 1183.

and serious and involved many people – it noted that 'the government forces and its collaborators, having previously drawn a list of targets, went from door to door, slaughtering any educated Anuak men they could find, women and children were raped, and homes and schools were burnt to the ground …'.

54. The complainant noted further that the judiciary in the respondent state is not independent due to interference at state level where there are reports of administrative officers interfering with court decisions, firing of judges, dictating decisions to judges, reducing salaries of judges and deliberately refusing to enforce certain decisions of the courts; and that bringing the case before Ethiopian courts would be unduly prolonging the process as the Ethiopian judiciary suffers from 'a complex system of multiple courts that lack coordination and resources', including 'dismal conditions of service, staff shortages, lack of adequate training, debilitating infrastructure and logistical problems'. The complainant claims court proceedings 'take years to yield results', and concludes that the respondent state's judicial system is 'so under resourced that prosecutions would be nearly impossible'.

55. The complainant also alleges that the Anuak fear for their safety in bringing the case in Ethiopia, adding that there are no Anuak trained as lawyers who could bring the case before Ethiopian courts. The complainant concludes by stating that to bring the case within the respondent state would only further endanger the lives of the remaining Anuak in the Ethiopia. The complainant adds that the respondent state had been given notice and adequate time to remedy the human rights violations against the Anuak but has utterly failed to do so.

56. Can this Commission conclude, based on the above allegations by the complainant that local remedies in the respondent state are not available, ineffective or insufficient?

57. It must be observed here that the complainant's submissions seem to suggest that local remedies may in fact be available but it is apprehensive about their effectiveness as far as the present case is concerned. From the complainant's submissions, it is clear that the complainant has relied on reports, including a World Bank report which concluded that 'of the three branches of government, the judiciary has the least history and experience of independence and therefore requires significant strengthening to obtain true independence'.

58. The complainant's submissions also demonstrate that it is apprehensive about the success of local remedies, either because of fear for the safety of lawyers, the lack of independence of the judiciary or the meagre resources available to the judiciary. Apart from casting aspersions on the effectiveness of local remedies, the

complainant has not provided concrete evidence or demonstrated sufficiently that these apprehensions are founded and may constitute a barrier to it attempting local remedies. In the view of this Commission, the complainant is simply casting doubts about the effectiveness of the domestic remedies. This Commission is of the view that it is incumbent on every complainant to take all necessary steps to exhaust, or at least attempt the exhaustion of, local remedies. It is not enough for the complainant to cast aspersions on the ability of the domestic remedies of the state due to isolated or past incidences. In this regard, the African Commission would like to refer to the decision of the Human Rights Committee in *A v Australia*[16] in which the Committee held that 'mere doubts about the effectiveness of local remedies … did not absolve the author from pursuing such remedies'.[17] The African Commission can therefore not declare the communication admissible based on this argument. If a remedy has the slightest likelihood to be effective, the applicant must pursue it. Arguing that local remedies are not likely to be successful, without trying to avail oneself of them, will simply not sway this Commission.

59. The complainant also argues that the violations alleged are serious and involve a large number of people and should be declared admissible as the Commission can not hold the requirements of local remedies to apply literally in cases where it is impracticable or undesirable for the complainant to seize the domestic courts in the case of each violation. In the *Malawi African Association and Others v Mauritania* case,[18] for example, this Commission observed that '[t]he gravity of the human rights situation in Mauritania and the great number of victims involved render[ed] the channels of remedy unavailable in practical terms, and, according to the terms of the Charter, their process [was] "unduly prolonged"'. In like manner, the *Amnesty International and Others v Sudan* case[19] involved the arbitrary arrest, detention, and torture of many Sudanese citizens after the *coup* of 30 July 1989. The alleged acts of torture included forcing detainees into cells measuring 1.8 meters wide and 1 meter deep, deliberately flooding the cells, frequently banging on the doors to prevent detainees from lying down, forcing them to face mock executions, and prohibiting them from bathing or washing. Other acts of torture included burning detainees with cigarettes, binding them with ropes to cut off circulation, and beating them with sticks until their bodies were severely lacerated and then treating the resulting

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

17 See also *L Emil Kaaber v Iceland*, communication 674/1995. UN Doc CCPR/C/58/D/674/1995 (1996). See also *Ati Antoine Randolph v Togo*, communication 910/2000, UN Doc CCPR/C/79/D/910/2000 (2003).

18 See combined communications 54/91, 61/91, 98/93, 164/97, 210/98 [(2000) AHRLR 149 (ACHPR 2000)] para 80.

19 Communications 48/90, 50/91, 52/91, 89/93 [(2000) AHRLR 297 (ACHPR 1999)] para 32.

wounds with acid. After the *coup*, the Sudanese government promulgated a decree that suspended the jurisdiction of the regular courts in favour of special tribunals with respect to any action taken in applying the decree. It also outlawed the taking of any legal action against the decree. These measures, plus the 'seriousness of the human rights situation in Sudan and the great numbers of people involved, the Commission concluded, render[ed] such remedies unavailable in fact'.[20]

60. Thus, in cases of massive violations, the state will be presumed to have notice of the violations within its territory and the state is expected to act accordingly to deal with whatever human rights violations. The pervasiveness of these violations dispenses with the requirement of exhaustion of local remedies, especially where the state took no steps to prevent or stop them.[21]

61. The above cases must, however, be distinguished from the present case which involves one single incident that took place for a short period of time. The respondent state has indicated the measures it took to deal with the situation and the legal proceedings being undertaken by those alleged to have committed human rights violations during the incident. By establishing the Gambella Commission of Inquiry and indicting alleged human rights perpetrators, the state, albeit under international pressure, demonstrated that it was not indifferent to the alleged human rights violations that took place in the area and in the view of this Commission could be said to have exercised due diligence.

62. This Commission has also held in many instances that domestic remedies have not been exhausted if a case that includes the subject matter of the petition before it is still pending before the national courts. In *Civil Liberties Organisation v Nigeria*,[22] the African Commission declined to consider a communication with respect to which a claim had been filed but not yet settled by the courts of the respondent state. In the present communication, the respondent state indicates that the matter is still pending before its courts and attached a list of cases still pending before the Federal Circuit Court in relation with the Gambella incident. The list provided the names of the suspects, file number of their cases, previous and future dates of adjournments. The complainant does not deny this process is going on. In the view of this Commission, it does not matter whether the cases still pending before the courts have been brought by the complainant or the state. The underlying question is whether the case is a subject matter of the proceedings before the Commission and whether it is aimed at granting the same relief the complainant is

20 As above.

21 *Organisation Mondiale Contre la Torture and Others v Rwanda* 27/89, 49/91, 99/93 [(2000) AHRLR 282 (ACHPR 1996)].

22 Communication 45/90 [(2000) AHRLR 178 (ACHPR 1994)].

seeking before the Commission. As long as a case still pending before a domestic court is a subject matter of the petition before this Commission, and as long as this Commission believes the relief sought can be obtained locally, it will decline to entertain the case. It is the view of this Commission that the present communication is still pending before the courts of the respondent state and therefore does not meet the requirements under article 56(5).

For the above reasons, the African Commission declares communication 299/2005, *Anuak Justice Council v Ethiopia*, inadmissible for non-exhaustion of local remedies in conformity with article 56(5) of the African Charter on Human and Peoples' Rights.

GHANA

Tsikata v Ghana

(2006) AHRLR 112 (ACHPR 2006)

Communication 322/2006, *Tsatsu Tsikata v Republic of Ghana*

Decided at the 40th ordinary session, November 2006, 21st Activity Report
Rapporteur: Malila

Complaint on the right to a fair trial declared inadmissible due to non-exhaustion of local remedies

Admissibility (insulting language, 39, 40; pending before national court, 42)

1. The Secretariat of the African Commission on Human and Peoples' Rights (the Secretariat) received the communication from the complainant - Redmond Tsatsu Tsikata - in accordance with article 55 of the African Charter on Human and Peoples' Rights (African Charter).

2. The author of the present communication, who is himself the complainant, submitted the communication against the Republic of Ghana (Ghana), alleging that the latter is in the process of trying him for 'wilfully causing financial loss to the state' contrary to section 179A(3) of the Criminal Code, 1960 (Act 29); an act which did not constitute an offence at the time of the commission. He alleges that this is contrary to article 19(5) of the Constitution of Ghana, which prohibits retroactive criminalisation, and article 7(2) of the African Charter. He had challenged this in the High Court in Ghana, and his contention was upheld.

3. He further alleges that in the course of his trial, he has been denied the right to a fair trial, in violation of article 7(1) of the African Charter. He alleged that he had been summoned 'in the name of the President' to appear before a 'Fast-Track Court'; and he had challenged the constitutionality of both at the Supreme Court, which claims were upheld on 28 February 2002. However, after the executive's alleged interference with the decision, and the 'questionable' appointment of a new Justice of the Supreme Court, the decision was 'reversed' by an 11-member panel of the Supreme Court, including the newly-appointed Justice, on 26 June 2002. The

case was further 'remitted' to the 'Fast-Track Court', which had now been declared Constitutional.

4. The author also notes that the Chief Justice had prior to the Supreme Court's latter decision, publicly and explicitly stated his determination to have the earlier decision of the case reversed.

5. The author also contends that both the manner of appointment of the new Justice of the Supreme Court and the conduct of the executive towards the judiciary in relation to his case constituted a violation of article 26 of the African Charter, which obliges states to guarantee the independence of the judiciary.

6. The author stated that on 9 October 2002, he was again charged before the High Court of Accra on four counts, including the retroactive charge of 'wilfully causing financial loss to the state' (paragraph 2 above); and intentionally misapplying public property contrary to section 1(2) of the Public Property Decree 1977, (SMCD 140). He alleges that the facts on which the charges were based are the same as those on which he had been charged before three previous courts: (a) Circuit Tribunal; (b) Fast Track Court; and (c) the normal High Court.

7. The author further alleges a violation of his right to fair trial under article 7(1) of the African Charter when the trial judge of the High Court of Accra overruled his counsel's submission of 'no-case-to-answer', without giving reasons; thereby violating his 'right to be presumed innocent until proven guilty by a competent court or tribunal', as well as right to have the violations of his fundamental rights redressed.

8. He further alleges that he had appealed to the Court of Appeal, and that in upholding the decision of the lower court, the Court of Appeal had relied on a repealed law, which was neither cited in the charge sheet, nor at any point in the trial proceedings at the High Court, except in response to the submission of 'no-case-to-answer'. He alleges that the Court of Appeal thereby denied him his right to defence guaranteed under article 7(1)(c) of the African Charter as he could not have known before the trial that a repealed law, which he had no (prior) notice of in the charge sheet or at any point in the trial, would be the basis of his charge. He also alleges a further breach of his right to be presumed innocent until proven guilty by a competent court or tribunal guaranteed by article 7(1)(b) of the African Charter.

9. He submits that there is a further violation of article 7(2) of the African Charter, and a failure to enforce articles 19(5) and (11) of the Constitution of Ghana, which accord him certain fundamental rights as an accused person.

10. He contends that he was further denied the right to defence guaranteed under article 7(1)(c) of the African Charter when upon his subpoena, the counsel for the International Finance Commission (IFC)

appeared before the Court and argued that the IFC was immune from the court's jurisdiction; and this argument was upheld, even by the Court of Appeal, despite the provision of article 19(2)(g) of the Constitution of Ghana, which guarantees the accused's right to call witnesses, and the fact that the statutory provisions on the IFC in Ghana do not grant them the claimed immunity from testifying.

11. He noted that article 19(2)(g) of the Constitution of Ghana is similar to the paragraph 2(e)(iii) of the provisions of the [Resolution on the Right to Recourse and Fair Trial adopted by] the African Commission on Human and Peoples' Rights, meeting at its 11th ordinary session in Tunisia, 2-9 May 1992.

12. Lastly, he contended that the continuation of his trial on charges and in the manner that offend the provisions of the African Charter would cause him irreparable damage.

Complaint

13. The author of this communication contends that the charge on which his trial is based constitutes a violation of the right against non-retroactive criminalisation under article 7(2) of the African Charter.

14. He also contends that the manners in which the trial has been, and is being carried out violate article 7(1) of the African Charter.

15. He seeks the intervention of the African Commission on Human and Peoples' Rights, and urges the Commission to invoke rule 111 of its Rules of Procedure on provisional measures, and request the Republic of Ghana not to proceed further with his trial until his case has been heard by the African Commission.

Procedure

16. The present communication was received by the Secretariat of the African Commission on 27 April 2006.

17. The Secretariat of the Commission acknowledged receipt of the Communication to the complainant under letter ACHPR/LPROT/ COMM/322/2006/RE of 2 May 2006, providing the references of the communication and informing the complainant that the communication would be scheduled for consideration by the African Commission at its 39th ordinary session to be held in May 2006 in Banjul, The Gambia.

18. At its 39th ordinary session, held from 11 to 25 May 2006 in Banjul, The Gambia, the Commission decided to be seized of the communication, but declined to request the respondent state to take provisional measures in accordance with rule 111(1) of its Rules of Procedure because the complainant did not demonstrate the irreparable damage that would be caused if the provisional measures were not taken.

19. On 1 June 2006, 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 three months after notification of the decision.

20. On 31 August and 5 September 2006, the Secretariat of the Commission received the submissions of the respondent state by fax and mail, respectively.

21. At its 40th ordinary session held from 15 to 29 November 2006 in Banjul, The Gambia, the African Commission considered this communication on admissibility.

Admissibility

The complainant's submission

22. In the case under consideration, the complainant makes reference to several recourses to the domestic courts for redress of the alleged violations of his rights, but gives no indication of the exhaustion of all available domestic remedies, particularly in view of the alleged on-going violation. From the facts presented, the alleged on-going violation of his rights involves an on-going trial, the legality of which he challenges on the basis of the provisions of the Charter. He however failed to present evidence of the conclusion of this trial, and or to prove that it has been unduly prolonged.

23. The complainant contended that the continuation of his trial based on charges and in the manner that offend the provisions of the African Charter would cause him irreparable damage, but without elaborating how.

The respondent state's submission

24. In its response in accordance with rule 116 of the Rules of Procedure of the African Commission, the respondent state referred to the provisions of article 56(5) of the African Charter which provides for the exhaustion of local remedies as a requirement for the African Commission to rule on the admissibility of communications, unless it is obvious that this procedure is unduly prolonged. It therefore submitted that since the matter of the complainant's communication is still pending in the High Court of Justice, Ghana, with further unexplored rights of appeal to the Court of Appeal and Supreme Court of Ghana, in accordance with articles 137 and 131 respectively of the Constitution of Ghana, the communication should be declared inadmissible by the Commission.

25. The respondent state also recalled that the guidelines for submission of communications provide that each communication should particularly indicate that local remedies have been exhausted, and observed that the complainant failed to provide any evidence of the domestic legal remedies pursued.

26. The respondent state also argued that the complainant further failed to meet the requirement of article 56(5) of the Charter as he could not show in his complaint that the procedure in the High Court of Justice has been protracted or unduly delayed. It further submitted that if indeed any delay has been occasioned, it would be due to the complainant's own repeated requests for adjournments and interlocutory appeals.

27. The respondent state also made reference to article 56(6) of the Charter, which provides for Communications to be submitted 'within a reasonable period from the time local remedies are exhausted …', and submitted that the complainant acted impetuously given that the matter has not been concluded, and time has not begun to run so as to afford the complainant an opportunity to bring his complaint.

28. Furthermore, the respondent state noted article 56(3) of the Charter and the guidelines for submission of communications which provide that a communication shall be considered 'if it is not written in disparaging or insulting language directed against the State concerned …'; and submitted that the language in paragraphs 15, 16 and 17 of the complainant's communication is insulting to Ghana and its judiciary where lack of integrity, impropriety, bias and prejudice are imputed to the executive and the judiciary of the Republic of Ghana. To this effect, the respondent state cited the complainant's statement in paragraph 17 of his communication whereby he stated that: 'Far from guaranteeing the independence of the Court in relation to my trial, the government of Ghana has shown an irrevocable determination to have me found guilty by hook or crook and incarcerated'.

The Commission's decision

29. The admissibility of the communications submitted before the African Commission is governed by the seven conditions set out in article 56 of the African Charter.

30. The parties' submissions only relate to the provisions of articles 56(3), (5) and (6).

31. Article 56(3) specifically stipulates that communications shall be considered if they 'are not written in disparaging or insulting language directed against the state concerned and its institutions …'.

32. In respect of the respondent's state's submission that paragraphs 15, 16 and 17 of the complaint is written in disparaging or

insulting language directed against the former, the Commission holds that this is not the case. The Commission notes that these stipulated paragraphs of the complaint are only facts of allegations of Charter violations; and expressions of the complainant's fear in this regard. It is on the basis of these allegations and fear that the complainant had submitted this communication. The Commission reiterates that the purpose of its mandate is to consider complaints alleging such perceived judicial bias and prejudice, and undue interference by the executive with judicial independence, in accordance with article 7 of the Charter, its Resolution on the Respect and the Strengthening of the Independence of the Judiciary (1996),[1] and other relevant international human rights norms; in accordance with articles 60 and 61 of the Charter.

33. In this light, the Commission wishes to distinguish these paragraphs, for instance, from its decision in the case of *Ligue Camerounaise des Droits de l'Homme v Cameroon* [(2000) AHRLR 61 (ACHPR 1997)], where the Commission condemned the use of words such as 'Paul Biya must respond to crimes against humanity'; '30 years of the criminal neo-colonial regime incarnated by the duo Ahidjio/Biya'; 'regime of torturers'; and 'government barbarisms'; as insulting language.

34. In respect of article 56(5), which stipulates that communications shall be considered if they 'are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged …', the Commission notes the importance of this rule as a condition for the admissibility of a claim before an international forum. It notes that the rule is based on the premise that the respondent state must first have an opportunity to redress by its own means and within the framework of its own domestic legal system, the wrong alleged to have been done to the individual.

35. In light of the parties' submissions, the African Commission notes that the complainant's allegations are in respect of an on-going/unconcluded trial. The information provided by the complainant himself states that the communication is still pending before the courts of the Republic of Ghana. The Commission further notes that should the on-going trial end against the complainant's favour, he has further rights of appeal to the Court of Appeal and Supreme Court of Ghana, in accordance with articles 137 and 131 respectively of the Constitution of Ghana. In this regard, the Commission draws the attention of the parties to the similar case of *Kenya Human Rights Commission v Kenya* [(2000) AHRLR 133 (ACHPR 1995)], where it had held that '... the facts supplied by the complainants themselves stated that the communication was pending before the courts of Kenya ... [and] that the complainants had therefore not exhausted all available local remedies'.

1 ACHPR /Res. 21(XIX) 96.

36. Therefore, although the communication presents a *prima facie* case of a series of violations of the African Charter, a close look at the file and the submissions indicate that the complainant is yet to exhaust all the local remedies available to him.

37. With regard to article 56(6) of the Charter which provides that communications shall be considered if '… they are submitted within a reasonable period of time from the time local remedies are exhausted, or from the date the Commission is seized of the matter', the Commission holds that this is quite related to the principle of the exhaustion of local remedies in accordance with article 56(5). This means that the Commission estimates the timeliness of a communication from the date that the last available local remedy is exhausted by the complainant. In the case of unavailability or prolongation of local remedies, it will be from the date of the complainant's notice thereof.

38. Unlike its Inter-American[2] contemporary, the Commission does not specify a time-period within which Communications must be submitted. However, it advised on the early submission of communications in the case of *Modise v Botswana* (communication 97/93).

39. However, having found that the complainant has not exhausted local remedies the Commission concurs with the respondent state's argument that the complainant had acted impetuously in bringing this communication. This is because the matter has not been concluded, for which reason time has not begun to run such as to afford the complainant the opportunity to bring this complaint.

For these reasons, the African Commission declares the communication inadmissible for non-exhaustion of local remedies.

[2] Art 32 of the Rules of Procedure of the Inter-American Commission; www.cidh.org.

SENEGAL

FIDH and Others v Senegal

(2006) AHRLR 119 (ACHPR 2006)

Communication 304/2005, *FIDH, National Human Rights Organization (ONDH) and Rencontre Africaine pour la Defense des Droits de l'Homme (RADDHO) v Senegal*

Decided at the 40th ordinary session, November 2006, 21st Activity Report
Rapporteur: Alapini-Ganson

Complaint challenging law granting amnesty for crimes committed with political motives declared inadmissible due to non-exhaustion of local remedies

Admissibility (not necessary indicate victims, 40; exhaustion of local remedies, 43-45)

1. The Secretariat of the African Commission on Human and Peoples' Rights (the Commission) received a communication on 2 May 2005 from the above NGOs, which was submitted in accordance with the provisions of article 55 of the African Charter on Human and Peoples' Rights (the African Charter).

2. The communication is submitted against the Republic of Senegal (state party[1] to the African Charter and hereinafter referred to as Senegal) and alleges that legislation enacted by the government of Senegal violates the government's obligations under the African Charter.

3. On 7 January 2005, the Senegalese Parliament adopted the 'Ezzan' law. In article 1, this law grants a complete amnesty for all crimes committed, in Senegal and abroad, relating to the general or local elections or committed with political motivations between 1 January 1983 and 31 December 2004, whether the authors have been judged or not.

4. Article 2 of the law was found unconstitutional by the Constitutional Court on 12 February 2005 and grants a similar amnesty for all crimes committed in relation to the death of Mr Babacar Seye, judge of the Constitutional Court.

1 Senegal ratified the African Charter on 13 August 1982.

Complaint

5. The communication alleges that the adoption of the 'Ezzan' law violates article 7(1)(a) of the African Charter.

6. The complainants request that the African Commission examine the effects of this legislation and determine whether it is in conformity with the obligations assumed by the state under the Charter.

Procedure

7. The Secretariat registered the complaint as communication 304/05, *FIDH, Organisation Nationale des Droits de l'Homme (ONDH) and Rencontre Africaine pour la Defense des Droits de l'Homme (RADDHO) v Senegal*. By letter ACHPR/COMM/304/05/SEN/IH of 4 October 2005, the Secretariat of the African Commission acknowledged receipt of the communication to the complainants and stated that it would be put on the African Commission's agenda for *prima facie* consideration at its 38th ordinary session, scheduled from 21 November to 5 December 2005 in Banjul, The Gambia.

8. At its 38th ordinary session held from 21 November to 05 December 2005, in Banjul, The Gambia, the African Commission on Human and Peoples' Rights considered the communication and decided to be seized thereof.

9. By letter ACHPR/COMM/304/05/SEN/IH of 15 December 2005, the Commission kindly asked the parties if they could forward their arguments on admissibility in accordance with article 56 of the African Charter within three months from the date of this notification.

10. By letter ACHPR/COMM/304/05/SEN/IH of 4 April the Secretariat of the Commission reminded the parties of its letter of 15 December and kindly asked the parties to submit their arguments on the admissibility.

11. On 10 April 2006, the Secretariat acknowledged receipt of the respondent state's correspondence transmitting its arguments on admissibility.

12. At its 39th ordinary session which was held from 11 to 25 May 2006 in Banjul, The Gambia, the African Commission considered the communication and intended to take a decision on the admissibility of the complaint at its 40th ordinary session so as to allow the complainants time to submit their comments on admissibility.

13. By letter dated 17 July 2006, the Secretariat of the Commission informed the parties of this decision of the 39th session and requested the complainants to convey their comments on the admissibility of this communication not later than 30 September 2006, to enable the Commission make a pronouncement thereon

during its 40th ordinary session scheduled for 15 to 29 November 2006.

14. On 10 October 2006, the Secretariat of the Commission received the comments from the complainants on the admissibility of communication 304/05.

Admissibility

Arguments of the complainants

15. The FIDH and its member organisations in Senegal, in their request to institute proceedings, claim that their communication is being brought against a state party to the African Charter by NGOs which have observer status with the African Commission and that it is alleging the violation of a provision of the Charter, specifically article 7 which stipulates that:

> (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 violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force;

16. The complainants also claim that local remedies have been exhausted since the Constitutional Council which had been seized by some members of the National Assembly had declared that the law in question was in conformity with the Constitution with the exception of article 2 which had been ruled unconstitutional by the Council. The complainants recall that under the terms of the Senegalese Constitution, the decision of the Constitutional Council is 'the last recourse'.

17. The complainants further specify that their challenge of the law in question has not been brought before any other international judicial or quasi-judicial body.

Arguments of the state

18. The state claims first of all that its statement of defence on admissibility submitted after the three months deadline extension granted by the Commission is admissible so long as the Commission has not arrived at a decision on admissibility, especially where the Rules of Procedure of the Commission do not provide for any sanction of a procedural nature in case of late submission of a statement.

19. The state then emphasises that a communication submitted in accordance with the provisions of article 55 of the Charter should be based on verified facts that have caused damage, with real identifiable victims, thereby making possible the exhaustion of local remedies. As far as the state is concerned, the communication submitted by the complainants is based on potential, even hypothetical violations since neither the authors of the

communication, nor the Members of Parliament who had brought the case before the Constitutional Council were victims and that their action could hardly be interpreted as an attempt to exhaust local remedies.

20. The Senegalese state is also of the view that the communication is incompatible with the Charter in that the complainants made reference either to cases which have been conclusively dealt with by the law courts, or to events which, having taken place in 1993, fell under the hammer of the decennial prescription well before the promulgation of the law being challenged.

21. According to the state which, for this purpose, is basing its argument on the decision of the Constitutional Council on case 1-C-2005 of 12 February 2005, the provisions of Law 2005-05 of 17 February 2005 are clear, without ambiguity and do not at all intend to prohibit recourse to the competent courts. As far as the state is concerned, by seizing the Commission, the complainants have no other intention than to have the Commission interpret the provisions of a domestic law, competence which, in the state's view, the Commission does not have.

22. The above-mentioned decision by the Constitutional Council had been made on the appeal submitted by Members of Parliament after adoption of the law by the National Assembly and prior to its promulgation by the President of the Republic. The Members of Parliament had requested the Constitutional Council to declare articles 1, 2, 4(2) and 10 of the law in question as being in conflict with some provisions of the Constitution, notably the preamble and articles 1, 67, 76 and 88, as well as with some provisions of the Universal Declaration of Human Rights and the African Charter on Human and Peoples' Rights. Whilst it ruled that article 2 of the law in question was in conflict with the Constitution, the Constitutional Council declared itself incompetent to pronounce on the conformity of the said law with the treaties ratified by Senegal. The Council considered that:

> ... Article 74 of the Constitution grants the Constitutional Council competence to pronounce solely on the conformity to the Constitution, of laws referred to it for consideration;
>
> ... under the terms of article 98 of the Constitution, 'the conventions or agreements lawfully ratified or approved have, from their date of publication, competence higher than that of the laws, subject to, for each convention or treaty, its application by the other party'; that these provisions neither prescribe nor entail the checking of the conventionality of the laws within the framework of pronouncement on the conformity of laws with the Constitution as provided for in article 74 of the said Constitution;
>
> ... that it is beyond the competence of the Constitutional Council to assess the conformity of the law with the provisions of an international convention or treaty;

23. The respondent state considers further that to claim, as the complainants have done, 'that in promulgating the amnesty law 'Ezzan' passed by National Representation on 4 January 2005, the President of the Republic of Senegal had allowed the entry into force of a law which violates the above mentioned article (of the Charter)' is insulting to the state of Senegal and to its democratic institutions.

24. In its oral submission before the Commission during the 40th session, the respondent state had re-affirmed that the law as promulgated by the President of the Republic after verification of its conformity with the Constitution had not been subjected to any jurisdictional appeal, and the absence of real and identifiable victims makes such an appeal improbable. The state also recalled that the ruling of the Constitutional Council does not prevent future victims from seizing the competent courts to demand redress for any damage they may have suffered.

25. Furthermore, the state clarified the procedure to be adopted before the Constitutional Council. The Council can be seized through action (before the promulgation of a law) and by exception (after the promulgation of a law). Through action, only the President of the Republic and one tenth of the Members of the National Assembly can challenge a law adopted by the National Assembly before the Constitutional Council. Through exception, any citizen, during proceedings to which he is a party before the National Council or the Appeals Court, can challenge the unconstitutionality of a law. In such a case, the National Council or the Appeals Court defers the judgment and seizes the Constitutional Council which first of all has to rule on the constitutionality of the said law.

26. The respondent state further withdrew its submission on the use of insulting language by the complainants.

27. The state of Senegal prays the African Commission on Human and Peoples' Rights to declare communication 304/05 inadmissible.

Comments by the complainants on the memorandum of the state on admissibility

28. The complainant NGOs first of all challenge the admissibility of the submission of the state on the grounds that it had not been submitted within the three months deadline given to the state by the Commission.

29. The complainants then go on to refute, one by one, the arguments of inadmissibility raised by the respondent state. Thus, with regard to the compatibility with the Charter, they contend, using the jurisprudence of the African Commission as basis, notably its decision on communication 245/2002 *Zimbabwe Human Rights NGO Forum v Zimbabwe,* that to be compatible with the Charter, the communication has only got to invoke the provisions of the law which

are presumed to have been violated, and that from then on it is 'up to the African Commission, after having considered all the facts at its disposal, to make a ruling on the rights which have been violated and to recommend the appropriate remedy to restitute the rights of the complainant'. According to them, communication 304/05 attempts to denounce the impunity sanctioned by the amnesty law known as 'Ezzan' by making it impossible for the perpetrators of crimes to be brought to justice in blatant violation of article 7(1)(a) of the Charter.

30. The complainants also assert that the simple fact of declaring that a state party has violated a provision of the Charter can hardly constitute, on its own, an 'insulting' remark, and that 'to admit that such an allegation is insulting would result in challenging the principle itself of resorting to the Commission for a remedy'.

31. The complainant also denies having based its communication on 'potential or hypothetical' facts, or limiting itself 'to simple declarations by re-echoing the artificial opinions of the political opposition', as is being claimed by the state in its submission. The facts which form the basis of the communication, it contends, have been verified. For the complainant NGOs, both the FIDH and its affiliates in Senegal and other international human rights protection institutions such as the United Nations Human Rights Commission, had previously denounced the human rights violations committed in the context of the electoral process in Senegal.

32. With regard to the identification of the victims, the complainant NGOs recall that article 56(1) of the Charter simply requires that the identity of the authors of a communication be mentioned. They base their argument on the position of the Commission in its decision on communications 54/91, 61/91, 98/93, 164/97 to 196/97, 210/98 *Malawi African Association and Others Mauritania* [(2000) AHRLR 149 (ACHPR 2000)] in which case the Commission had felt that the 'authors do not necessarily have to be the victims or members of their family.' The NGOs also recall in their favour the decision of the Commission according to which article 56(1) does not require that the names 'of all the victims of the alleged violations' be indicated (c*ommunication* 159/96 *Union Interafricaine des Droits de l'Homme and Others v Angola* [(2000) AHRLR 18 (ACHPR 1997)].

33. Concerning the exhaustion of local remedies, the complainants recall that according to the terms of the Constitution of the Republic of Senegal, international conventions have a supra-legislative value, that some of them, the African Charter included, having been cited in the preamble, even form an integral part of this constitutionality, and that the Constitutional Council is the sole competent body to rule on the constitutionality of a law. They also recall that the decisions of the Constitutional Council cannot be appealed and that only the

President of the Republic, one tenth of the Members of the National Assembly, the National Council or the Court of Appeal are empowered, when an exception of unconstitutionality is brought before them, to seize the Constitutional Council. They therefore conclude that the decision of the Constitutional Council declaring that the disputed law is in conformity with the Constitution makes it impossible for anybody to challenge this law before the national courts.

34. The complainant NGOs recall in conclusion that their communication had been submitted within a reasonable time frame and that they had not instituted any other international legal proceedings.

35. In their oral submission before the African Commission during the 40th session, the complainants recalled that the communication had not been drafted in abusive or insulting language. Furthermore, they re-affirm that the Constitutional Council had already made a ruling on the law in question, and that the decision of the Constitutional Council could not be subjected to any appeal. The complainants further contended that if remedies of a civil nature are guaranteed by the law being challenged, the amnesty law makes it impossible for any kind of criminal punishment to be meted out against the perpetrators of crimes, thereby supporting impunity in Senegal.

36. The complainants invite the Commission to declare the Communication admissible.

Decision of the Commission

37. The admissibility of communications presented in conformity with the terms of article 55 of the Charter is governed by article 56 of the African Charter which stipulates that:

> Communications relating to human and peoples' rights referred to in article 55, received by the Commission, shall be considered if they:
>
> (1) Indicate their authors even if the latter request anonymity;
>
> (2) Are compatible with the Charter of the Organization of African Unity or with the present Charter;
>
> (3) Are not written in disparaging or insulting language directed against the state concerned and its institutions or to the Organization of African Unity;
>
> (4) Are not based exclusively on news disseminated through the mass media;
>
> (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; and;
>
> (7) Do not deal with cases which have been settled by the states involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organization of African Unity or the provisions of the present Charter.

38. The Commission recalls that the conditions outlined in article 56 are cumulative and should all be adequately fulfilled for a communication submitted in conformity with the terms of article 55 to be admissible. Consequently, non-respect of any one of these conditions is liable to render a communication inadmissible.

39. In this particular case, most of the conditions laid down by article 56 appear, *prima facie* to have been respected by the authors of communication 304/05: The communication is not anonymous; it pleads the violation of a provision of the Charter; it is not exclusively based on information broadcast by the mass media; it is not the object of any international proceedings before another judicial or quasi-judicial body; it was submitted within a reasonable time frame, and the Commission did not find any abusive or insulting language in it. The only condition which really poses a problem for both parties is article 56(5) of the Charter which is the question of exhaustion of local remedies.

40. Before considering the condition relating to the exhaustion of local remedies, the Commission would like to address the matter of the identity of victims raised by the respondent state in its argument. The Commission recalls, in this context, that the African Charter does not call for the identification of the victims of a communication. According to the terms of article 56(1), only the identification of the author or authors of the communication is required. Besides it is not necessary for the author or authors to be present or the victims even where some link between the author and the victim exists. That had in fact been confirmed by the practice of the African Commission.[2] The flexibility of article 56 of the African Charter, which differs in this from the other international human rights protection instruments, is fully justified in the African context and 'reflects sensitivity of the practical difficulties which individuals can be faced with in the countries where human rights are violated'.[3]

41. Concerning the exhaustion of local remedies, according to the provisions of article 56(5):

> Communications relating to human and peoples' rights referred to in article 55, 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;

42. It does not at all show from the facts at the disposal of the Commission that efforts had been made by the authors of the communication to exhaust the local remedies available against Law 2005-05 of 17 February 2005. The remedy used by some Members of the National Assembly cannot constitute, in the view of the Commission, an attempt to exhaust local remedies for two main

2 See notably the decision on communications 54/91, 61/91, 98/93, 164/97 to 196/97, 210/98 *Malawi African Association and Others v Mauritania* [(2000) AHRLR 149 (ACHPR 2000)].

3 As above, para 78.

reasons: First of all, this recourse had been initiated on 12 and 13 January 2005 and the ruling of the Constitutional Council had been made on the 12 February 2005, that is to say before the entry into force of Law 2005-05 of 17 February 2005. The Commission is of the view that a law which has not yet entered into force cannot violate any right which is protected by the Charter.

43. Then, it would appear from the facts as presented by the two parties, from the appeal by the parliamentarians and from the ruling of the Constitutional Council which sanctioned it, that the victims had the opportunity to seize the competent Senegalese courts or even the Constitutional Council through the method of challenge of constitutionality. The Commission observes that instead of following this procedure, the complainants approached it (the Commission) directly.

44. If the parties agree to recognise that the decisions of the Constitutional Council cannot be appealed, there is no evidence to show that where the Constitutional Council declares itself incompetent to deal with a given issue (here it relates to the verification of the conformity of a law with a convention, in this case the African Charter), no other legal body in Senegal is competent on the matter. The Commission is of the view that the local remedies to which article 56(5) makes reference, cannot be limited to penal remedies. They include all the legal remedies, whether civil, penal or administrative.

45. On the basis of all of the above arguments, the Commission concludes that the complainants did not exhaust all the local remedies.

For this reason, the Commission declares the communication inadmissible.

ZIMBABWE

Zimbabwe Human Rights NGO Forum v Zimbabwe

(2006) AHRLR 128 (ACHPR 2006)

Communication 245/2002, *Zimbabwe Human Rights NGO Forum v Zimbabwe*

Decided at the 39th ordinary session, May 2006, 21st Activity Report
Rapporteur: Monageng

Whether an amnesty for perpetrators of human rights violations is in violation of the Charter and whether the state is responsible for the acts of non-state actors

Admissibility (news disseminated through the mass media, 42, 43; judicial remedies, 45; ousting of court jurisdiction, 64, 65, 67; massive violations, 69-72)
State responsibility (ruling political party distinct from government, 138, 140; effective measures to prevent violations by non-state actors, due diligence, 144-147, 152-154, 156-159, 181, 183, 186, 187, 210)
Evidence (declarations not made under oath, 176)
Fair trial (right to be heard, impunity, 200-215)

1. The communication is submitted by the Zimbabwe Human Rights NGO Forum, a coordinating body and a coalition of 12 Zimbabwean human rights NGOs based in Zimbabwe.

2. The complainant states that in February 2000, the country held a constitutional referendum in which the majority of Zimbabweans voted against the new government drafted Constitution.

3. The complainant alleges that following the constitutional referendum there was political violence, which escalated with farm invasions, by war veterans and other landless peasants. That during the period between February and June 2000 when Zimbabwe held its fifth parliamentary elections, ZANU (PF) supporters engaged in a systematic campaign of intimidation aimed at crushing support for opposition parties. It is alleged that violence was deployed by the

party as a systematic political strategy in the run up to the Parliamentary elections.

4. The complainant also alleges that in the two months before the Parliamentary elections scheduled for 24 and 25 June 2002, political violence targeted especially white farmers and black farm workers, teachers, civil servants and rural villagers believed to be supporting opposition parties.

5. Such violence included dragging farm workers and villagers believed to be supporters of the opposition from their homes at night, forcing them to attend re-education sessions and to sing ZANU (PF) songs. The complainant alleges that men, women and children were tortured and there were cases of rape. Homes and businesses in both urban and rural areas were burnt and looted and opposition members were kidnapped, tortured and killed.

6. It is also alleged that ZANU (PF) supporters invaded numerous secondary schools; over 550 rural schools were disrupted or closed as teachers, pupils and rural opposition members numbering 10 000 fled violence, intimidation and political re-education. Other civil servants in rural areas such as doctors and nurses were targeted for supposedly being pro-Movement for Democratic Change (MDC). Nyamapanda border post was closed for two days as civil servants fled ZANU (PF) supporters. Bindura University was closed by a student boycott after ZANU (PF) members were asked to produce a list of MDC supporters and one MDC supporter was kidnapped and assaulted by ZANU (PF) supporters/members posing as MDC.

7. It is also alleged that numerous activists including Morgan Tsvangirai – President of the main opposition party the MDC, Grace Kwinjeh, a journalist and a human rights activist, the *Daily News* editor - Geoff Nyarota, an Anglican priest - Tim Neill, MDC candidate from Chimanimani - Roy Bennet, Robin Greaves, a Nyamandlovu farmer and other farmers received death threats.

8. The complainant alleges that there were reports of 82 deaths as a result of organised violence between March 2000 and 22 November 2001.

9. The complainant also alleges that following the elections, MDC contested the validity of the outcome of the elections in 38 constituencies won by ZANU (PF) and this prompted another wave of violence.

10. The complainant claims that human rights abuses were reported in most of those cases that were brought before the High Court. However, those individuals that testified in the elections challenged before the Harare High Court, were subjected to political violence on returning home and thus forcing some to refrain from testifying and others to flee their homes due to fear of being victimised.

11. The complainant also states that in some cases MDC supporters were also responsible for minor assaults against some ZANU (PF) stalwarts.

12. The complainant alleges that various officials of the ruling ZANU (PF) party condoned the use of violence for political gains and quotes statements made by President Mugabe, Josaya Hungwe of Masvingo Province, the Minister of Foreign Affairs - Stan Mudenge, war veterans Andrew Ndhlovu and Edmon Hwarare that reinforced the ongoing violence.

13. The complainant also alleges that the primary instigators of this violence were war veterans who operated groups of militias comprising of ZANU (PF) youth and supporters. They also allege that the state was involved in this violence through Zimbabwe Republic Police (ZRP), the Zimbabwe National Army (ZNA) and the Central Intelligence Organisation (CIO) specifically through facilitating farm invasions.

14. The complainant states that prior to the June 2000 parliamentary elections, the ZRP on numerous occasions turned a blind eye to violence perpetrated against white farmers and MDC supporters. It is alleged that the police forces have generally failed to intervene or investigate the incidents of murder, rape, torture or the destruction of property committed by the war veterans. Furthermore, a general amnesty for politically motivated crimes gazetted on 6 October 2000 absolved most of the perpetrators from prosecution. While the amnesty excluded those accused of murder, robbery, rape, indecent assault, statutory rape, theft, possession of arms or any offence involving fraud or dishonesty, very few persons accused of these crimes have been prosecuted.

Complaint

15. The complainant alleges a violation of articles 1, 2, 3, 4, 5, 6, 9, 10, 11 and 13 of the African Charter on Human and Peoples' Rights.

Procedure

16. The communication was received at the Secretariat of the Commission on 3 January 2002.

17. On 8 January 2002 the Secretariat acknowledged receipt of the communication and informed the complainant that the matter would be scheduled for consideration by the Commission at its 31st session.

18. During its 31st ordinary session held from 2 to16 May 2002 in Pretoria, South Africa, the African Commission examined the complaint and decided to be seized of it.

19. On 29 May 2002 the parties to the communication were informed of the Commission's decision and requested to forward their submissions on admissibility to the Secretariat within three months.

20. At its 32nd ordinary session held from 17 to 23 October 2002 in Banjul, The Gambia, the African Commission examined the communication and decided to defer its consideration on admissibility to the 33rd ordinary session and the parties to the communication were informed accordingly.

21. 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 defer its decision on admissibility to the 34th ordinary session.

22. 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 written submissions on admissibility within two months.

23. At its 34th ordinary session held in Banjul, The Gambia from 6 to 20 November 2003, the African Commission examined the communication and decided to declare the communication admissible.

24. By letter dated 4 December 2003, the parties to the communication were informed of the African Commission's decision and requested to submit their written submissions on the merits within three months.

25. At its 35th ordinary session held in Banjul, The Gambia from 21 May to 4 June 2004, the African Commission examined the communication and decided to defer it to the 36th ordinary session for further consideration.

26. By *note verbale* dated 15 June 2004, and by letter bearing the same date, the Secretariat of the African Commission informed the parties accordingly.

27. At its 36th ordinary session held from 23 November to 7 December 2004, in Dakar, Senegal, the African Commission considered the communication and deferred its decision to the 37th ordinary session.

28. By *note verbale* of 16 December 2004 and by letter of 20 December 2004, the Secretariat informed the state and the complainant respectively of the decision of the African Commission.

29. At its 37th ordinary session held in Banjul, The Gambia, from 27 April to 11 May 2005, the African Commission deferred consideration of the communication due to lack of time.

30. By *note verbale* dated 24 May 2005 the state was notified of the decision of the African Commission. By letter of the same date the Secretariat of the African Commission notified the complainant.

31. At its 38th ordinary session held from 21 November to 5 December 2005, the African Commission deferred consideration on the merits to the 39th session.

32. By *note verbale* of 15 December 2005 and by letter of the same date, the Secretariat of the African Commission notified both parties of the African Commission's decision.

33. At its 39th ordinary session held from 11 to 25 May 2006, the African Commission considered the communication and found the Republic of Zimbabwe in violation of certain provisions of the African Charter.

34. By *note verbale* of 29 May 2006 and by letter of the same date, both parties were notified of the African Commission's decision.

35. The Commission took a decision on the merits of the communication during its 39th ordinary session, which was held from 11 to 25 May 2006 in Banjul, The Gambia.

Admissibility

36. The law relating to 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 generally must be fulfilled by a complainant for a communication to be declared admissible.

37. In the present communication, the respondent state submitted that the communication should be declared inadmissible by virtue of the fact that the communication did not satisfy the requirements contained in articles 56(4) and (5) of the African Charter.

38. Article 56(4) of the African Charter provides that: 'Communications … received by the Commission, shall be considered if they are not based exclusively on news disseminated through the mass media'.

39. The respondent state alleged that the statement of facts submitted by the complainant was based on information disseminated through the mass media which information should be considered cautiously. They submit that the statements recorded by the complainant in appendix 1 are tailor-made to suit press reports. The state indicated that an illustration of such a case was when an independent newspaper, the *Daily News*, on 23 April 2002 published a story furnished by one Mr Tadyanemhanda stating that his wife Brandina Tadyanemhanda had been decapitated by ZANU (PF) members in front of her children for the sole reason that she was a supporter of the MDC party, noting that the story was later found to

be false. That Mr Tadyanemhanda's son, Tichaona Tadyanemhanda, was listed as one of those persons whose death was reported to have occurred as a result of the political violence that took place from March 2000 to 30 November 2001. The respondent state concluded that, as indicated by the police, the death of Tichaona Tadyanemhanda was never political.

40. The respondent state maintained that during the period prior to, during and following the referendum, there was a concerted effort by the 'so called independent press' and the international press to publish false stories in order to tarnish Zimbabwe's image. The state thus submitted that the media reports in appendix 2 of the complainant's submissions were not meant to buttress the accounts of eyewitnesses but that the statement of facts by the complaint was a presentation of the contents of newspaper articles.

41. In their submissions to the African Commission, the complainant stated that the communication was not based solely on reports gathered from the press. They asserted that appendix 1 contained statements made by victims, while appendix 4 was a judgment of the High Court of Zimbabwe and appendix 2 contained selected extracts of media reports and the information therein had been provided in order to buttress the statements made by victims. According to the complainant, the newspaper reports were meant to corroborate the direct evidence provided by the victims.

42. The African Commission has had the opportunity to review the documents before it as submitted by the complainant. While it may be difficult to ascertain the veracity of the statements allegedly made to the complainant by the alleged victims, it is however evident through the judgment of the High Court of Zimbabwe that the communication did not rely 'exclusively on news disseminated through the mass media' as the respondent state would like the African Commission to believe.

43. Besides, this Commission has held in communications 147/95 and 149/96,[1] that 'while it would be dangerous to rely exclusively on news disseminated through the mass media, it would be equally damaging if the African Commission were to reject a communication because some aspects of it are based on news disseminated through the mass media. This is borne out of the fact that the Charter makes use of the word 'exclusively'. Based on this reasoning, the African Commission is of the opinion that the communication is not based 'exclusively on news disseminated through the mass media'. The operative term being 'exclusively'.

44. The other provision of the Charter in contention between the parties is article 56(5) of the African Charter. This sub article provides that communications received by the Commission shall be considered

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

if they 'are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged'.

45. The respondent state submitted in this regard that the complainant failed to exhaust domestic remedies by virtue of failing to pursue the alternative remedy of lodging a complaint with the Office of the Ombudsman, which is mandated to investigate human rights violations. The African Commission holds that the internal remedy to which article 56(5) refers entails remedies sought from courts of a judicial nature, and the Office of the Ombudsman is certainly not of that nature.[2]

Specific case of Talent Mabika

46. With respect to the case of Tichaona Chiminya and Talent Mabika (appendix 4), the complainant claimed that they attempted to access domestic remedies as shown by the record of the High Court. In this case, the Judge ordered the transmission of the record of proceedings to the Attorney-General with a view to instituting criminal proceedings against the murderers of Tichaona Chiminya and Talent Mabika. The complainant stated that as at when the communication was lodged to the African Commission, no such prosecution had taken place.

47. The African Commission is in possession of a copy of the proceedings of the High Court of Zimbabwe relating to the Buhera North election challenge and where Justice Devitte made an order with respect to the case of Chiminya and Mabika. From the proceedings, the High Court ordered that

> in terms of Section 137 of the Act, the record of evidence must be transmitted by the Registrar to the Attorney General 'with a view to the institution of any prosecution proper to be instituted in the circumstances' and the attention of the Attorney General is drawn to the evidence on the killing of Chiminya and Mabika.

The High Court Order was made on 2 March and 26 April 2001 and the complainant argued that at the time of bringing the communication, about 8 months later, on 3 January 2002, there had been no prosecution of the suspected murderers.

48. The respondent state argued that the order made by the High Court called upon the Attorney-General to exercise his powers under article 76 of the Constitution of Zimbabwe to direct the police to carry out investigations and depending on the outcome of those investigations prosecute the case. The respondent state submitted that the Attorney-General received the docket relating to the killing of Chiminya and Mabika from the police and that it was evident from the docket that it had been opened the very day that the incident in question had happened and that the recording of statements on the case had commenced immediately. However, after perusing the

2 Communication 221/98, *Cudjoe v Ghana* [(2000) AHRLR 127 (ACHPR 1999)].

docket, the Attorney-General referred the docket back to the police with directions on what further investigations should be conducted into the matter before the matter could be prosecuted. The respondent state submitted that as at when the communication was submitted to the African Commission, the matter was still being investigated and that the police had recorded 23 statements from witnesses.

49. The African Commission is of the view that with respect to the alleged murder of Chiminya and Mabika, the matter was still before the courts of the respondent state and cannot be entertained by it.

50. However, the Commission is of the opinion that there are no domestic remedies available to all the persons referred to in appendix 1, who as victims, were effectively robbed of any remedies that might have been available to them by virtue of Clemency Order 1 of 2000. The Clemency Order granted pardon to every person liable to criminal prosecution for any politically motivated crime committed between 1 January 2000 and July 2000. The Order also granted a remission of the whole or remainder of the period of imprisonment to every person convicted of any politically motivated crime committed during the stated period.

51. In terms of the Clemency Order, 'a politically motivated crime' is defined as:

> Any offence motivated by the object of supporting or opposing any political purpose and committed in connection with: Constitutional referendum held on the 12 and 13 February 2000; or the general Parliamentary elections held on 24 and 25 June 2000; whether committed before, during or after the said referendum or elections.

52. The only crimes exempted from the Clemency Order were murder, robbery, rape, indecent assault, statutory rape, theft, possession of arms and any offence involving fraud or dishonesty.

53. The complainant averred that the exceptions in the Clemency Order were a hoodwink; that even where reports were made by victims of criminal acts not covered by the Clemency Order, arrests were never made by the police neither were investigations undertaken and therefore there was no prosecution of the perpetrators of the violence, concluding that, the Clemency Order was constructively, a blanket amnesty.

54. The complainant argued further that it could not challenge the Clemency Order in a court of law because the President of Zimbabwe, who was exercising his prerogative powers in terms of the Constitution of Zimbabwe, ordered it.

55. Additionally, the complainant argued at the 33rd ordinary session of this Commission, that it was not possible to exhaust domestic remedies during the period in question because there was pervasive violence; and gross and massive human rights violations took place on a large scale and more particularly, politically

motivated violence. The complainant referred the African Commission to Justice Devitte's judgment in *CFU v Minister of Lands & Others* 2000 (2) ZLR 469 (S), in which the judge summarised the extent of the violence that transpired during the period that the communication covered. In that judgment Justice Devitte stated that: 'Wicked things have been done, and continue to be done. They must be stopped. Common law crimes have been, and are being, committed with impunity. The government has flouted laws made by parliament. The activities of the past nine months must be condemned'.

56. Furthermore, the complainant argued that the violence was extended to some members of the judiciary. The complainant submitted that during the time in question, some members of the judiciary were threatened, several magistrates were assaulted while presiding over politically sensitive matters and several Supreme Court judges were forced to resign. According to the complainant, there were instances where persons approached the courts and sought to interdict the government of Zimbabwe or the persons who had forcefully settled themselves on private properties; court orders were granted but subsequently they were ignored because the government of Zimbabwe said it could not allow itself to follow court decisions that went against government policy. The complainant asserted that in the overall context of such a situation there was no realistic hope of getting a firm and fair hearing from judicial system that had been so undermined by the respondent state.

State party's response

57. Responding to the complainant's submission relating to the effect of the Clemency Order, the respondent state submitted that the victims of the criminal acts covered by the Clemency Order could have and could still institute civil suits and sought to be compensated, which according to the respondent state, would be more beneficial to the victims than the imprisonment of the perpetrators of the crimes.

58. In its oral submissions during the 33rd ordinary session of the African Commission, the respondent state argued that the complainant could have sought alternative remedies under section 24(1) of the Constitution of Zimbabwe. This provision accords aggrieved persons the right to seek redress from the Supreme Court where it is alleged that the Declaration of Rights has been, is being or is likely to be contravened in relation to them.

59. The respondent state also submitted that the complainant had the right and could have challenged the legality of the Clemency Order in court. The respondent state argued that there had been cases in Zimbabwe where persons had challenged the legality of the prerogative of the President and that such a challenge was before the courts of Zimbabwe. The respondent state argued that challenging

the legality of Clemency Order would have eventually paved the way for prosecuting the persons that committed those criminal acts covered by the Clemency Order; therefore by neglecting to challenge the legality of the President's prerogative, the complainant had failed to exhaust local remedies. The respondent state argued further that until the courts in Zimbabwe rule otherwise on the matter of the legality of the presidential prerogative, the complainant could still utilise the courts in Zimbabwe to challenge the legality of the Clemency Order.

60. With respect to the situation prevailing during the period in question, the respondent state admitted that of the numerous cases reported to the police, only a small percentage of the murder cases were committed to the High Court. The respondent state argues that, at the time its criminal justice system could not have been expected to investigate and prosecute all the cases and ensure that remedies were given, bearing in mind the considerable number of cases that were reported.

61. The situation notwithstanding, the respondent state argued that the complainant could have attempted to ask the Attorney-General to invoke his powers under section 76(4)(a). Section 76(4)(a) of the Constitution of Zimbabwe mandates the Attorney-General to 'require the Commissioner of Police to investigate and report to him on any matter which, in the Attorney-General's opinion, relates to any criminal offence or alleged or suspected criminal offence, and the Commissioner of Police shall comply with that requirement.' The respondent state argued that except in the case of Tichaona Chiminya and Talent Mabika, the complainant had made no attempts to request the Attorney-General to invoke section 76(4)(a) in relation to the reported cases neither did they seek to find out from the Attorney-General what course of action had been taken with respect to those cases.

62. The respondent state also submitted that if all else was not possible, the complainant could have instituted private prosecutions against those persons alleged to have committed crimes and had not been prosecuted by the state in accordance with section 76(4) of the Constitution of Zimbabwe.

African Commission's decision on admissibility

63. The complainant in this communication states that during the period in question, the criminal acts that were committed ranged from assault, arson, theft, torture, kidnapping, torture, murder etc and these acts were directed towards persons perceived to be or known as supporters of the opposition and as such were politically motivated.

64. The African Commission holds the view that by pardoning 'every person liable for any politically motivated crime …' the Clemency Order had effectively foreclosed the complainant or any other person from bringing criminal action against persons who could have committed the acts of violence during the period in question and upon which this communication is based. By so doing, the complainant had been denied access to local remedies by virtue of the Clemency Order.[3]

65. Exhaustion of local remedies does not mean that the complainants are required to exhaust any local remedy, which may be impractical or even unrealistic. Ability to choose which course of action to pursue when wronged is essential and clearly in the instant communication the one course of action that was practical and therefore realistic for the victims to pursue – that of criminal action was foreclosed as a result of the Clemency Order.

66. The respondent state also submitted that the complainant failed to exhaust domestic remedies when they did not challenge the legality of the President's prerogative to issue a Clemency Order.

67. The African Commission is of the view that asking the complainant to challenge the legality of the Clemency Order in the Constitutional Court of Zimbabwe would require the complainant to engage in an exercise that would not bring immediate relief to the victims of the violations. The African Commission is aware that the situation prevailing in Zimbabwe at the time in question was perilous and therefore required the state machinery to act fast and firmly in cases such as this in order to restore the rule of law. To therefore ask victims in this matter to bring a constitutional matter before being able to approach the domestic courts to obtain relief for criminal acts committed against them would certainly result into going through an unduly prolonged procedure in order to obtain a remedy, an exception that falls within the meaning of article 56(5) of the African Charter.

68. It is argued by the respondent state that before bringing this matter to the African Commission, the complainant could have utilised the available domestic remedies by requesting the Attorney-General to invoke his powers under article 76(4)(a) or undertaken private prosecution of the persons alleged to have committed the said criminal acts under article 76(4).

69. The African Commission believes that the primary responsibility for the protection of human rights in a country lies with the government of that country. In the instant case, the international community in general and the African Commission paid particular attention to the events that took place in the run up to the

[3] Communications 54/91, 61/91, 98/93, 164-196/97, 210/98, *Malawi African Association and Others v Mauritania* [(2000) AHRLR 149 (ACHPR 2000)].

referendum in Zimbabwe in February 2000 right up to the end of and after the Parliamentary elections of June 2002. The respondent state was sufficiently informed and aware of the worrying human rights situation prevailing at the time.

70. The responsibility of maintaining law and order in any country lies with the state specifically with the police force of that state. As such, it is the duty of the state to ensure through its police force that where there is a breakdown of law and order, the perpetrators are arrested and brought before the domestic courts of that country. Therefore any criminal processes that flow from this action, including undertaking investigations to make the case for the prosecution are the responsibility of the state concerned and the state cannot abdicate that duty. To expect victims of violations to undertake private prosecutions where the state has not instituted criminal action against perpetrators of crimes or even follow up with the Attorney-General what course of action has been taken by the state as the respondent state seems to suggest in this matter would be tantamount to the state relinquishing its duty to the very citizens it is supposed to protect. Thus, even if the victims of the criminal acts did not institute any domestic judicial action, as the guardians of law and order and protectors of human rights in the country, the respondent state is presumed to be sufficiently aware of the situation prevailing in its own territory and therefore holds the ultimate responsibility of harnessing the situation and correcting the wrongs complained of.[4]

71. It is apparent to the African Commission that the human rights situation prevailing at the time this communication was brought was grave and the numbers of victims involved were numerous. Indeed the respondent state concedes that its criminal justice system could not have been expected to investigate and prosecute all the cases reported and ensure that remedies are given. This admission on part of the respondent state points to the fact that domestic remedies may have been available in theory but as a matter of practicality were not capable of yielding any prospect of success to the victims of the criminal assaults.

72. Thus, for the reasons outlined above, the African Commission declares this communication admissible and in coming to this conclusion, would like to reiterate that the conditions laid down in article 56(5) are not meant to constitute an unjustified impediment to access international remedies. As such, the African Commission interprets this provision in light of its duty to protect human and peoples' rights and therefore does not hold the requirement of

[4] *Malawi African Association and Others v Mauritania*. See also communications 48/90, 50/91, 52/91, 89/93, *Amnesty International and Others v Sudan* [(2000) AHRLR 297 (ACHPR 1999).

exhaustion of local remedies to apply literally in cases where it is believed that this exercise would be impractical or futile.

Merits

Complainant's submissions on the merits

Allegation of violation of article 1 of the African Charter

73. The complainant submitted that in terms of article 1 of the African Charter, the obligation of states parties to respect the rights enshrined in the Charter entails an obligation to refrain from conducts or actions that contravene or were capable of impeding the enjoyment of the rights and by so doing ensuring that human rights were protected. The complainant submitted further that to recognise the rights and duties enshrined in the African Charter, states parties also committed themselves to respect those rights and to take measures to give effect to them.[5]

74. The complainant went on to say that this duty pertains to the regulatory functions of the member state to prevent violations of rights by both state agents and other persons or organisations that were not state agents. This, according to the complainant, may necessitate the adoption of legislative, policy and administrative measures to prevent unwarranted interference with the enjoyment of these rights. Such measures include investigating allegations of violations as well as prosecuting and punishing those responsible for violations contained in the African Charter.[6]

75. It is submitted by the complainant that in the present communication state agents were directly involved in committing serious human rights violations such as in the case of the extra judicial execution of Tichaona Chiminya and Talent Mabika in Manicaland Province by an officer of the Central Intelligence Organisation.

76. It is also claimed that violent acts were carried out by state agents acting under the guise of public authority. According to the complainant, there were instances where police officers refused to record and investigate complaints of victims of various abuses thereby removing the protection of the law from the victims. Annexed to the communication as appendix one were statements allegedly made by alleged victims of violence stating that they made reports to the police but no action was taken, neither was any arrests

5 Communication 204/97, *Mouvement Burkinabé des Droits de l'Homme et des Peuples v Burkina Faso* [(2001) AHRLR 51 (ACHPR 2001)] and Communication 74/92, *Commission Nationale des Droits de l'Homme et des Libertés v Chad* [(2000) AHRLR 66 (ACHPR 1995)].

6 See *Velásquez Rodriguez,* Inter-American Court of Human Rights, judgment of 29 July 1988 paragraphs 160 – 167.

made. Most of them claimed the police refused to investigate their complaints because they were in the opposition MDC party.

77. The complainant averred that the government of Zimbabwe failed to provide security to members of opposition political parties thereby allowing serious or massive violations of human rights, adding that, the law enforcement agents on several occasions failed to intervene to prevent serious violations of human rights. The complainant argued that it is the primary responsibility of the government of Zimbabwe to secure the safety and the liberty of all of its citizens and to conduct investigations into allegations of torture, murder and other human rights violations.[7]

78. Regarding the Clemency Order 1 of 2000 granting a general amnesty for politically motivated crimes committed in the period preceding the June 2000 general elections, the complainant submitted that by failing to secure the safety of its citizens and by granting a general amnesty, the respondent state had failed to respect the obligations imposed on it under article 1 of the African Charter. Any violation of the provisions of the African Charter automatically means a violation of article 1 of the African Charter and that goes to the root of the African Charter[8] since the obligations imposed by article 1 of the African Charter are peremptory.[9]

Allegation of violation of article 2 of the African Charter - Non-discrimination

79. The complainant alleged a violation of article 2 of the African Charter which provides that:

> Every individual shall be entitled to the enjoyment of the rights and freedoms recognised 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 and social origin, fortune, birth or other status.

80. The complainant submitted further that the respondent state denied the victims their rights as guaranteed by the African Charter on the basis of their political opinions, and by so doing, the respondent state violated article 2 of the African Charter.

81. Article 2 of the African Charter guarantees enjoyment of the rights enshrined in the African Charter without distinction of any kind including political opinion[10] and the African Commission has held that the rights guaranteed in article 2 are an important entitlement as the availability or lack of them affects the capacity of one to enjoy many other rights.[11]

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7 Communication 74/92, *Commission Nationale des Droits de l'Homme et des Libertes v Chad*.
8 *Jawara v The Gambia*.
9 Communication 211/98, *Legal Resources Foundation v Zambia*.
10 *Malawi African Association and Others v Mauritania*
11 *Legal Resources Foundation v Zambia*.

Allegation of violation of article 3(2) of the African Charter

82. The complainant also alleged a violation of article 3(2) of the African Charter which provides that 'every individual shall be entitled to equal protection of the law'.

83. The complainant asserted that the police selectively enforced the law to prejudice victims of gross violations of human rights. The complainant argued that the statements appended as appendix one to the communication revealed that the police refused to record and investigate complaints filed by the victims in violation of article 3(2) of the African Charter.

84. The complainant requested the African Commission to have due regard to the Zimbabwe Supreme Court case of *Chavunduka & anor v Commissioner of Police*[12] when interpreting article 3(2) of the African Charter, noting that the request was based on the African Commission's own jurisprudence which states that in interpreting the African Charter, the African Commission may have regard to principles of law laid down by states parties to the African Charter and African practices consistent with international human rights norms and standards.[13] In the *Chavunduka* matter, the Supreme Court held that the police have the public duty to enforce the law. Consequently the entitlement of every person to the equal protection of the law embraces the right to require the police to perform their public duty in respect of law enforcement. This includes the investigation of an alleged crime, the arrest of the perpetrator and the bringing of him or her before a court.

Allegation of violation of article 4 of the African Charter

85. The complainant alleged a violation of article 4 of the African Charter. Article 4 of the African Charter provides that 'human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right'.

86. The African Commission considers that the right enshrined in article 4 'is the fulcrum of all other rights. It is the fountain through which other rights flow, and any violation of this right without due process amounts to arbitrary deprivation of life'.[14]

87. The complainant claimed that numerous people were victims of extra-judicial or summary executions, attacks or attempted attacks against their physical integrity and acts of intimidation. Documents attached by the complainant to support this claim include

12 2000 (1) ZLR 418 (S).

13 Communication 218/98 – *Civil Liberties Organisation and Others v Nigeria* [(2001) AHRLR 75 (ACHPR 2001)]; communication 225/98, *Huri-Laws v Nigeria* [(2000) AHRLR 273 (ACHPR 2000)]. See also art 61 of the African Charter.

14 Communication 223/98, *Forum of Conscience v Sierra Leone* [(2000) AHRLR 293 (ACHPR 2000)].

the judgment of the High Court of Zimbabwe in the *Buhera North election petition;* a list of persons who died between March 2000 and 31 December 2001 as a result of what it believed was politically motivated violence and extracts of newspaper articles.

88. The complainant submitted further that some of the executions were carried out by ZANU (PF) supporters and war veterans but also that extra-judicial or summary executions carried out by any other state agents such as an officer of the Central Intelligence Organisation are also a violation of article 4 of the African Charter.

89. The complainant further asserted that whether all levels of the government were aware of the acts complained of or that such acts were outside the sphere of the agent's authority or violated Zimbabwean law was irrelevant for the purpose of establishing whether the respondent state was responsible under international law for the violations of human rights as alleged in the communication. The complainant maintained that the state is required under article 1, to take all reasonable measures to ensure that people within its jurisdiction were treated in accordance with international human rights norms and standards.[15]

90. Furthermore, the complainant averred that the right to life read together with the state's general obligation required by implication that there should be some form of *effective official investigation* when there has been an extra-judicial execution. This obligation is not confined to cases where it has been established that the killing was caused by an agent of the state.[16]

91. The complainant referred the Commission to the European Court decision in *Jordan v the United Kingdom*[17] which stated that

> an effective official investigation must be carried out with promptness and reasonable expedition. The investigation must be carried out for the purpose of securing the effective implementation of domestic laws, which protect the right to life. The investigation or the result thereof must be open to public scrutiny in order to secure accountability. For an investigation into a summary execution carried out by a State agent to be effective, it may generally be regarded as necessary for the person responsible for the carrying out of the investigation to be independent from those implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence.

92. The complainant submitted that in the present communication there were no effective official investigations carried out in cases of extra-judicial or summary executions noting that this was because the very police which was implicated in failing to intervene and stop the murders were responsible for carrying out the investigations. The complainant referred the African Commission to its jurisprudence in

15 *Velásquez Rodriguez* paras 170, 177 and 183.
16 *Sabuktekin v Turkey* (2003) 36 EHRR 19.
17 *Jordan v United Kingdom* (2003) 37 EHRR 2.

several cases brought against Sudan with respect to the situation pertaining in that country between 1989 and 1993. In those communications, the African Commission held that 'investigations into extra-judicial executions must be carried out by entirely independent individuals, provided with the necessary resources, and their findings must be made public and prosecutions initiated in accordance with the information uncovered.'[18]

Allegation of violation of article 5 of the African Charter

93. The complainant also alleged a violation of article 5 of the African Charter which provides 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.

94. The complainant submitted that ZANU (PF) supporters acting in concert with war veterans subjected their victims to severe mental and physical suffering. They abducted and force-marched farm labourers to camps for political re-education meetings and to attend ZANU (PF) rallies as in the case of Robert Serengeti, Fungai Mafunga, Chamunorwa Steven Bitoni, Tazeni Chinyere, Champion Muleya, Bettie Muzondi and Misheck Muzondi. According to the complainant, while in the political re-education meetings, some of the farm workers were asked to produce ZANU (PF) membership cards and where they failed to produce ZANU (PF) membership cards they were interrogated about their involvement with opposition political parties. It is alleged that they were further ordered to lie prone and to roll in the mud while water was poured over them and that victims reported being subjected to severe beatings with various objects such as sticks, *sjamboks*, open hands, axe handles and hosepipes. Petros Sande, for example, is alleged to have testified that he was ordered to stick his penis in the sand and imitate sexual positions until he masturbated. When he failed to perform to his assailants' satisfaction his penis was hit with a stick.

95. The complainant provided information about persons who alleged to have been subjected to ill-treatment and stated that the victims of these atrocities reported to the police but in many of the cases the police made no effort to arrest or investigate the reports. Other victims were issued with death threats if they reported while others such as Sekai Chadeza feared reprisals and so they declined to report the assaults to the police.

96. The complainant submitted that all the above examples reveal a violation of article 5 of the African Charter by the respondent state and referred the African Commission to its jurisprudence in

[18] *Amnesty International and Others v Sudan*. See also resolution 1989/65 of 24 May 1989 of the Economic and Social Council of the United Nations

International Pen and Others (on behalf of Saro-Wiwa) v Nigeria[19] where it held that 'the prohibition in article 5 included not only actions which cause serious physical or psychological suffering, but also actions which humiliate the individual or force him or her to act against his will or conscience'. According to the complainant, the prohibition of torture, cruel, inhuman and degrading treatment is absolute[20] and one of the most fundamental values of a democratic society.[21]

Allegation of violation of article 6 of the African Charter

97. The complainant also alleged a violation of article 6 of the African Charter which provides 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.

98. The complainant submitted that the victims in the communication were abducted and kidnapped and held in detention for a whole night at camps established by war veterans and ZANU (PF) supporters mainly because they held differing political opinions. The complainant asserted that kidnapping of a person is an arbitrary deprivation of their liberty.[22]

99. The complainant further submitted that the African Commission has held that detaining a person on account of their political beliefs, especially where no charges are brought against them renders the deprivation of liberty arbitrary and where government maintains that no one is presently detained without charge does not excuse past arbitrary detentions.[23] The complainant makes reference to the decision of the European Court of Human Rights in *Bilgin v Turkey*[24] where it stated that

> any deprivation of liberty must not only have been effected in conformity with the substantive and procedural rules of national law but must equally be in keeping with the very purpose of Article 5, namely to protect the individual from arbitrary detention.

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19 [(2000) AHRLR 212 (ACHPR 1998)]. See also communication 224/98, *Media Rights Agenda v Nigeria* [(2000) AHRLR 262 (ACHPR 2000)]. See also the definition of torture in art 1 of the Declaration on the Protection of All Persons from Being Subjected to Torture, Other Cruel, Inhuman or Degrading Treatment or Punishment adopted by the General Assembly of the United Nations in resolution 3452(XXX) of 9 December 1975 and art 1 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984.

20 *Huri-Laws v Nigeria*.

21 *Lorse v Netherlands* (2003) 37 EHRR 3.

22 See *Velásquez Rodriguez*, para 155.

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

24 *Bilgin v Turkey* (2003) 35 EHRR 39.

100. The complainant stated that arbitrary deprivation of liberty often involves an element of suffering or humiliation which also amounts to cruel, inhuman or degrading treatment.[25]

Allegation of violation of articles 9, 10 and 11 of the African Charter

101. The complainant further alleged a violation of articles 9, 10 and 11 of the African Charter averring that there is a close relationship between these rights.[26]

Article 9 of the African Charter provides:

> (1) Every individual shall have the right to receive information.
>
> (2) Every individual shall have the right to express and disseminate his opinions within the law.

Article 10 of the African Charter provides:

> (1) Every individual shall have the right to free association provided that he abides by the law.
>
> Subject to the obligation of solidarity provided for in Article 29, no one may be compelled to join an association.

Article 11 of the African 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, the safety, health, ethics and rights and freedoms of others.

102. The complainant alleged that the victims in the present communication were abused because they held and sought to impart political views and opinions that were unfavourable to those of the respondent state. It is alleged that they were forced to attend all night rallies where they were given information on why they should support ZANU (PF) and not the opposition MDC. Furthermore, the victims were forced to surrender their parties' campaign materials and were prevented from communicating to others their parties' policies.

103. The complainant submitted further that freedom of expression is a basic human right vital to an individual's personal development and political consciousness. It is therefore one of the essential foundations of a democratic society and one of the basic conditions for its progress.[27]

104. According to the complainant, the persecution of real or perceived members of opposition political parties in an attempt to undermine the ability of the opposition to function amounted to an

25 *Huri-Laws v Nigeria*. See also *Lorse v Netherlands* (2003) 37 EHRR 3.

26 *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria*.

27 *Media Rights Agenda and Others v Nigeria* [(2000) AHRLR 200 (ACHPR 1998)], *Constitutional Rights Project and Others v Nigeria* [(2000) AHRLR 227 (ACHPR 1999)], communication 212/98, *Amnesty International v Zambia* [(2000) AHRLR 325 (ACHPR 1999)]; See also *Thoma v Luxembourg* (2003) 36 EHRR 21.

infringement[28] of article 10 of the African Charter and of persons because they belong to opposition political parties amounted to a violation of article 9 of the African Charter.[29]

Allegation of violation of article 13(1) of the African Charter

105. The complainant equally alleged a violation of article 13(1) of the African Charter which provides that:

> 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.

106. It is submitted by the complainant that the alleged victims were abused because of their political opinions and affiliations, while some of the victims were members of political parties others were not affiliated to any political party but were assumed to support the opposition and therefore subjected to abuse.

107. The complainant argued that the right of people to participate in the government of their countries is not limited to the casting of votes. In addition to voting for representatives of their choice, people participate in the government of their country through uninhibited, robust and wide open communication on matters of government, politics and public issues[30] and by freely associating and forming associations for political ends, adding that, there must always be a general capacity for citizens to join, without interference, in associations in order to attain various ends.[31]

State party's submission on the merits

108. The state contended that there were many allegations in the communication intended to give an impression of serious or massive violation of human rights which Zimbabwe proved to be false. The state indicated that there were many cases alleged to have been reported yet the police did not have records of such cases. The state also noted that complainant did not avail any proof to the Commission that reports had been made to the police; neither did complainant submit any medical reports of the injuries sustained by some of its clients as a result of the severe and life-threatening assaults allegedly perpetrated on the victims.

109. The state also submitted that the complainant exaggerated the number of deaths some of which were in fact as a result of natural causes and other causes not related in any way to political violence during the period in question. That complainant even included people

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28 See *Yazar, Karatas, Aksoy & People's Labour Party (HEP) v Turkey* (2003) 36 EHRR 6.

29 *Amnesty International and Others v Sudan*.

30 See *New York Times v Sullivan* 376 US 254 (1964) at 270; *Reynolds v Times Newspapers Ltd* [2001] AC 127.

31 Communication 101/93, *Civil Liberties Organisation (in respect of Bar Association) v Nigeria* [(2000) AHRLR 186 (ACHPR 1995)].

who were still alive and still had not submitted proof of the death of any of the 74 deceased persons. The state recognised its responsibility under the Charter to assist the Commission in arriving at the truth, provided the information on which cases had been reported, their reference numbers both police and court and progress made in the investigation of the matters in order to bring justice to the victims.

110. The state also drew the Commission's attention to the fact that in the complainant's submissions on merits, they abandoned a number of allegations and had made brazen submissions in respect of some of the allegations. The state noted that with regards to freedom of expression for example, complainant's submissions had always been centered on freedom of the media and the enactment of laws such as the Access to Information and the Protection of Privacy Act (AIPPA). However, in its submissions on merits it does not make any reference to these allegations other than making reference to paragraph 58 of the Report of the UN Special Rapporteur on Extra-judicial, Summary or Arbitrary Execution E/CN.4/2002/74 and paragraph 634 of E/CN.4/2002/74/Add.2, paragraphs 109-121 of E/CN.4/2002/75/Add.2. According to the state it should therefore be taken that complainant has abandoned its allegations in this regard.

111. The respondent state informed the Commission that the government of Zimbabwe had taken appropriate and effective measures to ensure that those who perpetrated the ascertainable violations specified in the communication be brought to book and as such had provided effective remedy to the aggrieved. The state indicated a number of measures taken to bring those accused of perpetrating violence to justice, including investigations conducted by the police, amendment of relevant legislation and the payment of compensation to victims.

Regarding the violations of specific provisions of the Charter, the respondent state noted as follows

112. As regards allegations of violation of article 1 of the African Charter, the respondent state pointed out that it unreservedly accepts that its obligations under the Charter are to respect, protect and promote the rights guaranteed under the Charter. By respecting the rights, Zimbabwe was required to refrain from interfering with the enjoyment of the rights. The respondent state indicated that the state had enacted the necessary policy and legislation, had made provision for effective remedies and taken the necessary administrative measures to ensure that its people enjoy their rights.

113. The state contended that the communication is essentially to determine whether the alleged violations of human rights can be imputed to the government of Zimbabwe since the complainant averred that the government planned, committed or otherwise aided

and abetted a campaign of terror and this was based on the perceived interlink between the government, ZANU (PF) and the war veterans.

114. The state noted that it is responsible for the acts of its organs and officials undertaken in their official capacity and for their omissions even when these organs act outside the sphere of their authority or violate internal law.[32] The underscoring factor, according to the state, is that any such violation is imputable to the state only when the act is by a public authority which uses its authority to perpetrate the violation.[33] The import of paragraph 172 of *Velásquez Rodriguez* case is that even where the state agent acts outside his/her authority or violates the law, the agent must have held himself/herself to be exercising his authority as a state agent. In any other circumstance, the illegal act can only be imputable to a state if there is lack of diligence to prevent or respond to the violation as required by the Charter. The state concluded that where a state agent is on a frolicking of his own and commits acts considered of violation of rights, such acts will not be imputed to the state.

115. The state further noted that whilst article 1 extends the obligation of a state party to investigate acts of violation of rights guaranteed under the Charter, the duty to investigate, such as the duty to prevent, is not breached merely because the investigation does not produce a satisfactory result, admitting however, the investigations must be undertaken in a serious manner and not as a mere formality. Referring to the *Velásquez Rodriguez* case, the state noted that the Inter-American Court of Human Rights was clear to what extent a state may become responsible for cases not intentionally or directly imputable to the state. The Court observed that

> an illegal act which violates human rights and which is initially not directly imputable to a state (for example, because it is an act of a private person or because the person responsible has not been identified) can lead to international responsibility of the state not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.

116. The state emphasised that there is a clear distinction between the government of Zimbabwe and ZANU (PF). The state maintained that whilst ZANU (PF) is the ruling party, the actions of the party cannot be attributed to the government of Zimbabwe and added further that the actions of the war veterans cannot equally, be attributed to the government of Zimbabwe. The respondent state acknowledged that President Mugabe is the patron of the war veterans, but that did not in any way imply that war veterans were controlled by the government of Zimbabwe. ZANU (PF) is a political party and the war veterans (either individually or as an association) are not state organs. Therefore, according to the state, their illegal

[32] See *Velásquez Rodriguez* paras 169 – 170.
[33] As above, para 172.

acts cannot be imputable to the government of Zimbabwe. Neither can it be said that the violence alluded to in the communication was an orchestrated policy of the government of Zimbabwe. Submissions by complainant in this regard are palpably untenable and should be disregarded, submitted the state.

117. The state concluded by noting that it was improper to impose liability on the government of Zimbabwe, or any government for that matter, for actions of persons or organisations who were not part of the state machinery. The state's liability in such a situation should only attach where the state fails to exercise the duty to protect the rights, welfare and interests of the people diligently or acts in complicity with such persons.

118. With regards to allegations of violation of article 4, the right to life, the state noted that extra-judicial, arbitrary or summary executions are, under international law, generally attributable to state organs and officials in the ordinary exercise of governance. They entail, among other things, disregard of due process of the law by state entities or officials. The state referred to the *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions Recommended by Economic and Social Council Resolution* 1989/65 of 24 May 1989 and the *UN Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions* (UN Doc G/ST/CS DHA/12 (1991) which provide for definitions of extra-legal, arbitrary and summary executions.

119. The state noted further that apart from the case of Chiminya and Mabika out of the alleged 74 'extra-judicial executions', the complainant did not give an account of how the others happened. Therefore, the complainant's naked allegations did not assist in determining whether or not the alleged deaths actually happened. To buttress this point, the state argued that although complainant alleged that some of the victims were severely assaulted with objects such as 'sticks, *sjamoks*, open hands, axe handles and hosepipes', not a single medical report was produced in support of such severe assaults. The state called on the Commission to distinguish the present communication from communications such as *Amnesty International and Others v Sudan* where the communication was supported with not only personal accounts but also medical testimonies. The state concluded that throughout the Communication, there was evidence that the complainant did not take steps to ascertain what had happened to the matters that were reported to the police.

120. As regards Joseph Mwale, who was alleged to have killed Chiminya and Mabika, and who was alleged to be a member of the Central Intelligence Organisation, the respondent state submitted that his actions could not be imputed to the state as the alleged acts could not be said to have been committed in his official capacity, in

other words, using their authority in the normal course of their duty. The death of Chiminya and Mabika, according to the state, was a case of an allegedly intentional and illicit deprivation of another's life which can and must be recognised and addressed in terms of the criminal law as murder.

121. Furthermore, the respondent state submitted that the alleged or perceived inaction of the police in relation to all the alleged violations cannot be said to be a contravention of the rights guaranteed by the Charter and in particular article 1. The state insisted that the police were deployed to deal with cases of violence and unrest, and to this end, suspects were arrested, investigations conducted and prosecutions effected. The state also reminded the Commission of the fact that the complainants had submitted at the 33rd ordinary session that in most cases the alleged victims of the alleged violence did not know who the perpetrators of the violence were and therefore could not assist the police in identifying the perpetrators of the violence and in a large number of cases, the alleged victims did not even report the alleged violations.

122. The state also drew the attention of the Commission to the fact that some of the names of those alleged to have been assaulted did not appear in the records of the Registrar General and therefore their existence was questionable; that some of the deaths had been found not to have occurred at all; that in some cases members of either ZANU (PF) or MDC were driven from other areas to perpetrate acts of violence in different areas. (*Alouis Musarurwa Mudzingwa v Oswald Chitongo* HH 73-2002); that some of the individuals alleged to have died in politically motivated violence, died of natural causes or other mishaps and not as a result of the alleged assaults and some well before the period in issue. The state noted that all the above came about as a result of investigations conducted by the police following reports in the press; that in the bulk of the cases the perpetrators had been identified, arrested, tried, convicted or acquitted and in some cases matters were still pending before the courts; that in other instances the police had carried out their investigations but had failed to identify the culprits; and that in other instances the Attorney-General declined to prosecute due to lack of evidence.

123. The state submitted that given the concession by the complainant and the fact that there had been prosecutions of some of the culprits, the police had discharged their duties diligently in the circumstances, noting that the fact that the investigations did not always produced results satisfactory to the complainant did not amount to a breach of their duty. The state concluded that the fact that the situation in the country had stabilised was indicative of the police's role in preventing further violations and containing the situation.

124. In the case of Chiminya and Mabika, the state submitted that the Attorney-General had appraised the investigations conducted by the police and had since issued instructions to the police for the arrest and prosecution of Mwale and others for the murder of Chiminya and Mabika. According to the state, general indications were that the investigations were done in a professional and independent manner and had been effective.

125. The state concluded on this allegation by noting that in any event, the question of an independent investigator does not arise as the alleged executions could not in the strict sense be termed extra-judicial or summary executions.

126. Regarding allegations of torture, inhuman and degrading treatment, the state noted that as in the case of extra-judicial or summary execution, torture, inhuman or degrading treatment must be inflicted '… by or at the instigation of, or with the consent or acquiescence of a public official or other person acting in an official capacity.' (See article 1 of the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment, 1984.)

127. To this end the state noted that ZANU (PF) and war veterans are not synonymous with the government of Zimbabwe and are not state institutions. Torture or ill treatment of a citizen by another citizen who is not in government service and/or whose behaviour is not sanctioned by government does not fall within the definition of the Convention. The respondent state argued that the police investigated those cases that were reported and since in most of the cases the alleged victims could not identify the perpetrators, the police could not pursue the matter any further.

128. On the allegation of arbitrary detention, the state submitted that its submissions on the right to life and freedom from torture equally applied in this context.

129. Regarding freedom of expression, association and assembly and discrimination, the state distinguished the communication from *Amnesty International and Others v Sudan* noting that in the latter cases government institutions perpetrated the violations. Although complainant made reference to 'parties', the list of persons assaulted was either ZANU (PF) or MDC or they were said not to be affiliated to any political party. The state pointed out that what was clear was that the violation was not directly attributed to the government. The state further noted that the government had taken the necessary measures to ensure that those who have perpetrated the violations were brought to book. And that there was no policy by the government of Zimbabwe to trample on the rights of any individual to freely associate with a political party of his or her choice. The state reiterated the same argument with regard to allegations of violation of the right to participate freely in one's government.

130. Regarding equal protection of the law, the state refuted the claim that the alleged victims had been denied this protection in the manner and to the extent averred by the complainant and denied that there was an outright denial of police protection for complainant's clients.

131. On Clemency Order 1 of 2000, the respondent state emphasised that the prerogative of clemency or amnesty is recognised as an integral part of constitutional democracies. To ensure that those who had committed more serious offences did not go unpunished, the Clemency Order excluded crimes such as murder, rape, robbery, indecent assault, statutory rape, theft and possession of arms. The state further noted that a decision by the Commission that the Clemency Order was an abdication of Zimbabwe's obligations under the Charter would amount to undermining the whole notion of the clemency prerogative worldwide adding that clemency orders are the prerogatives of the head of state and this discretion was exercised reasonably under Clemency Order 1 of 2000.

132. On the report issued by the Special Rapporteur on Extra-judicial, Summary or Arbitrary Execution's Report E/CN.4/2001/9/ Add.1, the state submitted that her appeal to the government of Zimbabwe was based on reports that she had received on the alleged violation of human rights, and it was, according to the state, apparent from the report that:

(i) the alleged violations were by the supporters of the ruling party and war veterans and not by the government of Zimbabwe; and

(ii) that Zimbabwe responded to the Special Rapporteur's appeal that all incidents were being investigated.

133. In conclusion, the state stated that the Special Rapporteur's report was supportive of its submissions that the government of Zimbabwe did not have a policy to violate the rights if its people and also that it took its obligations on human rights seriously.

Issues for determination and decision of the African Commission on the merits

134. The present communication raises several issues that must be addressed by the African Commission to determine whether the respondent state has or has not violated the rights of the victims as alleged by the complainant. The African Commission is called upon to determine:

- What non-state actors are and whether the Zimbabwe African National Union-Patriotic Front - ZANU (PF) and the Zimbabwe Liberation War Veterans Association (war veterans) can be termed non-state actors;
- The extent of a state's responsibility for human rights violations or acts committed by non-state actors; and
- Whether Clemency Order 1 of 2000 resulted to a violation of the respondent state's obligations under article 1 of the Charter.

Issue one: What are non-state actors under international law?

135. Traditionally, international human rights law mostly talked to and about national governments or states. The need to look beyond the state or its agents as the primary subject of international law and the sole possible actor capable of impairing the enjoyment of the human rights of others, requires a term that captures the very many different kinds of individuals, groups or institutions whose behaviour, actions or policies have an effect on the enjoyment of human rights, and who can either be directly called to answer by the international system or for whom the government will be called to answer.

136. The term 'non-state actors' has therefore been adopted by the international community to refer to individuals, organisations, institutions and other bodies acting outside the state and its organs. They are not limited to individuals since some perpetrators of human rights abuses are organisations, corporations or other structures of business and finance, as the research on the human rights impacts of oil production or the development of power facilities demonstrates.[34]

Issue two: Are the Zimbabwe African National Union-Patriotic Front - ZANU (PF) and the Zimbabwe Liberation War Veterans Association (war veterans) non-state actors?

137. By its submission of 23 February 2004, the complainant argued that the government of Zimbabwe planned, committed or otherwise aided and abetted a campaign of terror and violence and stated further that the war veterans and the supporters of the governing ZANU (PF) with endorsement and support of the government unlawfully occupied commercial farms which were turned into torture and re-education camps. The complainant argued further that 'under the current political arrangement in Zimbabwe, ZANU (PF) is government and the government is ZANU (PF) and with respect to the war veterans, the complainant submitted that 'at all material times the government of Zimbabwe exercised extensive *de jure* and *de facto* control over the war veterans', noting that the chairperson of the Zimbabwe Liberation War Veteran Association, Dr Hunzvi made a statement in court to the effect that President Mugabe had control over the war veterans. The complainant was therefore implying that the ZANU (PF) and the war veterans were either state apparatus or were controlled by the government. In its submission of 23 February 2004 the complainant argued further that even if it were found that ZANU (PF) supporters and war veterans were not agents of the government, read together with the general obligation under article 1 of the African Charter, the government could still be held liable for

[34] See African Commission decision on communication 155/96, *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* [(2001) AHRLR 60 (ACHPR 2001)].

a violation of the Charter, noting that under article 1 of the Charter, the government is required to take all necessary measures to ensure that people within its jurisdiction are treated in accordance with international norms and standards.

138. In the opinion of this Commission, the ZANU (PF) is a political party (the ruling party) in Zimbabwe and just like any other party in the country, distinct from the government. It has an independent identity from the government with its own structures and administrative machinery, even though some of the members of the Zimbabwe government - cabinet ministers, also hold top ranking positions in the party. For example, President Robert Mugabe is the President and First Secretary General of the party.[35] This Commission also holds that the War Veterans Association is a group of ex-combatants of the Zimbabwe liberation struggle. President Mugabe was the Patron during the period under consideration.

139. Given what this Commission will call the 'mixed membership', it would appear that there is a very thin line to be drawn between the government and the ZANU (PF), the government and war veterans and between the ZANU (PF) and the war veterans. There are members of government who are members of the party and members of the party who are war veterans. However thin the line of distinction may seem, it is not the view of the African Commission that the ZANU (PF) and the Zimbabwe Liberation War Veterans Association are structures of the government or organs of the state. The complainant did not supply the African Commission with documentary evidence to prove this relationship. Even if President Mugabe is Patron of the War Veterans and exercises control over the group, this does not make the war veteran association part of government or state machinery.

140. It must also be noted that during oral submissions by both parties at the 35th ordinary session of the African Commission, the complainant dropped its argument that the ZANU (PF) and the Zimbabwe Liberation War Veterans Association were structures of the government or organs of the state. The complainant noted in its submission of 26 August 2004 that 'the assertion that the respondent state acquiesced to the gross violations of human rights is based not on agency but a failure to effectively protect its citizens from the harmful conduct of third parties'. In the African Commission's view therefore, the complainant has admitted not only that ZANU (PF) and the war veterans are not government structures or organs of the state, but is also accepting the state's argument that it had nothing to do with their alleged actions. The complainant is simply concerned with the fact that the state has a responsibility to effectively protect its citizens from the harmful conduct of third parties, a responsibility, which, according to the complainant, the respondent state failed to

[35] Seventeen members of the Zimbabwe cabinet are also members of the ZANU (PF) Politburo, the decision making organ of the party.

discharge. It is therefore the view of the African Commission that both ZANU (PF) and the Zimbabwe Liberation War Veterans Association are organisations outside the government or state structures and as such, non-state actors.

141. Having established that ZANU (PF) and the Zimbabwe Liberation War Veterans Association are non-state actors, the Commission will proceed to deal with the complainant's major concern – the state's responsibility to effectively protect its citizens from the harmful conduct of third parties (non-state actors). Can the violence and atrocities alleged to have been committed by these non-state actors be attributed to the respondent state or put differently, can the respondent state be held responsible for the violations committed by these non-state actors?

Issue three: Extent of a state's responsibility for acts of non-state actors

142. Article 1 of the African Charter is essential in determining whether a violation of the human rights recognised by the Charter can be imputed to a state party or not. That article charges the states parties with the fundamental duty to 'recognize the rights … and undertake to adopt legislative or other measures to give effect to them'. Any impairment of those rights which can be attributed under the rules of international law to the action or omission of any public authority constitutes an act imputable to the state, which assumes responsibility in the terms provided by the African Charter.

143. Human rights standards do not contain merely limitations on state's authority or organs of state. They also impose positive obligations on states to prevent and sanction private violations of human rights. Indeed, human rights law imposes obligations on states to protect citizens or individuals under their jurisdiction from the harmful acts of others. Thus, an act by a private individual and therefore not directly imputable to a state can generate responsibility of the state, not because of the act itself, but because of the lack of due diligence[36] to prevent the violation or for not taking

[36] In human rights jurisprudence this standard was first articulated by a regional court, the Inter-American Court of Human Rights, in looking at the obligations of the state of Honduras under the American Convention on Human Rights – *Velásquez Rodriguez*, ser C, No 4, 9 *Human Rights Law Journal* 212 (1988). The standard of due diligence has been explicitly incorporated into United Nations standards, such as the Declaration on the Elimination of Violence against Women which says that states should 'exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the state or by private persons'. Increasingly, UN mechanisms monitoring the implementation of human rights treaties, the UN independent experts, and the court systems at the national and regional level are using this concept of due diligence as their measure of review, particularly for assessing the compliance of states with their obligations to protect bodily integrity.

the necessary steps to provide the victims with reparation.

144. The Inter-American Court of Human Rights has issued a judgment in the case of *Velásquez Rodríguez v Honduras*[37] which articulates one of the most significant assertions of state responsibility for acts by private individuals. The Court stated that a state 'has failed to comply with [its] duty ... when the state allows "private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention"'.[38] In the same case, the Inter-American Court reaffirmed that states are 'obliged to investigate every situation involving a violation of the rights protected by [international law]'. Moreover, the Court required governments to 'take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.'[39] This represents an authoritative interpretation of an international standard on state duty. The opinion of the Court could also be applied, by extension, to article 1 of the African Charter of Human and Peoples' Rights, which requires states parties to 'recognize the rights, duties and freedoms enshrined in the Charter and … undertake to adopt legislative and other measures to give effect to them'. Thus, what would otherwise be wholly private conduct is transformed into a constructive act of state, 'because of the lack of due diligence to prevent the violation or respond to it as required by the [African Charter]'.

145. The Inter-American Court of Human Rights in the *Velásquez Rodriguez* case, thus affirmed that: 'an illegal act which violates human rights and which is initially not directly imputable to a state (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the state, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention [or the African Charter]'.[40]

146. The established standard of due diligence in the *Velásquez Rodriguez* case provides a way to measure whether a state has acted with sufficient effort and political will to fulfil its human rights obligations. Under this obligation, states must prevent, investigate and punish acts which impair any of the rights recognised under international human rights law. Moreover, if possible, it must attempt to restore the right violated and provide appropriate compensation for resulting damage.

37 Series C, no 4, 9 *Human Rights Law Journal* 212 (1988).
38 *Velásquez Rodríguez* para 176.
39 As above, para 174.
40 As above, para 172.

147. In fact, international[41] and regional[42] human rights standards expressly require states to regulate the conduct of non-state actors containing explicit obligations for states to take effective measures to prevent private violations of human rights. The doctrine of due diligence is therefore a way to describe the threshold of action and effort which a state must demonstrate to fulfil its responsibility to protect individuals from abuses of their rights. A failure to exercise due diligence to prevent or remedy violation, or failure to apprehend the individuals committing human rights violations gives rise to state responsibility even if committed by private individuals. This standard developed in regard to the protection of aliens has subsequently been applied in regard to acts against nationals of the state. The doctrine of due diligence requires the state to 'organize the governmental apparatus, and in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights'.[43]

148. From the foregoing, can it be argued that the respondent state's actions to deal with the allegations or the violence alleged to have been committed by individuals and non-state actors during the period under consideration meet the due diligence test?

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41 The Covenant on Civil and Political Rights (ICCPR), in its art 2(3)(a), imposes a duty on each party to ensure an effective remedy to any person whose rights or freedoms are violated, whether or not by persons acting in an official capacity. Further, as far as the definition of torture is involved, the Human Rights Committee in its general comment 20 on art 7 of the ICCPR stated that: 'It is the duty of the state party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by art 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity'. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW): Under art 2(e) states undertake 'all appropriate measures to eliminate discrimination against women by any person, organization or enterprise'. The CEDAW supervising Committee further stated that: 'Discrimination under the Convention is not restricted to action by or on behalf of Governments … Under general international law and specific human rights Covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence and for providing compensation.' Art 4(c) of the UN Declaration on the Elimination of Violence Against Women obliges states to '[E]xercise due diligence to prevent, investigate and in accordance with national legislation, punish acts of violence against women whether those acts are perpetrated by the State or by private persons'.

42 Arts 2, 3, 8 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms establish a positive obligation on the state (including through legislative means). Art 1 of the American Convention provides that 'the states parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, colour, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition'.

43 *Velásquez Rodríguez* para 166.

149. To fully conceptualise a state's responsibility in terms of the due diligence doctrine, it must be made clear who is responsible and to what degree, where that responsibility arises from, towards whom such responsibility exists, and how such responsibility is asserted.[44] Thus, in this context, the task is not only to identify the responsibilities, but also to reflect on whether and under what conditions the state can be responsible for violations by private actors. The underlying aspect is that it is up to states, and states alone, to carry out obligations established by international human rights treaties.

150. State responsibility in general terms denotes a situation which occurs following a breach by a state of its legal obligations. Such obligations can be negative or positive, and can give rise to direct and indirect responsibilities.[45] In all of its aspects therefore the question of responsibility must also be related to the element of breach – breach of a duty to respect, protect, promote or fulfil the rights of persons under its jurisdiction.

151. In its decision in *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria*,[46] the African Commission noted that internationally accepted ideas of the various obligations engendered by human rights indicate that all rights - both civil and political rights and social and economic - generate at least four levels of duties for a state that undertakes to adhere to a rights regime, namely, the duty to respect, protect, promote, and fulfil.

152. At a primary level, the obligation to respect entails that the state should refrain from interfering in the enjoyment of all fundamental rights; it should respect right-holders, their freedoms, autonomy, resources, and liberty of their action.[47] At a secondary level, the state is required to ensure others also respect their rights. This is what is called the state's obligation to protect right-holders against other subjects by legislation and provision of effective remedies. This obligation requires the state to take measures to protect beneficiaries of the protected rights against political,

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44 In general, see the Dutch branch of Amnesty International and Pax Christi International, *Multinational Enterprises and Human Rights*, Utrecht, November 1998, ch III, www.paxchristi.nl/mne.html (15 January 2002). Although any complete set of peremptory human rights has not been agreed upon, discussions frequently mention: genocide, crimes against humanity, piracy, torture, slavery, and war crimes. See eg Bassiouni 'The sources and content of international criminal law: A Theoretical Framework' in M Cherif Bassiouni *International Criminal Law* (2 ed), vol I, 3-125, at 41, and Ian Seiderman *Hierarchy in international law: The human rights dimension* (2001) 66-121.

45 C Scott (ed) *Torture as tort: Comparative perspectives on the development of transnational human rights litigation* (2001) 47-48.

46 [(2001) AHRLR 60 (ACHPR 2001)].

47 K Drzewicki 'Internationalization of human rights and their juridization' in R Hanski and M Suksi (eds) *An introduction to the international protection of human rights: A textbook* (1999) 31.

economic and social interferences. Protection generally entails the creation and maintenance of an atmosphere or framework of an effective interplay of laws and regulations so that individuals will be able to freely realize their rights and freedoms. This is very much intertwined with the tertiary obligation of the state to promote the enjoyment of all human rights. The state should make sure that individuals are able to exercise their rights and freedoms, for example, by promoting tolerance, raising awareness, and even building infrastructures. The last layer of obligation requires the state to fulfil the rights and freedoms it freely undertook under the various human rights regimes. It is more of a positive expectation on the part of the state to move its machinery towards the actual realisation of the rights.

153. In communication 74/92,[48] the African Commission held that governments have a duty to protect their citizens, not only through appropriate legislation and effective enforcement but also by protecting them from damaging acts that may be perpetrated by private parties. This illustrates the positive action expected of governments in fulfilling their obligation under human rights instruments. This obligation of the state is further emphasised in the practice of the European Court of Human Rights, in *X and Y v Netherlands*.[49] In this particular case, the Court pronounced that there was an obligation on authorities to take steps to make sure that the enjoyment of the rights is not interfered with by any other private person.

154. In the present communication, the respondent state has an obligation to make sure the rights of persons under its jurisdiction are not interfered with by third parties. The state argues that during the riots the police were deployed in areas where violence was reported and cases of alleged abuses were duly investigated. The state added that however, due to the circumstances prevailing at the time, the nature of the violence and the fact that some victims could not identify their alleged perpetrators, the police were not able to investigate all cases referred to them.

155. The extent of a state's responsibility must not be determined in the abstract. Each case must be treated on its own merits depending on the specific circumstances of the case and the rights violated. This follows therefore that, in choosing how to provide effective protection of human rights, there are different means at a

[48] *Commission Nationale des Droits de l'Homme et des Libertés v Chad* [(2000) AHRLR 66 (ACHPR 1995)].

[49] 91 ECHR (1985) (Ser A) at 32.

state's disposal.[50] This is still a disputed element but the International Court of Justice (ICJ) has held due diligence in terms of 'means at the disposal' of the state.[51] Nevertheless, this need not be inconsistent with maintaining some minimum requirements.[52] It could well be assumed that for non-derogable human rights the positive obligations of states would go further than in other areas.

156. An analysis of the feasibility of effective state action must also be undertaken. A finding that no reasonable diligence could have prevented the event has contributed to denials of responsibility.[53] In the present communication, the respondent state contended that the police did their best to investigate the allegations brought to them.

157. Could the respondent state have foreseen the violence and taken measures to prevent it? Even though it is not always possible for a state to know beforehand how a non-state actor is going to act, states have the responsibility, not only to protect human rights, but also to prevent the violation of human rights. The question to be addressed here is not necessarily who violated the rights, but whether under the present communication, the state took the necessary measures to prevent violations from happening at all, or having realised violations had taken place, took steps to ensure the protection of the rights of the victims.

158. A single violation of human rights or just one investigation with an ineffective result does not establish a lack of due diligence by a state.[54] Rather, the test is whether the state undertakes its duties seriously.[55] Such seriousness can be evaluated through the actions of both state agencies and private actors on a case-by-case basis.

159. The due diligence requirement encompasses the obligation both to provide and enforce sufficient remedies to survivors of

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50 *Plattform 'Ärzte für das Leben' v Austria*, (21 June 1988), Publications of the European Court of Human Rights, Series A, vol 139, para 34: '… while it is the duty of the Contracting States to take reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully, they cannot guarantee this absolutely and they have a wide discretion in the choice of the means to be used'.

51 *Case Concerning United States Diplomatic and Consular Staff in Tehran* (*US v. Iran*), judgment, ICJ Reports 1980.

52 B Smith *State responsibility and the marine environment The rules of decision* (1988) 32.

53 Sornarajah 'Linking state responsibility for certain harms caused by corporate nationals abroad to civil recourse in the legal systems of home states', and T Meron *Human rights and humanitarian norms as customary law* (1989) 159.

54 Commission on Human Rights, fifty-second session, February 1996, report of the Special Rapporteur on violence against women, its causes and consequences, 'Further promotion and encouragement of human rights and fundamental freedoms, including the question of the programme and methods of work of the Commission alternative approaches and ways and means within the United Nations system for improving the effective enjoyment of human rights and fundamental freedoms', submitted in accordance with Commission on Human Rights resolution 1995/85.

55 As above.

private violence. In general terms, the Human Rights Committee has held, for example, that the existence of legal rules does not suffice to fulfil a condition of reasonable measures. The rules must also be implemented and applied (entailing for instance, investigations and judicial proceedings) and victims must have effective remedy.[56] Thus, the existence of a legal system criminalising and providing sanctions for assault and violence would not in itself be sufficient; the government would have to perform its functions to 'effectively ensure' that such incidents of violence are actually investigated and punished. For example, actions by state employees, the police, justice, health and welfare departments, or the existence of government programmes to prevent and protect victims of violence are all concrete indications for measuring due diligence. Individual cases of policy failure or sporadic incidents of non-punishment would not meet the standard to warrant international action.

160. It follows from the above that, by definition, a state can be held complicit where it fails systematically to provide protection of violations from private actors who deprive any person of his/her human rights. However, unlike for direct state action, the standard for establishing state responsibility in violations committed by private actors is more relative. Responsibility must be demonstrated by establishing that the state condones a pattern of abuse through pervasive non-action. Where states do not actively engage in acts of violence or routinely disregard evidence of murder, rape or assault, states generally fail to take the minimum steps necessary to protect their citizens' rights to physical integrity and, in extreme cases, to life. This sends a message that such attacks are justified and will not be punished. To avoid such complicity, states must demonstrate due diligence by taking active measures to protect, prosecute and punish private actors who commit abuses.

161. In the present communication, the state indicated measures that it took to deal with the alleged human rights violations, including amendment of legislation, arrest and prosecution of alleged perpetrators, payment of compensation to some victims and ensuring that it investigated most of the allegations brought to its attention. The complainant did not dispute these actions claimed to have been taken by the respondent state but contends instead that the actions were not sufficient and were not taken early enough to be diligent.

162. The question to be asked is whether these measures taken by the state were sufficient for the Commission to come to the conclusion that the state had discharged its duty?

163. The complainant did not dispute these actions claimed to have been taken by the respondent state but contended instead that the

[56] E Klein 'The duty to protect and to ensure human rights under the International Covenant on Civil and Political Rights' in E Klein (ed) *The duty to protect and to ensure human rights* (Colloquium, Potsdam, 1-3 July 1999) 2000.

actions were not sufficient and were not taken early enough to be diligent. The complainant also did not demonstrate collusion by the state to either aid or abet the non-state actors in committing the violence, and equally failed to show that the state remained indifferent to the violence that took place. This view is supported by the conclusion of the report of the this Commission's fact-finding mission to the respondent state which noted that

> there were allegations that the human rights violations that occurred were in many instances at the hands of ZANU PF party activists. The mission [was] however not able to find definitively that this was part of an orchestrated policy of the government of the Republic of Zimbabwe. There were enough assurances from the Head of State, cabinet ministers and the leadership of the ruling party that there has never been any plan or policy of violence, disruption or any form of human rights violations, orchestrated by the state.

164. Given the above, the African Commission cannot find that with regards to the violence perpetrated by the non-state actors, the respondent state failed to comply with its duty under article 1 of the African Charter to '… adopt other measures to give effect to [the rights]' and to that extent cannot find the state to have violated article 1 of the African Charter.

Allegation of violation of specific provisions of the African Charter

165. Apart from alleging that the respondent state has breached its fundamental duty under article 1 of the African Charter, the complainant also alleged the violations of several other provisions of the African Charter namely, articles 2, 3, 4, 5, 9, 10, 11 and 13.

166. Before addressing itself to whether the state has violated any of the provisions of the African Charter, the African Commission would like to rule on the matter raised by the respondent state that because the complainant did not mention some of the rights during its submission on the merits, it means they have abandoned their allegations of violation of those rights.

167. The African Commission would like to state that the failure by the complainant to indicate the particular articles or the rights of the African Charter alleged to have been violated is not fatal, to the extent of regarding the communication inadmissible or un-meritorious. He or she does not need to indicate the remedy sought. It is for the African Commission, after consideration of all the facts at its disposal, to make a pronouncement on the rights violated and recommend the appropriate remedy to reinstate the complainant to his or her right.

168. With respect to allegations of violation of article 2 and 3(2) - complainant submits that the respondent state denied the victims their rights as guaranteed by the African Charter on the basis of their political opinions. Article 2 of the African Charter provides that:

> Every individual shall be entitled to the enjoyment of the rights and freedoms recognised 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 and social origin, fortune, birth or any status.

Article 3(2) provides that 'every individual shall be entitled to equal protection of the law'.

169. Together with equality before the law and equal protection of the law, the principle of non-discrimination provided under article 2 of the Charter provides the foundation for the enjoyment of all human rights. As Shestack has observed, equality and non-discrimination 'are central to the human rights movement'.[57] The aim of this principle is to ensure equality of treatment for individuals irrespective of nationality, sex, racial or ethnic origin, political opinion, religion or belief, disability, age or sexual orientation. The African Commission has held in communication 211/98[58] that the right protected in article 2 is an important entitlement as the availability or lack thereof affects the capacity of one to enjoy many other rights.[59]

170. Discrimination can be defined as applying any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on equal footing, of all rights and freedoms.[60] From the definition of discrimination provided above, we can conclude that a universal 'composite concept of discrimination' can contain the following elements, stipulates a difference in treatment, has a certain effect and is based on a certain prohibited ground.

171. The general obligation is on states parties to the different human rights treaties to ensure through relevant means that persons under their jurisdiction are not discriminated on any of the grounds in the relevant treaty. Obligations under international human rights law are generally addressed in the first instance to states. Their obligations are at least threefold: to respect, to ensure and to fulfil the rights under international human rights treaties. A state complies with the obligation to respect the recognised rights by not violating them. To ensure is to take the requisite steps, in accordance with its constitutional process and the provisions of relevant treaty (in this case the African Charter), to adopt such legislative or other measures which are necessary to give effect to these rights. To fulfil the rights

57 J Shestack 'The jurisprudence of human rights' in T Meron (ed) *Human rights in international law: Legal and policy issues* (1984) 101.
58 *Legal Resources Foundation v Zambia*.
59 As above.
60 See Human Rights Committee general comment 18.

means that any person whose rights are violated would have an effective remedy as rights without remedies have little value. Article 1 of the African Charter requires states to ensure that effective and enforceable remedies are available to individuals in case of discrimination.

172. The complainant in the present communication concedes in their submission that the violence and alleged human rights violations were carried out by non-state actors including supporters of ZANU (PF), the war veterans and some members of the MDC. The complainant has not shown that there was any deliberate policy of the government to encourage this violence and by so doing discriminate against persons holding an alternative political view. The respondent state provided the Commission with proof that it did investigate some of the allegations and the complainant did not challenge the fact the state investigated some of the allegations. Based on the evidence before it, the African Commission could not establish whether there was a discriminatory pattern in the way the police conducted investigations on the alleged violations. However, the legislative and other measures taken by the government to deal with the violence does not suggest, in the opinion of the African Commission, a discriminatory pattern.

173. Sometimes a law may be neutral on its face, yet have a disparate impact on a group of people due to its application. For example, in *Yick Wo v Hopkins*,[61] Justice Stanley Matthews commented on the disparity in law enforcement by saying:

> though the law itself be fair on its face and impartial in appearance, yet, if applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, and the denial of equal justice is still within the prohibition of the [Charter]

174. For there to be equal protection of the law, the law must not only be fairly applied but must be seen to be fairly applied. Paragraph 9(3)(a) of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms[62] provides that everyone must be given the right

> to complain about the policies and actions of individual officials and governmental bodies with regard to violations of human rights and fundamental freedoms, by petition or other appropriate means, to competent domestic judicial, administrative or legislative authorities or any other competent authority provided for by the legal system of the state, which should render their decision on the complaint without undue delay.

175. The complainant in the present communication claims that the police selectively enforced the law to the prejudice of the victims -

61 118 US 356 (1886).
62 UN General Assembly resolution 53/144.

that the police refused to record and investigate complaints filed by the victims. Due to the above behaviour of the police, the complainant concludes that the conduct amounted unequal protection of the law in a violation of article 3(2) of the Charter. The state on its part holds that the police was deployed in all areas where violence was reported and because of the widespread nature of the violence and the scanty information provided to the police by the victims, the police could not effectively investigate all the allegations. The complainant provided unsigned statements to the Commission of persons who reported their cases to the police but were either turned away or the cases were not investigated.

176. While the African Commission cannot dispute the fact that the alleged victims did complain to the police or that they made declarations to the complainant about the alleged conduct of the police and while the African Commission cannot confirm or deny the allegations against the police, the fact that the declarations submitted by the complainant were not made under oath or corroborated by sworn affidavits makes it difficult to ascertain their authenticity. This Commission cannot accept the complainant's submission that the newspaper articles attached to the communication as appendix two corroborate the statements allegedly made by the alleged victims. The African Commission can therefore not rely on these declarations to conclude that the alleged victims were victimised, discriminated or denied equal protection of the law.

177. With respect to allegations of violation of articles 4 and 5 of the African Charter, the complainant alleges that extra-judicial executions and torture were perpetrated by supporters of the ZANU (PF) and the war veterans.

178. The respondent state noted on the other hand that for it to be held responsible, the violations must be inflicted by or at the instigation of, or with the consent or acquiescence of a public official or other person acting in an official capacity.[63]

179. Citing the UN Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions,[64] the state noted that generally extra-judicial executions are attributable to state organs and officials in the ordinary exercise of governance. This is supported by the UN Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions.[65] The introductory paragraph of the 1991 United Nations Manual provides that such executions include: (a) political assassinations; (b) deaths resulting from torture or ill-treatment in prison or detention;

63 See art 1 of the Conventions Against Torture and other Cruel, Inhuman and Degrading Treatment, 1984.
64 Recommended by Economic and Social Council resolution 1989/65 of 24 May 1989.
65 UN Doc G/ST/CS DHA/12 (1991).

(c) death resulting from enforced 'disappearances'; (d) deaths resulting from the excessive use of force by law-enforcement personnel; (e) executions without due process; and (f) acts of genocide. The six circumstances of extra-judicial executions mentioned in the UN Manual point to the fact that under international law, such executions can only be carried out by the state or through its agents or acquiescence.

180. UN Fact Sheet 11 provides that the 'situations of extrajudicial, summary or arbitrary execution' which the Special Rapporteur is requested to examine include all acts and omissions of state representatives that constitute a violation of the general recognition of the right to life embodied in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.[66] This view is also supported by the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms which stresses that the prime responsibility and duty to promote and protect human rights and fundamental freedoms lie with the state.[67] This is in line with article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which provides that

> the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, *when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity* ...

181. The above international human rights instruments support the state's argument that extra-judicial executions and torture are caused by the state or through its agents or acquiescence. In the present communication, the complainant alleges that killings were committed by ZANU (PF) supporters and war veterans. The respondent state maintains that to fulfil its obligations under international law, it investigated allegations of suspected deaths and the perpetrators were charged with the criminal law crime of murder. Some of them have been found guilty while some are still being prosecuted. The complainant does not dispute the fact that such investigations had been undertaken but argue they were not effective. From the above reasoning, the respondent state cannot be liable for extrajudicial executions as alleged by the complainants, and accordingly cannot be said to have violated article 4 of the African Charter.

66 Fact Sheet no 11 (Rev1), Extrajudicial, Summary or Arbitrary Executions.
67 UN General Assembly resolution 53/144.

182. In the specific case of the killing of Chiminya and Makiba, the respondent state in its oral submission at the 35th ordinary session of the African [Commission] stated that investigations into the murder was initiated immediately and three of the alleged perpetrators, Webster Gwamba, Bernard Makuwe and Morris Kainosi were arrested and remanded into custody and the police was still looking for Mr Mwale. The state noted further that the three accused have been charged and are awaiting trial. Based on the fact that the matter is still before the courts in Zimbabwe, the African Commission decided not to make a decision on it at the admissibility stage. It will therefore not pronounce on it at this stage as well.

183. Regarding the allegation of torture, the complainant did not adduce any evidence to show that state organs were responsible or that the government or state organs connived with ZANU (PF) supporters and war veterans to inflict pain on others. The state can also not be held responsible because it has demonstrated that it investigated allegations brought to its attention. Under international law, responsibility can lie directly to the individuals and non-state actors for their acts.

184. Regarding allegations of arbitrary detention, the complainant argues that the victims were abducted or kidnapped and detained by war veterans and ZANU (PF) supporters. Article 6 of the African Charter provides for the right to liberty and protection from arbitrary detention.

185. Under international law, arbitrary detention or arrest refers to detention that is not consistent with due process of the law established by the state or international human rights norms. The UN Working Group on Arbitrary Detention in its opinion on the arbitrary detention of Dr Wang in case 10/2003[68] declared that

> Wang, during his first five months in detention, did not have knowledge of the charges, the right to legal counsel, or the right to judicial review of the arrest and detention; and that, after that date, he did not benefit from the right to the presumption of innocence, the right to adequate time and facilities for defense, the right to a fair trial before an independent and impartial tribunal, the right to a speedy trial and the right to cross-examine witnesses

186. These fair trial procedures required by the UN are only available within a state setup and a person held by other individuals or non-state actors such as ZANU (PF) or the war veterans cannot be required to invoke a violation of these fair trial requirements because they do not exist under those circumstances. The situation would have been different if the non-state actors were holding the victims on behalf of the state, but the complainant has not shown such

68 *Wang v People's Republic of China*, regarding the continuing detention of Dr Wang Bingzhang, and the past detentions of Yue Wu, and Zhang Qi. The so-called 'Democracy Three' were kidnapped on the Vietnamese border and taken by force into China, where they were subsequently detained by the government.

agency. The respondent state can therefore not be said to have violated article 6 of the African Charter because unlike communications 140/94, 141/94 and 145/95 where the violations were perpetrated by the policemen and security personnel of the Federal Republic of Nigeria, the current communication alleges violations caused by organisations and individuals not associated with the state. These individuals and organisations can, under international law, be held personally liable for human rights violations and under national law be charged with common law offences. The state becomes liable only when it is informed of such acts and it fails to take action, which in the present instance, the state claimed to have investigated.

187. With respect to allegations of violation of articles 9, 10, 11 and 13 of the African Charter guaranteeing freedoms of expression, association and assembly, the right to participate freely in the government of one's country, respectively, the complainant argues that the victims were forced by supporters of the ruling party to surrender their party campaign material and that the victims were prevented from communicating to others. In communications 137/94, 139/94, 154/96 and 161/97[69] the African Commission held that there is a close relationship between the right to freedom of expression and the rights to association and assembly. Because of that relationship, the actions of the government not only violated the rights to freedom of assembly and association, but also implicitly violated the right to freedom of expression. In the above communications, the actions that occasioned the violations were the direct consequence of the state action. However, in the present communication, the violations alleged to have been committed were done by individuals or organisations not directly connected to the state party. For this reason, the state cannot be said to have violated articles 9, 10, 11 and 13 of the African Charter.

Issue four: The Clemency Order and the respondent state's human rights obligations under the African Charter

188. The complainant submits that by virtue of Clemency Order 1 of 2000, the victims of human rights abuses could not seek redress for the human rights violations they suffered because they could not challenge the Clemency Order. The Clemency Order granted pardon 'to every person liable to criminal prosecution for any politically motivated crime' committed between January and July 2000. The respondent state emphasised that the prerogative of clemency is recognised as an integral part of constitutional democracies. To ensure that those who had committed more serious offences do not go unpunished, the Clemency Order excluded crimes such as murder, rape, robbery, indecent assault, statutory rape, theft and possession

69 *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria.*

of arms. The respondent state further noted that a decision by the African Commission that the Clemency Order is an abdication of Zimbabwe's obligations under the African Charter would amount to undermining the whole notion of the clemency prerogative worldwide.

189. The African Commission would like to first of all address the assertion by the respondent state that 'a decision by the African Commission that the Clemency Order is an abdication of Zimbabwe's obligations under the Charter would amount to undermining the whole notion of the clemency prerogative worldwide'. This assertion by the respondent state seems to imply that the African Commission lacks the competence to make a determination on this matter.

190. The African Commission was established to monitor and ensure the protection of all human rights enshrined in the African Charter. It does this through among other things, making sure that policies and legislation adopted by states parties to the African Charter do not contravene the provisions of the African Charter. The fact that the doctrine of clemency is universally recognised does not preclude the African Commission from making a determination on it, especially if it is believed that its use has been abused to the extent that human rights as contained in the African Charter have been violated. The African Commission would also like to emphasise the point that the African Charter is an international treaty and it is customary in international law that where domestic legislation, including a national constitution is in conflict with international law, the latter prevails. The African Commission is therefore competent to make a determination on any domestic legislation, including a domestic legislation in a constitutional democracy that grants the executive absolute discretion.

191. Having concluded that it has the competence to rule on the question of the Clemency Order, the African Commission would now determine whether the Clemency Order as issued by the respondent state violated the latter's obligation under the African Charter. The Clemency Order granted pardon to 'every person liable to criminal prosecution for any politically motivated crime committed' between January and July 2000.

192. The order also granted a remission of the whole or remainder of the period of imprisonment to every person convicted of any politically motivated crime committed during the stated period. In terms of the Clemency Order, 'a politically motivated crime' is defined as:

> Any offence motivated by the object of supporting or opposing any political purpose and committed in connection with
>
> The Constitutional referendum held on the 12 and 13 February 2000; or
>
> The general Parliamentary elections held on 24 and 25 June 2000; whether committed before, during or after the said referendum or elections.

193. The only crimes exempted from the Clemency Order were murder, robbery, rape, indecent assault, statutory rape, theft, possession of arms and any offence involving fraud or dishonesty.

194. The Clemency Order under review in the present communication relates to a situation where non-state actors are alleged to have violated human rights, a situation of generalised violence which according to the state was politically motivated, a situation which resulted in loss of life and property. In a bid to reconcile the population the respondent state passed Decree 1 of 2000 adopting executive clemency to absolve perpetrators of violence if the latter related to 'any offence motivated by the object of supporting or opposing any political purpose'. The question for the African Commission is to determine whether the Clemency Order in question is a negation of the state's responsibility under article 1 of the African Charter.

195. The term clemency is a general term for the power of an executive to intervene in the sentencing of a criminal defendant to prevent injustice from occurring.[70] The exercise of executive clemency is inherent in many, if not, all constitutional democracies of the world. National governments have chosen to implement clemency for a number of reasons. For instance, executive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law. The administration of justice by the courts is not necessarily always just or certainly considerate of circumstances which may properly mitigate guilt. To afford remedy, it has always been thought essential to vest in some authority other that the courts, power to ameliorate or avoid particular criminal judgments.[71]

196. Clemency embraces the constitutional authority of the president to remit punishment using the distinct vehicles of pardons, amnesties, commutations, reprieves, and remissions of fines. An amnesty is granted to a group of people who commit political offences, eg during a civil war, during armed conflicts or during a domestic insurrection. A pardon may lessen a defendant's sentence or set it altogether. One may be pardoned even before being formally accused or convicted. While a pardon attempts to restore a person's reputation, a commutation of sentence is a more limited form of clemency. It does not remove the criminal stigma associated with the crime, it merely substitutes a milder sentence. A reprieve on its part postpones a scheduled execution.

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70 A Madden 'Clemency for battered women who kill their abusers: finding a just forum' 4 *Hastings Women's LJ* 1, 50 (1993).

71 L Ammons, 'Discretionary justice: A legal and policy analysis of a governor's use of the clemency power in the cases of incarcerated battered women' 3 *JL & Policy* 1, 30 (1994).

197. Clemency orders are not peculiar to Zimbabwe. These are resorted to the world over generally in the interest of peace and security. In the history of Zimbabwe, it is a well known fact that clemency orders have been resorted to as a process of easing tension and creating a new beginning. For instance, at independence in 1979/ 80, amnesty was resorted to by former colonial regime in order to create an environment for the new independent dispensation and to reduce the tension between the nationalists and the former white [rulers]. In the process, members of the former white regime who had been guilty of massive killings were beneficiaries of clemency. In another incident, following the civil war in the southern part of Zimbabwe involving two former nationalists movements, ZANU (PF) and the opposition an amnesty was resorted to in order to create an environment for a Peace Accord in 1987, which brought about permanent peace to Zimbabwe. The result was the release of several thousands of people including those who were guilty of massive human rights violations including murder, treason, and terrorism. Also generally, clemency is granted annually to serving prisoners for the purpose of giving them a new beginning, including those released on the humanitarian grounds.

198. Generally however, a clemency power is used in a situation where the president believes that the public welfare will be better served by the pardon, or to people who have served part of their sentences and lived within the law, or a belief that a sentence was excessive or unjust or again for personal circumstances that warrant compassion. In all these situations, the president exercises a near absolute discretion.

199. The reason the framers of national constitutions vest this broad power in the executive branch is to ensure that the president would have the freedom to do what he/she deems to be the right thing. In *Ex Parte Garland*,[72] the US Supreme Court characterised the scope of executive clemency thus:

> the clemency power thus conferred is unlimited, with the exception (in the case of impeachment). It extends to every offence known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgement. This power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restriction.

200. Over the years however, this strict interpretation of clemency powers have been the subject of considerable scrutiny by international human rights bodies and legal scholars. It is generally believed that the single most important factor in the proliferation and continuation of human rights violations is the persistence of impunity, be it of a *de jure* or *de facto* nature. Clemency, it is

[72] 71 US (4 Wall) 333, 380 (1866).

believed, encourages *de jure* as well as *de facto* impunity and leaves the victims without just compensation and effective remedy. *De jure* impunity generally arises where legislation provides indemnity from legal process in respect of acts to be committed in a particular context or exemption from legal responsibility in respect of acts that have in the past been committed, for example, as in the present case, by way of clemency (amnesty or pardon). *De facto* impunity occurs where those committing the acts in question are in practice insulated from the normal operation of the legal system. That seems to be the situation with the present case.

201. There has been consistent international jurisprudence suggesting that the prohibition of amnesties leading to impunity for serious human rights has become a rule of customary international law. In a report entitled 'Question of the impunity of perpetrators of human rights violations (civil and political)', prepared by Mr Louis Joinet for the Sub-commission on Prevention of Discrimination and Protection of Minorities, pursuant to Sub-commission decision 1996/119, it was noted that 'amnesty cannot be accorded to perpetrators of violations before the victims have obtained justice by means of an effective remedy' and that 'the right to justice entails obligations for the state: to investigate violations, to prosecute the perpetrators and, if their guilt is established, to punish them'.[73]

202. In his report, Mr Joinet drafted a set of principles for the protection and promotion of human rights through action to combat impunity, in which he stated that 'there can be no just and lasting reconciliation unless the need for justice is effectively justified' and that

> national and international measures must be taken ... with a view to securing jointly, in the interests of the victims of human rights violations, observance of the right to know and, by implication, the right to the truth, the right to justice and the right to reparation, without which there can be no effective remedy against the pernicious effects of impunity.

The report went on to state that

> even when intended to establish conditions conducive to a peace agreement or to foster national reconciliation, amnesty and other measures of clemency shall be kept within certain bounds, namely: (a) the perpetrators of serious crimes under international law may not benefit from such measures until such time as the state has met their obligations to investigate violations, to take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that they are prosecuted, tried and duly punished, to provide victims with effective remedies and reparation for the injuries suffered, and to take acts to prevent the recurrence of such atrocities.[74]

203. In its general comment 20 on article 7 of the ICCPR, the UN Human Rights Committee noted that

[73] See E/CN.4/Sub.2/1997/20/Rev 1, paras 32 and 27.
[74] As above, principles 18 and 25.

> Amnesties are generally incompatible with the duty of states to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible.[75]

In the case of *Hugo Rodríguez v Uruguay*,[76] the Committee reaffirmed its position that amnesties for gross violations of human rights are incompatible with the obligations of the state party under the Covenant and expressed concern that in adopting the amnesty law in question, the state party contributed to an atmosphere of impunity which may undermine the democratic order and give rise to further human rights violations. The 1993 Vienna Declaration and Programme of Action supports this stand and stipulates that: 'States should abrogate legislation leading to impunity for those responsible for grave violations of human rights such as torture and prosecute such violations, thereby providing a firm basis for the rule of law'.[77]

204. Importantly, the international obligation to bring to justice and punish serious violations of human rights has been recognised and established in all regional human rights mechanisms. The Inter-American Commission and Court of Human Rights have also decided on the question of amnesty legislation. The Inter-American Commission on Human Rights has condemned amnesty laws issued by democratic successor governments in the name of reconciliation, even if approved by a plebiscite, and has held them to be in breach of the 1969 American Convention on Human Rights, in particular the duty of the state to respect and ensure rights recognised in the Convention (article 1(1)), the right to due process of law (article 8) and the right to an effective judicial remedy (article 25). The Commission held further that amnesty laws extinguishing both criminal and civil liability disregarded the legitimate rights of the victims' next of kin to reparation and that such measures would do nothing to further reconciliation. Of particular interest are the findings by the Inter-American Commission on Human Rights that 'amnesty' legislation enacted in Argentina and Uruguay violated basic provisions of the American Convention on Human Rights.[78] In these cases, the Inter-American Commission held that the legal consequences of the amnesty laws denied the victims the right to obtain a judicial remedy. The effect of the amnesty laws was that cases against those charged were thrown out, trials already in progress were closed, and no judicial avenue was left to present or continue cases. In consequence, the effects of the amnesty laws

75 See Human Rights Committee general comment 20 (44) on article 7, para 15 (www.unhchr.ch/tbs/doc.nsf/view40?SearchView).

76 *Rodríguez v Uruguay*, communication 322/1988, UN DocCCPR/C/51/D/322/1988 (1994).

77 See The Vienna Declaration and Programme of Action, Section II, para 60, at www.unhchr.ch/huridocda/huridoca.nsf/Sym. /A.CONF.157.23.

78 Annual Report of the Inter-American Commission on Human Rights, 1992-1993.

violated the right to judicial protection and to a fair trial, as recognised by the American Convention and in the present case, the African Charter.[79]

205. In Argentina, the national courts have found Argentina's *Full Stop Law*[80] and the *Due Obedience Law*[81] as incompatible with international law and in particular with Argentina's obligations to bring to justice and punish the perpetrators of gross human rights violations. This is because these two pieces of legislation had been enacted to prevent from prosecution low and high ranking military officials (government agents) who were involved in human rights violations and disappearances during the 1970s and 1980s.

206. The Inter-American Court stated in its first judgment that states must prevent, investigate and punish any violation of the rights recognised by the Convention.[82] This has been re-emphasised in subsequent cases. In the 'Street Children case', the Court reiterated 'that Guatemala is obliged to investigate the facts that generated the violations of the American Convention in the instant case, identify those responsible and punish them'.[83] The Inter-American Court of Human Rights, in the Barrios Altos Case, *Chumbipuma Aguirre y otros v Perú*[84] held that amnesty provisions, proscription and the exclusion of responsibility which have the effect of impeding the investigation and punishment of those responsible for grave violations of human rights, such as torture, summary, extrajudicial or arbitrary executions, and enforced disappearances, are prohibited as contravening human rights of a non-derogable nature recognised by international human rights law. The Court held further that the self-amnesty laws lead to victims being defenceless and to the perpetuation of impunity, and, for this reason, were manifestly incompatible with the letter and spirit of the American Convention. The Court concluded by stating that as a consequence of the manifest incompatibility of the amnesty laws with the Inter-American Convention on Human Rights, the laws concerned have no legal effect and may not continue representing an obstacle to the investigation of

79 As above. See also J Edelstein, *Rights, Reparations and Reconciliation: Some comparative notes*, seminar 6 July 1994.

80 Law 23,429 of 12 December 1986.

81 Law 23,521 of 4 June 1987. The Committee Against Torture took the view , in respect of these laws, that the passing of the 'Full Stop' and 'Due Obedience' laws in Argentina by a 'democratically elected' government for acts committed under a *de facto* government is 'incompatible with the spirit and purpose of the Convention [against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment]' (Committee against Torture, communications 1/1988, 2/1988 and 3/1988, Argentina, decision dated 23 November 1989, paragraph 9.)

82 *Velásquez Rodriguez* para 166.

83 *Hilaire, Constantine and Benjamin et al*, judgment of 21 June 2002, Inter-Am Ct HR, (Ser C) no 94 (2002), 'Street Children' case, judgment of 26 May 2001, Inter-Am Ct HR, (Ser C) no 77 (2001), para 101 and operative clause 8.

84 *Caso Barrios Altos, Chumbipuma Aguirre y otros v Perú*, Inter-American Court of Human Rights, (Ser C), no 75 - judgment of 14 March 2001.

the facts of the case, nor for the identification and punishment of those responsible.[85]

207. The European Court of Human Rights on its part has recognised that where the alleged violations include acts of torture or arbitrary killings, the state is under a duty to undertake an investigation capable of leading to the identification and punishment of those responsible.[86]

208. The African Commission has also held amnesty laws to be incompatible with a state's human rights obligations.[87] Guideline 16 of the Robben Island Guidelines adopted by the African Commission during its 32nd session in October 2002 further states that

> in order to combat impunity states should: a) ensure that those responsible for acts of torture or ill-treatment are subject to legal process; and b) ensure that there is no immunity from prosecution for nationals suspected of torture, and that the scope of immunities for foreign nationals who are entitled to such immunities be as restrictive as is possible under international law.[88]

209. The UN Special Rapporteur on Torture has also expressed his opposition to the passing, application and non-revocation of amnesty laws (including laws in the name of national reconciliation, the consolidation of democracy and peace, and respect for human rights), which prevent torturers from being brought to justice and hence contribute to a culture of impunity. He called on states to refrain from granting or acquiescing in impunity at the national level, *inter alia*, by the granting of amnesties, such impunity itself constituting a violation of international law. As the International Criminal Tribunal for the former Yugoslavia Trial Chambers noted in the *Celebici* and *Furundzija* cases,[89] torture is prohibited by an absolute and non-derogable general rule of international law.

210. In the present communication, the African Commission has established that most of the atrocities, including human rights

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85 Cited in the interim report on the question of torture and other cruel, inhuman or degrading treatment or punishment, submitted by Sir Nigel Rodley, Special Rapporteur of the Commission on Human Rights, in accordance with para 30 of General Assembly resolution 55/89. Interim Report A/56/156, 3 July 2001.

86 European Court of Human Rights, *Aksoy v Turkey*, 18 December 1996, para 98. See also, *Aydin v Turkey* app 23178/94, judgment of 25 September 1997, para 103; *Selçuk and Asker v Turkey* apps 23184/94 and 23185/94, judgment of 24 April 1998, para 96; *Kurt v Turkey* app 24276/94, judgment of 25 May 1998, para 139; and *Keenan v United Kingdom* app 27229/95, judgment of 3 April 2001, para 122.

87 See also *Malawi African Association and Others v Mauritania* and *Degli and Others v Togo* [(2000) AHRLR 317 (ACHPR 1995)].

88 Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (The Robben Island Guidelines), African Commission on Human and Peoples' Rights, 32nd Session, 17-23 October, 2002, Banjul, The Gambia. See also *Malawi African Association and Others v Mauritania*

89 IT-96-21-A, 20 February 2001, Appeals Chamber; *The Prosecutor* v *Anto Furundzija* (IT-95-17/1-T), Trial Chamber II, judgment, 10 December 1998 (121 ILR 218) 45, 47, 48, 49, 61, 316, 333, 334, 337, 340, 342, 402, 469.

violations, were perpetrated by non-state actors, that the state exercised due diligence in its response to the violence – investigated the allegations, amended some of its laws, and in some cases, paid compensation to victims. The fact that all the allegations could not be investigated does not make the state liable for the human rights violations alleged to have been committed by non-state actors. It suffices for the state to demonstrate that the measures taken were proportionate to deal with the situation, which in the present communication, the state seemed to have shown.

211. However, this Commission is of the opinion that by passing Clemency Order 1 of 2000, prohibiting prosecution and setting free perpetrators of 'politically motivated crimes', including alleged offences such as abductions, forced imprisonment, arson, destruction of property, kidnappings and other human rights violations, the state did not only encourage impunity but effectively foreclosed any available avenue for the alleged abuses to be investigated, and prevented victims of crimes and alleged human rights violations from seeking effective remedy and compensation.

212. This act of the state constituted a violation of the victims' right to judicial protection and to have their cause heard under article 7(1) of the African Charter.

213. The protection afforded by article 7 is not limited to the protection of the rights of arrested and detained persons but encompasses the right of every individual to access the relevant judicial bodies competent to have their causes heard and be granted adequate relief. If there appears to be any possibility of an alleged victim succeeding at a hearing, the applicant should be given the benefit of the doubt and allowed to have their matter heard. Adopting laws such as the Clemency Order 1 of 2000, that have the effect of eroding this opportunity, renders the victims helpless and deprives them of justice. To borrow from the Inter-American human rights system, the American Declaration of the Rights and Duties of Man[90] provides in article XVIII that every person has the right to 'resort to the courts to ensure respect for [their] legal rights,' and to have access to a 'simple, brief procedure whereby the courts' will protect him or her 'from acts of authority that … violate any fundamental constitutional rights'. The right of access is a necessary

[90] American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/ Ser.L.V/II.82 doc.6 rev.1 at 17 (1992).

aspect of the right to 'resort to the courts' set forth in article XVIII.[91] The right of access to judicial protection to ensure respect for a legal right requires available and effective recourse for the violation of a right protected under the Charter or the constitution of the country concerned.

214. In yet another jurisdiction, the Canadian Human Rights Charter[92] provides a similar guarantee in section 24(1), which establishes that: '[a]nyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances'. The effect of this right is to require the provision of a domestic remedy which enables the relevant judicial authority to deal with the substance of the complaint and grant appropriate relief where required. In addition to the explicit rights to judicial protection, implementation of the overarching objective of the Charter (ensuring the effectiveness of the fundamental rights and freedoms set forth), necessarily requires that judicial and other mechanisms are in place to provide recourse and remedies at the national level.

215. In light of the above, the African Commission holds that by enacting Decree 1 of 2000 which foreclosed access to any remedy that might be available to the victims to vindicate their rights, and without putting in place alternative adequate legislative or institutional mechanisms to ensure that perpetrators of the alleged atrocities were punished, and victims of the violations duly compensated or given other avenues to seek effective remedy, the respondent state did not only prevent the victims from seeking redress, but also encouraged impunity, and thus reneged on its obligation in violation of articles 1 and 7 (1) of the African Charter. The granting of amnesty to absolve perpetrators of human rights

91 See generally, IACHR, resolutions 3/84, 4/84 and 5/85, cases 4563, 7848 and 8027, Paraguay, published in *Annual Report of the IACHR 1983-84*, OEA/Ser L/V/II.63, doc 10, 24 Sept 1984, at 57, 62, 67 (addressing lack of access to judicial protection in proceedings involving expulsion of nationals; linking right to freely enter and remain in one's own country under article VIII of the Declaration to the rights to a fair trial and due process under articles XVIII and XXVI). See also, report 47/96, case 11.436, Cuba, in *Annual Report of the IACHR 1996*, OEA/Ser L/V/II.95, doc 7 rev, 14 March 1997, para 91, (citing *Annual Report of the IACHR 1994*, 'Cuba' at 162, and addressing failure of state to observe freedom of movement of nationals under article II via denial of exit permits from which no appeal is allowed). In the context of the American Convention, see generally, IACHR, resolution 30/81, case 7378, Guatemala, in *Annual Report of the IACHR 1980-81*, OEA/Ser L/V/II.54, doc 9 rev 1, 16 Oct 1981, 60 at 62 (addressing denial of right to judicial protection in expulsion of foreigner absent any form of due process), report 49/99, case 11.610, Mexico, *Annual Report of the IACHR 1998*, OEA/Ser L/V/II.102, doc 6 rev, 16 April 1999, vol II; see also Eur Ct HR, *Ashingdane* case, Ser A no 93 (1985) para 55.

92 The Canadian Charter of Rights and Freedoms, Ottawa, Canada, 17 April 1982.

violations from accountability violates the right of victims to an effective remedy.[93]

For these reasons, the African Commission:

- Holds that the Republic of Zimbabwe is in violation of articles 1 and 7(1) of the African Charter;
- Calls on the Republic of Zimbabwe to establish a Commission of Inquiry to investigate the causes of the violence which took place from February to June 2000 and bring those responsible for the violence to justice, and identify victims of the violence in order to provide them with just and adequate compensation.
- Request the Republic of Zimbabwe to report to the African Commission on the implementation of this recommendation during the presentation of its next periodic report.

[93] See the African Commission's Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, para C(d).

DOMESTIC DECISIONS

BOTSWANA

Sesana and Others v Attorney-General

(2006) AHRLR 183 (BwHC 2006)

Roy Sesana, Keiwa Setlhobogwa and Others v the Attorney-General (in his capacity as recognised agent of the government of the Republic of Botswana)

High Court of Botswana at Lobatse, misca 52 of 2002, 13 December 2006
Judges: Dibotelo, Dow, Phumaphi
Extract: Judgment of Dow (partly dissenting)
Full text on www.chr.up.ac.za

Constitutionality of measures adopted by government to ensure relocation of indigenous people

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Life (removal of services, 228, 229)

Dow J

A. Introduction

[**1.**] This judgment is one of three, the case having been presided over by a panel of three judges. I have read the judgments of my two fellow judges and I have sufficient disagreements with their reasoning and/or their conclusions to justify the writing of a full stand-alone judgment. I am also convinced that such a judgment, covering all areas, even those on which I am in agreement with my fellow judges, is also justified for a better understanding and appreciation of the conclusions I reach on the various issues. My two fellow judges, too, have found it necessary, for the same reasons, to write full stand-alone judgments. The extent to which we agree and/or disagree is finally reflected in the order of this Court and it appears at the end of the three judgments.

[**2.**] This judgment is organised under the following main topics:

- The initial High Court application
- The Court of Appeal decision
- The unsuccessful application to amend the original relief
- Findings of fact
- A comment on irrelevant evidence
- Selected rulings made during the hearing of this case.
- Conclusions and decisions on the issues
- Directions on the way forward
- The order

B. The initial High Court application

[**3.**] On 19 February 2002, the applicants, then represented by Rahim Khan, filed an application in which they sought that this Court make an order in the following terms:

> (a) Termination by the government, with effect from 31 January 2002 of the following basic and essential services to the applicants in the CKGR is unlawful and unconstitutional:
>
> (i) The provision of drinking water on a weekly basis;
>
> (ii) the maintenance of the supply of borehole water;
>
> (iii) the provision of rations to registered destitutes;
>
> (iv) the provision of rations for registered orphans;
>
> (v) the provision of transport for the applicants' children to and from school;
>
> (vi) the provision of healthcare to the applicants through mobile clinics and ambulance services.
>
> (b) The government is obliged to:
>
> (i) Restore the applicants the basic and essential services that it terminated with effect from 31 January 2002; and
>
> (ii) continue to provide to the applicants the basic and essential services that it had been providing to them immediately prior to the termination of the provision of these services;

(c) Those applicants, whom the government has forcibly removed from the CKGR after termination of the provision to them of the basic and essential services referred to above, have been unlawfully despoiled of their possession of the land which they lawfully occupied in their settlements in the CKGR, and should immediately be restored to their possession of that land.

(d) Order that the respondent pay the applicants' costs granting further or alternative relief.

[**4.**] The application came before a single judge of the High Court, on a Certificate of Urgency. It was filed and argued at the height of the relocations that were then being complained off. The application was dismissed with costs on 19 April 2002, the reasoning being that the applicants had failed to comply with certain procedural rules.

[**5.**] The applicants were granted leave to re-file the same application, if they so wished, but they elected to appeal the High Court decision. It was not until the following year that the matter came before the Court of Appeal.

C. The appeal to the Court of Appeal

[**6.**] On 23 January 2003, the matter came before the Court of Appeal which court observed that there were material disputes of facts and that such disputes could only be resolved by the hearing of oral evidence. The Court of Appeal made a Consent Order, which essentially turned the relief sought by the applicants into questions for consideration and answering by the High Court. The full order of the Court of Appeal appears in Justice Dibotelo's judgment and the questions to be answered are reproduced later in this judgment.

[**7.**] To minimise costs the Court of Appeal ordered that the hearing of the applicants' witnesses' be done at Ghanzi and that of the respondent's witnesses at Lobatse.

[**8.**] The matter was to be heard as one of urgency on dates that were to be set by the Registrar in consultation with the parties' legal representatives but it was not until May 2004 that the applicants were able to prosecute their case.

D. The unsuccessful application to amend the original relief

[**9.**] A year after the Court of Appeal Order, on 28 May 2004, the matter came before the High Court once again, but this time before the present panel of three judges.

[**10.**] At this hearing the applicants unsuccessfully attempted to have the matter postponed to a date at which an application to amend their prayers by the inclusion of what they termed 'a land claim' could be heard. Mr Du Plessis, the then instructing attorney for the applicants, indicated that he was not sufficiently briefed to handle the matter and that he had instructions to withdraw from the case if

the Court pressed him to argue the application for amendment. He explained that the advocates who were in a position to argue the matter were appearing in another court in another country. This court took a very dim view of the attitude adopted by the applicants' attorneys and consequently, with Mr Du Plessis describing himself as a post-office box for the real counsels for the applicants, it struck out the application for the amendment and proceeded to make directions on the future conduct of the case. The directions related to dates of 'inspection *in loco*' of the settlements and villages at the heart of the case as well as the dates and places for the hearing of evidence.

E. Findings of fact

Introduction

[**11.**] The initial application was founded on the founding affidavit of the first applicant, Roy Sesana, which in turn was supported by the supporting affidavits of Abdul Rahim Khan and Mosodi Gakelekgolele. The applicants' case was later expanded upon by additional affidavits and witness summaries.

[**12.**] The case for the applicants remained, largely, as pleaded by Sesana in his founding affidavit, although there are some allegations made by Roy Sesana that were either not supported by any evidence or were abandoned as the case progressed. An example of a position that was abandoned is the allegation that the 1997 relocations were 'forced removals'. The new position seemed to be that those relocations were based on the consent of those or at least the majority of those, who relocated and that the relocations followed extensive consultations at Old Xade. Indeed it became an important part of the applicants' argument that while all of Old Xade residents relocated to New Xade, the majority of the residents in the smaller settlements never relocated and some of those who did, began to trickle back to the reserve over the years that followed the 1997 relocations. The case as originally pleaded by Mr Sesana was amended in at least that one respect.

[**13.**] The applicants allege that the respondent wrongfully, forcibly and without their consent terminated the provision of basic and essential services to them. The unlawfulness and wrongfulness of this action, it is said, arise from the fact that the applicants had a legitimate expectation that the services would not be terminated without their first being consulted on the matter. It is said that indeed at the time of the abrupt and sudden notice to terminate the provision of services, the discussions between the parties had suggested that ways could be found that would allow the continued residence in the reserve of those residents who did not wish to relocate. The relief sought on this point is that the services be restored while respondent consults the applicants on the matter.

[**14.**] The other allegations are that the applicants were in lawful possession of their settlements in the CKGR and that they were dispossessed of that land forcefully, wrongfully and without their consent. It is alleged further on this point that the condition that those who were relocated in 2002 can only re-enter the CKGR with permits is unlawful.

[**15.**] The other main piece of the applicant's case is that the decision to refuse the issuance of hunting licences to the applicants is unlawful and unconstitutional.

[**16.**] The respondent's defence too has many pieces to it. Initially, one of the main pieces of the respondent's defence was that the respondent had not terminated the services as alleged by the applicants, but had merely relocated them to other places. It has since been conceded that the service provision at the settlements has been terminated, period.

[**17.**] On consent to relocate, the respondent has pleaded that the applicants have consented to the relocation. The case, it was pleaded was launched by Roy Sesana, who, supported by some international busybodies, was attempting to prevent the applicants from relocating. It is further the respondent's case that as the date given for the termination of services approached, people began to register to relocate and around the time of the actual termination of services, even more people registered to relocate. At no point was there force, coercion or improper conduct on the part of the respondent's representatives. By the time the exercise was complete, it is said, 17 of the initial 600 or so residents still remained in the CKGR and this, the argument goes, is prove enough that no one was forced to leave.

[**18.**] On the lawfulness of the termination of services and the stoppage of the issuance of special game licences, the defence is essentially that:

> (a) The respondent was justified in terminating the services as it had taken a position a long time ago that they were temporary and secondly, it had repeatedly consulted with the applicants on the matter. After years of consultations the respondent finally, in August 2001, communicated with the applicants its decision to terminate services and gave them six months before it executed its decision.
>
> (b) The services were too expensive to maintain on a long-term basis.
>
> (c) Human residence within the reserve posed a disturbance to the wildlife there and was contradictory to the policy of total preservation of wildlife.

[**19.**] The shear volume of the evidence led makes it impossible for every little piece of testimony to be discussed, thus only those aspects, and even then, only a selected portion, that are considered to be relevant to the disposition of the matter are discussed below.

[**20.**] The original urgent application has, over the four years that the case has run, evolved into a full-scale trial, of a scale none of the parties, nor the two courts, for that matter, could have initially

anticipated. It has turned out to be the most expensive and longest running trial this country has ever dealt with. It has also attracted a lot of interest, as well as a fair amount of bandwagon jumpers, both nationally and internationally, than perhaps any other case has ever done.

[**21.**] The trial has also had more than its fair share of dramatic antics from various players:

(a) Counsel for the respondent, Mr Pilane, was found to be in contempt of the court when he was unable to muster the necessary grace to accept a ruling against him. He finally apologised to the Court and not much more needs to be said about the matter.

(b) Counsel for the applicants, Mr Boko, who it must be said has not been particularly helpful in this trial, decided that he was more effective in criticising the Court and other lawyers, in the media, than in representing his clients in Court. Against this Court he had many laments, one of them being that his clients could not expect justice before a court whose rules they did not understand. As regards his fellow lawyers he lambasted the ones he called 'briefcase lawyers', the type, he explained, who engaged foreign attorneys and then limited their participation to carrying their briefcases. Mr Boko would apologise to the court for his antics only to dash-off yet another missive to the press the following week. In the final analysis, it seems fair to say that Mr Boko is cited as an attorney in this matter not because of his active participation in Court, but because his firm is the one that instructed Mr Bennett, the British attorney who took over from the South African team early on in the case. He might not have carried Mr Bennett's briefcase, but he certainly could have been more help to him and to the Court than he has been.

(c) Mr Roy Sesana, the very man whose founding affidavit was the anchor of these proceedings, had a lot to say outside the Court; but to this Court, he said absolutely nothing. Outside Court, through the media and without the limitations of an oath to tell the truth, he had plenty to say, some of which, sadly, was pretty ridiculous. Of significance, though, is that on many occasions, what he presented to the public through the press as his case was at variance with what his attorney, Mr Bennett presented to this Court as the applicants' case. On more than one occasion Mr Bennett offered apologies on Mr Sesana's behalf and promised to rein him in. Mr Bennett even, at one point, promised to file a letter of undertaking by Mr Sesana that he would stop the presentation of the distorted version of his case to the public. The apologies and the offer of an undertaking changed very little, if anything at all. Mr Sesana simply continued to argue his case in the media, free to embellish and/or distort. An example; it was not, the Court was told, the applicants' case that the relocations were motivated by diamond mining; but that was exactly the case Mr Sesana kept on pushing in the press, perhaps with that as the rallying crying, he could raise the money to fund this case. That the case was funded by donors who had to be persuaded to continue to part with money for a case that was taking longer than originally planned was a cry that the Court heard from Mr Bennett on several occasions. It appears that Mr Sesana decided that the end justified the means, he wanted money, a cry that he had been relocated for diamond mining would raise the necessary money and that is the cry he yelled to the papers. Of course it is not the case that Mr Sesana presented to the media that is being judged here, but it is unfortunate that Mr Sesana chose to deny this court the opportunity to hear him, since he clearly had a lot to say, and instead used his energies in the way that he has done. It is not even as if he was not available to give evidence; he was present in court on many occasions. He could have taken the stand, had he wished, but he chose not to do so for reasons that have never been explained. The only conclusion one can reach, and

it is an adverse one, is that this was a case of 'he who pays the piper, calls the tune', that is, Mr Sesana chose to sing the tune dictated by those or some of those who paid for his fees. Unfortunate.

(d) Some government representatives too, found it rather hard to remain silent, and not infrequently their comments were borderline unacceptable. One would have expected that at least from that quarter, the Court could have received the dignity it deserves.

[22.] While it is accepted that the nature, scope, length and duration of this case were always going to create media frenzy, it is a pity that some of the parties were unable to refrain from feeding that frenzy. None of these antics, in the final analysis, will be helpful to this court; for it is not the case that has been presented to the media that must be judged, but the one that has been presented to this court. And it is not the media, but this court, notwithstanding Mr Boko's misgivings about its competence, that must decide this case.

[23.] What follows next then are the facts I find to have been proven and such facts are the basis for the conclusions I finally reach. The findings are derived from an assessment and analysis of all the evidence offered; that is the applicants' evidence, the respondent's evidence, the admitted evidence, such evidence in the various affidavits and witness summaries that have not been challenged or has been found to be asserted by both parties and such observations made during the inspection of New Xade, Kaudwane, Gugamma, Kikao, Mothomelo, Metsiamanong, Molapo and Gope, as were read into the record as representing what both sets of lawyers accepted were what pertained on the ground.

[24.] The findings cover the following broad sub-topics:

- The applicants: Who they are?
- The Central Kgalagadi Game Reserve
- The applicants: Their personal and other circumstances
- The respondent's strategy of provision of services to the applicants
- The respondent's execution of its 'persuade but not force' plan
- The applicants' resistance to relocation from the CKGR
- The respondent's declared and acted-out positions on termination of services and relocation
- The general circumstances and processes of the 2002 relocations
- The termination and withdrawal of special game licences

The applicants: Who they are?

[25.] Of the original applicants, there are 215 applicants still living, 182 of whom are represented by Mr Bennett on the instructions of the law firm Boko, Motlhala, Rabashwa and Ketshabile. The remaining 29 applicants were not represented and they remain litigants on paper only. Notwithstanding, having launched the case, they remain parties to the case and are bound, for better or for worse, by the decision of this Court. They had ample time, over the last four years, to withdraw from the case, if that is what they wished.

[**26.**] The first applicant is Roy Sesana, about whom, in view of the evidence that has been led or accepted unchallenged, the following can be said: He is a member of the Kgei band of the San or Basarwa people and his ancestors are indigenous to the Central Kgalagadi region and they have lived in and around the settlement of Molapo. He had two or three wives living within the Central Kgalagadi Game Reserve (the CKGR or the Reserve), two at Molapo and a third at another settlement.[1] With one of his wives he had at least six children.[2] He himself was ordinarily resident outside the Reserve, perhaps in Ghanzi. He was a member of the First People of the Kgalagadi (FPK), which organisation represented the applicants in these proceedings. He was also a member of a consortium of individuals and organisations called the Negotiating Team, which too was concerned with interests of the residents of the CKGR of whom the applicants were a part. He has spearheaded the launching of this case and in that respect he engaged all the lawyers who have, over the past four years represented the applicants. He was also in attendance during the Court's travel through the CKGR and was visibly a part of the applicants' team. Thus, although he chose not give evidence, his interest in the case cannot be doubted. Two of his wives and six of his children were relocated from Molapo during the 2002 relocations.[3]

[**27.**] A list of the rest of the applicants, who are typically adult residents, at the material time, of the settlements of Gugamma, Kikao, Mothomelo, Metsiamanong, Molapo and Gope, forms a part of the record.

[**28.**] The applicants comprise residents who relocated as well those who did not. According to admitted evidence,[4] at the conclusion of the 2002 relocation exercise, the following adults and children had been moved from the indicated settlements to places outside the Reserve:

(a) 96 people; 40 adults and 56 children, were relocated from Mothomelo.

(b) 132 people; 72 adults and 60 children were relocated from Molapo.

(c) 100 people; 34 adults and 66 children were relocated from Metsiamanong.

(d) 14 people; 7 adults and 7 children were relocated from Kikao.

(e) 10 people; 3 adults and 7 children were relocated from Gugamma.

(f) 3 people; 1 adult and 2 children were relocated from Gope.

[**29.**] The respondent says, but the applicants dispute the point without giving a counter-position, that 17 people remained in the Reserve. In July 2002, there were 35 people at Metsiamanong.[5]

1 Moragoshele's testimony.
2 Bundle 3C 65 (ExD176)- Relocation Exercise CKGR – 2002.
3 Bundle 3C 65 ibid.
4 Bundle 3C 53-73 (ExD176)- Relocation Exercise – 2002.
5 Bundle 3C 75 (ExP153)- Ghanzi District Council – Weekly Report on CKGR Situation.

The Central Kgalagadi Game Reserve (CKGR)

[**30.**] The settlements of Gugamma, Kikao, Mothomelo, Metsiamanong, Molapo and Gope, which are at the heart of this dispute, are situated within the CKGR, which in turn is situated within the Kgalagadi ecosystem. The villages of Kaudwane and New Xade are situated outside the boundaries of the CKGR, but within the Kgalagadi ecosystem.[6]

[**31.**] The CKGR is partly fenced, of particular importance; there is no fence between Kaudwane and the Reserve or between New Xade and the Reserve.

[**32.**] The CKGR is a vast unique wilderness in an area in excess of 52 000 square kilometres. It was created as a game reserve in 1961, and at the time of its creation it was the largest game reserve in Africa. It is now the third or so largest.[7] It is the largest game reserve in Botswana.

[**33.**] The creation of the reserve resulted from the recommendations of a survey of the San or Basarwa conducted by Dr Silberbauer. The proposal, at the time, was to carve out a large portion of the inner part of the Kgalagadi desert, where Basarwa and some Bakgalagadi who were already resident therein, could continue to follow their traditional hunting and gathering way of life. At the time of the creation of the reserve though, apartheid South Africa, with its racists and segregationist policy, was thriving next door, it was considered politically unacceptable to be seen to be creating, at best a human reservation and at worst a human zoo.[8] A deliberate decision was thus taken to create, not a Bushman reserve, but a game reserve.

[**34.**] When all was done though, the colonial government had created a game reserve within which Basarwa continued to live; hunting, gathering and keeping small stock, with one important new problem; hunting and keeping stock were prohibited by the new law.[9] Since the prohibitions had not been intended, these activities were ignored though and the Basarwa were more or less left alone to lead their traditional way of life. The entry into the reserve by others, who typically were tourists, hunters or anthropologists, was regulated through the issuance of permits.

[**35.**] The residents of the Reserve were then in 1961 and continued to be up until the 2002 relocations, family groups of the San, Bakgalagadi, San/Bakgalagadi descendants and to a very limited extent, descendants of intermarriages with these two groups to other Tswana groups.

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6 Alberton, Alexander and Silberbauer.
7 Albertson's testimony.
8 Silberbauer.
9 High Commission Territory No 33 of 1961.

[**36.**] It is not an insignificant piece of land, it being about the size of Belgium, but the human population there in has never been large. According to the 1991 and 2001 population censuses, the population of the CKGR has been 991 and 689, respectively.[10]

[**37.**] It has a harsh climate, is prone to droughts and has limited and unreliable rainfall.[11]

[**38.**] It is home to a significant population of wildlife, including large antelopes such as gemsbok, hartebeest, eland, giraffe, kudu and wildebeest and large carnivores such as lion, leopard, cheetah and hyenas.[12]

[**39.**] It is home to one of the few remaining descendants of hunting and gathering peoples in the world.

[**40.**] The residents of the Reserve have over time come to live in permanent settlements, whose populations have varied from season to season and/or from year to year, sometimes shrinking and sometimes increasing, depending on water availability. In some instances, settlements have disappeared altogether, while in one case at least, a settlement has formed. Examples of settlements that have disappeared altogether are Manwatse, Bape and Kaka and an example of a settlement that has formed in recent years is Gope.[13]

[**41.**] A settlement can have a population of as few people as three and as many people 245.

[**42.**] About the re-settlement villages and the CKGR settlements, the following can be said:

> (a) Gugamma: Gugamma or Kukama, or Kukamma is first of the five settlements located on the main track that one would have to take to traverse the Reserve if one entered at Kaudwane and exited at or near Old Xade. The other four settlements along this track are Kikao, Mothomelo, Metsiamanong and Molapo. Gugamma is situated about 70 kilometers from Kaudwane. It has no permanent water source. Its population, in 1988-89, 1991, 1996 and 1999, respectively, was zero, zero, 26 and zero.[14] By July 2004, when the Court visited the settlement, at least twelve adults and seven children were observed in the settlement. There were ten huts in one or two compounds that the Court could see.
>
> (b) Kikao: Kikao or Kikau is located a few kilometers from Kaudwane and has a pan that in July 2004, midway between two rainy seasons, had water. Its population in 1988-89, 1991, 1996 and 1999, respectively, was 104, 98, 30 and zero.[15] In 2001 its population was 31.[16] Its entire

[10] Bundle 3B 497 (ExP123) Notes on the Central Kgalagadi Game Reserve and other Developments in the ... Min of Local Government June 2003.

[11] Albertson, Alexander and Silberbauer.

[12] Bundle 2B 113 -Third Draft Management Plan.

[13] Bundle 3B 496 (ExP123) - Notes on the CKGR and other Developments in the ... Min of Local Government June 2003.

[14] Bundle 2C 150 (ExP5) – Population Data for Communities in the CKGR.

[15] Bundle 2C 150 (ExP5) – Population data for Communities in the CKGR.

[16] Bundle 3B 496 (ExP123) - Notes on the Central Kalahari Game Reserve and other Developments in the ... Min of Local Government June 2003.

population was relocated in 2002, but by July 2004, when the Court toured the Reserve, two donkeys were observed drinking at the pan. No people were observed, but the Court was informed, and neither side seemed to take issue with this, that deep in the bush from the original settlement, there was a newly constructed compound, inhabited by about nine adults and five children.

(c) Mothomelo: Mothomelo was a large settlement, by CKGR standards. Its population in 1988-89, 1991, 1996 and 1999, respectively, was 145, 149, 272, 150.[17] In 2001, it was 245.[18] Its entire population was relocated in 2002 and in July 2004, no resettlement had taken place. It is located about 28 km from Gugamma, and just under 100 km from Kaudwane. There was at Mothomelo, until the relocations of 2002, a borehole from which Mothomelo and the other settlements were supplied with water.

(d) Metsiamanong: Metsiamanong is about 48km from Mothomelo and is situated next to pan that in July 2004, was observed to be dry. At the edge of the pan, around protective thorn bushes were nestled a couple of 200 litre metal drums and a few 20 litre plastic containers. It was determined that some of the drums contained water while some were empty. In the settlement itself, there were about four to five compounds, in which there were old and new huts. There was evidence of huts being under construction. There were residents, about 30-35 adults and about 15-17 children. There were also a couple of vehicles. Its population in 1988-89, 1991, 1996 and 1999, respectively, was 90, 71, 130, 130[19] and in 2001, 141.[20]

(e) Molapo: Molapo is situated 110km from the north-eastern boarder of the Reserve, 135 from Old Xade and 223km from Kaudwane. Its population in 1988-89, 1991, 1996 and 1999, respectively, was 202, 61, 113, and 130[21] and in 2001 it was 152.[22] All its residents were relocated in 2002, but by July 2004, the Court observed more than thirty huts, more than twenty people, about four vehicles and dogs, chickens, goats and donkeys in and around Molapo.

(f) Gope: Located 36km from the eastern edge of the Reserve, Gope was the closest settlement to Reserve boundary. Its population, like that of all the other settlements, has grown and shrunk over recent years and by the time of the Court visit on the 10 August 2005, there was no one resident at Gope. For the years 1988-89, 1991, 1996 and 1999, the population of Gope has been 100, 43, 110 and 10 respectively.[23] In 2001, there were 63 people in Gope.[24] There has been diamond exploration at Gope since 1981 and test mining took place in 1997. By 2000, the company involved had decided that the profitability of the mine was not assured but not wishing to give up all together, it applied for a retention license. The people who settled in Gope were drawn to the mine site by the availability of water.

(g) New Xade: New Xade was first settled in 1997, as a result of the relocations of that year. Its population, in 2001, was 1094.[25] In 2004, it had a Kgotla housed in a modern building and staffed by a Kgosi and a police officer, a primary school, boreholes and water tanks, a

17 Bundle 2C 150 (ExP5) - Population Data (ibid).
18 Bundle 3B 496 (ExP123) - Notes on the CKGR and other Developments in the ... Min of Local Government June 2003.
19 Bundle 2C 150- Population Data (ibid).
20 Bundle 3B 496 (ExP123) - Notes on the CKGR and other Developments in the ... Min of Local Government June 2003.
21 Bundle 2C 150 (ExP5) - Population Data (ibid).
22 Bundle 3B 496 (ExP123) - Ministry of Local Government - June 2003.
23 Bundle 2C 150 (ExP5) - Population Data (ibid).
24 Bundle 3B 496 (ExP123) - Ministry of Local Government – June 2003.
25 Bundle 3B 496 (ExP123) - Ministry of Local Government – June 2003.

community hall of the type found in many villages in the country, a horticultural project, a modern clinic with a maternity wing, a shop, a bar, and hostels. The village is situated about forty kilometers from the western boundary of the Reserve and there is no fence separating the village from the Reserve. As regards the residential accommodation of the residents, huts, similar to the ones that had been observed in the Reserve were situated in plots lined up to make street-like passages between them. The whole village was organised into wards, named after settlements in the Reserve and plots had been allocated on the basis of where people had originated. As regards how people sustained themselves, cattle, goats, a horticulture project were observed.

(h) Kaudwane: The settlement village of Kaudwane is situated across the road from the edge of the south-eastern part of the Reserve. Its population was 551[26] in 2001 and ten years earlier, in 1991, it did not exist, having been established in 1997, when five hundred residents were relocated there from the Reserve. In 2004, the residents lived in the main in clearly demarcated lots, on which stood huts of the type found in the Reserve as well as a sputtering of one-roomed corrugated iron-roofed cement brick houses. It boasted a health clinic, a Rural Administration Center, A primary school, two boreholes, a water reservoir, standpipes and residential accommodation for government workers. In terms of how people sustained themselves, the following were observed: A tannery (abandoned), donkeys, cattle, goats, chickens and a horse. Kaudwane is about 260km from Gaborone.

The applicants: Their personal and other circumstances

[**43.**] On the totality of the evidence given, those applicants who gave evidence and a few about whom they testified, had, prior to the relocations of February 2002, the following general characteristics in common:

(1) They were either born in the CKGR or had sufficient ties, by either blood or marriage, to claim residence in the CKGR.

(2) They were Basarwa, Bakgalagadi, and Basarwa/Bakgalagadi, although the possibility of some of them being partly descendent from other Tswana ethnic groups cannot be ruled out.

(3) Their primary places of residence within the Reserve was in one of six settlements; namely, Gugamma, Kikao, Mothomelo, Metsiamanong, Molapo and Gope.

(4) They lived in family units that comprised their immediate as well as, in many instances, extended family members.

(5) They lived in huts built completely with locally harvested materials, these being grass, wooden poles and some brush.

(6) Huts were located in compounds and compounds were typically oblong-shaped yards fenced in by bush or brush. A typical compound was inhabited by a husband and wife, their children, some of whom were in some instances adults and their extended family members, some of whom too, could be adults.

(7) Huts and compound fences required seasonal repairs and/or rebuilding. Completely broken down huts left no injury to the land and the location of a hut, once the materials had broken down completely, could prove difficult to pin-point.

(8) A few men had more than one wife, typically, two, although in the case of Roy Sesana, possibly three.

[26] Bundle 3B 496 (ExP123) - Ministry of Local Government - June 2003.

(9) They lived in small settlements and the populations in 2001 were Kikao 31, Mothomelo 245, Metsiamanong 141, Molapo 152 and Gope 63.[27]

(10) They could not read or write, except for the occasional person who could read and write a little bit of Setswana. They spoke Setswana with various degrees of proficiency but otherwise spoke seG//ana, and/or seG/wi and/or Sekgalagadi, depending on one's own ethnicity or associations over the years.

(11) They were a highly mobile people, travelling constantly within the Reserve as well as to places outside the reserve. As far back as 1961, the mobility of the then residents was such that some residents lived an average of four months within the reserve.[28] Mobility in and within the reserve has, during the years, been linked to availability of drinking water.[29]

(12) While they have, in the past, lived as hunter-gatherers, carrying out subsistence activities within the confines of clearly defined territories called NGO's, they have, for more than forty years now, been augmenting their diet with agricultural produce and for more than twenty years with services provided by the respondent. These services are now 'essential' to their livelihood.[30]

(13) In terms of agricultural produce, they grew crops, such as melons, beans, maize and reared livestock, notably goats, donkeys, horses, chickens and dogs. They did not rear any cattle within the reserve although an insignificant number, amongst them the Moeti family, may have reared them at places outside the reserve.[31]

(14) They also hunted for meat, employing such methods as chasing down game on horseback and killing it by the aid of dogs, trapping and bows and arrows.[32]

(15) At the time of the 2002 relocations, there was a permanent water source, in the form of a borehole, at Mothomelo, but the other settlements, except for Gope, depended on water being brought in by truck by the respondent, as well rainwater that collected seasonally in pans. The Gope residents at one point depended on borehole water at the diamond mine prospecting site that was then taking place there.

(16) They survived on limited resources, in terms of food, water, shelter and health services. Most of them were classified as destitute, in terms of the respondent's policy on the matter and as such received food rations and transport of their children to schools outside the reserve. They also on occasion, it seemed, received donations of clothing; when the Court went through the CKGR, it was observed that most of the residents found at Molapo had uniform towels to protect them from the cold. The group that huddled for a photograph, on the suggestion of the applicants' counsel, Mr Bennett resembled a group one might see at a refugee camp – bare-footed, poorly clad for the weather, and the desert temperatures do, during winter nights, plummet to freezing, and obviously without sufficient water for proper hygiene.

(17) They are indigenous to the Central Kgalagadi region.

[**44.**] Tshokodiso Bosiilwane and Amogelang Segootsane are two males whose personal circumstances are fairly typical of the average male applicant who gave evidence. Bosiilwane was born in the CKGR while Segootsane was not. They say the following.

27 Bundle 3B 496 (ExP123) - Ministry of Local Government - June 2003.
28 Bundle 2B 30 ExP71 – Savingram dated 26 May 1961.
29 The testimonies of Albertson, Silberbauer and Alexander.
30 Most applicants who gave evidence testified to this.
31 Moragoshele's testimony.
32 The testimonies of some applicants and that of Albertson.

[**45.**] Tshokodiso Bosiilwane: He was born at Metsiamanong and so was his wife, but he does not know his birth date. His parents and grand parents too were born at Metsiamanong. He and his family were resident at Metsiamanong at the time of the 2002 relocations. He and his wife belong to the Xanakwe ethnic group. At the time he gave evidence he and his wife had five children.

[**46.**] Bosiilwane and his wife had nine huts in their compound in Metsiamanong. They grew crops, and reared goats, donkeys and horses. They also gathered veldt products. They also received food rations from the government.

[**47.**] Bosiilwane's children attended school outside the Reserve and the respondent transported the children to and from school at the beginning of the school term and at the end, respectively.

[**48.**] Bosiilwane did not wish to relocate and in pursuit of this end he associated himself with FPK because he believed they would represent his interests on the issue.

[**49.**] During the relocations, Bosiilwane says he made his wishes known to the officials that he did not wish to relocate, but the officials dismantled his huts and those belonging to his wife and daughter. He claims they took his wife away by 'force'. His wife came back to Metsiamanong later in the year but when he gave evidence, he was still bitter at the way, he says, the government had disregarded his wishes that his wife not be relocated.

[**50.**] Before the relocations, Bosiilwane hunted for meat, using horses, on the authority of hunting licences granted to him by the Department of Wildlife and National Parks [DWNP]. When the DWNP announced that there would be no more hunting, he could no longer hunt and the licence he then had was rendered useless.

[**51.**] Before the relocations, Bosiilwane came to know that the government was planning to 'take away what is theirs' and he decided that he would continue to live in the CKGR even without the services.

[**52.**] Amogelang Segootsane, another male applicant who did not relocate, had a similar story to tell.

[**53.**] Segootsane was born in Salajwe, just under 100km from Gugamma, of parents who had some historical ties to the CKGR. He lives in Gugamma and is married with children. He can read and write a little Setswana. He has three huts there and he lives with his wife and three children.

[**54.**] Segootsane's two oldest children are in school at D'Kar, and they are driven to school in a council vehicle at the beginning to the term and driven back to Gugamma at the end of the term. This arrangement continued even after the 2002 relocations.

[**55.**] He knows that his parents come from the Reserve because they told him they were born in the CKGR, in 'the same area' as Gugamma.

[**56.**] He has two donkeys, four to six goats, chickens and dogs and a horse. He grows crops. He gathers veldt products and he used to hunt but was told that the government was no longer issuing hunting licenses.

[**57.**] During the 2002 relocations, government officials removed the water tank from which the residents of Gugamma used to get water. The water in the tank was thrown out.

[**58.**] Since the relocations, he gets water, using donkey carts, from a pan at Kikao and boreholes in the resettlement village of Kaudwane. At first, he was stopped by government officials when he attempted to bring water from outside the Reserve to Gugamma. He then wrote to the Government, seeking permission to bring water into the CKGR. Ditshwanelo, the Botswana Centre for Human Rights, drafted the letter for him and the government gave him permission to bring water for himself and his immediate family only.

[**59.**] Before the relocations, the government used to provide health and some food rations and pension to residents in Gugamma, but this has since been stopped.

[**60.**] He associates himself with FPK, and says it fights for the land rights of the Basarwa and Bakgalagadi. He is a member of the Negotiating Team.

[**61.**] At the start of the 2002 relocations, he was in Salajwe visiting his sick father-in-law who was also Gugamma's headman. He returned to Gugamma to find that relocations were in progress and people were dismantling their houses. His own three huts were still standing but many people had left. He did not want to relocate because he wants to live on his ancestral lands. He has no intention to relocate from the Reserve.

[**62.**] The Basarwa in particular and the Bakgalagadi to some extent, as ethnic groups have historically been at the lower end of the social, economical and political social strata, and indicators of this disadvantaged position are:

> (a) The language employed by the colonial government during the debates about the need for the setting aside of a 'reserve' in which the Basarwa and the Bakgalagadi then resident in that area could continue to practice their traditional way of life. They are called 'little people', 'uncivilised' and 'wild'. Others, notably officials and anthropologists, speak for them as options are explored and decided upon about how their future can be secured;[33]
>
> (b) The colonial government's failure to carve out a 'tribal territory' for either group, in the same way that it carved out 'tribal territories'

[33] Bundle 2B 1-51B- Several correspondences to the Bechaunaland Protectorate Government.

or 'native reserves' for some ethnic groups in the then Bechuanaland Protectorate.

(c) The lack of mention of either of the ethnic groups in sections 77, 78 and 79 of the Constitution and the consequence that neither has representation, in the way that the Bakgatla or the Bakwena, for example, have on the House of Chiefs;

(d) The position adopted, in 1964, by the colonial government, when preparations were being made for the first elections that, 'Any really intensive effort to secure registration of potential Bushmen voters would however be of little value'.[34]

(e) The high illiteracy level, compared to the national average, of the residents of the CKGR.[35]

(f) In the respondent's own words, 'The Basarwa are the most socially and economically disadvantaged ethnic community in Botswana' and, 'until recently, the Basarwa were politically "silent"'.[36]

The respondent's strategy of provision of services to the applicants

[**63.**] The respondent, and rightly so, fully appreciates its responsibility to provide all populations with such services as can reasonably be afforded and it was guided on this by various policies. As the country evolved from one of the poorest in the world to a middle-income country, the services provided grew in sophistication and diversity over the years. The various settlement policies reflect this development.

[**64.**] As regards service provision to the applicants, the respondent has adopted the following path:

[**65.**] In 1985 it appointed a fact-finding mission,[37] whose mandate was to 'study the potential conflicts and those situations that were likely to adversely affect the Reserve and the inhabitants of the area'.

[**66.**] In 1986, having considered the mission report, the respondent took various decisions, some of which were that:[38]

(a) Social and economic developments of settlements within the CKGR be frozen with immediate effect.

(b) Viable sites for economic and social development should be identified outside the Reserve and the residents of the Reserve encouraged – but not forced – to relocate at those sites.

(c) The Ministry of Local Government and Land should advise government on the incentives required to encourage residents in the Reserve to relocate.

34 Bundle 2B 50 (ExP76) - Savingram dated 10 April 1964.

35 Bundle 3C 188 (ExD193) The Basarwa, The Remote Area Development Programme and the Central Kgalagadi Game Reserve: The Facts.

36 Bundle 3C 188 (ExD193) The Basarwa, The Remote Area Development Programme and the Central Kgalagadi Game Reserve.

37 Bundle 3B/516 (ExD37) - Fact Finding Mission Report- November 1985.

38 Bundle 3B/559 (ExD38) - Min of Commerce and Industry Circular No 1 of 1986 dated 15 July 1986.

(d) Wildlife policies be speedily implemented to facilitate faster realisation of the benefits from wildlife.

(e) Regulations for the Game Reserve be promulgated as a matter of urgency.

(f) Settlements then receiving water deliveries not to continue to receive such water deliveries, not even as a temporary measure.

[**67.**] In 1994, the respondent, through a decision of Cabinet, reaffirmed its 1986 decision and further directed the relevant ministry to accelerate development sites for relocations.[39]

[**68.**] The respondent's strategy was thus to attract CKGR residents to locations outside the reserve by the provision, at those places, of services and opportunities for economic development.

[**69.**] It took eleven years before the 'viable sites for economic and social developments' were ready for occupation. In the meantime, not withstanding the decision not to deliver water to those settlements that had been receiving such deliveries, the respondent did in fact continue to deliver water to those settlements.

[**70.**] Had the respondent stopped the delivery of water to the settlements, in accordance with its decision, without first establishing sites to which to relocate the residents, there would have been a congregation at Old Xade and Mothomelo, where there were boreholes and to which deliveries had not been necessary. Such congregation would have led to depletion of wildlife resources around the borehole area.[40]

[**71.**] And had the respondent not only stopped water deliveries to the settlements, but had further sealed the Old Xade and Mothomelo boreholes as it did at the latter settlement in 2002, it is fair to say that the majority, if not all the residents of the Reserve, would have relocated to places outside the Reserve. Whether or not they would have gone back seasonally, when it rained, would have depended upon whether they could hunt during such seasonal residence.

[**72.**] The services that were being provided by the respondent, which both parties agree were 'basic and essential services' were:[41]

(a) Drinking water on a weekly basis to each settlement;

(b) A borehole at Mothomelo, which pumped water into two 10 000 litre tanks.

(c) For Kikao, Gugamma, Metsiamanong and Molapo residents, trucked-in water from borehole at Mothomelo. Truck pumps water into 10 000 litre storage tanks at each of the named settlements.

(d) Provision of rations to registered destitutes in all the settlements. In 2002 there were 96 registered destitutes in the Reserve, distributed

39 Presidential Directive Cab 15/94.

40 Testimony of Silberbauer. Supported by that of Albertson and Bundle 3B/693Q (ExD61) - Report by the Task Force on Potential sites for the resettlement of Xade dated 20 September 1996.

41 Pleaded by Sesana and not challenged.

as follows; Molapo 36, Metsiamanong 22, Gope 8, Mothomelo 15, Kikao 7 and Gugamma 8.[42]

(e) Provision of rations to registered orphans, of which, in 2002, there were 13 in Mothomelo, 8 in Gugamma and 7 in Kikao.[43]

(f) Provision of transport for applicants' children, to and from school.

(g) Provision of healthcare to applicants through a mobile clinic and an ambulance service.

[**73.**] The respondent thus had a three-pronged approach to resolution of the 'conflicts' within the CKGR which it had sought to resolve by the appointment of the fact finding mission of 1986; to persuade but, not to force residents to relocate, to terminate provision of water to the settlements and lastly to develop economic sites at locations outside the Reserve.

Respondent's execution of its 'persuade but not force' Plan

[**74.**] Initially, for reasons that have not come out clearly from the evidence, the respondent attempted to relocate everyone to the then Xade, now Old Xade, but that plan, executed around 1995, does not seem to have found favour with either the residents of the smaller settlements or ecologists.[44] The residents complained of life at Old Xade and the death of their life-stock, while an ecologist, Dr Lindsay saw problems with, amongst others, establishing a village that could be expected to grow to about 2 000 in the migration route of some of the wildlife in the Reserve.

[**75.**] Respondent decided to find alternative relocation sites outside the Reserve and that is how New Xade and Kaudwane came to be established.

[**76.**] The respondent appears to have believed that all it had to do was to identify sites within the general geographic area of the CKGR and then make them attractive to residents of the Reserve by the provision of services of a superior nature to those that residents had been used to and the applicants would then want to move to those areas.

[**77.**] In respondent's own words, 'When relocations took place government reasoned and expected that those who had remained behind would overtime weigh the advantages and disadvantages of remaining in a Game Reserve and would for their own benefit, their future and that of their children consider to follow others outside'.[45]

[**78.**] On the above reasoning, the respondent:

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42 Bundle 3C 125 (ExD184) Ghanzi District Council letter to Ditshwanelo 16 January 2002.

43 Bundle 3C 125 (ExD 184) ibid.

44 Bundle 3C 195 (ExP115) - Solution to the CKGR; Bundle 3C 205 (ExD44) Consequences for Wildlife for Major Village Development at Xade; Bundle 3C 212 (ExP214) - Ghanzi District Council CKGR Task Force Activities.

45 Bundle 2B 62 (ExP81) - Talking Notes for Assistant Minister Kokorwe ... 2 and 6 August 2001.

(a) During 1996, formed a Resettlement Reference Group. That group in turn formed a Task Force, consisting of representatives of the Ministry of Local Government, the Departments of Water Affairs, Agriculture and Transport, DWNP, the Ghanzi District Council and Ghanzi Land Boards.[46]

(b) On 19 and 20 September 1996, the Task Force conducted a visit to sites inside and outside the CKGR to consult with Old Xade residents for the development of "New Xade".[47]

(c) The Task Force engaged residents of the Reserve in discussions and consultations about where to relocate New Xade. Sites were selected, boreholes sunk, schools and clinics built and extension staff posted.

(d) The residents of the CKGR were expected to want to move to this place; they would not have to be separated from their school-going children, they would have access to water, enough not just to drink, but to bathe and water their livestock too, they would have economic opportunities that had never been open to them within the CKGR. The settlement of New Xade was even given an optimistic name, Kgeisakweni, meaning 'we want life' signifying a 'new beginning' or a 'new future'.

[**79.**] Indeed the residents of Old Xade and perhaps a few from the other settlements were over months persuaded to move to New Xade and Kaundwane and the majority of those who relocated in 1997 have settled there and seem to have made homes there.

[**80.**] Judging from the public announcements made around the time leading up to the 1997 relocations, the respondent must have been either optimistic about the attractiveness of the re-settlement villages and/or convinced of the right of those residents who wished to remain to continue to receive such services as had been supplied before the relocations.

[**81.**] On the 22-23 May 1996 government representatives assured the Ambassadors of Sweden and the United States, the British High Commissioner, the Norwegian *Chargé d'Affaires* and an official of the European delegation that 'social services to people who wish to stay in the Reserve will not be discontinued'.[48]

[**82.**] At a briefing session on 4 June 1996 the Minister of Local Government, Lands and Housing stated that 'Services presently provided to the settlements will not be discontinued'.[49]

[**83.**] On 18 July 1996 the Acting Permanent Secretary at the Ministry of Local Government circulated to other government departments a paper which 'will be always the basis of their talks whenever they are required to talk about the plight of the remote area dwellers or the

46 Bundle 3B/693Q (ExD61)- Report by the Task Force on Potential sites for the resettlement of Xade dated 20 September 1996.

47 Bundle 3C 156 (ExD188) Minutes of the CKGR Steering Committee, 18 September 1996.

48 Bundle 1A/81 (ExP23) - Extracts from notes of Briefing Session by Minister of Local Government and the Minister of Commerce & Industry on the Basarwa of Xade dated 4 June 1996.

49 Bundle 1A 81 (ExP23) Extracts notes of Briefing Session dated 4 June 1996.

Basarwa People'.[50] This expressly stated that 'The current residents of the CKGR will be allowed to remain in the Reserve and the current government services will be maintained, though no new services will be provided'.

[**84.**] In a letter to the Botswana *Guardian* dated 16 September 1997, the Ghanzi Council Secretary and the Ghanzi District Commissioner stated that 'The government's position [is] that services will continue being provided for so long as there shall be a human soul in the CKGR. So there is no violation of any human rights, nor reneging of any promises by government. Anything to the contrary would be pure propaganda'.[51]

[**85.**] The expectation, it seems, was that it would be a matter of time before all the residents saw the value and wisdom of moving from the Reserve. They would not be forced, but they would be persuaded by what was being offered in the new settlement villages – schools, clinics, title to land, cattle and goats grants; generally living a Tswana type life. It was supposed to be an improvement on the life they lived in the Reserve.

[**86.**] The promise though was that in the event that anyone failed to see the value and wisdom of relocating, they would be allowed to live in the Reserve, enjoying the limited services that were then being provided.

The applicants' resistance to relocation from the CKGR

[**87.**] Notwithstanding the superiority of the services provided at New Xade and Kaudwane, those applicants who gave evidence and some about whom they testified resisted relocation to places outside the CKGR and demonstrated such resistance in the following ways:

> (1) They had associated themselves with the First People of the Kgalagadi (FPK), the Negotiating Team and Ditshwanelo, all organisations that have supported, to varying degrees and in various ways, some residents' attempt at seeking a way of remaining in the CKGR.
>
> (2) During the time leading up to the 1997 relocations, the consistent message from the majority of the residents in the smaller settlements was that they did not wish to relocate, either to Old Xade as was the initial plan, or to any place else.[52]
>
> (3) In fact at the end of the registration exercise undertaken in September 1996, not one household at Metsiamanong or Gope and only one at Molapo, had registered to relocate.[53]

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50 Bundle 3C/186 (ExD193) - Savingram dated 18 July 1996.

51 Bundle 3B 693h (ExD64) – Letter from Ghanzi District Council to The Editor, Botswana Guardian, September 1997.

52 Bundle 3C 213-215 (ExP113) Report on the Visit to Central Kgalagadi Game Reserve by Councilors; Bundle 3C 158 (ExP110).- Minutes of the Special Meeting of the CKGR Resettlement Committee, 1996.

53 Bundle 3C 170 (ExP111).- Report on the Registration Exercise by the Central Kgalagadi Game Reserve Local Task Forces - 1996.

(4) Following the 1997 relocations, which the applicants have come to accept were, contrary to what they had originally pleaded, not forced, they have remained in the reserve and some of those who had relocated have since returned to the Reserve.[54]

(5) The relocations became, to use the respondent's own words a 'sensitive issue' meaning that it was not a matter that a government representative raised with residents if he wished to continue to remain friendly with them, unless one had specific authority to do so.[55]

(6) Notwithstanding their frequent sojourns to places outside the reserve, during which time they would have observed Kaudwane, New Xade and other places, they continued to make the reserve their primary place of residence or at least an important enough place to call 'home'.

(7) With the support of FPK, The Negotiating Team and Ditshwanelo, they engaged the respondent in lengthy, time consuming, technical discussions, all aimed at retention of the land they occupied within the CKGR.

(8) Following the announcement, in 2001, that services would be terminated the Negotiating Team acted on their behalf, seeking to have the respondent reconsider its position.

(9) When the respondent would not change course and as the date for the termination of services approached, they launched the present case.

Respondent's declared and acted-out positions on termination of services and relocations

[**88.**] Prior to the initiation of the 2002 relocation exercise, respondent took the following positions on termination of services and/or relocation of the CKGR residents.

[**89.**] It adopted, in 1986,[56] a policy that said two main things:

(a) Residents would 'be encouraged - but not forced - to relocate'.

(b) Water would not continue to be provided, even on a temporary basis.

[**90.**] It consulted, in preparation of the 1997 relocations, with the residents of Old Xade as well as residents of the other six settlements about the benefits of relocating to places outside the CKGR.

[**91.**] It assured, during the planning of the 1997 relocations, residents, either directly or through the making of public statements directed at others, that services would not be terminated as long as there were residents within the CKGR.

[**92.**] It consulted, after the 1997 relocations, with residents on alternatives to relocations. One consultant, Masuge, discussed with the residents the idea of creating Community Use Zones (CUZs) within the Reserve and the residents selected areas for this purpose. Masuge's had been engaged specifically to 'assist the DWNP to

54 Bundle 3C 134 (ExD73) - Minutes of the Joint Meeting by Ghanzi and Kweneng District Council Officials held at Mothomelo January 2000.

55 Macheke and Moragoshele's testimonies.

56 Bundle 3B 559 (ExD38) - Min of Commerce and Industry Circular No 1 of 1996 dated 15 July 1996.

encourage and facilitate community development programmes and community consultation for management planning purposes with the people in and around the central and southern parks.'[57]

[**93.**] It promulgated, in 2000, regulations that confirmed and/or assumed and/or facilitated human residence within the Reserve.

[**94.**] The National Parks and Game Reserves Regulations 28 of 2000 promulgated in terms of the Wildlife Conservation and National Parks Act, 28 of 1992, provide, in part that:

> 3(1) The Director (of DWNP) shall prepare a management plan ... (6) in the absence of a management plan, a draft management plan will be used as a guide where one exists (7) the plan shall be subject to a comprehensive review at least every 5 years, but also can be reviewed as and when required ...
>
> 18(1) Areas can be designated Community Use Zones. (2) CUZs are for the use of designated communities living in or adjacent to the national park or game reserve. (3) CUZs are only to be used for tourism activities, sustainable use of veld products but not hunting unless otherwise specified.

[**95.**] The Regulations provide for hunting by residents in the following terms:

> 45(1) People who were residents of the CKGR at the time it was established, or persons who can rightly lay claim to hunting rights in the CKGR may be permitted in writing by the Director to hunt specified animal species and collect veld products in the game reserve and subject to any terms and conditions and in such areas as the Director may determine.

[**96.**] It developed, over a period of about two years, various drafts of a Management Plan of the Reserve to the stage of three drafts, with human residence within the Reserve as a recurring feature. The position, even as recently as February 2001 was that 'This resettlement is completely voluntary. Many people have taken the opportunity but a significant number do not wish to move. It is proposed that this project will support both the people who wish to move and the CKGR residents through appropriate zonation of the reserve and encouragement of suitable economic activities'.[58]

[**97.**] In November 1998, DWNP must have been managing the Reserve in terms of the Second Draft Management Plan, since, in terms of the applicable Regulations, 'in the absence of a management plan the development and management of the national park or game reserve shall be guided by the draft management plan'.

[**98.**] It informed the residents on numerous occasions that services were temporary and would one day be terminated.

[**99.**] It took a resolution, around the first week of April 2001, to cut off all services in the CKGR. The Resolution was that of the Ghanzi District Council.[59]

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57 Bundle 3D 291 (ExP15(a)) Terms of Reference for Community Liaison Advisor.
58 Bundle 3D 291 (ExP15(a)) Terms of Reference for Community Liaison Advisor.
59 Bundle 3C 132 (ExD123) Resolution on the Central Kgalagadi Game Reserve.

[**100.**] It refuted, through a press interview in April 2001 that services would be terminated. The interview was given by Dr Margaret Nasha, the then Minister of Local Government and Lands[60] who later in her affidavit explained that 'Whereas most of the article is by and large correct, I did not overrule the Ghanzi Councillors. What I said was that services have to be maintained for a while but gradually will be phased out. There was a need for consultations to be done before the termination of services completely.'[61]

[**101.**] It provided services up and until the 2002 relocations when they were finally terminated, except for the transportation of children to schools, which service continued uninterrupted.

The circumstances and processes of the 2002 relocations

[**102.**] The 2002 relocation process was undertaken under the following climate or circumstances:

(1) Respondent having decided to terminate basic and essential services it had been providing to the applicants made public its decision and gave the applicants six months notice of the impending termination.

(2) Respondent made a blanket decision to terminate issuance and withdrawal of already issued, of special game licences (SGLs) to all residents.[62]

(3) Respondent, once the relocations were underway, poured water from water tanks and sealed the Mothomelo borehole. At first, soon after the relocations, one resident, PW2, was prevented from bringing water into the reserve. Only after he enlisted the help of Ditshwanelo, was he allowed to bring water into the reserve and even then restrictions as to the use of the water and with whom he could share it with were imposed on the permit.[63]

(4) Respondent, in many instances, made relocation pacts with individuals, as opposed to families. PW3's huts, for example were dismantled even though he said he was not keen on leaving while his wife apparently wanted to go.

(5) Hut dismantlement was a key feature, perhaps a necessary part of relocations.

(6) Registration to relocate by an individual was immediately followed by the measurement of the huts and fields identified by the individual as their own, the dismantlement of huts, the loading of items identified by the individual as her own into a truck and the transportation of that individual, 'her' goods and all members of the her household to New Xade, Kaudwane or Xere.[64]

(7) There was some police officers present during the relocation process and in the case of the relocation of two of Sesana's wives, one officer commissioned their oaths in a letter they wrote asking to be relocated.

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60 Bundle 1A 98 (ExP29) - 20-26 April 2001 Mmegi newspaper report. 'Nasha over-rules Ghanzi Councillors'.

61 Bundle 1A 182 (ExD125) Respondent's affidavit of Dr Margaret N Nasha.

62 Bundle 2C 334 (ExD106) - Special Game Licences: Central Kgalagadi Game Reserve (letter of 17 January 2002 from Director DWNP terminating SGLs).

63 Bundle 2B/71, 72, 73, 74 and 75 (ExP84, 85, 86 87 and 88) Letters by Ditshwanelo, Segootsane and DWNP May – June 2002).

64 The respondents witnesses who took part in the relocations testify to this.

(8) In view of the extent to which the police service is used in this country, the presence of the police in an operation of this nature and size would not, of itself, be curious; what is curious though, is the persistent denial by the respondent's witnesses that there was police presence.

(9) The relocation exercise involved twenty-nine big trucks and seven smaller vehicles, drivers, lorry-attendants and officials.[65] This must have represented a significant and overwhelming disturbance in the settlements, regard being had to the population sizes of the settlements.

(10) On occasion, families, especially husbands and wives, were separated and little attempt, if any, was made to get a common position by both.

(11) Those who were reluctant to relocate were engaged in discussions designed to make them change their minds and such discussions ranged from persuasion to pestering. One particular family not wishing to relocate had to request the District Commissioner to let them stay to take care of an ailing relative. While permission was given for them to stay, the ailing relative excuse was recognised as a ploy used by the family not to relocate.[66]

(12) The question becomes why someone who is not under pressure to relocate would need a ploy to remain in the Reserve.

(13) No-one had ever told the residents before that they could not keep life-stock.

(14) There was no opportunity created for negotiations relative to the amount of compensation to be paid and what interest could be compensated.

(15) There was insufficient information about the way in which compensation would be calculated, when it would be paid or the amount that would be paid.

(16) At least 11 of the residents, some of them applicants, who relocated and then went into the Reserve are facing criminal charges for re-entering the Reserve without the entry permits.[67]

F. Irrelevant evidence

[103.] A point needs to be made about three issues that took a significant amount of the Court's time but which, in the end of the day, can be called, for lack of a better expression, 'red herrings'. This was essentially either irrelevant evidence or evidence led to answer issues that, although they might have been raging in the 'court of public opinion', were not issues before this Court.

[104.] The first is the lengthy, technical, and without doubt professionally sound, evidence offered by Dr Alexander on disease transmission from wild animals to domestic animals and vice-versa. The technical and detailed evidence on how banded-mongooses, wild dogs and other wild-animals, might get this or that disease from this or that domestic animal, and vice versa, have not been helpful to the disposition of this case. That whole evidence was, by and large, a waste of time. This is by no means a negative comment on the

65 Bundle 3D 34-35 (ExD200) - Trucks Engaged On Relocation Exercise 2002.

66 Bundle 3C 75-76 (ExP153) - Ghanzi District Council – A Weekly Report on the CKGR Situation – Week ending 2-8-2002.

67 Bundle 2B 80 - Charge Sheet dated 4 April 2003.

professional integrity of Dr Alexander, but it is certainly a comment on the relevance of her testimony on this point to the issues that faced the court.

[**105.**] The second relates to equally lengthy and equally technical evidence, supported by graphs, maps, tables and shape-files, offered by both Mr Albertson and Dr Alexander on wildlife distribution in the CKGR and whether human settlements were likely to affect such distribution. Once again, Dr Alexander may have offered sound professional opinions about whether or not a gemsbok is likely to amble along foot-paths in Metsiamanong, when there are people at that location and/or whether the settlements are located near fossil valleys, thus forcing a competition for food resources, between man and animal. My view though is that while all that evidence explained why it made sense, from an ecological point of view, to limit or exclude human settlements from game reserves it did very little to help answer the questions of the lawfulness or otherwise of the respondent's actions, *vis-à-vis* the termination of services and/or relocating the residents, nor did it help in determining whether the applicants consented to the relocations. A detailed discussion about how wildlife of a number that could only be estimated would thrive or fail to thrive, in an unfenced area of approximately 52 000 km, if 600 or so people, their stock whose numbers have not been given and their crop fields whose sizes have not been given, were eliminated does nothing to answer the questions before this Court. Even if this evidence were remotely relevant, it certainly did not need to be as detailed as it was.

[**106.**] The third is the diamond mining issue. Mr Bennett's position was that the applicants never pleaded that they had been relocated because of diamond mining. Mr Pilane, on the other hand, was not satisfied with that answer and queried why it was, if the issue was not part of the case, that it kept on bubbling to the surface. Finally, on the application of Mr Pilane and in the face of opposition from Mr Bennett, the court visited Gope and found that while diamond prospecting had taken place there in the past, there was no actual mining then taking place. This issue was not only irrelevant, but such an assertion lacks credibility for the following reasons:

> (a) The applicants accept, as Mr Bennett conceded in submissions, that the settlement of Gope was established as a result of diamond prospecting as opposed to having been closed down because of diamond mining. It was the availability of water at the prospecting site that had attracted people there and led to the establishment of a settlement. In fact, it was the prospectors or an agent of the prospectors, who gave the name 'Gope', 'meaning nowhere', to that locality. This is not to say, though, that there were no people in the Gope area, for indeed the evidence is that the residents of the Reserve were historically highly mobile and Albertson places three families in this general area.[68] The 'Gope area' by the very fact of its location, covers areas both inside and

[68] Bundle 2A 255 (ExP1) - Territoriality and land-use in surveyed traditional territories of the CKGR- January 2001(Report by Alberston).

outside the Reserve and indeed the people who congregated at Gope during the prospecting came from both places inside as well as outside the Reserve.

(b) Gope is too far from the other settlements for mining at that site to require relocations of residents from the other settlements. In fact to relocate people from Molapo to Kaudwane would necessarily mean bringing the people nearer to the mine site than away from it.

(c) Gope is only 36km from the eastern border of the reserve so fencing it off for mining purposes could have been done without any of the other settlements feeling the faintest ripple.

(d) The CKGR is part of the larger Kgalagadi area and therefore if diamonds are a feature of the Reserve, they may well be a feature of the region. Relocations motivated by the need to make way for diamond mining would have to be to points beyond the 5km that Kaudwane is from the south-eastern boundary of the Reserve and the 40km that New Xade is beyond the western boundary of the Reserve.

(e) Re-settlement at Kaudwane or New Xade is not and cannot, according to the law or any reasoning, be a promise that if minerals were to be discovered there, people located there would be protected from any disturbance.

[**107.**] While diamond mining as a reason for the CKGR relocations might be an emotive rallying point, evoking as it does images of big, greedy multinationals snatching land from, and thus trampling the rights of small indigenous minorities, the case before this Court does not fit that bill. It would be completely dishonest of anyone to pretend that that is the case before this court. Those looking for such a case will have to look somewhere else.

G. Selected rulings made during the hearing of this case

[**108.**] This Court has made various orders over the course of the four years that it heard this case and a selection of the ones that are deemed to be of significance are given below.

[**109.**] The 5 November 2004 order on Mr Boko's mandate to represent all 242 of the applicants. The applicants' lawyers at the beginning of the hearing of evidence seemed to be in two distinct camps. On one camp was the team made up of Mr Du Plessis and Mr Whitehead and on the other was Mr Bennett, who came into the scene just before the inspection of the settlements. The team split up early on during the taking of the evidence of the applicants. Mr Du Plessis and Mr Whitehead withdrew from the case and Mr Bennett remained, acting on instructions from a new set of attorneys, Boko, Motlhala, Rabashwa and Ketshabile. A question arose as to whether Mr Boko, who had evidently never met the people he claimed where his clients, except perhaps Mr Sesana, really had the mandate to represent them. After hearing arguments on the matter, it was ruled that:

(a) Attorneys Boko, Motlhala, Rabashwa and Ketshabile have authority to act for Roy Sesana, Jumanda Gakelebone and the 131 Applicants whose names appear at the foot of the letter of 19 August 2004 addressed to Du Plessis.

(b) Attorneys Boko, Motlhala, Rabashwa and Ketshabile have no authority to act for the remaining 111 Applicants and such applicants remain as unrepresentative litigants.

(c) The case will proceed in the absence of the un-represented applicants, who are at liberty to continue without representation or to engage any attorney at any further date during these proceedings.

(d) Boko to prepare, file and serve, by 12 November 2004, a list of the full names of the applicants he acts for, assigning them the numbers they were assigned in RS1.

[**110.**] The 25 May 2005 order: The question was whether respondent's summary of evidence of Mr Joseph Matlhare complied with order 41, sub-rule 9, which rule regulates the introduction of a witness as an expert. It was observed that Mr Bennett had failed to raise an objection for close to one year and further that the defect he complained as regards the summary of evidence of Mr Matlhare, was a defect that afflicted the summaries of his own expert witnesses. The objection was overruled and it was ruled that the respondent could lead Mr Matlhare as an expert witness.

[**111.**] The 30 August 2005 order: The question was whether the respondent could use a report on of 'a field assessment of the [CKGR]' the purpose of which had been to evaluate 'wildlife and domestic animal health and ecological conditions in the Reserve'.[69] The report was complied by one of the respondent's expert witness, Dr Alexander, and the pictures included in the report were taken by yet another of respondent's witnesses, Mr J Broekhuis and the two were accompanied by about twenty other persons, termed 'participants'. Amongst 24-strong-party was one of the attorneys for the respondent, Mrs Manewe and an official who was still to give evidence, Mr Ringo Ipotseng. The assessment was undertaken during the Court's recess, without prior notice to either the Court or the applicants' counsel and was based on information collected, in part, from interviewing some applicants and examining domestic animals in their possession. The applicants' objection was upheld on a majority of 2 to 1, (Dibotelo J dissenting) and it was ordered that the respondent could not use the report in question in any way in advancement of its case. The order was based on the reasoning that the respondent could not, in terms of order 41(6), examine a thing in the possession of an opposing party without first giving that party notice of its intention to examine the thing; the respondent had not been justified in not informing the Court and the applicants of its intention to undertake the assessment; the respondent had improperly interviewed some applicants, in an on going case, without any reference to their counsel. The whole exercise had been prejudicial to the applicants.

[**112.**] 28 October 2005 order: The main question was whether the respondent was justified in removing stock from the Reserve, some of which belonged to some applicants. A related question became

[69] Dr K Alexander, Central Kalahari Game Reserve Inspection Report, July 2005, page 4.

whether the use of the Dr Alexander report in this interlocutory application in any way affected the earlier order that it could not be used in the main application. It was decided that the interlocutory application was moved by one applicant, Mr Segootsane and his wife; that the removal of their stock from the Reserve was not justified, and that the use of the Alexander report did not in any way make it evidence in the main case. Respondent remained precluded from using it in furtherance of its case.

H. Conclusions on the issues

Introduction

[**113.**] With the above factual findings as the foundation, final conclusions on the issues are reached hereunder. In some instances, additional findings are made and in that case, the basis of those findings is indicated. Otherwise, where positive statements of facts are made, the basis for such assertion can be found in the earlier part of this judgment.

[**114.**] The position I hold is that while each of the various questions could very well be answered as stand-alone questions, there is significant inter-play and inter-connectedness between the questions, making such an approach too narrow and too simplistic. For example, while the termination of services, may, by itself not raise constitutional questions, the consequence of such termination may well do. If for example, it is found that the termination of services had the consequence of forcing the applicants out of the Reserve, then the termination would necessarily raise such constitutional questions, as for example, the right to movement. And in view of the acceptance by the parties that the services were basic and essential, their termination, if that is found to have been unlawful, will necessarily raise the constitutional question of whether the right to life has been abridged.

[**115**.] Another example, if it is found that the applicants' right of movement has been unconstitutionally curtailed by the requirement of entry permits into the Reserve and further that termination of SGLs was unlawful and not only unlawful, but affected the applicants' right to enjoyment of residence in the Reserve, the termination of SGLs, becomes a constitutional issue, when, ordinarily, it might not have been.

[**116**.] Before answering the questions, some of the issues, concepts and principles that inform the way the questions will be answered are discussed below.

[**117**.] First, I take the position that the fact the applicants belong to a class of peoples that have now come to be recognised as 'indigenous peoples' is of relevance and more particularly, I find relevant that:

(a) Botswana has been a party to The Convention of the Elimination of All Forms of Racial Discrimination since 1974. The Race Committee[70] adopted Recommendation XXIII, which requires of state parties to 'ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent'.

(b) The current wisdom, which should inform all policy and direction in dealing with indigenous peoples is the recognition of their special relationship to their land. Jose R Martinez Cobo,[71] states: 'It is essential to know and understand the deeply spiritual relationship between indigenous peoples and their land as basic to their existence as such and to all their beliefs, customs, traditions and culture. For such peoples the land is not merely a possession and a means of production. The entire relationship between the spiritual life of indigenous peoples and Mother Earth, and their land, has a great many deep-seated implications. Their land is not a commodity which can be acquired, but a material element to be enjoyed freely' (paras 196 and 197).

[**118.**] Second, I adopt the position that has been followed in this Court and the Court of Appeal on the proper approach to constitutional construction. In the case of *The Attorney-General v Dow*[72] Justice Aguda, had the following to say on the issue:

> Generous construction means to my understanding that you must not interpret the Constitution to whittle down any of the rights and freedoms unless by clear and unambiguous words such interpretation is compelling.[73]
>
> I conceive it that the primary duty of the judges is to make the Constitution grow and develop in order to meet the just demands and aspirations of an ever developing society which is part of the wider and larger human society governed by some acceptable concepts of human dignity.[74]

[**119.**] Flowing from the above approach, in deciding whether or not the applicants succeed in their assertion that their freedom of movement has been curtailed or limited, I take the view that a related notion has to be the right to liberty, as guaranteed by section 3 of the Constitution. I take the position that the right to liberty connotes more than just the right not be retrained or restricted in one's movement. I subscribe to the views of the United States Supreme Court that:

> Liberty is a broad and majestic term which is among the constitutional concepts purposely left to gather meaning from experience and which relates to the whole domain of social and economic facts, subject to change in a society that is not stagnant.[75]

And

> Without doubt it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the

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70 Committee on the Elimination of All Forms of Racial Discrimination, General Comment XXIII, U.N. Doc A/52/18, Annex V, at para 4(d).

71 The Study of the Problem of Discrimination Against Indigenous Populations, Vol V No E.86.XIV.3 (United Nations publication).

72 1992 BLR 119.

73 Ibid page 165.

74 Ibid page 166.

75 *Board of Regents of State Colleges v Roth* 1972 408 US 564.

> common occupations of life… and generally to enjoy those privileges long recognised at common law as essential to the orderly pursuit of happiness by free men.[76]

[**120.**] The question then becomes whether, the actions of the respondent, taken in their totality, and in view of the special situation of the applicants, amount to a curtailment of their rights to life, liberty and freedom of movement.

[**121.**] Third, in interpreting the relevant legislation, including legislation now repealed, I am guided by section 24(1) of the Interpretation Act, which provides that:

> For the purposes of ascertaining that which an enactment was made to correct and as an aid to the construction of the enactment a court may have regard to any text-book or other work of reference, to the report of any commission of enquiry into the state of the law, to any memorandum published by authority in reference to the enactment or to the Bill for the enactment, to any relevant international agreement or convention and to any papers laid before the National Assembly in reference to the enactment or to its subject matter, but not to the debates of the Assembly.

The issue: Whether subsequent to 31 January 2002 the applicants were in possession of the land they lawfully occupied in their settlements in the CKGR.

The reasoning

[**122.**] Section 49 of the Interpretation Act defines occupy as including 'use, inhabit be in possession of or enjoy the premises in respect whereof the word is used, otherwise than as mere servant or for the purposes of the care, custody or charge thereof.'

[**123.**]It is common cause between the parties that those residents, amongst them the applicants, who were relocated 2002, were in possession of the land that they occupied at time of the relocation.

[**124.**] Further, the government when in invited to admit that the applicants 'both before and subsequent to 31 January 2002 were in possession of the land which they occupied in their settlements in the CKGR': replied 'admitted, but the (the applicants) were preferably in occupation and not possession'. The respondent is ineffectually quibbling with words.

[**125.**] The decision: The applicants were in possession of the land they occupied in [their] settlements in the CKGR.

[76] *Mayer v The State of Bebraska* (1923) 262 US 390 at 399.

The issue: Whether the applicants were in lawful possession of the land they occupied in the CKGR

Reasoning

[**126.**] Some of the applicants are descendants of people who have been resident in the Kgalagadi area, more particularly the CKGR area, before the Reserve was established as such in 1961. They were, by operation of the customary law of the area, in lawful occupation of the land prior to the creation of the Bechuanaland Protectorate and they were in lawful occupation at the time of the creation of the Reserve.

[**127.**] Some of the applicants, amongst them Segootsane and possibly some of the persons relocated from Gope, are persons and/or descendants of persons, who were resident in the Kgalagadi area, but not necessarily within the CKGR, at the time of the creation of the CKGR. They would ordinarily have been in lawful possession, of the land they occupied, whether such land fell inside or outside the Reserve, at the time of the creation of the Reserve.

[**128.**] Segootsane, and possibly some of the people who were resident in Gope at time of the 2002 relocations, were not born within the CKGR. Segootsane, would have been, all things being equal, in lawful possession of the land he occupied in Salajwe, by operation of the customary law of the area and/or the received law.

[**129.**] All the applicants who gave evidence and some additional applicants, about whom they testified, were resident in the CKGR at the time 2002 relocations. Where they, in 2002, in lawful possession of the land they occupied in the CKGR?

[**130.**] At the time of the creation of the Reserve, only forty one years before the 2002 relocations, the mobility of the residents of the inner-part of the Kgalagadi area, was recognised and it was the Bushmen who spent on average at least four months in a year in that area, who were expected to benefit from the creation on a Reserve that excluded all others, unless such others possessed entry permits to enter it.

[**131.**] Thus the people who were to benefit from the creation of the Reserve, were not persons locked in there, year in and year out, but persons who occasionally left the Reserve for all kinds of reasons, sometimes for months, sometimes for years and sometimes for ever. Segootsane's parents may well represent an example of residents who left and never returned to the Reserve.

[**132.**] Segootsane and his family are resident in the Reserve, the respondent has never required a permit from them and continues to take the position that they not having relocated, they do not require an entry permit into the Reserve.

[**133.**] During his residence in the Reserve, and up until the 2002 relocations, Segootsane has benefited from the issuance by the respondent to him of Special Game Licenses (SGLs), which licenses are issued to 'citizens of Botswana who are principally dependent on hunting and hunting veld produce'[77] and in the case of the hunting in the CKGR, persons who were 'resident in the (CKGR) at the time of the establishment of the (CKGR), or persons who can rightly lay claim to hunting rights in the (CKGR)'.[78]

[**134.**] While the colonial government had by letter of the law outlawed hunting and the keeping of small animals within the Reserve and by practice allowed them, the Botswana government, by operation of law allowed hunting in the Reserve.

[**135.**] It is reasonable to conclude that one could only claim hunting rights in the CKGR if one could claim right of residence. Such right can only flow from one either having been born in the Reserve or having been born to persons who themselves could claim residence there.

[**136.**] The right of the residents of the CKGR to reside therein without the requirement of a permit and the right of the government to exclude others, if such exclusion is necessary for their protection, was at the time of the creation of the Reserve, contained in the legislation or the interpretation of the legislation that created the Reserve.

[**137.**] At independence, this special right of residence in the Reserve and the right to exclude others if need be, found its way into the Constitution after much debate by the colonial government about the matter.[79]

[**138.**] The Constitution provides as follows at section 14(1) and 14(3)(c):

> No person shall be deprived of his freedom of movement, and for the purpose of this section the said freedom means the right to move freely throughout Botswana, the right to reside in any part of Botswana, the right to enter Botswana and immunity from expulsion from Botswana ... Nothing contained in or done under the authority of any law shall be held to be in consistent with or in contravention of this section to the extent that the law in question makes provision – for the imposition of restrictions on the entry into or residence within defined areas of Botswana of persons who are not Bushmen to the extent that such restrictions are reasonably required for the protection or well being of Bushmen.

[**139.**] Section 14(3)(c) is a derogation clause, in that it curtails or sets limits to the right to freedom of movement granted under section 14(1). The section further curtails the equality rights granted to all under section 3(a) and section 15 of the Constitution. Section 3,

77 Section 30 Wildlife Conservation and National Parks Act.
78 Regulation 45 Wildlife Conservation and National Parks Act.
79 Bundle 2B 51A (ExP78) - Extract from House of Lords Hansard 30 June 1966.

grants all persons *inter alia*, equality before, and equal protection of, the law and does that in the following language:

> Whereas every person in Botswana is entitled to the fundamental rights an freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest to each and all of the following, namely - ... protection of the law.

[**140.**] 'Protection of the law', has been held to mean 'equal protection' of the law and indeed the section 3 makes it clear that such rights as are detailed therein are to enjoyed without discrimination.

[**141.**] Section 15, goes further to make clear that the right not to be discriminated against guaranteed under that section is subject to, among others, section 14(3). Sections 15(1), (3) and (7) are reproduced hereunder:

> (1) Subject to the provisions of subsections (4), (5) and (7), of this section, no law shall make any provision that is discriminatory either in itself or in its effect ... (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 ... whereby persons of one such description are subject 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 ... (7) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision whereby persons of any such description as is mentioned in subsection (3) of this section may be subjected to any restrictions on the rights and freedoms guaranteed in section 9, 11, 12, 13 and 14 of this Constitution, being such restrictions as is authorised by sections 9 (2), 11(5), 12 (2), 13 (2) and 14(3) as the case may be.

[**142.**] Section 14(c) allows for unequal protection of the law or discrimination, in that it allows the respondent to exclude non-Bushmen from defined areas, if such exclusion can be justified on the grounds of the protection of the well being of Bushmen.

[**143.**] Under the operation of sections 14(3)(c) and section 15(7) therefore, the respondent had full authority to regulate the entry into the Reserve of persons who were not Bushmen, if such regulation, could be justified on the basis that it was for the latter's protection.

[**144.**] The CKGR is a 'defined area' within the meaning of section 14(3)(c) and I so hold for the reason that there cannot be any doubt that that portion of the Constitution was informed by the concerns about the future of the Bushmen then resident in the CKGR at the time leading up to independence.

[**145.**] The Constitution could hardly protect that which was unlawful to begin with, thus residence by the Bushmen in the Reserve was lawful as at the time of the adoption of the independence

Constitution and nothing since has been done, either by way of policy or legislation, to change that.

[**146.**] In fact, quite to the contrary, the respondent has over the years adopted policies, regulations and practices and promulgated laws, that have supported human residence in the Reserve.

[**147.**] The residents whose residence in the Reserve the respondent has supported and facilitated through policies, laws and practices are the 'Bushmen' who in 1961 were to be protected by the creation of the Reserve and their descendants and such residents and their descendants, as were, either by marriage or other social ties, ordinarily resident in the Reserve at the time of the 2002 relocations. The applicants fall within this category.

[**148.**] The provision of services to residents in the Reserve, without questioning their right to reside there is an act that supports the proposition that the respondent accepts the lawfulness of the applicants' residence in the CKGR.

[**149.**] The policy of not seeking to regulate the entry and exit of the residents of the Reserve through the issuance of permits is yet another indicator that respondent did not, at least until 2002, question the lawfulness of the residence of the applicants in the Reserve.

[**150.**] Section 45(1) of the Wildlife Conservation and National Parks (Regulations) recognises that there were residents with the CKGR at the time of its establishment and gives those residents and as well as persons who 'can rightly lay claim to hunting rights' in the Reserve, an opportunity to hunt therein. Parliament would hardly facilitate that which is unlawful.

[**151.**] Section 18(1) of the Wildlife Conservation and National Parks Act (Regulations) provide for the creation of Community Use Zones within national parks and game reserves of for the benefit of communities living in or immediately adjacent to such parks or game reserves.

[**152.**]Section 26 of the Interpretation Act provides that: 'Every enactment shall be deemed remedial and for the public good and shall receive such fair and liberal construction as will best attain its object according to its true intent and spirit'.

[**153.**] The intent and purpose of the provisions above was to recognise rights of residence and hunting that existed prior to the establishment of the CKGR and to facilitate continued enjoyment of those rights.

[**154.**] It has been said that the CKGR is state land and so it is. So are Gaborone Township, Lobatse Township and other areas not falling within tribal territories. That fact alone does not make residence therein unlawful. Residence within Gaborone Township is guided by

land use policies, regulations and laws, just as residence in the CKGR is. But there is one difference, residence in the CKGR of Bushmen, is specially protected, in that others may be excluded.

[**155.**] The CKGR is a piece of State land with two primary uses that pre-dates 1966, the year of Botswana's independence. The uses are game conservation and residence by a specified community of people.

[**156.**] The respondent has long recognised this dual use of the land, and that explains the policies, laws and practices if has adopted over the years.

[**157.**] At no point during the discussions about relocations has the respondent suggested that residence within the Reserve was in any way unlawful.

[**158.**] It has been said that human residence within the Reserve is inconsistent with the respondent's policy of total preservation of wildlife. That may be so, and in that case, the respondent has adopted a policy that cannot be realised. Alternatively, the respondent policy must be read as an ideal with certain acknowledged limitations, one of them being the reality of human residence within the Reserve. After all, the policy came after the people.

[**159.**] Decision: The applicants were in lawful possession of the land they occupied in their settlements.

The issue: Whether the applicants were deprived of such possession by the government forcibly or wrongly and without their consent

The reasoning

[**160.**] In dealing with this issue the following points are considered: the respondent's policy framework that informed the relocation and service provision, the relocation process, in terms of but dismantlement, pouring out of water, compensation processes and the individual versus the family in seeking consent to relocate. Also considered in making findings on consent is the relevance of the relative powerlessness of the applicants.

The respondent's policy positions

[**161.**] The respondent has the right, indeed the obligation, to make policies regarding management and allocations of national resources.

[**162.**] The respondent's policy of 'encourage but not force' was contradictory to the policy of 'no water provision, even on a temporary basis'. This inherent contradiction explains the respondents acts of failing to observe the latter policy. In short, the

respondent appreciated, as far back as 1986 that termination of the provision of water would necessarily lead to some, if not all, of the affected residents leaving the Reserve in search of water at places outside the Reserve. As far back as 1965, it was recognised that water availability within the CKGR was a major determinant in mobility of the residents. An inherently problematic policy therefore, guided the respondent right from the start.

[**163.**] The respondent adopted conflicting and irreconcilable positions over relocations and service terminations.

[**164.**] They took the position that services were temporary and indeed informed the residents of this position but provided the 'temporary services' for many years. This temporary provision of services continued for more than fifteen years and was terminated in 2001 on a six months' notice.

[**165.**] They informed third parties who took an interest on the issue that services would not be terminated as long as people were resident in the Reserve. There was then at least not suggested that there was a policy on timeline and at the very least the promise was that service provision would not be terminated as long some people still remained in the Reserve.

[**166.**] Just two years before they took the decision to terminate the services and fourteen years earlier having decided that all regulations relevant to the management of the Park should be strictly enforced, they promulgated new regulations that had provisions that assumed and in fact facilitated, human residence in the Reserve.

[**167.**] Up until August 2001, the respondent's policies on residence within the Reserve and its provision of services to those who resided there were neither clear nor easily ascertainable. Was it to terminate services, whether or not there were people in the reserve? Was it to provide services, as long there were people who had not been persuaded to leave the reserve? Was it to provide services temporarily, persuade but not force people to relocate and terminate the services, whether persuasion failed or succeeded?

[**168.**] The August 2001 position that services would be terminated in six months could have been read in one of two ways:

(a) As a clear statement of policy, which overrode all earlier ones, and cleared all earlier ambiguities.

(b) As yet, another statement by respondent that only added to the then existing confusing policy position, especially with the April 2001 publicised position by Minister Nasha refuting that services would be terminated.

[**169.**] As it turned out, it was one position that was going to be followed through; indeed, at the expiration of the six months, the respondent moved into the Reserve to execute its decision.

[**170.**] In fact, the August 2001 position, coming as it did during the drafting of a Management Plan that took human residence within the CKGR as a given, seemed to come out of the blue. In view of the respondent's own position that others who had no business to meddle in local affairs were doing just that, this new position was most probably fuelled by a feeling that 'enough was enough' to quote Mr Bennett.

[**171.**] Respondent would have appreciated that the termination of services would result in most, if not all, of the then residents of the CKGR relocating to Kaudwane, New Xade and perhaps to Xere too. This is borne out by the size of the exercise, in terms of the number of trucks employed, the number of staff members both at the settlements and at the destinations, the diversity of the government departments involved. In short, the respondent was prepared, in terms of resources and logistics, to relocate all the residents of the six settlements; it must therefore have expected that termination of services would lead to residents getting into the offered trucks. In short, the respondent gave the residents six months' notice and then set about to prepare for the only consequence – relocation.

[**172.**] The execution of the service-termination-within-six-months decision led to exactly what it would have led to 16 years previously, had the 1986 'no water, even on a temporary basis' decision been executed; the relocation of the residents of the Reserve.

[**173.**] The applicants say that they had a legitimate expectation that the respondent would not change its policy on service provision without first allowing them an opportunity to be heard on that change.

[**174.**] The Botswana Court of Appeal case of *Labbeus Ditiro Peloewetse v Permanent Secretary to the President, Attorney General and Shaw Kgathi*, CA 26/99, which involved a challenge to the terms of which the third respondent, Shaw Kgathi, was appointed to the position of Director of Sport and Recreation, is instructive on the position of the law. The applicant in that case claimed that he had a legitimate expectation to the position as advertised because he fit the qualifications for the position, while the third respondent did not. The Court adopted the view that a legitimate expectation arises 'where a person responsible for taking a decision had induced in someone who may be affected by the decision a reasonable expectation that he will receive or retain a benefit or that he will be granted a hearing before the decision is taken ... It is founded upon the basic principal of the rule of law, which requires regularity, predictability, and certainty in government's dealings with the public.' At 13-14.

[**175.**] Thus, on the above authority, a legitimate expectation can arise from an express promise given by a public authority. It must also

cause those receiving the benefit of the promise to believe they will receive such benefit or be given a hearing before the final decision in taken. Having a legitimate expectation to benefit from a promise or decision by a government authority is something that is important to the rule of law and a government's relations with the public.

[**176.**] *Council for Civil Service Unions v. Minister for the Civil Service* cited above offers some guidance. Lord Diplock cited specific circumstances when judicial review of administrative decision may be allowed. To qualify for judicial review:

> [T]he decision must have consequences, which affect some person (or body of persons) other than the decision-maker, although it may affect him too. It must affect such other person either: by altering rights or obligations of that person which are enforceable by or against him in private law; or by depriving him or some benefit or advantage which either (i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated some rational grounds for withdrawing it on which he has been given an opportunity to comment. [At 408].

[**177.**] In view of the pre-August 2001 environment, what could an average resident of the Reserve expect from the respondent? Some might have expected that what had obtained for more than fifteen years, supported by policy, law and practice, would not be changed without them first being given a chance to be heard. Others might have expected not be forced to relocate, but rather that attempts to persuade them would continue, provided of course that indications were still that they might be persuaded. Yet others might have thought that the respondent had accepted that persuasion was not happening. These might have expected continued provision of basic and essential services in their settlements, until such time that a new policy on service provision was developed and with their input. At the very least, all were entitled to clarity on what the policy was and were entitled to be informed about a policy change before it was made.

[**178.**] I find that the respondent operated under a confusing and unclear policy and on this point alone I would hold that the applicants were deprived of possession of the land they lawfully occupied wrongfully and unlawfully and without their consent, but I go on to consider other factors that I say are informative on whether the applicants gave their free and informed consent to the relocation.

The relevance of family and other social ties to consent

[**179.**] Once the respondent executed its decision, it failed to appreciate the importance of the fact that the applicants lived in families, compounds and small settlements. This was not a relocation of people living in an apartment building in New York or Block 8 in Gaborone. This was a relocation of people linked together by blood, marriage, mutual-cooperation and general inter-dependence. And

true consent by any one to relocate could hardly be obtained unless the family, the compound and in some instances the whole settlement was taken as a unit.

[**180.**] While the respondent had at its disposal and even at the scene of the relocations, social workers whose job is the promotion of the welfare of people in their constituencies, no attempt was made to enquire into the consequences, to the rest of the family, of an individual 'registering' to relocate. Those who executed the relocations took this as a cue to process the person as an individual, disregarding the welfare of those who may have shared the individual's assets, assuming they had indeed been individual assets. It seems that the agents of the respondent, although they ought to have known better, decided to use the notion of individual ownership to property to guide them in the relocation process. Life in the small communities in general and in the communities of the applicants in particular, is generally cooperative and interdependent; the actions of one, will necessarily affect the actions of another. Processing people as individuals necessarily 'forced' family members living with that individual to relocate.

[**181.**] There were instances where a hut from a compound was dismantled, leaving another or others standing, on the reasoning that the owner of the dismantled hut wished to relocate while the owner of the hut left standing did not wish to. No attempt was made to enquire into why the various persons shared a compound in the first place and how they had cooperated and how the 'consent' of one would affect those who did not wish to relocate.

[**182.**] There was a recurring theme suggesting that the residents valued consultation amongst families before taking a position on relocation.[80] Except in the case of Kikao, it seemed that the respondent's agents found it too cumbersome to deal with families and rather preferred dealing with people as individuals, with the result that in some instances, wife was pitted against husband and child against parent. It has to be in the respondent's interest to promote, rather than undermine, family unity and community cohesion. Respondent's agents ought to have appreciated that dissentions within families undermined and called into question the true consent of those who registered.

[**183.**] On the above point, the admitted evidence of Kaisara Caesar Mpedi, the then Council Secretary of the Kweneng District states: 'It is worth noting that although there were some reluctant families in Kikao and Kukamma, some family members volunteered to move against the will of their leaders. In Kikao, Ms Mokgathiswe and two others relocated and in Kukamma, Letsema and Mashote, who were

[80] Applicants' evidence, respondent's evidence, 3C 165 (ExP143) Minutes of the Joint Task Force Meeting September 1996.

the sons of the old man, Mr Tshotlego Mohelang, volunteered to relocate and were only waiting to discuss the matter with their father'.[81]

[**184.**] The example of how Sesana's two wives were relocated, illustrates how the relocation of one necessarily affected the decision of others. As the huts were dismantled and residents boarded trucks and the village of Molapo literally disappeared around them, they had no choice but to 'request to be relocated.'

The relevance of the relative powerlessness of the applicants to the issue of consent

[**185.**] In view of the position of the applicant, in terms of their ethnicity, their literacy levels and political and economic clout, to obtain true consent to relocate, that is, to be sure that it had 'persuaded but not forced' anyone to relocate, common sense dictated that the respondent acknowledged and addressed the relative powerlessness of the applicants.

[**186.**] The Basarwa and to some extent the Bakgalagadi, belong to an ethnic group that is not socially and politically organised in the same manner as the majority of other Tswana speaking ethnic groups and the importance of this is that programmes and projects that have worked with other groups in the country will not necessarily work when simply cut and pasted to the applicants' situation. A model of consultations that assumed that the calling of a '*kgotla*' meeting as one would in a Tswana village was sufficient consultation may not necessarily have been the best. This is not to hold as a matter of fact that the 'kgotla' meeting model was not proper consultation in all instances, but it is certainly a questioning of that process. What, for example, constitutes a '*kgotla*' meeting in a settlement like Gope, where there was no chief, or in Kikao, where the entire settlement is basically one family or in Gugamma where the headman was away sick in Salajwe?

[**187.**] The applicants belong to an ethnic group that has been historically looked down-upon, often considered to be no more than cheap, disposable labour, by almost all other numerically superior ethnic groups in Botswana. Until recently, perhaps it is still the case, 'Mosarwa' 'Lesarwa' 'Lekgalagadi' and 'Mokgalagadi' were common terms of insult, in the same way as 'Nigger' and 'Kaffir' were/are. Any adult Motswana who pretends otherwise is being dishonest in the extreme. The relevance of this fact is that those applicants who had been politicised through their involvement with FPK, Ditshwanelo and the Negotiating Team were bound to see any action that smelled of a top-down approach as yet another act of disrespect by the initiators of the action. On the other hand, the average non-politicised

[81] Bundle 1A 142 respondent's affidavit of Kaisara Rampedi para 8; admitted.

applicant, illiterate, dependant upon government services, without political representation at the high political level, was hardly in a position to give genuine consent. It was the respondent's obligation to put in place mechanisms that promoted and facilitated true and genuine consent by individuals, families and communities. Groups like Ditshwanelo or the Negotiating Team could have been invited to ensure some levelling out of the negotiation playing field.

[**188.**] The respondent has charged that Roy Sesana and 'his international friends' to quote Mr Pilane who on occasion was unable to contain his irritations and frustrations with 'foreigners' who will not leave 'us' alone, are really the cause of the problems. The applicants wanted to move, the respondent says, but FPK, The Negotiating Team and Survival International have intimidated them into not relocating. Here is an African government – is the essence of the complaint - that has the best interests of its citizens at heart, that has built clinics and schools, has sunk boreholes to ensure clean portable water, has granted title to land and granted choices of cattle or goats. It has plans to facilitate and promote private enterprise within the re-settlement villages, and a bunch of latter-day-colonialists are scuttling all that, with their talk of indigenousness, culture and land rights. What is a government to do?

[**189.**] How can one not sympathise with the respondent on this point, it might be asked? After all;

- Slavery carted black people across the seas and the ripples are still felt today.
- Colonialism carved up Africa, including the CKGR, for European benefit. In the case of Botswana, when it officially ended, the country was one of the poorest five in the world and boasted the legendary 12 miles of tar road, in a country the size of France.
- Apartheid's wounds are still oozing, not quite healed. And apartheid was thriving and well and the colonial government was managing Botswana from its bosom, when it was deciding whether or not to carve out a piece of land for residence of Basarwa and what to call it once it had been carved out.
- When the respondent's own advisers (The Mission Report) suggested the partitioning of the CKGR into two, keeping one part for the residents another part for wildlife, the views of the European Union were relevant to the rejection of that proposition.[82] The European Union had money to offer and the African government had designs on that money, so that plan, not to say it was a good plan, never saw the light of day. And donor money often comes with consultants to offer advice and counsel, and the case of Phillip Marshall, the author of the early versions of the CKGR Management Plans, is a case in point.
- Since the relocations started in 1996, the respondent has had to assure diplomats of one Western country or another that it will do that and it will not do that as regards the future of the CKGR and its residents.
- Then, an act that has irked the respondent enough to find mention in various of its affidavits and witness summaries; Survival International

[82] Bundle 3C 194 (ExP115) - Solution to the Central Kgalagadi Game Reserve – Letter from DWNP to Permanent Secretary, Ministry of Commerce and Industry, 15 December 1995.

threw its weight behind, the respondent will say, in front of, the applicants. Yet another Western player, insinuating itself between a people and their government, the respondent says.

- Then, a British lawyer, a thing that has irritated Mr Pilane, flew from England to represent the applicants. Will it ever stop; you can almost hear the cry, this continued and continuous interference from the West? What is a government to do?

[**190.**] The case being judged, though, is not whether slavery was brutish, which it was, or whether colonialism was a system fuelled by a racist and arrogant ideology, which it was or whether apartheid was diabolical, which it was. It is not even about how high the Botswana government should jump when a Western diplomat challenges or questions its decision. I think it is only fair to observe that African governments will continue to do quite a bit of jumping as long the global economic and political arrangements remain the way they are. But that is not the case before us.

[**191.**] As regards, Mr Bennett's appearance in this court, why, it is the respondent's own laws that makes that possible. Mr Pilane cannot justifiably take that against Mr Bennett or his clients. The applicants had a right to engage whom they wished and if they wished for Mr Bennett and the law allows it, then he can fly from England as often as he wishes and Mr Pilane should accept it and if that irritates him, he just must muster some grace and hide his irritation as best he can.

[**192.**] As regards the role of Survival International, like FPK, Ditshwanelo and the Negotiating Team, it seems to me that these organisations have given courage and support to a people who historically were too weak, economically and politically to question decisions affecting them. For present purposes, the fact that Survival International is based in the West is neither here nor there. The question is whether or not the applicants had a right to associate with this group in their attempts to resist relocating and the answer has to be in the affirmative. It was always up to the applicants to decide whose arguments, those of the respondent or those of any one else, including those the respondent considered irksome, made sense to them. Finally, it had to be their decision and that is the only question that matters; what did the applicants decide?

[**193.**] What is a government to do? The government can be as irritated and/or annoyed as it wants to be at what it considers outside interference in its affairs, but it cannot, it should not, in response to such irritations disadvantage its own people. More than anything else, a government that hears sounds of discontent is obligated to pause and listen and ask itself why it is that a course of action it thought reasonable and rational is attracting dissent and disquiet.

[**194.**] Even assuming that it had believed that the applicants were keen to relocate, once there appeared to be some resistance, once the FPK, the Negotiating Team and Ditshwanelo started to seek a revision of the relocation decision, once the lawyers were instructed

and litigation was threatened, the respondent was obligated to pause and listen.

[**195.**] After all, the respondent's interest must ultimately be the welfare of its people, and its people include the applicants. The decision to terminate the services, to relocate the applicants, to terminate the issuance of special game licences, to refuse the applicants re-entry into the reserve, are ultimately resource management and allocation and welfare promotion decisions.

[**196.**] Such decisions require a balancing of rights, a consideration of who benefits and who is adversely affected when one path or other is followed. Such a balancing exercise would have necessarily involved a comparative analysis of the expected losses and the benefits to the applicants, as well as the expected losses and the benefits to the nation, of relocations.

[**197.**] In considering whether the applicants consented to relocate, perhaps it is worth considering what an individual applicant would actually gain by relocating.

[**198.**] The respondent says those who relocate will get title to land. The question becomes, to do what with it? What is the value of a piece of paper giving one rights to a defined piece of land, typically 40m x 25m,[83] when one had access to a much larger area? This is not to say there is no value, but it is to question whether such a possible value was discussed with the residents.

[**199.**] The respondent says those who relocate will have a choice of between fifteen goats or five cows. No doubt this is fifteen more goats or five more cattle than they had before, but clearly not enough to pull them out of the need to receive destitute rations, at least in the short term. The respondent's realised that and directed that all those relocated be classedas 'temporary destitutes'.

[**200.**] The respondent says those who relocate will have access to health care services and schools; but they had those before, it just that one had to travel to get to them. A mobile clinic that comes twice a week to one's settlement may well be considered sufficient, making relocation to a village close to a big clinic that is available 24 hours a day seem unnecessary, especially to a highly mobile individual who is well prepared to travel to where the clinic is on a need basis.

[**201.**] The respondent says those who relocate will get water, but they did get water; perhaps not sufficient to ensure healthy levels of hygiene, but an individual might well decide that water-on-tap is not a sufficient incentive to relocate.

[**202.**] The respondent says that those who relocated were offered wards in which they could live with people they had lived with in their

[83] Bundle 2C 57 - List of People Allocated Plots During the Relocation (letter from Permanent Secretary dated 9 April 2002).

settlements, but this ignores the fact that space within compounds, space between compounds space between settlements and space generally, was a key feature in the applicants' pattern of settlement. Being jammed together in square plots, separated by a wire fence from one's neighbour was not one of the features of life in the settlement.

[203.] It is not difficult to see how, at a personal level, an individual might well have decided that it was better to be poor at home, than to be poor in a new and unfamiliar place.

[204.] It is not hard to see how a person from Kikao might have been less enthusiastic about moving to New Xade, than a person from Old Xade. After all in 1985, the dry season population of Kikao was four people and that of Old Xade was 860.[84] In 2001, the population of Kikao was 31 and that of New Xade, all of Old Xade having been relocated, was 1094.[85]

[205.] This is not to say that the respondent did not have the interests of the applicants at heart, but it is to say that they ought to have listened more carefully at what motivated or was likely to motivate the applicants' decisions and choices.

[206.] The respondent, saw the economic-development potential, the health benefits and the educational opportunities to the children of the applicants, of the relocations, but failed to see the cultural and social upheavals that could result. Two illustrations:

> (a) The then Minister of Local Government wrote to Ditshwanelo that, 'May I add here once more, that the government has the interests of the Basarwa at heart. The decision to relocate was taken with many positive things in mind. We as a government simply believe it is totally unfair, to leave a portion of our citizens underdeveloped under the pretext that we are allowing them to practice their culture. I would therefore urge you, in communicating this government decision to the rest of the Negotiating Team, to appreciate that all we want to do is treat Basarwa as humans not game, and enable them to partake of the development cake of their country.'[86]
>
> (b) When one of the applicants gave evidence that she did not wish to relocate because she wished to be near the graves of her ancestors, Mr Pilane burst out laughing and when it seemed clear by the silence in the Court that he needed to explain the source of his mirth, he explained that he had not been aware that they buried their dead, but had rather thought that they collapsed a hut over their dead and moved on.

[207.] The two examples demonstrate how the respondent's view of development fails to take into consideration the knowledge, culture, and ideologies of the applicants.

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84 Bundle 3B/574 (ExD37) - Fact Finding Mission Report- November 1985.

85 Bundle 3B/496 (ExP123) - Notes on Central Kgalagadi Game Reserve and Other Developments in Remote Area Dweller Settlements, Ministry of Local Government, 5 June 2003.

86 Bundle 1A 104 (ExP32)- Letter from Minister Nasha to Ditshwanelo dated 7 January 2002.

[**208.**] Operating under the believe that relocation to centres offering 'secure' land tenure, the opportunity to rear cattle, better healthcare, educational and other facilities has to be something everyone wants, the respondent was unable to appreciate the reasons behind the persistent resistance to relocate and finally explained it away as the result of bad advice by busybodies meddling in matters that did not affect them.

[**209.**] But the respondent ought not to have been surprised that some people might chose to remain in the Reserve, not withstanding the better facilities outside, for as far back as 1986, their own advisers cautioned that 'relocations would create a group of frustrated people'.[87]

[**210.**] Respondent might want to pause and consider whether the disappearance of a people and their culture isn't too high a price to pay for the gain of offering those people services at a centralised location. It might want to consider, whether with Botswana's relatively small population of 1.6 million people, regard being had to its land size and its relative wealth, cannot, faced with a unique culture on the verge of extinction as it is, afford to be innovative in its development programmes. The failure of economic projects at Kaudwane and New Xade may well have something to do with the culture and pattern of life of those who relocated there. Perhaps they do not even like tomatoes and in that case, no matter how much money is poured into the horticulture projects, the projects will not thrive. Perhaps never having reared cattle in the Reserve, being given five cattle to take care of is more of a challenge than a benefit. Perhaps the community that made up Kikao would have been persuaded to move to a game ranch of its own, than to growing tomatoes in Kaudwane. And this is not a fanciful idea; the respondent current policies actually have programmes and projects that allow for individuals to own large tracts of land for game and/or cattle farming. This is not to make definitive findings on these point, but it is to say that I am not convinced, on the evidence, that the decision to terminate services and relocate the applicants and what to offer them once they has been relocated, took into consideration such relevant considerations as the potential disruptions to their culture and the threat to their very survival as a people. I note the respondent's position that it does not discriminate on ethic lines, but equal treatment of un-equals can amount to discrimination.

[**211.**] The respondent allowed its annoyance with the involvement of groups who were themselves not residents of the CKGR, especially the involvement of Survival International, to influence its dealings with the applicants and ultimately the respondent changed course too swiftly and without allowing the applicants an opportunity to be heard on the matter.

87 Bundle 3B/608 (ExD37) - Fact Finding Mission Report – November 1985.

The relevance of the pouring out of water to consent

[212.] The only explanation for the pouring out of water and the sealing of the borehole at Mothomelo at the time and in the manner that was done has to be that the respondent wanted to press the point to those who could have been doubtful, that the only option was relocations. Water is a precious resource anywhere and a particularly scarce one in the CKGR and it would have been brought there at some costs, so to up-turn tanks would have been a dramatic and clear statement to the applicants. This is particularly so since those in charge of the relocation exercise needed water too, but this problem was solved by bringing water that they could control, the message being very clear, namely that there would be water only as long as the registration process was in progress. This act was intended to cause the residents to register to relocate.

The relevance of dismantlement of huts to consent

[213.] It is said that huts were dismantled because those residents who relocated wished to re-use the materials at their destinations. While that is a reasonable explanation, it seems very strange that not one person elected to leave his/her hut with a relative who did not wish to relocate. The other purpose of the dismantlement of huts has to have been a keenness to ensure that nothing remained that could possibly entice people back. The respondent has insisted that there is no difference in vegetation type between the old settlements and the resettlement villages. If that is the case, why transport used poles at considerable expense when the residents could have harvested materials around their new homes? And why is there no shred of evidence that there was any discussions whatsoever about there being a choice to leave huts standing?

[214.] It is common cause that at the end of the relocation process, in the case of Molapo, for example, everyone had been relocated, whether they had registered or not. The dismantlement of huts would have caused the whole settlement to disappear and thus made it almost impossible for anyone to decide to stay behind.

Acceptance of compensation as an indicator of consent

[215.] It is said that the residents appreciated that the measuring of their huts and fields and the counting of the poles used to build some of those structures was for purposes of paying them compensation. While this must indeed have been the case, it is remarkable that it was assumed by the respondent that the applicants would accept whatever was offered. No attempt was made to make any of the residents aware of how the amount would be calculated and on average how much they could expect. The respondent was aware of the applicants associations with Ditshwanelo, FPK and the Negotiating Team and surely it would have been a small matter to

invite these groups to assist in compensation negotiations. There were, in fact, no compensation negotiations, only a one-sided decision process. The whole process was top-down in its execution, and was conducted as just one more step to go through in getting the task at hand, which was relocation, executed.

[216.] The manner in which the compensation process was handled was also unique in another way. The normal compensation procedure is for the compensation payment to be made first or at least an offer of an amount to be made, and only then is the person required to move. In the present case, there was no room for negotiations. The Compensation Guidelines used by the respondent suggest that only in the case if an emergency will occupants be asked to vacate 'their land' before compensation is paid.[88]

The relevance of the termination of the issuance of Special Game Licenses (SGLs) to consent

[217.] On 17 January 2002, the respondent, through the office of the DWNP, issued a blanket instruction to the effect that no more SGLs would be issued and further that existing ones would be withdrawn. The instruction was based on the reasoning that 'in view of the recent government decision to terminate services to the residents of the ... Reserve ... the Department is obliged to conform. The Department has considered the services it offers in the ... Reserve and it has decided to cease issuance of Special Game Licences to people residing inside the Reserve'.[89]

[218.] The motivation could not have been cost, since the Director of DWNP has not remotely suggested that cost was a motivator.

[219.] The motivation could not have been conservation of wildlife, since the Director did not avert his mind to that issue before terminating the issuance of the licences and withdrawing already issued licences.

[220.] The motivation could not have been disease control, since that issue does not seem to have exercised the Director's mind until he came to give evidence in this case. Dr Alexander's views of disease transmission from domestic animals to wild animals and vice-versa were not sought during the many months that the DWNP was developing a plan to manage the Reserve.

[221.] The motivation could not have been anything that the applicants had done; for the Director would then have dealt with individual offenders.

88 Bundle 3D 12 Compensation Guidelines for Tribal Areas.

89 Bundle 2C 334 (ExD106) Letter from Ag Director, DWNP to Ag District Wildlife Coordinator, dated 17 January 2002.

[**222.**] If the respondent's position that it was always its view that those who wished to remain could do so even after termination of services, the question becomes why then withdraw the one benefit that could be enjoyed with no extra cost to the respondent? Officials of the DWNP patrol the Reserve all the time and delivery of SGLs to the applicants, who lived in settlements hugging the main track running through the Reserve, was hardly an onerous task.

[**223.**] The plan, therefore, was that by the end of 31 January 2002, there would be no water, no food, and no hunting, within the Reserve. Life would simply be very hard, if not outright impossible.

The applicants' actions and consent

[**224.**] The applicants' actions were consistent with their intention to remain in the CKGR thus suggesting that they did not consent to the relocation; those actions include the following:

- The instruction of FPK to negotiate with the government on finding ways and means of ensuring that they remain within the reserve;
- The instruction of the Negotiating Team to engage the respondent in consultations aimed at ensuring their retention of possession of their settlements;
- The participation, by some applicants and through the Negotiating Team, in the protracted and technical negotiations with the Department of Wildlife, all aimed at facilitating residence within the CKGR;
- The instruction of attorneys to challenge the termination of services and this at the height of the very relocations that the respondent says they consented to;
- The actions of some, and in view of the sizes of the settlements, this really means most, of the residents in the smaller settlements have been consistent in their reluctance to relocate. Some reluctantly relocated to Old Xade in 1995 only to go back to their settlements later. Some relocated to Kaudwane and New Xade during the 1997 relocations, only to go back to the Reserve during the years that followed that. Some relocated Kaudwane, New Xade and Xere in 2002 only to return to the Reserve by July of the same year. Some never relocated at all. The evidence is that they did not consent to the 2002 relocations. The evidence is further that in 2002, they were dispossessed of the land they occupied wrongfully and unlawfully and without their consent.

[**225.**] Decision: Those applicants who relocated in 2002, whether they had registered to relocate or relocated with their families were deprived of possession of the settlements they lawfully occupied by the government forcibly, wrongly and without their consent.

Issue: Whether the termination of by the government of the provision of basic and essential services to the applicants in the CKGR was unlawful and unconstitutional

The reasoning

[**226.**] The termination of basic and essential services was intended to force relocation and the reasons given above for the holding that relocation was forced, wrongful and without consent applies to this issue as well.

[**227.**] While the cost of service is certainly a factor that respondent is entitled to take in deciding whether to supply same at any one location, the respondent failed to take into consideration the fact in the case of the applicants, relocation meant a complete new way of life. Was the financial saving worth the social and cultural loss? Did any one do the maths? Was the potential loss to a people's identity worth the financial saving?

[**228.**] The constitutionality of the issue arises from the fact that the services, which included water and food to destitutes and orphans, were essential; by this the parties must mean essential to the recipients' survival. Their termination endangered life and, thus their termination had the consequence it had, relocation.

[**229.**] The right to life is a constitutionally right and the termination of essential services was in essence, a breaching of that right.

[**230.**] Decision: The termination with effect from 31 January 2002 by the government of the provision of basic and essential services to the applicants in the CKGR was unlawful and unconstitutional.

Issue: Whether the government is obliged to restore the provision of such services to the appellants in the CKGR

The reasoning

[**231.**] Four and a half years has gone by since the applicants launched this application and in the meantime many applicants have remained in the re-settlement villages.

[**232.**] On the other hand, while the respondent maintain that by the time the relocations were complete, only seventeen people remained in the Reserve, it is also the respondent's evidence that by May of the following year, there was a total of 57 people, living Molapo (35), Metsiamanong (19) and Gugamma (3).[90]

[**233.**] Further, at the time the Court travelled through the reserve in July 2004, there was evidence of re-building of compounds and huts in some settlements, notably at Metsiamanong and Molapo. It is not

[90] Bundle 3B/497 (ExP123) - Ministry of Local Government.

known to the Court how many, if any, of the people who were observed re-building have remained in the reserve without government basic and essential services. There were then more than ninety of people in the Reserve.[91]

[**234.**] The applicants never challenged the respondent's ultimate right to terminate services. What they complain about is the process of the decision-making. They are essentially saying that, had the respondent paused and listened to them, considered their viewpoint, they may well have reached a different decision. They are saying: provide the services while you consult us, as you should have done in the first place. The relief therefore is for temporary restoration, while consultations take place, which consultations may result in either termination or non-termination, the respondent having considered the position in full.

[**235.**] Some of the applicants have found solutions, perhaps temporary, to securing services. Segootsane obtained a permit to bring in water and the Court observed vehicles parked at some of the settlements. It is reasonable to assume that with some of the relocated residents having access to compensation money, for the first time ever, for there is no record whatsoever of motor-vehicle ownership by any resident prior to the 2002 relocations, some of them purchased vehicles.

[**236.**] To order restoration of services is in effect to order specific performance against the government, an order that is available generally and against the government specifically, in limited circumstances.

[**237.**] Specific performance being an extra-ordinary remedy, it is only available where no other possible remedy will offer relief. In this case, there will be some people for whom an order for damages would be sufficient while for others it would not be sufficient. The latter group would be people who have either never relocated or have since gone back to the Reserve.

[**238.**] For those applicants, who, as a result of the passage of time, have made permanent homes in re-settlement villages and have no wish to go back to live in the Reserve, an order for damages would be appropriate. I note that no prayer was made for damages, but I hold the view that it is the passages of time that calls for ordering a 'further or alternative relief'. After all, section 18 of the Constitution gives this court broad powers once it finds that the Constitution has been offended against.

[**239.**] For those applicants who wish to remain in or if they relocated to return to the Reserve, an order for specific performance is indicated.

91 Inspection in Loco Report.

[240.] Decision: The respondent is obliged to restore basic and essential services to those residents who are in the Reserve and those residents who are prepared to back to reside in the Reserve and is obliged to pay damages to those residents who do not wish to go back. Such damages to be agreed or assessed by a Judge or a panel of Judges as the Chief Justice might direct.

The issue: Whether the government refusal to issue special game licenses to the applicants is unlawful and unconstitutional

Reasoning

[241.] The powers of the Director of DWNP to issue SGLs was in terms of sections 26 and 30 of the Wildlife Conservation and National Parks Act (the Act) and section 45(1) of the National Parks and Game Reserves Regulations of 2000 (the Regulations) and section 9 of the Wildlife Conservation (Hunting and Licensing) Regulations (the Hunting Regulations) and the Director was obligated to exercise the powers granted to him reasonably, rationally and fairly.

[242.] In terms of the Act, and the Hunting Regulations, persons who were entitled to be issued with SGLs were persons who were 'principally dependent on hunting and gathering veld produce for their food.' (Section 30(1)).

[243.] In terms of Regulations, persons who were resident within the CKGR at the time of its establishment or those who could lay claim to hunting rights in the CKGR could be permitted to hunt therein.

[244.] Prior to the 2002 relocations, the respondent had determined that the applicants fell within one or more of the above categories and had issued them with SGLs.[92] The licence purports to have been issued in terms of section 30, thus bringing Segootsane, for example, within the category of persons 'principally dependent on hunting and gathering' for food.

[245.] The Director's decisions not to issue special game licences, as well as to render invalid those already issued, was not based on the need to conserve or to protect wildlife, but rather on the view by the then Director of DWNP that a special game licences was a service subject to withdrawal in terms of the respondent's decision to withdraw services to the residents of the CKGR.[93]

[246.] The Director should have been guided by the provisions of the Act and the Regulations, as opposed to what he heard over the radio, on how to exercise powers granted to him under the said Act and Regulations.

92 Bundle 2B 76 (ExP89) - Segootsane's 2000/2001 SGL.
93 DW2 - Matlhare's testimony, on 7 June 2005.

[**247.**] The Act and the Regulations contemplate a situation where the Director would evaluate, on a case-by-case basis, whether an individual or a household, fell within the category of persons described by the said Act and/or the Regulations and the Director failed to do that.

[**248.**] The Director thus acted outside the powers granted to him by law or at the very least failed to act as the law directed him to act.

[**249.**] In any event, the DWNP had no power to withdraw already issued licenses; such an act would constitute a wrongful deprivation of a right to property without an opportunity to be heard.

[**250.**] An existing SLG conferred a right and the taking away of that right without an opportunity to be heard was unlawful.

[**251.**] Conclusion: The respondent refusal to issue special game licenses to the applicants unlawfully and unconstitutional.

The issue: Whether the government refusal to allow the appellants to enter the CKGR unless they are issued with a permit is unlawful and unconstitutional

The reasoning:

[**252.**] The respondent's position seems to be that only those who did not relocate, and it says there are 17 of them, may remain in, and if they leave, re-enter the Reserve without permits and that all others, are caught by section 49 of the National Parks and Game Reserves Regulations, 2000 (the Regulations). This group would include every one who vacated the Reserve during the 2002 relocations, whether they 'registered' to relocate or not. For those who 'relocated' it appears that their right to return to the Reserve without a permit depends on whether they have been 'compensated'. This policy is contained in the 30 October 2002 Presidential Directive which states on this point, 'All those people who have relocated and were compensated should not be allowed to resettle in the CKGR'.[94] The case of Kaingotla Kanyo illustrates the respondent's point. His wife, Mongwegi Tlhobogelo, gave evidence and the portion relevant to this point is as follows. She relocated with her husband, he having registered to relocate. Both went to New Xade and after he had collected the compensation money in the amount P 66 325.00, received five head of cattle and land to settle in, they headed back to the Reserve, leaving the cattle behind in New Xade.

[**253.**] It appears from what she said that the reason she and her husband went to New Xade was to get compensation money and the cattle. Asked in cross-examination why she did not go back to Molapo before they were given the cattle, she asked rhetorically: 'How could

94 Bundle 2C 131 (ExP96) - Presidential Directive CAB 38(a) 2002.

we go back to Molapo before we received that which caused us to go to New Xade?' In answer to why they did not go back to Molapo before they were given the money and the cattle, she said: 'We were waiting for the money or the said compensation before we reverted back to Molapo and we are still waiting for some more for the goods that we lost during the relocation.' She also said that they kept the money and the cattle even though they returned to Molapo.

[254.] In June 2003, The respondent issued summons against Kaingotla Kanyo, charging that he had entered the Reserve without the requisite permit[95] the allegation being that such an act is contrary to section 49 of the National Parks and Game Reserves Regulations.[96]

[255.] Kaingotla Kanyo was one of at least eleven former residents of the Reserve who was charged with re-entry into the Reserve without a permit.

[256.] The respondent's policy though is far from clear. On the very same matter, the respondent has advanced the position that; 'There are however, a few who have returned to the game reserve with their new livestock ... Their decision to resettle in the game reserve has placed them in breach of the agreement that they voluntarily entered into with the government to relocate outside the game reserve. However, in line with its declared policy of persuasion, the government of Botswana has not done anything to force these people to leave the reserve'.[97]

[257.] The question becomes; is the respondent policy to persuade or to prosecute? It can hardly be both.

[258.] Since it is respondent's position that those who never relocated, and by this it is meant those who were not transported by the respondent out of the Reserve during the 2002 relocations, can remain, exit and re-enter without permits, it must be the respondent's position that it was their act of relocating, and perhaps coupled with the acceptance of compensation, that extinguished their rights to re-enter without permits. It must then, also be the respondent's case that, prior to the relocations, the applicants had a right to live in the Reserve.

[259.] Whatever the respondent says is the basis of the continuing right of those applicants who did not relocate and the right, prior to relocation, of those who did, to reside in the Reserve, there are various problems with the proposition that relocations or relocations coupled with acceptance of compensations, extinguished the right of those who relocated to re-enter the Reserve without permits.

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95 Bundle 2B 82(E) - Summons issued on 16 June 2003.

96 Bundle 2B 80 Charge Sheet dated 4 April 2003.

97 Bundle 2C 92 - Reasons for the Relocation of the Former Residents of the Central Kgalagadi Game Reserve (CKGR) May 2004.

[**260.**] The first problem is that for the people who 'registered' to relocate, the extinction of their right to relocate must be said to have occurred when they accepted the terms of the relocation. What were those terms? When did the respondent communicate those terms to the applicants? Where these new terms, applicable only to the 2002 relocations and not to earlier relocations? After all, some people who had relocated before had returned to the Reserve and no demands for permits were made on then.

[**261.**] The second problem is that the reality on the ground was that many people vacated the Reserve not because they had made a personal decision to leave, but because a family member, who could point at a hut as his or hers, had 'registered' and the hut had been taken down. With a wife, husband, parent etc, leaving, such 'dependent' family members had no option but to get into the truck. For the rights of these persons to return to the Reserve to be extinguished, it would have to be said that the leaving with a family member constituted an agreement that all rights to return would be extinguished.

[**262.**]If the respondent's position is that it is actually the acceptance of compensation that extinguished all rights to return, the respondent reasoning hits the same snags discussed above, and more.

[**263.**] There is no evidence to suggest that either party even contemplated that compensation would extinguish the right to return to the Reserve. This possible consequence was not discussed and in fact in the past some persons who had relocated had returned to the park and there is no evidence that such returns were regulated by issuance of entry-permits, nor that anyone had ever been prosecuted for entry without a permit. It was only after the 2002 relocations and after the respondent had set-up a Relocation Task Force, to enquire into 'why people are going back to the Central Kgalagadi Game Reserve'[98] that returns were visited with punishment. One of the recommendations of this Task Force was that the DWNP should be flexible in issuing entry permits for people going into the Reserve to visit relatives and ancestral places and in the case of those who did not exit on the given dates, 'they should be followed and be removed' from the Reserve.[99]

[**264.**] If it was compensation that extinguished the right to return without a permit and if relocation was an individual decision, and if compensation was paid to the individuals who relocated, then other members of that family could not possibly be bound by the decision of the individual to extinguish his/her right to return. Thus, on this reasoning, Mongwegi Gaotlhobogwe, the wife of Kaingotla Kanyo can,

98 Bundle 2B 83 (ExP93) - Relocation Task Force Inquiry Report (undated but task force constituted early November 2002).

99 Bundle 2B 91 (ExP93) - Relocation Task Force Inquiry Report - Recommendation No 6.

without offending against the law, return to the Reserve to resettle, but her husband can only visit her if he is issued with a permit, which permit will have a specific date on which he is to exit. The Ghanzi District Council has made a recommendation that an entry permit should grant the permit-holder a seven-day stay.[100] What of their children, it might be asked?

[265.] A similar question arises in relation to Roy Sesana and his family. He ordinarily lives outside the Reserve and had two wives and six children at Molapo. Before the relocations, there is no question of him requiring an entry permit to see his family. His wives, Sesotho Gaotlhobogwe and Mmamoraka Roy received compensation in the sums of P 36 347.00 and P 7708, respectively. Did these payments extinguish Roy Sesana's right to enter the Reserve without a permit? It would appear that the respondent's position is that it did as it did refuse Roy Sesana entry on at least one occasion during the 2002 relocations.[101]

What of his children's right to enter the Reserve without a permit?

[266.] If compensation was intended to extinguish the right to return, and if the respondent was relocating individuals and was not concerned whether such relocations could separate husband from wife, for example, then acceptance of compensation by one could well have meant a permanent spilt of families, a consequence the respondent could not or should not, have wished at all.

[267.] The question of what rights might be retained by the residents of the Reserve even after relocation was raised but it appears no position was taken, by at least one official of the respondent as far back as 1996, before the 1997 relocations. The then Director of DWNP expressed the view, at a meeting of the CKGR Resettlement Steering Committee that it would be necessary to consult with the residents about what rights they wished to retain and whether such rights would be enjoyed by both those who relocated and those who remained in the Reserve.[102]

[268.] In any event, flowing from the holdings that the applicants were in lawful occupation of their settlements and that the entire relocation exercise was wrongful, unlawful and without the necessary consent, any rights that were lost as a result thereof were lost wrongfully and unlawfully lost. Any attempt to regulate the enjoyment of those rights by permits, when such permits were not,

[100] Bundle 3C 76 (ExP153) - Ghanzi District Council – A Weekly Report on the CKGR Situation (August 2002).

[101] Bundle 1A 126 ExP36 – Letter from Roy Sesana to the Director of DWNP dated 22 February 2002.

[102] Bundle 3C 161 (ExD188) - Minutes of the Special Meeting of the CKGR Resettlement Committee, 12 September 1996.

prior to the 2002 relocations, a feature of the enjoyment of such right is an unlawful curtailment of the right of movement of the applicants. It is unlawful and unconstitutional.

[**269.**] There can not be any doubt that the respondent, through the DWNP, was always entitled, as part of its management of the Reserve, to monitor and regulate traffic, especially vehicular traffic, into the Reserve. In the case of the applicants, such monitoring and regulation might well include keeping records of identities and numbers of the residents, the incidence of entry and exit from the Reserve, the nature and impact on the Reserve of the transportation they used for such entry and exit. But such management cannot be used as a means of denying the applicants to right to reside in the Reserve.

[**270.**] Conclusion: The respondent's refusal to allow the appellants to enter the CKGR unless they are issued with a permit is unlawful and unconstitutional.

I. Directions on the way forward

[**271.**] In conclusion, it seems to me that this case invites concluding comments. This Court has been invited to resolve a dispute, which at first blush is about the termination of water and other named services to a few hundred people, who are demanding access to a specified piece of land and the right to hunt in that piece of land. While that is indeed correct, this dispute cannot be resolved, will not be resolved, unless the respondent acknowledges and addresses its deeper context, its nub, and its heart.

[**272.**] This is a case that questions the meaning of 'development' and demands of the respondent to take a closer look at its definition of that notion. One of colonialism's greatest failings was to assume that development was, in the case of Britain, Anglicising, the colonised. All the current talk about African renaissance is really a twisting and turning at the yokes of that ideology. Botswana has a unique opportunity to do things differently.

[**273.**] The case is thus, ultimately about a people demanding dignity and respect. It is a people saying in essence, 'our way of life may be different but it worthy of respect. We may be changing and getting closer to your way of life, but give us a chance to decide what we want to carry with us into the future.' Did any one even think to record settlements on video and/or film, before they disappeared into the grassland? Did any one consider that perhaps a five-year old being relocated may one day wish to know where she/he came from? Or perhaps the respondent lifestyle was seen as a symbol of poverty that was worth preserving.

[**274.**] The respondent's failure has been in assuming that a cut and paste process, where what has worked in someplace else, and even

then taking short cuts at times, would work with the applicants. When the case started, Mr Pilane was full of talk about how the services belonged to the respondent and how the respondent had a right to do what it wished with them. This prompted some applicants to say that in that case, the government could take the services and leave them in their land. That, in my view, is a very unfortunate view of the role of governments. Governments exist for one reason only; to manage the people's resources for the people's benefit, period. They do this guided by policies and laws and they put in place structures and agencies that make this possible. In doing so, they very often have to make very difficult decisions about resource allocations. But the resources do not belong to governments to do what they wish with them. They belong to the people.

[275.] The world over, non-governmental organisations are increasingly being recognised as legitimate and important actors in civil society. The applicants have identified Ditshwanelo, FPK and the Negotiating Team as their representatives. The respondent should see this as offering an opportunity for the promotion of true consultation between the parties, as opposed to a meddling by third parties.

[276.] Roy Sesana, too, if he genuinely seeks the resolution of this dispute, might want to decide whether he is still with the rest of the applicants, especially those who have given evidence or whether he is now dancing to a completely different tune. His actions; particularly his failure to give evidence, his consistent defiance of his own counsel on what he can or can not say to the media and his blatant misrepresentation to the media of what his case is, suggest that he cares little about what this Court decides. That is unfortunate.

[277.] It is my conclusion that the applicants have proved their case on all points and I would make the following order:

(1) The applicants had a right to have communicated to them a clear and unambiguous policy on their continued residence within the CKGR and further, they had a right to be consulted on any variation of the policy that had the foreseeable consequence of adversely affecting their enjoyment of such residence.

(2) The termination with effect from late February or early March 2002, by the government of the provision of basic and essential services to the applicants in the CKGR was unlawful and unconstitutional.

(3) Pending the formulation of a clear policy on residence within the CKGR, and the giving the applicants an opportunity to consider and give their views on such a policy, the government is obliged to restore the provision of basic and essential

services to the applicants in the settlements of Gugamma, Kikao, Metsiamanong, Mothomelo, Molapo and Gope, in the CKGR.

(4) The government is obliged to pay damages to those of the applicants who have, due to the passage of time, made homes outside the CKGR and have now decided to settle at those homes instead of returning to the CKGR and the amount of such damages is to be determined by agreement, failing which, either party may set the matter down before any judge, or a panel of judges as the Chief Justice might direct, for assessment.

(5) The consequence of the relocations of February to March 2002 was to deprive the applicants of possession of their land forcibly, wrongly and without their consent.

(6) The government's refusal to issue special game licenses to the applicants is unlawful and unconstitutional.

(7) Government's refusal to allow the applicants to re-enter the CKGR unless they are issued with a permit is unlawful and unconstitutional.

(8) Costs to the applicants and against the respondent.

THE GAMBIA

Denton v The Director-General, National Intelligence Agency and Others

(2006) AHRLR 241 (GaHC 2006)

Ajaratou Mariam Denton v The Director-General National Intelligence Agency, Inspector-General of Police, The Chief of Defence Staff Gambia Armed Forces, The Director-General of Prisons and the Attorney-General

High Court of The Gambia, HC241/06/MF/087/F1, 24 July 2006
Judge: Monageng

Arbitrary detention

State responsibility (domestic law cannot be invoked to justify non-compliance with treaty obligations, 18)
Health (detainee not taken to hospital when required, 33
Interpretation (international standards, 40)
Personal liberty and security (arbitrary detention, 36, 53, 58)

[**1.**] The applicant, Mrs Ajaratou Mariam Denton, filed an originating summons dated 10 July 2006, seeking the following reliefs:

> (1) A declaration that her arrest by the 1st, 2nd, 3rd and 5th respondents or by their subordinates and/or agents on Thursday 6 April 2006 at the applicant's residence at Churchill's Town in Kombo Saint Mary Division of the Gambia is unlawful, in that it is inconsistent and/or in contravention of section 19 of the Constitution of the Gambia 1997.
>
> (2) A declaration that her detention by the respondents, their subordinates and/or agents since Thursday 6 April 2006 is unlawful and unconstitutional, in that the said detention is inconsistent with, and/or in contravention of section 19 of the 1997 Constitution of the Republic of the Gambia, and article 6 of the African Charter on Human and Peoples' Rights (ACHPR) and article 9 of the International [Covenant] on Civil and Political Rights (ICCPR).
>
> (3) An order for the unconditional release of the applicant or her release on such terms as the Court may deem fit.

[**2.**] The application is brought pursuant to sections 5, 19 and 37 of the 1997 Constitution of the Gambia, article 6 of the African Charter on Human and Peoples' Rights (ACHPR) and article 9 of the International [Covenant] on Civil and Political Rights (ICCPR).

[**3.**] In support of the summons, the applicant filed a 24 paragraph affidavit sworn to by her brother of full blood, one Demba Alieu Jack.

[**4.**] The state filed a notice of preliminary objection dated 17 July 2006, which was heard by this Court, and I ruled against the state and maintained the *status quo*. In that hearing, the question of interpretation of sections 6 and 17 of the Gambian Constitution 1997 *vis-à-vis* section 19 of the said Constitution was raised, and I ruled that interpretation, and consequently referral of this matter to the Supreme Court does not arise. Having disposed of the preliminary objection, the proceedings matured to the main application.

[**5.**] The facts as presented by the applicant appear in the affidavit in support of the originating summons, and I will deal with these in detail later on in my judgment, since some of the averments raise very fundamental issues. At paragraph 16 of the affidavit in support, the applicant's brother deposes that he does not believe that the applicant has committed any criminal offence. The applicant avers that this has not been refuted by the state, hence she submits that her arrest and detention are unlawful and unconstitutional. She relies further on section 19(3) of the Constitution and avers that had she committed a criminal offence under the laws of the Gambia, she would have been brought before a Court, without undue delay, in any event, within seventy two hours from the time of arrest.

[**6.**] There was a submission that these words of the Constitution are absolutely clear and that a detention of 103 days, as of the date of the hearing, cannot be justified under section 19(3) of the Constitution. Further, my attention was drawn to the fact that, on the facts as presented by the state, there is no reasonable suspicion of her having committed an offence or about to, and that even if there had been, her continuous detention runs foul of the Constitution.

[**7.**] My attention was brought to exhibit MD 2, where on 28 April 2006, this Court was informed that investigations in the matter of the attempted *coup* had not been concluded. The applicant informs this Court that a group of people has since been charged in relation to those investigations, and that there can never be any justification for her continued detention, which, contrary to what the state submits, does not comply with the relevant provisions of the Constitution. She further submits that the onus lies on the state to justify her continued detention.

[**8.**] In this regard, she relies on the case of *Ajayi v Attorney-General of the Federation* 1998 *Human Rights Law Reports of Africa*, 373 at 377 where the Court held, 'once an applicant proves facts which *prima facie* show that his constitutional right has been infringed, the onus then devolves on the respondent to justify the infringement. It is not the duty of the appellant to exclude all

circumstances of justification'. The applicant's counsel contends that the state has failed to bring itself within any law that will justify the applicant's continued detention. The applicant also drew my attention to the case of *Abiola v Abacha* 1998 (1) *Human Rights Law Reports of Africa*, where this position was restated when the Court held that: 'The burden of proving the legality or constitutionality of the arrest and/or detention of a person is on the arresting authority. Therefore it is the respondents' duty to justify the arrest of the applicant. The respondents having admitted the arrest and detention of the applicant, the onus is on them to prove that such arrest or detention was lawful'. Counsel for the applicant further submits that 'the Court is always prepared and will be quick to give relief against any improper use of power or any abuse of power by a member of the executive, the police or any person, which results in an unlawful detention of a citizen' *Abiola v Abacha* 453.

[**9.**] A further submission was made to the effect that the applicant has consented to giving evidence on behalf of the state, in the ongoing criminal case against *Captain Bunja Darboe and others*, Criminal Case number HC/208/06/Cr/37/A, hence she is listed as witness number 13.

[**10.**] In response to the above submissions, learned counsel representing the state raised the following as issues for determination:

(1) Whether the arrest of the applicant is indeed unlawful or unconstitutional.

(2) Whether the detention of the applicant is indeed unlawful or unconstitutional.

(3) Whether this Court can, in law, grant the declarations sought, and if this Court can, whether it can do so at this stage of the proceedings.

[**11.**] The state introduced sections 6(1) (a) and (b) of the Constitution and said that they are in agreement with paragraphs 2, 3, and 4 of the affidavit in opposition. I was also referred to sections 23, 26, 35 (1) (a) and section 36 of the Criminal Code Cap 10 Laws of the Gambia, which sections deal with parties to an offence. I was referred to section 4 of the Police Act and to this extent, learned state counsel said that the police had a duty to investigate, arrest and where necessary, detain. The National Intelligence Agency Decree of 1995 and the Armed Forces Act were also invoked in terms of the powers of the agency and the force to investigate, arrest and where necessary to detain.

[**12.**] These were referred to in an effort to justify the arrest and detention of the accused. The state further submitted that the knowledge contained in the annexure to the originating summons, brings the applicant under the provisions of section 6 of the Constitution and sections 23, 26, 35, (1) (a) and 36 of the Criminal Code, and therefore that the arrest of the applicant cannot be said to be unlawful or unconstitutional. It was further submitted that

these authorities have the power to grant conditional or unconditional bail, and that the law of the Gambia gives discretion to these authorities in this regard.

[**13.**] The state further revisited the issue of interpretation and referral of this matter to the Supreme Court, for that Court to make a comprehensive interpretation of sections 6 and 17 of the Constitution of the Gambia *vis-à-vis* sections 19(3), (4) and 5 of the Constitution.

[**14.**] It was further submitted that it would be premature for this Court to make a determination of this matter before the Supreme Court makes its comprehensive views known. Learned counsel also submitted that the case of *Ajayi v Attorney-General supra* is not relevant to these proceedings. The state also submitted that reference to the African Charter on Human and Peoples' Rights is misplaced, since the Gambia has not domesticated the Charter, unlike the Republic of Nigeria, where the Charter has been domesticated and is therefore applicable. There was a further submission by the state that the Charter does not provide for unlimited liberties or derogations from constitutions of sovereign states. In reaction to reliance by the applicant on article 19 of the International Covenant on Civil and Political Rights (ICCPR), learned counsel said that the laws and procedures of the Gambia adequately cover arrest and detention of the applicant, and therefore that the ICCPR is irrelevant. The state referred me to the case of *Hon Halifa Sallah and 3 others v Clerk of the National Assembly & others* case 1/ 2005 – 7 July 2005, where the Court referred the case to the Supreme Court for interpretation, even though the subject matter was whether or not the seat of the applicant had not become vacant. On the issue that certain paragraphs of the affidavit in support of the originating summons had not been disputed by the state, learned counsel said these were mitigatory in nature and the Court should not take them into consideration. The fact that the applicant is listed as a witness, the state submits, is the discretion of the 1st, 2nd, and 5th respondents, in view of paragraphs 2, 3, 4, and 6 of the affidavit in opposition. It was the state's further submission that the fact that the applicant has been listed as a witness is not proof that investigations are complete or otherwise.

[**15.**] Section 99 of the Criminal Procedure Code as amended was referred to in the context of section 19(4) and (5) of the Constitution, and that this Court will be guided by section 99 of the Criminal Procedure Code, should the discretion of the respondents be affected.

[**16.**] Section 17(2) of the Constitution was raised with relevance to public interest and the fact that the Constitution embodies what the Gambian public needs, and that there is therefore no need to go outside the Constitution. Similarly, section 17(1) of the State

Proceedings Act, the Laws of the Gambia was referred to, and in this context, I was reminded that the Court shall not grant injunctions and orders capable of being specifically enforced, but can only make orders regarding the rights of the parties in proceedings for declarations. Finally, the state moved for a referral of this matter to the Supreme Court for interpretation.

[**17.**] By way of reply to the state, the applicant's counsel submitted that the Armed Forces Act has no relevance to the present case, regard being had to section 34 of the Act, which stipulates persons to whom the Act is applicable. Further that the National Intelligence Agency Decree 1995 bears no justification for the circumstances of this case, and that in fact the Decree is subject to the Constitution, and that these Acts, together with the Police Act, cannot be used to whittle down entrenched provisions of the Constitution ie section 19. Further, that section 99 of the Criminal Procedure Code has no application since the applicant has not been charged and brought before any court. Learned counsel further submitted that the relevance of the *Sabally* case *supra*, reinforces the fact that principles laid down by the African Commission are pertinent and relevant to cases at national level. She also referred the Court to its powers under the Constitution to grant the reliefs sought.

[**18.**] From the onset, I wish to refer to the case of *Loayza Tamayo* v *Peru*, 3 June 1999, Inter America Court series (c) 53 (1999). In this case, Peru had refused to implement the decision of the Inter-American Court, and the Court observed that article 27 of the Vienna Convention on the Law of Treaties of 1969, prohibits parties from invoking internal law to justify non-compliance with treaty obligations.

[**19.**] I am bringing this up to address the respondent's contention that since the Gambia has not domesticated the African Charter, as was the case in Nigeria in the case of *Abiola v Abacha* 1998 1 HRLRA, then the applicant cannot rely on the Charter. It is a fact that once a country signs a treaty, it should, strictly speaking, put into effect measures to domesticate it immediately on ratification. But there is no time limit to this; some countries do it faster than others. Others ultimately ratify the instrument before putting the domestication measures into effect. But the fact that a country has not domesticated an international instrument, but has ratified it only, does not exonerate it from its obligations under that instrument.

[**20.**] This has been demonstrated fully with particular reference to the African Charter on Human and Peoples' Rights, and in particular by the government of the Gambia, which has rightly subjected itself to the jurisdiction of the African Commission on Human and Peoples' Rights in many instances, where the Commission has ruled, for and against the Gambia, for instance in communications 131/94 *Manjang v The Gambia* [(2000) AHRLR 101 (ACHPR 1994)] and 86/93 *Ceesay v*

The Gambia [(2000) AHRLR 101 (ACHPR 1995)], when government representatives acquitted themselves very ably in defence of the government, in matters brought to the Commission against the Gambia. This position is also amplified in the case of *Sabally v IGP* 1997-2001 878. If I am to agree that non domestication of the treaties by the Gambia exonerates the government from its responsibilities under the Charter and the ICCPR, then I would seek to defeat the whole purpose of ratification, and what it means to the Gambian government and her people. I should observe that the Commission is the implementing institution of the Charter, and that the Commission is charged with protection of human and peoples' rights in Africa.

[**21.**] I would now wish to address the issue of referral under section 127 of the Constitution of the Gambia 1997. A spirited submission was made on behalf of the state, to the effect that this Court presently has no jurisdiction to hear this application, since there are issues that need interpretation, which is the preserve of the Supreme Court of the Gambia. This, the state argues, results from the state's counter argument, which has introduced sections 6 and 17 of the Constitution, which the state says have an impact on section 19 of the Constitution, under which the applicant has brought her application to this Court.

[**22.**] At this stage, I wish to turn to the applicant's affidavit in support and the state's affidavit in opposition to establish if this argument can be sustained. In particular I wish to refer to paragraphs 16, 17, 18, 19, and 20 of the applicant's affidavit in support, which I reproduce below:

> (16) That I verily believe that the applicant has not committed any crime.
>
> (17) That I am advised by counsel for the applicant and I verily believe the same to be true that if the applicant is arrested in connection with any offence, she must be brought before a court of competent jurisdiction not later than 72 hours after her arrest.
>
> (18) That I know as a fact that the applicant has not been charged with any offence nor brought before any court for any offence she might be suspected to have committed.
>
> (19) That I verily believe that the arrest and detention of the applicant is an unconstitutional act by the respondents and not justified by law.
>
> (20) That up to the time of settling this affidavit, the applicant was and is still in the unlawful custody of the respondents and their subordinates/agents.

I believe in answer to the averments that are contained therein, the state relies on paragraph 4 of the affidavit in opposition, which states: 'The applicant was arrested and being investigated in connection with her knowledge and or participation in the aborted coup of March 2006'.

[**23.**] In her submission, and in what was generally viewed in Court as a hilarious point to raise, the learned counsel for the applicant had this to say, and I quote:

> I want to draw the Court's attention to the affidavit in opposition. The affidavit does not contain any proper justification for the continued detention of the applicant. At paragraph 4, some words are missing and these are either 'is' or 'was'. If it is 'is' this means that the investigations are continuing now, and if it is 'was' this means that they are completed. The concerned word was omitted conveniently.

[**24.**] In response to this submission, learned counsel for the state had this to say and I quote:

> In paragraph 4 he (Demba Sowe) gave the reason for the arrest of the applicant, and the reason why the applicant is being investigated. In view of paragraph 3 of the affidavit in opposition, that the investigation is still on going, there is no omission, whether of the word 'is' or 'was' and nothing can be added to the paragraph by way of any submission from the Bar. The paragraph is very clear and speaks for itself.

[**25.**] I must say that there is no explanation of this very serious aspect from the state. I am aware that I should not trivialise issues that are placed before me, neither should I dramatise such issues nor read things I should not read into them. I should not use fanciful technicalities to defeat the ends of justice. But with the greatest respect to the state, paragraph 4 of the affidavit in opposition, as it stands, is so ambiguous that reliance cannot be placed on it. This glaring ambiguity was highlighted by the applicant as above, the state was given a chance to address this serious concern and the state chose not to. In my considered view, there is a yawning *lacuna* in the state's case, and a doubt has been created in my mind, and this doubt to me hits the very foundation of section 6 of the Constitution, on which the state requires me to refer this matter to the Supreme Court. The section, in my view, is dealt a death blow, since it is trite learning that, when a doubt exists, it inures to the benefit of the accused or in this case, of the applicant.

[**26.**] The result of this is that the state cannot tell me with certainty whether investigation is ongoing or concluded. In fact, the result is nought. In the circumstances, I am left with only the applicant's affidavit in support of her originating summons at paragraphs 16,17,18,19, and 20 to consider, where she seeks to demonstrate exactly what has resulted in paragraph 4.

[**27.**] The state contends that paragraph 3 of the affidavit in opposition is clear and I agree with that. But paragraph 3 does not say that the applicant is being investigated, it is a general statement. Instead, the state tried to show what the applicant's situation is at paragraph 4, but I have just said that it is speculative and does not assist the Court in any way. In the case of *Omar Manjang and Lamin Fatty v The State and Kinteh, Nyang & Fatty v The State* Criminal Appeals 2, 3, and 4 - 1992, the Gambia Court of Appeal, quoting the case of *Okokm v The State* (1984) I All NLR 423 at 427 said the following 'The duty of the jury to give the benefit of the doubt is a duty which they should discharge having regard to the materials before them, for it is on the evidence and the evidence alone, that the accused is being tried.' The Court further went on to say 'the

same thing applies *mutatis mutandis* where the judge is sitting as judge of facts and law. Courts cannot speculate outside the evidence'. This position applies fully to this application.

[**28.**] I reiterate my earlier position that there is no need for the Supreme Court to interpret section 6, because there are no facts before the Court to justify that. As demonstrated above, my view is that the state has failed to show that, and the benefit has to go to the applicant. The state went further and brought section 17 of the Constitution into play and again said that it calls for interpretation, and specifically relied on the notion of public interest. I will deal with this later on in my judgment. Suffice it to say that I find no basis to refer this matter to the Supreme Court, for there are no facts to support that. I want to say very strongly that it is trite law that referrals should not be used to stall the disposal and finalisation of constitutional matters, but should be done in good faith and lawfully. Having said that, this particular case is distinguishable from the case of the *United Democratic Party (UDP) and others and the Attorney-General, The Gambia (SCCS*) case 3/2000, a Supreme Court decision, where Honourable Hassan B Jallow, in establishing the jurisdiction of the Supreme Court, said at page 12 of the ruling:

> Unlike the case of Isatou Combeh Njie, in this case there is a specific issue of interpretation of the Constitution: Are Messrs Johnson and Fatty still respectively Chairman and member of the Independent Electoral Commission in view of the alleged non-compliance with the procedure set out in section 42(6) of the Constitution, in their removal, dismissal or termination.

[**29.**] The Honourable Judge actually distinguished that case with the case of *Isatou Combeh Njie v Attorney-General and the Judicial Service Commission (SCCS)* 1/2000, where the applicant approached the Supreme Court for a declaration that her dismissal was in contravention of the Constitution and of the rules of natural justice. The Court held that there was no request before the Court in *Njie*'s case for the interpretation of any specific provision of the Constitution, and therefore, the applicant was given leave to withdraw the action, with liberty to institute proceedings in another court. In my view, this settles the issue of referral to the Supreme Court.

[**30.**] The state has referred to a pending appeal against my decision in suit HC/130/06/MF/404/F. This is a decision I made in a case that was argued before me by the applicant, Mrs Denton, in which I ruled in her favour. It appears to me that I am being asked, by the state, not to make any pronouncements regarding the present matter, because of the pending appeal. As rightly submitted, it is trite law that an appeal does not operate as a stay, and I think this position of the law deals sufficiently with this aspect and needs no further elaboration. In any case, in the present matter, the applicant seeks completely different reliefs from those in the decision that is being appealed against.

[**31.**] I now wish to touch on some paragraphs of the affidavit in support of the originating summons. At paragraph 2, the applicant avers that she is a legal practitioner, a widow and the mother of two children. These averments fall squarely under paragraph 1 of African Charter on Human and Peoples' Rights. Article 15 of the Charter provides that every individual shall have the right among others, to work. Article 18(1) of the Charter recognises the family as the natural unit and basis of society, which shall be protected by the state, and enjoins the state to take care of its physical health and morals. Article 29 requires the individual to preserve the harmonious development of the family and to work for the cohesion and respect of the family.

[**32.**] Article 18(2) enjoins the state to assist the family, which is the custodian of morals and traditional values recognised by the community. To me, these provisions go a long way in restating and reinforcing the applicant's expectation for this Court to positively consider her [relatives], and are not mere fanciful restatements of her social life, which does not concern the Court, and I daresay should be taken seriously by the state, in the context of the state's responsibilities and obligations under the Charter.

[**33.**] The applicant avers at paragraphs 15 and 21 of her affidavit in support that she has fallen ill and was not taken to hospital, that she fears she might relapse and develop further illnesses. In response to this, the state at paragraph 5 of its affidavit in opposition merely states that, the Central Prison Mile 2 has medical and feeding arrangements for all its inmates, without controverting these paragraphs, especially paragraph 15. I take a very dim view of the state's attitude and again wish to draw the state to its obligations under article 22(1) of the Charter, which provides that all people shall have the right to their economic, social and cultural rights, and of course this is the provision that addresses the right to health. I find it unacceptable for the state to cursorily dismiss these averments with such contempt.

[**34.**] With reference to exhibit MD 2, I adopt the same reasoning as the one I used in relation to paragraph 4 of the affidavit in opposition, whose effect is to render the state's averments in April 2006 of no force or effect, due to the fact that the present position regarding the applicant is unknown and the state has failed to make it known. Furthermore, whether investigations were ongoing in April 2006 or not should not preoccupy this Court.

[**35.**] The state, as observed above, by operation of paragraph 4 of the affidavit in opposition has failed to discharge its onus of demonstrating the present status of the applicant.

[**36.**] One portion of this case that needs serious consideration is the fact that the applicant has consented to giving evidence on behalf of the state, and the question is what does this mean? In fact, a summary

of her evidence has been made a public document. I must say that I have never known of a situation where a witness is kept in detention for the sole purpose of ensuring that she appears in Court and to give evidence favourable to the state. This would be very strange indeed. Consequent to paragraph 4 of the affidavit in opposition, and the decision I have reached on that paragraph, I can only surmise that this is the only reason why she continues to be detained. I do not believe that the government of the Gambia would want to give its subject with one hand and take away with the other immediately. Unfortunately, the state only found it fit to give the answer that consenting to give evidence does not mean that investigations are complete or ongoing, which I again find very disturbing and very negatory of issues before this Court. Surely, on the face of it, any reader of exhibit MD 2 would reach no other conclusion than that the applicant continues to be detained so that she is present to give evidence when called upon to do so.

[**37.**] But is this justifiable, especially in view of paragraph 4 of the affidavit in opposition? I find this unfortunate because we all know what action the state can take if the applicant turns on her word and does not present herself to give evidence as and when she is required to. I find that in view of exhibit MD 2 and what I have said above, some measure of good faith needs to be exercised in this case by the state.

[**38.**] The applicant's counsel appropriately responded to the issue of the provisions of the Criminal Code, Armed Forces Act, National Intelligence Agency Decree and the State Proceedings Act. These pieces of legislation to me are irrelevant to these proceedings, and I have failed to appreciate their purport. The applicant is not one of those people who fall under the Armed Forces Act; the National Intelligence Agency Decree gives way to the Constitution, the State's Proceedings Act is not the answer and it is trite that the Police Act cannot be used to whittle down individual rights. This is especially so in view of paragraph 4 of the affidavit in opposition.

[**39.**] I should mention that international human rights instruments protect the right to personal liberty, in that no one shall be arbitrarily deprived of his liberty. There may accordingly be legitimate deprivations of liberty, such as of convicted persons or of those accused of serious offences. There may further be other forms of deprivation of liberty attributable to administrative authorities, as in the case of mentally disturbed persons. In addition, the right to personal liberty may suffer limitations during states of emergency, in accordance with article 4 of the International Covenant on Civil and Political Rights and other internationally recognised standards.

[**40.**] International human rights instruments do not definitively answer the question of when detention is or becomes arbitrary. The Universal Declaration of Human Rights, for instance, merely provides in article 9 that 'no one shall be subjected to arbitrary arrest,

detention or exile'. Article 9(1) of the International Covenant on Civil and Political Rights is scarcely any clearer: 'Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law'. Article 6 of the African Charter provides that 'Every individual shall have the right to liberty and to the security of his person. No one may be deprived of this freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested'.

[**41.**] Happily, the Constitution of the Republic of the Gambia for its part, provides in its article 19(1) that 'every person shall have the right to liberty and security of the person. No one shall be subject to arbitrary arrest or detention. No one shall be deprived of his or her liberty except on such grounds and in accordance with such procedures as established by law'. Sub-paragraphs 2 and 3 are even more instructive for our purposes, and state that 'any person who is arrested or detained shall be informed as soon as is reasonably practicable and in any case within three hours, in a language he or she understands, of the reasons for his or her arrest or detention and of his or her right to consult a legal practitioner' and 'any person who is arrested or detained: -(a) for the purposes of bringing him or her before a Court in execution of the order of a Court; or (b) upon reasonable suspicion of his or her having committed, or being about to commit a criminal offence under the laws of the Gambia, and who is not released, shall be brought without undue delay before a Court and, in any event, within seventy two hours'.

[**42.**] In the present case, the applicant has been held without charge for over three months and has thus approached this Court to invoke her rights. The state on its part claims that her continuous detention is necessary for public interest, and I will now address the issue of public interest.

[**43.**] The respondents in a very intensive submission urged me to find that individual rights in the circumstances of this case should give way to public interest, and invoked section 17 of the Gambian Constitution in support of this contention.

[**44.**] It has been observed in many fora that public interest refers to the common well-being or general welfare. The public is central to policy debates, politics, and democracy and the nature of government itself. While nearly everyone claims that aiding the common well-being or general welfare is positive, there is little if any consensus of what exactly constitutes the public interest. There are different views on how many members of the public must benefit from an action before it can be declared to be in the public interest.

[**45.**] At one extreme, an action has to benefit every single member of society in order to be truly in the public interest, at the other extreme, any action can be in the public interest as long as it benefits some of the population and harms none. The public interest is often contrasted with individual rights under the assumption that, what is good for society may not be good for a given individual and *vice versa*. This definition allows us to 'hold constant' private interests in order to determine those interests that are unique to the public.

[**46.**] However, society is composed of individuals, and public interest must be calculated with regard to the interests of its members. There is wide ranging debate about whether the public interest requires or destroys the idea of human rights, about the degree to which the ends of society are the end of its individual members, and the degree to which people should be able to fulfil their own ambitions even against the public interest. It should be noted that it is also possible that in some cases, advancing the public interest will hurt certain individual rights. This risks 'the tyranny of the majority' in any democracy, since minorities' rights may be overridden.

[**47.**] Black's Law Dictionary (6th ed 1990) page 1229 defines public interest as 'something that the public, the community at large, has some pecuniary interest, or some interest by which their legal right or liabilities are affected'. It further says that 'public interest does not mean anything so narrow as mere curiosity, or as the interest of the particular localities, which may be affected by the matters in question'. It further defines it as 'interest shared by citizens generally, in affairs of local state or national government'. This seems to me to be the case in the present matter.

[**48.**] I recall here that part of the requirement for this Court to refer this matter for interpretation is section 17(2), that has been raised by the state, with particular reference to the issue of public interest. It has been submitted by learned counsel for the applicant that it should not simply be said that it is in the public interest to continue detaining the applicant, and to arrest her, simply to do away with chapter 4 of the Constitution. Further that there must be sufficient material (facts) provided to the Court, for it to determine whether or not public interest has arisen. In view of my earlier observations regarding paragraph 4 of the affidavit in opposition, section 6 of the Constitution and all other facts placed before me, I find that using public interest as a reason for referral to the Supreme Court is indeed a red herring and cannot be sustained, in the absence of any facts placed before this Court.

[**49.**] I should observe that my understanding of this case is two-fold: this Court must first determine the nature of the applicant's rights, and if any rights have been infringed upon by her continuous

detention, then resolve the further question as to whether the continuous detention is justified.

[**50.**] In the case of *Irwin Ravin, Petitioner v State of Alaska* 537 P 2d 494, 27 May 1975, the Supreme Court of Alaska, quoting *Breese v Smith* (Alaska 1972), stated that 'Once a fundamental right under the constitution … has been shown to be involved, and it has been further shown that this constitutionally protected right has been impaired by governmental action, then the government must come forward and meet its substantial burden of establishing that the abridgement in question was justified by a compelling governmental and/or public interest'.

[**51.**] The United States Supreme Court in *Griswold v Connecticut*, 381 US 479, 496: 29-30 March 1965, has also stated that 'where there is a significant encroachment upon personal liberty, the state may prevail only upon showing a subordinating interest which is compelling. The law must be shown necessary, and not merely rationally related, to the accomplishment of a permissible state policy'.

[**52.**] From these cases, it can be said that the general proposition that the authority of the state to exert control over the individual, extends only to activities of the individual, which affect others or the public at large, as it relates to matters of public health, morality, security or safety, or to provide for the general welfare. This tenet is basic to any free society. The state cannot impose its own notions of morality, security or safety on individuals, when the public has no legitimate interest in the affairs of those individuals. The right of the individual to do as he pleases is not absolute, of course: it can be made to yield when it begins to infringe on the rights and welfare of others.

[**53.**] In the present case, it is my view that the state has not demonstrated the public harm that would be caused by the release – conditional or otherwise of the petitioner, nor has it availed this Court with any proof to show that the applicant's continuous detention is justified. I find that no public interest has been, it being or is likely to be served by the continuous detention of the applicant. I find no basis for agreeing to refer the matter to the Supreme Court for interpretation as this will be unlawful.

[**54.**] The African Commission, in its case law, has established a few criteria, which are applicable in considering whether or not an arrest and detention can be considered as arbitrary. For example, the detention of individuals for the reason that they protested against being tortured has been found to be a violation of the right to freedom of liberty and a violation of article 6 of the African Charter – see communications 25/98, 47/90, 56/91 and 100/93 joined. In the specific case of *Jawara v The Gambia*, communications 147/95 and

149/96, the complainant alleged *inter alia*, that 'several members of the armed forces had been detained, some for up to six months, without charge or trial, following the introduction of Decree No 3 of July 1994. This Decree gave the Minister of Interior the power to detain and to extend the period of detention and infinitum. The Decree further prohibited the proceedings of *habeas corpus* on any detention issued under it.

[**55.**] In its argument before the Commission, the Republic of the Gambia, commenting on the allegation of violation of the right to liberty, said it was acting in conformity with laws previously laid down by domestic legislation. The government said that the decrees do not prohibit the enjoyment of freedoms, but were merely there to secure peace and stability, and that only those who wanted to disrupt the peace would be arrested and detained.

[**56.**] I have had the opportunity to read the *Jawara* case, and it would be recalled that the detention of the applicant in the present case is under similar circumstances as the detention of those described in the *Jawara* communication before the African Commission. The arguments of the government before this Court for the continuous detention of the applicant are almost similar to the arguments before the African Commission in the *Jawara* communication.

[**57.**] In that case before the African Commission, the Commission held that 'the argument that the action of the government is in conformity with regulations previously laid down by law is unfounded'. The Commission restated its decision in communication 101/93, with respect to freedom of association, that 'competent authorities should not enact provisions which limit the exercise of this freedom. The competent authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the constitution and international human rights standards'. And more importantly, the Commission in its Resolution on the Rights to Freedom of Association has also reiterated that: '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'. It follows that any law which is pleaded for curtailing the enjoyment of any of the rights provided for in the Charter must meet this requirement.

[**58.**] Given the above analysis, I find that the arrest and continuous detention of the petitioner, can therefore be termed arbitrary, and be regarded as a violation of her right to freedom of liberty as contained in article 19(3) of the Gambian Constitution, article 6 of the African Charter on Human and Peoples' Rights and article 9 of the International Covenant on Civil and Political Rights.

[**59.**] I should mention that in my view, the initial arrest of the applicant by the respondents, cannot be said to be unlawful, given the powers that vest on them to arrest anybody who is reasonably suspected of having committed or being about to commit a crime, as provided for by section 19(3)(b) of the Constitution. This is part of democracy and good governance in any civilised society. However, the same section, to safeguard excesses and abuses by state agents, provides that the same detainee shall be brought before a court of competent jurisdiction, without undue delay, in any event within 72 hours of such arrest.

[**60.**] If within the 72 hours, the person is not brought before a court of competent jurisdiction, this then renders both the arrest and detention unlawful and unconstitutional. In this particular case, by reason of the above violations, and for all the reasons I have given in my judgment, I find that the arrest and detention of the applicant on 6 April 2006 are unlawful and unconstitutional.

[**61.**] In the result, I find that I have to agree with the applicant and to grant the reliefs that she seeks. To that extent, I make the following declarations:

(1) The applicant's arrest by the 1st, 2nd, 3rd and 5th respondents or by their subordinates and/or agents on Thursday 6 April 2006 at the applicant's residence at Churchill's Town in Kombo Saint Mary Division of the Gambia is unlawful, in that it is inconsistent with and/ or in contravention of section 19 of the Constitution of the Gambia.
(2) The applicant's detention by the respondents, their subordinates and/or agents since Thursday 6 April 2006 is unlawful and unconstitutional in that the said detention is inconsistent with and/ or in contravention of section 19 of the Constitution of the Republic of the Gambia and article 6 of the African Charter on Human and Peoples' Rights and article 9 of the International Covenant on Civil and Political Rights.

[**62.**] I make the following order:

(1) The applicant be and is hereby released from detention with immediate effect.
(2) The applicant shall make herself available for questioning as and when requested to do so by the police.
(3) The applicant shall not travel out of the country, the Republic of the Gambia, without authorisation from this Court.

KENYA

RM v Attorney-General

(2006) AHRLR 256 (KeHC 2006)

RM (suing through next friend JK), CRADLE, COVAW and FIDA, interested parties v the Attorney-General

High Court of Kenya at Nairobi, civil case 1351 of 2002, 1 December 2006
Judges: Nyamu, Ibrahim

Parental responsibility for children born out of wedlock

International law (21, 22, 40)
Locus standi (37)
Constitutional supremacy (41)
Interpretation (lexical, 42, 47, 64; constitution prevail over international treaties, 43, 63; purposive, 48, 79; avoid conflict with international law, 63, 64
Limitations (margin of appreciation, 43, 78, 79)
Children (parental responsibility, best interest of the child, 50, 52, 61, 72, 77, 81)
Equal protection of the law (reasonableness, 53-55)
Equality, non-discrimination (margin of appreciation, 66; distinction must be reasonable and for a legitimate purpose, 67, 69, 75, 80)
Socio-economic rights (harmonise with civil and political rights, 70)
Family (customary marriage, 72)

[**1.**] This is an application brought by way of an originating summons dated and filed on 12 August 2002. It has been brought by RM (a minor through next friend JK, her mother) and CRADLE, a non-governmental children's foundation as the 1st interested party. The 2nd interested party is COVAW (Coalition on Violence Against Women). The 3rd interested party is FIDA. (Federation of Women Lawyers Kenya). The application was brought for the determination of the following questions:

> (1) Is section 24(3) of the Children Act an abrogation of the plaintiffs' human right; to wit, protection from discrimination to the extent that it negates the Constitution, international conventions and charters of which Kenya is a signatory, in particular, articles 2 and 3 of the

Convection on the Rights of the Child and articles 2 and 3 of the African Charter on the Rights and Welfare of the Child, by expressly discriminating against children born out of wedlock and failing to take into account the best interest of the child?

(2) Is section 24(3) of the Children Act either of itself or in its effect discriminatory to the extent that it expressly or constructively prescribes that a father of a child who is neither married to nor has subsequently married the child's mother bears no parental responsibility in relation to that child?

(3) Is section 24(3) of the Children Act inconsistent with section 82(2) of the Constitution of Kenya concerning a child whose parents were not married to each other at the time of the child's birth to the extent that it permits a father of such child to discharge parental responsibility to the child by virtue of its provision?

(4) Has the applicant been treated in a discriminatory manner by his father who, acting by virtue of section 24(3) of the Children Act, has refused to assume parental responsibility on her behalf?

(5) Does section 24(3) of the Children Act impose a statutory criterion which discriminates against children whose parents were not married to each other at the time of their birth as against all other children; which criterion is inconsistent with section 82(1) and (2) of the Constitution of Kenya, making the same therefore null and void?

(6) Who shall pay costs of this summons?

[**2.**] The factual background is that RM was born on 16 September 2000 through a relationship between the mother and another man. It is alleged that the father worked with a local company as a mechanic. At the time of the birth the mother deposes that she was cohabiting both before the date of birth and up to 3 January 2001 with the alleged father who duly paid hospital expenses at the hospital where RM was born. On 3 January 2001 the alleged father disappeared or avoided the mother completely until April 2001.

[**3.**] On 16 September 2000 the mother deposes that the alleged father came to the matrimonial home and named the child after his mother (rm) and shaved her head after one week as per his tribe's customary law ie Kisii.

[**4.**] She deposes that he has failed to give any parental support to both the mother and the child and that both entirely depend on good Samaritans for their upkeep.

[**5.**] She laments that the law does not place any parental responsibility on the plaintiff's father since she is not married and had she married him the plaintiff's father would have had parental responsibility towards the plaintiff just like the mother.

[**6.**] She finally deposes that she has been advised that the law ie s 24(3) of the Children Act is discriminatory as it puts the plaintiff at a disadvantaged position *vis-à-vis* other children whose fathers have married or subsequently married their mothers. Such children do not therefore have to contend with the question of who will take responsibility on their behalf. And therefore the plaintiff should be accorded equal treatment with those children whose parents are

married or have subsequently married by placing parental responsibility or both the father and mother.

[**7.**] Counsel for all the parties, including interested parties (hereinafter called IPs) have since filed affidavits and have also filed and relied on written skeleton arguments with lists of authorities which we have duly considered in preparing this judgment.

Analysis

[**8.**] According to the format of the originating summons, s 82 of the Constitution of Kenya has been mentioned in prayers 3 and 5 of the originating summons and because the Constitution is the supreme law of the land, we consider it important to start with it by setting out relevant parts *in extensor*. Section 82(1), (2), (3), (4) and (6) read:

> (1) Subject to subsections (4) 5 and (8), no law shall make any provision that is discriminatory either of itself or in its effect.
>
> (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 or 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.
> (4) Subsection (1) shall not apply to any law so far as the law makes provision —
> (a) with respect to persons who are not citizens of Kenya;
> (b) with respect to adoption, marriage, divorce, burial devolution of property on death or other matter of personal law; (c) for the application in the case of members of a particular race or tribe of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applies in the case of other persons; or (d) whereby persons of a description method in subsection (3) may be subjected to a disability or restriction or may be accorded a privilege or advantage which, having regard to its nature and special circumstances pertaining to those persons or to persons of any other such description is reasonably justifiable in a democratic society.
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> (6) Subsection (2) shall not apply to: (a) anything which is expressly or by necessary implication authorised to be done by a provision of law referred to in sub section (4);
>
> ...

[**9.**] We also consider it important to set out in full the relevant sections of the Children Act 2001 of Kenya, that is the sections which have given rise to this suit:

> 24(1) Where a child's father and mother were married to each other at the time of his birth, they shall have parental responsibility for the child and neither the father nor the mother of the child shall have superior right or claim against the other in exercise of such parental responsibility.
>
> (2) Where a child's father and mother were not married to each other at the time of the child's birth and have subsequently married each other, they shall have parental responsibility for the child and neither

> the father nor the mother of the child shall have a superior right or claim against the other in the exercise of such parental responsibility.
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> (3) Where a child's father and mother were not married to each other at the time of the child's birth and have not subsequently married each other (a) the mother shall have parental responsibility at the first instance (b) the father shall subsequently acquire parental responsibility for the child in accordance with the provisions of section 25.
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> (4) More than one person may have parental responsibility for the same child at the same time.
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> (5) A person who has parental responsibility for a child at any time shall not cease to have that responsibility for the child ...

The marginal note to section 24 states: 'Who has parental responsibility'.

Section *25* states:

> (1) Where a child's father and mother were not married at the time of birth —
> (a) the court may on application of the father, order that he shall have parental responsibilities for the child; or (b) the father and mother may by agreement ('a parental responsibility agreement') provide for the father to have parental responsibility' for the child.
>
> (2) Where a child's father and mother were not married to each other at the time of his birth but have subsequent to such birth cohabited for period or periods which amount to not less than twelve months or where the father has acknowledged paternity of the child or has maintained the child, he shall have acquired parental responsibility for the child, notwithstanding that a parental responsibility agreement has not been made by the mother and father of the child.

[**10.**] It is strongly contended that s 24(3) of the Children Act also violates the Convention on the Rights of the Child and in particular its preamble which provides:

> Recognising that the United Nations has, in the Universal Declaration of Human Rights and in the International Covenants on Human Rights, proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind such as race, colour, sex, language religion, political or other opinion national or social origin property, birth or other status.

[**11.**] It has been argued that s 24(3) of the Children Act is discriminatory against children born out of wedlock whose parents are not married to each other either at the time of the child's birth or subsequently thereafter. The argument is that the discrimination is on social origin, birth or other status which is that the child cannot benefit and enjoy parental responsibility from both the mother and father because of the status of the mother, a single mother. For this reason the court is urged to hold that s 24(3) is inconsistent with the United Nations Convention on the Rights of the Child which Convention was intended to be domesticated by the passage of the Children Act. It is submitted that the section should be declared discriminatory and null and void.

[**12.**] Article 2(1) of the United Nations Convention on the Rights of the Child has also been relied on by the applicant. It states:

> States parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination

> of any kind irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin property, disability birth or other status.

[**13.**] The argument presented to court on the above is that excluding children born out of wedlock from automatically receiving support from their fathers is discriminating against them on the grounds of their social origin, birth and status. Status here being that the child's parents were not married to each other at the time of the child's birth and or subsequently thereto. Reliance has also been placed on article 18(1) of the same Convention which reads:

> States parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child ... The best interests of the child shall be their basic concern.

[**14.**] The argument by the applicant is that article 18(1) envisages the principle that both parents have joint primary responsibility for bringing up their children. There should be no distinction that the child is born within or out of wedlock. Thus children born out of wedlock are being victimised for something they have no control over; the children cannot decide whether they want to be born either within or out of a subsisting or subsequent marriage of their parents. Kenya should therefore as a state implement the provisions of the Convention without any reservations because she did not seek any when she ratified the Convention.

[**15.**] The applicant and the IPs have also reinforced their argument by citing article 3 of the African Charter on the Rights and Welfare of the Child which provides:

> Every child shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in this charter irrespective of the child's or his/her parents' or legal guardian's race, ethnic group colour, sex, language, religion, political or other opinion, national and social origin birth or other status.

[**16.**] Article 4 of the same Charter states: 'In all actions concerning the child undertaken by any person or authority, the best interests of the child shall be the primary consideration'.

[**17.**] Article 18(3) of the same Charter declares: 'No child shall he deprived of maintenance by reference to the parents' marital status'. And finally article 20(1) provides: 'Parents or other persons responsible for the child shall have the primary responsibility for upbringing and development of the child ...'.

[**18.**] The applicant has also relied on the provisions of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) (1979). Discrimination against women is defined as

> any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and

> fundamental freedoms in the political, economic, social, cultural, civil or any other field.

[**19.**] It has been submitted that by ratifying the convention, states undertook to incorporate the principle of equality of men, and women in their legal systems and to abolish all discriminatory laws and adopt appropriate ones prohibiting discrimination against women. For this argument the court's attention has been drawn to article 2 of CEDAW which reads:

> To take all appropriate measures including legislation, to modify or abolish existing laws regulations, customs and practices which constitute discrimination against women;

[**20.**] Article 16(1)(d) provides:

> The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount; ...

Position of international conventions and the state constitutions

[**21.**] Having set out above the relevant conventions and the constitutional provisions including the challenged sections of the municipal law, we consider it important to touch on the relationship between the two — namely the conventions and state law, including the Constitution. The general principle is that unless there is a provision in the local law of automatic domestication of a convention or treaty, a Convention does not automatically become municipal law unless by virtue of ratification. The position has been very ably articulated in the Bangalore Principles 1989 as follows:

> It is within the proper nature of the judicial process and well established judicial functions for national courts to have regard to international obligations which a country undertakes — whether or not they have been incorporated into domestic law — for the purposes of removing ambiguity or uncertainty from national constitutions, legislation or common law.

[**22.**] On the other hand, where the national law is clear and inconsistent with the international obligation, in common law countries, the national court is obliged to give effect to national law and in such cases the court should draw such inconsistencies to the attention of the appropriate authorities since the supremacy of the national law in no way mitigates a breach of an international legal obligation which is undertaken by a country. From this analysis the court does adopt the reasoning of Justice Musumali of the Zambian High Court in his holding in the case cited by the applicants and interested parties' counsel namely, *Sara Longwe v International Hotels* (1993) 4 LRC 221, where held:

> Ratification of such [instruments] by a nation state without reservations is a clear testimony of the willingness by the state to be bound by the provisions of such [a treaty] Since there is that willingness, if an issue comes before this court which would not be covered by local legislation but would be covered by international instruments, I would take judicial notice of that treaty or convention in my resolution of the dispute.

[**23.**] We shall shortly revert to analysis of the Kenyan position *vis-à-vis* the relevant conventions with particular reference to the Bangalore Principles as set out above, after analysing the respondents' submissions on the issue of parental responsibility, what discrimination is, and what the Kenyan Constitution stipulates. Before we turn to the respondents' arguments, however, it is important to reproduce the definition of parental responsibility as per the Children Act.

[**24.**] S 23(1) defines parental responsibility:

> In this Act, parental responsibility means all the duties rights, powers, responsibilities and authority which by law a parent of a child has in relation to the child and the child's property in a manner consistent with the evolving capacities of the child.

[**25.**] S 23(2) sets out the actual responsibilities. It is also significant to ascertain who is a parent. *The Concise Oxford English Dictionary* (11th ed, Oxford University Press) defines the word 'parent' as under '(1) a father or mother, an animal or plant from which younger ones are derived - derivatives - parental (adj) and parenthood (n)'.

[**26.**] The Attorney-General who is the respondent has put forward the following arguments:

> (1) The application does not set out in precise terms the actual provisions in the Constitution which are violated by s 24(3) of the Children Act.
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> (2) No specific grievance or injury, specific to the infant, has been demonstrated. The court cannot pursue a matter which is of academic value only.
>
> (3) The applicant has no cause of action.
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> (4) An applicant in an application under s 84(1) of the Constitution is obliged to state his complaint the provision of the constitution he considers has been infringed in relation to him and the manner in which he believes they have been infringed. Those allegations are the ones which, if pleaded, will particularity invoke the jurisdiction of this Court under the section. It is not enough to allege infringement without particularising the details and the manner of infringement see (a) *Matiba v Attorney-General* NB HC MISC 613 of 1999; (b) *Anarita Kariminjeru v R (Nol)* 1979 KLR 154; and (c) *Cyprian Kubai v Mwenda* NBI HC MISC 615 of 2002. The respondent argues that no specific prayer has been sought against him or any violation attributable to the Attorney-General and that no case can stand without any particular grievance The respondent further contends that *locus standi* of a party needs not be assumed. Under s 84 of the Constitution the violation of the right must be personal to the applicant, which he has suffered over and above others. On the contrary, in this case the alleged contravention is only in respect of the parents and their marital status and it is not the parents who have brought the originating summons but the child. Sections 23, 24 and 25 deal with parents and not the child. A person must sue on his own behalf.
>
> (5) A child cannot effectively claim that the effect of a parent's classification would discriminate against her or him, as the criteria under s 82 do not include 'age' and marital status see *Attorney-General v Lawrence* (1985) LRC 921 at page 930 D. The test is whether the applicant has been directly affected by the impugned statute.
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> (6) That issues against the respondent have not been adequately or properly addressed or the jurisdiction of the court properly invoked.

(7) When considering whether or not s 24(3) is discriminatory the court must take into account the history and social economic context of the legislation or, in other words, the environment in which the legislature enacted the statute. Thus the Act repealed and consolidated all statutes on child legislation - the Children and Young Persons Act, the Adoption Act and the Guardianship of Infant Act. In addition, principles in the international Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child were taken into consideration. In children's matters the tendency is to define what is good for the child by reference to the parents. Generally the Act views a child as an individual member of the family. The Children Act achieved this principle by giving the child the right to protection from discrimination, child labour, abuse, economic and sexual exploitation, to live and be cared for by his parents to basic education and identity

(8) It is quite clear that s 24(3) merely states that such responsibility for a child born out of wedlock shall vest in the mother in the first instance. The essential feature of s 24(3) is that it does not prohibit a father of a child born out of wedlock from claiming parental responsibility. The steps to be followed by the father to achieve the status of a parent with responsibility over that child are set out. By following the outlined steps the uncertain status of the father is changed.

(9) The respondent has identified three issues related to the above for determination namely, (a) whether s 24(3) of the Act is discriminatory of itself and; (b) whether s 24(3) has introduced discriminatory statutory criteria to illegitimate children against all other children; and (c) whether the national law is subject to the international convention or charters.

(10) The respondent has powerfully argued that if the court were to hold that s 24(3) affords different treatment for the children in its effects then the criteria which that alleged differential treatment arises has to be one of those provided for under section 82(3) of the Constitution in order to be discriminatory in terms of the Constitution. Discrimination is defined in the Kenya Constitution and the court must be guided by this in its determination.

(11) Even if the court were to find that there is discrimination as per the definition in the Constitution, it has been argued that should not be the end of the matter. The court should go a step further and consider whether the difference in treatment has an objective and reasonable justification and for such justification to be established it has to be shown that the difference in treatment (i) pursues a legitimate aim (ii) bears a reasonable relationship of proportionality between the aim sought to be realised and the means used to achieve it — see the case of *R v Westminster City Council and First Secretary of State* 2004 EWHC 2191.

[**27.**] It has been argued for the respondent that s 82(3) does not prohibit Kenya from adjusting its legislation to differences or forbid classification at all. It only requires that the classification be reasonable, justifiable and necessary. It has also been stressed that s 82 of the Constitution does not demand that things that are different be treated as though they were the same. What is forbidden is the differences based wholly or mainly on race, colour or as specified in s 82 of the Constitution The respondent has with a touch of humour given two illustrations why not every difference in fact violates s 82 of the Constitution. Thus, it cannot be unconstitutional when employing nurses to observe that women appear to have a natural advantage over men in this area. Similarly one would be entitled to

classify people on the basis that there are more men night-guards than women in real life. This kind of thinking would not be unconstitutional or discriminatory because you are not treating the classification on account of one of the specified descriptions or classification mentioned in s 82. The additional reason is that, although in the humorous examples on sex as illustrated above, 'sex' is one of the forbidden classifications, the employer is not wholly employing on the basis of sex. There is a justifiable and objective reason for the difference — there are situations where nature must have an edge in real life. By analogy a child born out of wedlock is not being addressed in the Children Act only in the capacity of an illegitimate child, rather he is being treated as one at whose birth it is likely that the father might not be known or immediately available to fend for him, yet the child's immediately needs parental responsibility which is absolutely necessary at the moment of birth and the needs cannot reasonably be expected to await, for example, a Legitimacy Act suit or await a paternity suit under the Children's Act or any other law that regulates the maintenance of children. Reason demands that the law apportions parental responsibility in the first instance because parental responsibility can in certain situations vest in only one parent because of the overriding interest of the child and this is what it has done. The mother or any other person with the *locus standi* can thereafter cause the parental responsibilities to be shared thereafter and the child would be at par in terms of parental responsibly with the child born within wedlock. In other words, the law places parental responsibility on unmarried mother because she is the only one immediately available at birth where there is no marriage and the needs of the child have to be paramount or overriding at any given time. The differentiation is not wholly or mainly on her status or that of the child. It is the mother who in the first instance has a clear and undisputed linkage to the child. The respondent has also contended that it is the opposite situation which would be unreasonable and unconstitutional — which is to allow a mother to point at the nearest man in the street and baptise him a father of the child without according him the right of hearing or producing proof of paternity.

[**28.**] The respondent concludes that the exclusion of marital status or age in s 82 is clear proof that any legislation that provides for such classification is not and cannot be unconstitutional.

[**29.**] The applicant has on the other hand urged the court to adopt a broad and purposive interpretation of s 82 and find that although marital status is not specified in s 82 we should all the same, hold that it is so included, because the framers of the Constitution could not have contemplated or foreseen all possible categories on which discrimination ought to have been forbidden at the time the Kenyan Constitution was being drafted. Alternatively, we have been urged to adjudicate in terms of the conventions reproduced above, and which

have specifically included the terms 'other status'. In support of this the applicants have quoted the Canadian case of *Andrews v Law Society of British Colombia* (1989) 1 SCR 143, where it was held that the enumerated heads of discrimination in article 15(1) of the Canadian Charter 'race, national or ethnic origin, colour, religion, sex, are or mental or physical disability' were not a complete listing of categories of discrimination. The invitation to the court is that we go beyond the categories set out in s 82 of the Constitution namely, 'race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex'. We shall be touching on this aspect later on in this judgment. Wilson J in the *Andrews* case (*supra*) defined discrimination as follows:

> Distinction which whether intentional or not but based on grounds relating to personal characteristics of individual or group has an effect which imposes disadvantages not imposed upon others or which withholds or limits access to advantages available to other members of society.

[**30.**] At page 127 in *Botswana v Unity Dow* the learned Judge held:

> I do not think that the framers of the Constitution intended to declare the categories mentioned in that definition to be forever closed. Other grounds or classes needing protection would arise In that sense, classes or groups itemised in the definition would be and in my opinion, are by way of example of what the framers of the Constitution thought worthy of membership as potentially some of the most likely areas of possible discrimination. Sex was not specified in the Constitution of Botswana.

[**31.**] Although the suit is filed on behalf of the child an argument has been presented on behalf of mothers as follows:

> A mother of a child born within wedlock on the other hand or one who subsequently marries the father of her child does not go through this process of proof. She enjoys obvious advantages, as the law imposes a duty on the father to have parental responsibility towards the child/ children. She does not have to shoulder parental responsibility on her own. This means that the law on one hand treats unmarried mothers differently from married mothers and thereby discriminates on the basis of marital status and on the other hand discriminates on the basis of sex by making mothers of children born out of wedlock have sole parental responsibility in the first instance.

[**32.**] The case of *R v Westminster City Council and First Secretary of State* 2004 EWHC 2191 has been relied on by the applicant for the principle that when a state legislates on a convention or domesticates it cannot do so discriminatively. The argument is that s 24(3) should be on all fours with the relevant convention. In determining whether or not the provisions under the Children Act are discriminatory when tested against the conventions and the constitutional provisions we were urged to consider the five questions posed in *London Borough Council v Michalak* (2003) 1 WLR 617, when Brooke LJ posited that if the answer to any of the questions is 'no', then the claim is likely to fail. The questions are:

> (1) Do the facts fall within the ambit of one or more of the substantive Convention rights (European Convention for the Protection of Human Freedoms)?
> (2) If so, was there different treatment as respect that right between

the complainant on the one hand and the other person put forward for comparison?
(3) Were the chosen comparators in an analogous situation to the complainant's situation?
(4) If so, did the difference in that treatment have an objective and reasonable justification? Did it pursue a legitimate aim and did the differential treatment bear a reasonable relationship on proportionality to the aim sought to be achieved?5. If so was the difference in treatment on one or more of the prohibited grounds under article 14?

Personal law

[**33.**] While conceding that discrimination or distinction is allowed in relation to matters of personal law, the applicant and counsel for the other interested parties (IPs) contend that the framers could not have allowed discrimination that encompasses the entire spectrum of a person's life. The applicant defines personal law as the law of religion, tribe or other personal factors. The applicant again drew the Court's attention to the definition of personal law in *Botswana v Unity Dow* where the learned Judge observed that the words 'other matters of personal law in section 15(4)(c) of the Botswana Constitution referred to personal transactions determined by the law of his tribe, religious groups or other personal factors as distinct from the territorial law of the country'. Thus, at page 652, Amissah JP held that citizenship which is conferred by statute on a statewide basis is not a matter of personal law. Thus, if there is a matter that is legislated on a state-wide basis, the same cannot then be subject to personal law otherwise this would make mockery and nonsense of modern law. Tribal and religious laws have clear provision in relation to women and children that are often inimical to written law and which encompass their economic, political social and cultural lives. It was therefore argued that parental responsibility is conferred by the Children Act on a state-wide basis and for this reason it cannot be treated as a matter of personal law which deals with laws of tribe religions or communities. Children or women are not a homogenous group subject to the same personal law everywhere.

Conflicts in the Children Act

[**34.**] The applicant has argued that part 11 of the Act and in particular s 5 prohibits discrimination on the basis of birth or other status among other grounds. This is in conflict with s 24(3) of the same Act. As the Act was meant to domesticate the Convention on the Rights of the Child and the African Charter, the Court has been invited to hold that part 11 must prevail in the face of the apparent conflict.

Jus cogens

[**35.**] It has also been argued that discrimination against the child born out of wedlock or their mothers by the state through legislation forms part of *jus cogens,* which is the technical name now given to the basic principles of international law, which states are not allowed

to contract out of - otherwise known as 'peremptory norms' of general international law — and that there is such a general recognition of use of force, of genocide, slavery, gross violations of the right of people to self-determination and of racial discrimination and prohibition on torture as *jus cogens*.

[**36.**] A consistent pattern of gross violations of internationally recognised human rights if practiced encouraged or conducted by the government of a state as official policy — constitutes a violation in the category of *jus cogens*. It has therefore been argued that the court should regard the discrimination against the child in terms of parental responsibility as breach of customary international law.

Findings

(a) *Locus standi*

[**37.**] We find that the applicant has *locus* in public law because he is affected by the subject matter of the suit namely, parental responsibility; but the mother had no *locus* to attempt in the course of the proceedings to articulate the position of mothers generally, including herself. Any alleged violation of a Constitution has to be made personally unless the relevant right can be asserted by a corporate body or unincorporated association (see s 84 and s 123 of the Constitution for the definition of a 'person'). On this point we respectfully depart from that great judgment of Ringera J in the *Njoya* case.

(b) Personal law

[**38.**] The Court does not accept the definition of personal law as outlined by the applicant. They have only captured part of the definition and left out the rest. *Blacks Law Dictionary* (18th ed) defines personal law at p 1180 as follows:

> The law that governs a person's family matters usu regardless of where the person goes. In common law systems personal law refers to the law of the person's domicile. In civil law systems it refers to the law of the individuals nationality (and is sometimes called *lex patriae*) cf territorial law.
>
> The idea of the personal law is based on the conception of man as a social being, so that those transactions of his daily life which affect him most closely in a personal sense, such as marriage, divorce, legitimacy many kinds of capacity and succession, may be governed universally by that purpose ... Although the law of domicile is the chief criteria adopted by English courts for the personal law, it lies within the power of any man of full age and capacity to establish his domicile in any country he chooses and thereby automatically to make the law of that country his personal law.

[**39.**] In view of the above it is quite clear that the definition of personal law is wider than what the applicant has contended in this matter and we would not accept to restrict its meaning under the Constitution and we opt to give it its widest meaning as defined

above. We are therefore unable to find for the applicant on this point in the face of the above definition and the constitutional provision excepting personal law under s 82(4) of the Constitution. It is one field of law where the Constitution gives the legislature some latitude to create suitable laws that are in keeping with the peculiar needs and values of the society at any given time.

(c) *Jus cogens*

[**40.**] On this, a perusal of the authoritative sources and international jurisprudence reveals that although the applicants are correct in the definition of *jus cogens* as outlined above and its current classifications, it has not yet embraced parental responsibility and the rights associated with it. The closest linkage is the right to life and we are not convinced that the challenged section(s) threaten the right to life. On the contrary, the provisions endeavour to provide for the gaps that have hitherto existed in the law so that the overriding interest of the child is satisfied even where the status of the parents is uncertain. The provisions have in our view been crafted in a fairly objective and reasonable manner. There is therefore nothing which we could apply to Kenya by way of *jus cogens* except recognised classifications set out above. In enacting s 24 and 25 we find that the legislature invoked the provisions of s 82 of the Constitution.

(d) Conflict between the provisions of the Children Act

[**41.**] We accept that s 5 is worded in broader terms in terms of the definition of discrimination because it includes 'birth' and status. However in so far as part II purports to go contrary to s 82 of the Constitution (although this has not arisen for determination in this case because part II and in particular section 5 have not been challenged) it would be void to the extent of the conflict. As held elsewhere we have a serious duty to uphold the provisions of the Constitution and nothing has been established to justify the invitation either to add to or to subtract from what appears to us to be very clear unambiguous, unequivocal provisions of the Constitution. Neither an Act of Parliament nor a provision in any ordinary Act of Parliament can alter the Constitution.

(e) Invitation to expand the anti-discrimination categories set out in s 82 of the Constitution

[**42.**] We reject the invitation to blindly follow the *Attorney-General of Botswana v Dow* (above) where the court unilaterally added 'sex' to the Botswana Constitution. Firstly, with all due respect, we consider that if we did the same in Kenya it would amount to usurpation of the work of the Constitution framers. We would have no reason to add or to subtract in the face of what is to us very clear provisions. Moreover, in the context of Kenya, in 1997 the Country

deliberately came up with a constitutional amendment to include the classification of 'sex' to the section so as to bring in line the constitutional provision, with the emerging jurisprudence contained in the relevant convention. Failure to expand to other categories was in our view deliberate and *inter alia* took into account the limitations already contained in s 82 and in particular subsection 4. Any other approach would amount to unacceptable judicial activism. Similarly, the invitation that we call a woman's 'womb' 'a place of origin' strains the language or the wording used in the Constitution and we would have no reason to embark on such a course. In this regard, while conceding that some of the reasoning in the case *of Republic v El Mann* 1969 EA 357 have been substantially overtaken, especially in the interpretation of the Constitution, one important principle remains intact, that the words of the Constitution or a statute should be accorded their natural and ordinary sense. This is the path we have chosen in the circumstances of this case. We further endorse Potter J's holding in *Ngobit Estate Ltd v Carnegie* (1982) KLR 137:

> The function of the judiciary is to interpret the statute law not to make it where the meaning of a statute is plain and ambiguous no question of interpretation or construction arises. It is the duty of the judge to apply such a law as it stands. To do otherwise, would be to usurp the legislative functions of Parliament.

(f) Other status etc

[**43.**] Even if we adopted the *Andrews* case or the *Westminster* or the *Dow* cases (*supra*) and expanded the constitutional categories and definition we would still not find for the applicant because of what we have said elsewhere in this judgment concerning the non-restrictive approach adopted by the United Nations monitoring bodies in interpreting the Universal Declaration and the Covenant on Civil and Political Rights. The additional reason for not taking the path of the cases relied on above is that in our view they fail to recognise 'the states margin of appreciation' as defined in the ever expanding international jurisprudence - see the *Belgian Linguistics* case 1968 [European Court of Human Rights] and the *Constitution of Costa Rica* 1984 OC/4/84 [Inter-American Court of Human Rights].

[**44.**] Finally we cannot uphold the applicant in the face of the Bangalore Principles concerning the position of the conventions *vis-à-vis* the states constitutions where there is no ambiguity the clear provisions of the Constitution prevail over the international conventions.

[**45.**] Principles 6, 7 and 8 as per the reprint Commonwealth Secretariat *Developing Human Rights Jurisprudence* vol 3 151 read:

> While it is desirable for the norms contained in the international human rights instruments to be still more widely recognised and applied by national courts, this process must take fully into account local laws, traditions, circumstances and needs.

> It is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations which a country undertakes — whether or not they have been incorporated into domestic law — for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law.
>
> However, where national law is clear and inconsistent with the international obligation of the state concerned, in common law countries the national court is obliged to give effect to national law. In such cases the court should draw such inconsistency to the attention of the appropriate authorities since the supremacy of national law in no way mitigates a breach of an international legal obligation which is undertaken by a country.

[**46.**] In *Cheney v Conn* 1968 NWLR 242 at page 245 E and G-H it was held that the conventions, treaties and charters need not bind its legislature.

[**47.**] Returning to the *El Mann* case we have great sympathy for the principle expressed in the case as under:

> We have said enough to show that in our opinion sub-section (7) of s 21 of the Constitution means no more and no less than it is to be gathered from the plain words of the provision and is not to be given an extended meaning which cannot be spelt out of the words used without doing violence to the language of the subsection.

[**48.**] Of course the *El Mann* principles have quite rightly been buffeted or shaken by the powerful winds of broad and purposive approach in interpreting the Constitution together with the living tree principle of interpreting the Constitution but except in exceptional cases where these two approaches apply the above principle still reigns supreme. The situation where a living spirit has to be injected into the constitutional provisions, include, where the language used is likely to lead to unjust situations. Even where the living tree principle of construction is invoked the nourishment given must originate from the roots, the trunk and the natural branches. The court would not be entitled to disregard the roots, the trunk and the natural branches in the name of giving flesh to the Constitution, or to graft in, its own artificial branches. The living tree is sustained by the tree and any graftings are likely to be rejected. By all means, let the courts be innovative and take into account the contemporary situation of each age but let the innovations be supported by the roots.

[**49.**] In this regard we endorse fully the presumption of constitutionality which was powerfully expressed by the Supreme Court of India in the *Hamdarddawakhana v Union of India* AIR 1960 554, where the respected Court stated:

> In examining the constitutionality of a statute it must be assumed that the legislature understands and appreciates the need of the people and the law it enacts are directed to problems which are made manifest by experience and the elected representatives assembled in a legislature enacts laws which they consider to be reasonable for the purpose for which they are enacted. Presumption is therefore, in favour of the constitutionality of an enactment.

[**50.**] Nothing has been shown to us that can lead us to upset the presumption that s 24(3) and by extension s *25* were not enacted for a reasonable purpose and for a need the legislature felt had to be addressed. Indeed it has not been demonstrated to us by the applicant that the striking out or declaring the section unconstitutional would be in the interest of the intended beneficiary or the overriding interest of the child which is the aim of the legislation. On the contrary, the child's interest would be subverted by the prayers sought. In addition it has not been demonstrated how the contended equality could be achieved by law in a situation where parental responsibility is wholly shared by both parents in the case of married couples and split only where one of them is not available in the first instance because of the uncertain status of the father. In our view the legislature has provided for all possible situations in order to address the aim of parental responsibility. We would of course have agreed with the applicant's contention on inequality and discrimination if, for example, it is the government which was charged with parental responsibility and it dishes better treatment to a child born within wedlock and dishes out bad or inferior treatment to that born out of wedlock. There would be an iron-cast case for inequality and discrimination. However the definition of a parent includes both parents when immediately available or one of them when the other is not available — see the meaning of 'parent' as set out above. The court in sustaining the constitutionality of the section must carefully analyse the relationship under scrutiny and all the underlying circumstances which necessitated differential treatment. We would therefore wish to associate ourselves with the holding in the *Hamdarddawakhana* case *supra* where the court observed:

> that in order to sustain the presumption of constitutionality the court may take into consideration matters of common knowledge, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation.

[**51.**] We further approve the holding in the same decision on what the function of the court is when an enactment is impugned on the ground that it is *ultra vires* and unconstitutional:

> As already stated when an enactment is impugned on the ground that it is *ultra vires* and unconstitutional what has to be ascertained is the true character of the legislation and for that purpose regard must be had to the enactment as a whole, to its objects, purpose and true intention and the scope and effect of its provisions or what they are directed against and what they aim at.

[**52.**] While there is no contention that the impugned section(s) are *ultra vires*, it is contended that s 24(3) is unconstitutional and we as a court have the mandate as expressed above. As crafted the Children Act is a milestone in entrenching and securing the rights of the child and s 24(3) is in on view a big improvement of the uncoordinated laws which dealt with parental responsibility before its enactment. Scrapping it from our law would go against the objects of the Act and

the state responsibility to endeavour to create laws, aimed at securing the best interests of the child.

(g) Equal protection of laws

[**53.**] Equal protection of laws means subjection to equal laws applying to all in the same circumstances. In the circumstances presented to us, the child born within wedlock has the immediate support of the two parents. In the case of the child born out of wedlock there is only one parent available in the first instance. The difference in terms of the two otherwise equal situations arises because the status of the father in the latter case is not immediately ascertainable and the law goes on to provide for the process of ascertainment and to allow the sharing of responsibility upon ascertainment of status or acceptance by the father. The law does not prevent or frustrate paternity or legitimacy suits. They are contemplated by the section or other applicable laws. The question is, does the right of equal protection under the Constitution, prevent the legislature from legislating differently in the two situations? The answer in our view is no. The principle of equal protection of the laws does, not prevent the legislature or the state from adjusting its legislation to differences in situations or forbid classification in that connection, but it does require that the classification be not arbitrary, but based on a 'real and substantial difference, having a reasonable relation to the subject or aim of the particular legislation'.

[**54.**] The equal protection provisions do not in our view require things which are different in fact or in law to be treated as though they are the same. Indeed, the reasonableness of a classification would depend upon the purpose for which the classification is made. There is nothing wrong in providing differently in situations that are factually different.

[**55.**] The intelligible differentiation in the case before us is the uncertain status of the father in the first instance. The differentiation is not arbitrary because it has a nexus to attachment of parental responsibility and it recognises that the process of ascertainment of the status will take time. Surely there is a substantial distinction between the two situations and the law has handled the distinction in a reasonable manner and with the object of parental responsibility and the objects of the Act in view. By way analogy we wish to quote with approval the holdings of Mahrjan J ad Das J respectively in the Indian case of *State of WB v Anwarali* 1952 SCR 284 and 335:

> The classification permissible must be based on some real and substantial distinction bearing a just and reasonable relation to the objects sought to be attained and cannot he made arbitrarily and without any substantial basis ... Thus the legislature may fix the age at which persons shall be deemed competent to contract between themselves but no one will claim that competence to contract can be made to depend upon the stature or colour of the hair — such a

> classification for such a purpose would he arbitrary and a piece of legislative despotism.

And Das J put it:

> The classification must not be arbitrary but must be rational, that is to say, it must not only be based on some qualifies or characteristics which are to be found in all the persons grouped together and not in others who are left out but those qualities or characteristics must have a reasonable relation to the object of the legislation. In order to pass the test two conditions must be fulfilled namely:
>
> (1) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others and
> (2) that that differentia must have a rational relation to the object sought to be achieved by the Act.

[**56.**] In this case, child born within wedlock etc and out of wedlock is the differentia and parental responsibility is the nexus. Unwedded mothers and their children are grouped together for the purpose of locating parental responsibility. This cannot be said be an arbitrary or unreasonable differentia — because how else can parental responsibility be located in the two situations? To reinforce this point permit us to quote from the American Supreme Court decision in *Rigner v State of Texas* (1940) 310 US 141:

> The Fourteenth Amendment enjoins the equal protection of the laws, and laws are not abstract propositions. They do not relate to abstract units, A, B and C, but are expressions of policy arising out of specific difficulties addressed to the attainment of specific ends by use of specific remedies. The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.

[**57.**] And to answer the question we have posed above, as to whether the law could have handled or dealt with the situation in any other way, the decision in the American Supreme Court in *Buck v Bell* (1926) 274 US 2000 (208) is to the point:

> The law does all that is needed when it does all that it can indicates a policy, applies it to all within the lines and seeks to bring within the lines all similarly situated so far and as fast as its means allow.

[**58.**] To conclude this important point we recognise that the American jurisprudence has extensively covered the rule of equality since the case of *Maquin v Illinois Trust Bank* (1898) 170 US 283 to *Baysine Fish Co v Gentry* (1936) 297 US 422 (429) as follows:

> The rule of equality permits many practical inequalities. And necessarily so. In a classification for governmental proposes, there cannot be any exact exclusion or inclusion of persons and things.
>
> In other words, a classification having some reasonable basis, does not offend against the clause merely because it is not made with mathematical nicety, or because, in practice, it results in some inequality.
>
> Government is not a simple thing. It encounters and must deal with the problems which come from persons in an infinite variety of relations. Classification is recognition of those relations and, in making it a legislature must be allowed a wide latitude of discretion and judgment.
>
> In applying the dangerously wide and vague language of the equality clause to the concrete facts of life, a doctrinaire approach should he avoided. When a law is challenged as offending against equal protection

> the question for determination by the court is not whether it has resulted in inequality, but whether there is some difference which bears a just and reasonable relation to the object of the legislation.

[**59.**] As the Supreme Court of India has observed in the case of *Kedar Nath v State of WB* (1953) SCR 835 (843):

> Mere differentia or inequality of treatment does not per se amount to discrimination within the inhibition of the equal protection clause. To attract the operation of the clause it is necessary to show that the selection or differentiation is unreasonable or arbitrary: that it does not rest on any rational basis having regard to the object which the legislature has in view.

[**60.**] Finally by analogy we turn to the American case of *Lalli v Lalli* 1439 US 259 (1978). A state was permitted to condition an illegitimate's inheritance from his father on a judicial determination of paternity during the father's lifetime.

[**61.**] The section recognises the child right to parental support at all stages provided paternity is established and even where it is not an agreement of parental responsibility has been allowed. We find no unreasonableness in the way the legislation has provided for the situations which arise, in this personal law relationship.

[**62.**] We therefore conclude that the differentiation in s 24(3) and 25 is not arbitrary and cannot be said to lack a rational basis having regard the objects of the Act and in particular locating parental responsibility.

Constitutional position to prevail as per the Bangalore Principles

[**63.**] After analysing the case law cited to us by the applicants counsel including the interested parties counsel we prefer reinforcing the three relevant Bangalore Principles set out elsewhere in this judgment to the effect that the states clear constitutional provisions should prevail over those of the conventions. It follows that the clear provisions of s 82 and the limitations must prevail and we so hold. It is only where an act intended to bring a treaty into effect is itself ambiguous or one interpretation is compatible with the term of the treaty while others are not that the former will be adopted. This is in recognition with a presumption in our law that legislation is to be construed to avoid a conflict with international law. In this regard we endorse as good law Lord Diplocks comments in the English case of *Solomon v Commissioner of Customs* (1967) 2 QB, cited elsewhere in the judgment where he said: 'Parliament does not intend to act in breach of international law, including, specific treaty obligations'.

[**64.**] However, where the words of Constitution or statute are unambiguous the courts have no choice other than to enforce the local law irrespective of any conflict with international agreements. Where not domesticated, treaties may be taken into account in seeking to interpret ambiguous provisions in the municipal law, see *R*

v Chief Immigration Officer, Heathrow Airport exp BIBI [1976] 13 ALL 843.

Position as per international instruments – states permitted to take into account special circumstances

[**65.**] The Universal Declaration of Human Rights 1948 article 2 and *7* state the following about human rights, equality before the law and discrimination:

> Article 1: All human beings are born free and equal in dignity and rights.
>
> Article 2: Everyone is entitled to all the rights and freedoms set forth in this declaration without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property birth or other status.
>
> Article 7: All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of the Declaration and against incitement to such discrimination.

[**66.**] It is strikingly clear that article 2 of the Universal Declaration prohibits distinction of any kind. The obvious interpretation is that no differences at all can be legally accepted. However the situation on the ground does not support such a restrictive interpretation of the Declaration in that the monitoring bodies have not supported any such interpretation and in some of the constitutions of the member states including that of Kenya do not support the position as stated in article 2. The member states have claimed and have been allowed 'a margin of appreciation' because differences in real life are inevitable and they are not necessarily negative. Indeed, international jurisprudence and supporting case law demonstrates that not all distinctions between persons and groups of persons can be regarded as discrimination in the strict sense or true sense of the term. Thus, general comment 18 in the United Nations *Compilation of General Comments*, p 134 para 1 lays what appears to be a peremptory international norm *jus cogens* in these words:

> non-discrimination, together with equality before the law and equal protection of the law without any discrimination constitute a basic and general principle relating to the protection of human rights.

[**67.**] The second principle which is now generally accepted and which does not support a restrictive interpretation is that distinctions made between people are justified provided that they are, in general terms reasonable and imposed for an objective and legitimate purpose.

[**68.**] To amplify on this we wish to borrow again from the Human Rights Committee general comments (*supra*) at page 135 para 7 in its definition of 'discrimination':

> that the term discrimination as used in the Covenant (International Covenant on Civil and Political Rights) should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

> and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing of all rights and freedoms.

[**69.**] The Human Rights Committee has commented that the enjoyment of rights and freedoms on an equal footing does not mean identical treatment in every instance. Taking the ICCPR as an example, article 6(5) prohibits the death sentence from being imposed on persons below 18 years of age and from being carried out on pregnant women. The other obvious example is affirmative action which is aimed at diminishing or eliminating conditions likely to perpetuate inequality or discrimination in fact. Such a corrective action constitutes or is termed legitimate differentiation under the ICCPR, it is therefore an accepted international principle of law that differentiation based on reasonable and objective criteria does not amount to prohibited discrimination. A state which complies with this criteria would not be faulted in practice or in its formulation of a supporting law provided this criteria is adhered to. To explain the position further, the universality of the 1948 Declaration of Human Rights is based on a common heritage of humankind which is the oneness of the human family and the essential dignity of the individual. It is from these two universally shared traits from which the notion of equality finds its stem or base.

Interdependency and indivisibility of human rights

[**70.**] In this particular case the court has deliberately declined to stretch the natural meaning of the words set out in s 82 of the Constitution of Kenya for the reasons given herein. However, we must clarify that we are acutely aware that the role of the Court in determining the values and principles of our Constitution is vast in that in the hitherto neglected field of economic, social and cultural rights the courts have the critical role of harmonising these rights with the civil and political rights. The reason for this is that the two sets of rights are interdependent and indivisible. A good recent example is this Court's broad interpretation of the right to life in the case of *PK Waweru v Attorney General and Others*. This was in the field of environmental law, and the court ruled that life was more than soul and body. In this decade and beyond one of the greatest challenges in the courts will be finding a lasting place for economic social and cultural rights in our jurisprudence.

[**71.**] The challenge in this case is however different and we decline to pave a new path — because the facts and the law have not sufficiently energised us to pave such a path in the circumstances.

No discrimination where the difference has a legitimate purpose

[**72.**] It is clear to the court that what s 24 and 25 are seeking to achieve is to have the parental responsibility shared in the case of the

married couples or where there is a consensual parental agreement or the responsibility split between individuals if there is no marriage and also to locate parental responsibility permanently where an unmarried father, has had a 12 months history of giving maintenance to the child. In cases outside these situations the law initially locates the parental responsibility on the mother of the child because firstly there cannot be a gap in parental responsibility in the first instance and the best interests of the child is for the identified parent to take up the responsibility. The law assumes that the process of identifying the father outside marriage is likely to take time eg paternity or legitimacy suits are likely to take time where instituted, yet the needs of the child cannot be held in abeyance even for a moment. Taking the facts of the case before the court as an illustration the next friend of the child has claimed that the child's head was 'shaven' by the father pursuant to the Kisii customary tradition. Yet she has not explained why she has not pursued this claim in a court of law. A constitutional court is not the right forum for such a claim. Customary African marriages are recognised by our law. Thus in the event of a successful claim under the customary law s 24(3) could still be invoked to ensure that parental responsibility is shared between the two. The section is not tied to the statutory marriages only.

[**73.**] In the circumstances we have no hesitation in finding that the challenged subsection 24(3) on the mother's initial responsibility and the father in the situations described in the subsection and 25 have a legitimate purpose and are based on the realities of the relationships and the rights of all those concerned. A law that does not recognise the right of all concerned including those disputing paternity would be unrealistic and unreasonable and would be contrary to justice, to reason and to the nature of things.

[**74.**] This is why this Court agrees with [the Inter-American Court in its advisory opinion on the case of proposed amendments to the naturalisation provisions of the Constitution of Costa Rica] we take the liberty of reproducing:

> 57. Accordingly, no discrimination exists if the difference in treatment has a legitimate purpose and if it does not lead to situations which are contrary to justice, to reason or to the nature of things. It follows that there would be no discrimination in differences in treatment of individuals by a state when the classifications selected are based on substantial factual differences and there exists a reasonable relationship of proportionality between these differences and the aims of the legal rule under review. These aims may not be unjust or unreasonable, that is, they may not be arbitrary, capricious, despotic or in conflict with the essential oneness and dignity of human kind.

[**75.**] Thus we find that since the aim of the section is to provide for parental responsibility locating it initially in the mother and providing for a shared responsibility taking into account all possible relationships that spring from the birth the section has handled the situation with a reasonable proportionality between the difference of the one set of children (generally born within and those born out of

wedlock since the aim is to provide for parental responsibility in both situations as far as it is practically possible in the later situation. We find that the balance struck by the challenged section cannot be said to be unreasonable or unjust. The difference between the two sets of situations cannot in our view be said not to have an objective and reasonable justification.

A margin of appreciation is in certain situations permitted

[**76.**] Although as is clear from s 82 of the Constitution of Kenya our Constitution does allow departure from the non discrimination rule, in cases of marriage and areas of personal law. The courts are obliged to apply the law as it is at the moment, even in those situations where birth, age or marital status are categories in the Constitution (or as we were being persuaded to agree with our brother judges in Zambia where the court appears to have extended the categories) because the local legislation does not have to be on all fours with the convention. We are persuaded to hold that even in these situations each state has a certain margin of appreciation which she can exercise in the legislating as has happened in Kenya as regards sections 24(3) and 25 by extension. In the case before us, we would be more inclined to agree with the finding of the Inter- American Court of Human Rights in its advisory opinion on the case *of Proposed amendments to the naturalisation provisions of the Constitution of Costa Rica* 4/84 of 19 January 1984, para 54 where it gave this opinion:

> Although it cannot be denied that a given factual context may make it more or less difficult to determine whether or not one has encountered the situation described in the foregoing paragraph, it is equally true that, starting with the notion of the essential oneness and dignity of the human family, it is possible to identify circumstances in which considerations of public welfare may justify departures to a greater or lesser degree from the standards articulated above. One is here dealing with values which take on concrete dimensions in the face of those real situations in which they have to be applied and which permit in each case a certain margin of appreciation in giving expression to them.

[**77.**] While the ideal situation may be holy matrimony or the other legally recognised marriage status, in terms of parental responsibility the law as crafted has gone beyond this in order to locate and provide parental responsibility so as to achieve it, this being a cornerstone of the, overriding interest of the child. If a state or the courts were to blindly apply the rule of the thumb and hold that there cannot be legitimate distinction in the situation before us, then what is the case of the single mothers who would have nothing to do with the father by choice? Should the law wipe them from the face of the earth or should it not try and do social engineering by providing for each situation using the best criteria available to secure the rights and obligations of all in the interest of justice, reason and equity.

[**78.**] In interpreting our Constitution we consider ourselves bound by its provisions in the matter before us namely s 82 and its limitations.

Perhaps it is important to point out at the outset, that following the great momentum of gender equity in the 80's and 90's, s 82 of the Kenya Constitution was amended in 1997 and the prohibited category expanded to include 'sex'. Age and marital status were not added. At the moment one can only conclude that the exclusion was deliberate and we do not consider that it is the function of the court to fill the gaps. It must not be forgotten that modern constitutions are being negotiated with the people directly or indirectly by way of constituent assemblies and referendums and it would not be proper for the courts to take their places by filling in fundamental gaps in the constitutions. The life of society has other important actors such as Parliament and other organs which must be left to play their role to the full. In this regard we would like to borrow from one of the holding by the European Court of Human Rights in the *Belgian Linguistics* case judgment of 23 July 1968, series A, no 6, p 33 para 9 where they held:

> In attempting to find out in a given case, whether or not there has been an arbitrary distinction, the Court cannot disregard those legal and factual features which characterise the life of the society in the state which, as a contracting party, has to answer for the measure in dispute. In so doing it cannot assume the role of the competent national authorities (in our case read the people, Constituent Assembly or referendum and Parliament) because it would thereby lose sight of the subsidiary nature of the international machinery of collective enforcement established by the Convention. The national authorities remain free to choose the measures which they consider appropriate in those matters which are governed by the Convention. Review by the Court concerns only the conformity of those measures with the requirements of the Convention.

[**79.**] Thus in the case of our Parliament it did address the measures set out in the cited conventions and choose only those measures which are considered suitable to the local situation. Parliament had no obligation to adopt, line hook and sinker, the provision of the conventions in formulating the Children Act. It had a margin of appreciation reserved to the state as defined above. On the other hand the role of the Court is to uphold the provisions of the Constitution by recognising the prohibited categories in s 82. The situations which would justify a constitutional court in adopting a broad view or using the living tree principle of the interpretation of the Constitution is where there is ambiguity, inconsistencies, unreasonableness, lack of legislative purpose or obvious imbalance or lack of proportionality or absurd situations. In all these situations a court would he justified in breathing life into any such provisions in order to achieve situations which are not contrary to justice, to reason or to nature of things. Any other approach would in our view be usurpation of the role of the Constitution framers and other law makers. Any spirit or nourishment to constitutional provisions by the court must spring directly from the roots and cannot justifiably he grafted from outside the living tree.

[**80.**] To sum up we find and hold that s 23(4) and by extension 25 do not offend the principle of equality and nondiscrimination either by themselves or in their effect. We further hold that the principle of equality and nondiscrimination does not mean that all distinctions between people are illegal. Distinctions are legitimate and hence lawful provided they satisfy the following: (1) pursue a legitimate aim such as affirmative action to deal with factual inequalities; and (2) are reasonable in the light of their legitimate aim.

[**81.**] The challenged difference does satisfy both criteria in our view. At the moment we find no other better option of dealing with the situation other than as set out in the sections. It must be recalled that the Act took the best provisions of the repealed Children and Young Persons Act, Guardianship, Adoption of Infants Act and other laws affecting children and the relevant international conventions among others and codified them as one. The Act including the challenged section(s) captures the issue of parental responsibility in a manner never done before in the history of the rights of the child in. this country and. it would be a great tragedy for the Court to accept the invitation to strike them out or to hold that the subsection is unconstitutional. If the court were to do so the gap in meeting the overriding interest of the child would be immediately retrogressive and unforgivable.

[**82.**] The suit is dismissed with no order as to costs as the suit had been brought on behalf of child.

[**83.**] We would like to thank all the advocates for their research and diligence in handling this important case.

Lemeiguran and Others v Attorney-General and Others

(2006) AHRLR 281 (KeHC 2006)

Rangal Lemeiguran & Others v Attorney-General & Others

High Court of Kenya at Nairobi, misc civil application 305 of 2004, 18 December 2006
Judges: Nyamu, Anyara Emukule

Right to representation in Parliament of indigenous people

Locus standi (victim requirement, 60, 61)
Political participation (size of constituency, 75, 76, 83, 93; representation in Parliament of special interest groups, 103, 104, 107-109, 142; effective representation, 116, 149)
Indigenous peoples (definition, 95-98, 102)
Interpretation (constitution to be read as a whole, 100; international law, 105, 111; broad and purposeful, 113, 120, 122; protect disadvantaged groups, 138)
Democracy (protection of minorities, 135, 147)

[**1.**] This judgment relates to an application by way of an originating summons dated and filed on 12 March 2004 under the provisions of rules 9 and 11 of the Constitution of Kenya (Protection of Fundamental Rights & Freedoms of the Individual) Practice and Procedure Rules 2001 (Legal Notice 133 of 2001), which requires that such application be brought by way of an originating summons under Order XXXVI of the Civil Procedure Rules. This application is also premised upon the provisions of section 84(1), 1 and 1A and section 33 of the Constitution of Kenya, and all other enabling powers and provisions of law.

[**2.**] The application is brought by the four applicants, against the Attorney-General (on behalf of the government of Kenya as its principal legal adviser), the Electoral Commission of Kenya (as the body charged with the creation and distribution of constituencies under the Constitution). The application is spent so far as the third respondent, the Constitution of Kenya Review Commission, is concerned as that body has now wound up its activities, and is for all practical purposes disbanded. The four applicants claim for the following declarations:

> (a) A declaration that the fundamental rights of representation in the National Assembly of the Republic under the provisions of section 1A of

the Constitution of Kenya, has been effectively denied to the Il Chamus community;

(b) A declaration that the fundamental right of expression protected by section 79 of the Constitution of Kenya has been, is being as is likely to be contravened in relation to the applicants and the Il Chamus community;

(c) A declaration that entitlement to the fundamental rights protected by section 70 of the Constitution of Kenya has been, is being and is likely to be contravened in relation to the applicants and the Il Chamus community;

(d) A declaration that the fundamental right of the unhindered enjoyment of the freedom of conscience protected by section 78 of the Constitution of Kenya, is being and is likely to be contravened in relation to the applicants and the Il Chamus community;

(e) A declaration that the Il Chamus community of the Republic of Kenya is disenfranchised in the election of any of its members to the National Assembly;

(f) A declaration that the constitutional machinery for the representation and protection of minorities, including the Il Chamus community, to wit the provisions of section 33 of the Constitution of Kenya, has not been implemented as by the Constitution required;

(g) A declaration that the statistical chance of an Il Chamus candidate being successful as a Member of Parliament in the present Baringo Central constituency is in practice so minimal as to effectively prevent any such membership of Parliament by such candidate for the foreseeable future (as it has been prevented in the past forty years);

(h) A declaration that in the particular circumstances that have prevailed and will prevail, the Il Chamus community constitutes a special interest for the mandatory provisions of section 33 of the Constitution of Kenya;

(i) A declaration that the Il Chamus community ought to be appointed as a nominated member of the National Assembly to represent the special interest of the Il Chamus community under the mandatory provisions of section 33 of the Constitution of Kenya;

(j) A declaration that the political parties nominating persons to be appointed as nominated members under section 33 of the Constitution of Kenya ought to nominate a person from the Il Chamus community while taking into account the principle of gender equality;

(k) A declaration that the principle of the representation of special interests has not been, or not sufficiently been, taken into account in the appointment of nominated members under section 33 of the Constitution of Kenya to the eighth Parliament to the detriment of the Il Chamus community;

(l) A direction that the Electoral Commission of Kenya at its next boundary review do take into account requirements set out in section 42 of the Constitution of Kenya, in particular the need to ensure adequate representation of sparsely populated rural areas, population trends, and community of interest in respect of Baringo Central constituency so as to prevent the present electoral marginalisation of the Il Chamus from continuing;

(m) A direction that the Electoral Commission of Kenya is complying with its duties under section 33(5) of the Constitution of Kenya ensure observance also of the primary principle of the representation of special interests which section 33(1), Constitution of Kenya mandatorily provides for;

(n) A declaration that the Electoral Commission of Kenya in the performance of its duties under section 33(5), Constitution of Kenya, in respect of the eighth Parliament has failed to ensure [...] adequate observance of the primary principle of the representation of special

interests which section 33(1), Constitution of Kenya mandatorily provides for;

Further or in the alternative

(o) A declaration that the present Baringo Central constituency be divided by the next Boundary Commission into two separate constituencies taking into adequate account the appropriate demographic and numerical considerations and all powers set out in section 42, Constitution of Kenya so as to prevent the present electoral marginalisation of the Il Chamus from continuing;

(p) A declaration that the present Baringo constituency be divided by the next Boundary Commission into two separate constituencies taking into adequate account the requirements set out in section 42, Constitution of Kenya in particular the need to ensure adequate representation of sparsely populated rural areas, population trends, and community of interest so as to prevent the present electoral marginalisation of the Il Chamus from continuing; and

(q) A declaration that the provision of fair representation of all communities constituting the people of the Republic and in particular of the Il Chamus be taken into account by the Constitution of Kenya Review Commission;

(r) A direction that all the orders in this application be taken into account by the Constitution of Kenya Review Commission and the Electoral Commission of Kenya in the fulfilment of their respective duties;

(s) The Court do make, issue and give such further, other and consequential orders, writs and directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 70 & 83 (inclusive) of the Constitution of Kenya in relation to the applicants.

[**3.**] The application is grounded upon the supporting affidavit of Rangal Lemeiguran, the first applicant herein, made and sworn on behalf of himself and on behalf of the other three applicants on their authority on 17 March 2004. The affidavit is comprised of 83 paragraphs, and because of its centrality in the submissions of Pheroze Nowrojee, learned counsel for the applicants we have divided it into the form of said counsel's submissions.

The Il Chamus – the people

[**4.**] The applicants are all members of the Il Chamus community, that live principally around the shores of Lake Baringo in Rift Valley Province within the Republic. The Il Chamus are also known as Njemps, a corruption of the name during the colonial period. They are a distinct and small community numbering about 25 000 to 30 000 persons and regard themselves as one of the indigenous peoples of the Republic. They are also one of the branches of the Maasai peoples that settled around the shores of Lake Baringo about two centuries ago.

[**5.**] In a study of the community Il Chamus – Njemps by Rolf Gloor Contensdivil, Switzerland, Schach-Verlag AH, 1986, the author at page 7 writes:

> Some tribes of the Maasai clan 'Il Kerois' were most likely pushed away into the region south of Lake Baringo at the turn of the 18th to the 19th

> century. Fighting with other Maasai groups, they lost their cattle. Therefore they were forced to settle in fertile grounds and to earn their living by farming ... Later on tribes of the Samburu clain Il Mae came into the district of Baringo for similar reasons and other clans followed ... At the end of the 19th century clans for the tribes of Turkana, Pokot and Tugen married and adapted the traditions of the country. Even today it still happens that the Il Chamus integrates clans of other groups into their tribe ... Since the first merger of the tribe at Lake Baringo attacks have been organised by the Maasai again and again. But the people here have always been on their guard and put up resistance. That is why the Maasai gave the name Il Chamus which means 'people who can see into the future'. Later on the Europeans changed it to Njemps ...

[**6.**] Mr Pheroze, learned counsel for the applicants, concluded from the above historical background that the correct name of the community is Il Chamus, not Njemps, and that they are a distinct community with their own history and language.

The land occupied by the Il Chamus

[**7.**] The Il Chamus occupying the area around Lake Baring for electoral purpose fall within Baring Central constituency and within the said constituency the main wards occupied by the Il Chamus are Salabani Makutani, Ng'ambo, Il Chamus and part of Marigat.

[**8.**] Apart form the above wards the remainder of Baringo Central constituency and its wards are occupied almost totally by members of the Tugen community. A map annexed as exhibit RLI, showed the three Baringo District constituencies (Central, East and North) for the National Assembly, including the said wards.

[9.] The total number of registered voters in Baringo Central is 48 949, out of which the number of registered voters in the five wards mainly occupied by the Il Chamus total 7252 made up as follows:

Name of ward	Total registered voters
Salabani	1515
Makutani	1640
Ng'ambo	1170
Il Chamus	1294
Marigat (part)	1633
Subtotal	**7252**

The above figures were clearly identifiable from the registered voters per polling station of Baringo Central and currently published by the Electoral Commission of Kenya (and marked Exhibit RL2, and also the list of wards in the constituency). Extracts from the 1999 Population and Housing Census published by the Ministry of Planning, 2001, in relation to the said areas also showed:

> (a) Marigat division: A total population of 26 923 with an almost equal number of males 13 285 and females 13 638 and 6 356 households, an area of 685 sq kms and a diversity of 39 persons per sq km. This includes also Il Chamus ward.

(b) Makutani division: With a total population of 7 520 comprised of 3 584 males, 3 936 females, 1 534 households, an area of 526.9 sq km and a diversity of 14 persons per sq km.

(c) Ng'ambo divisions: With total population of 4 947 comprised of 1 954 males, 2 093 females, 777 households, an area of 557 sq km and population of 73 persons per sq km.

(d) Salabani division: With a total population of 3 718 comprised of 1 802 males, 1 916 females with 875 households, an area of 80.2 sq km and a population diversity of 46 persons per sq km.

(e) Il Chamus electoral ward: This is included within Marigat division with a total of 1 294 registered voters among the Il Chamus population.

The geography and total area occupied by the Il Chamus

[**10.**] According to the report to the Electoral Commission of Kenya (ECK) made on 19 December 1995, the Il Chamus occupy a vast area of land. The land is said to be 150x100 kilometres. It borders Samburu District in Amonya, Laikipia District and Nyahururu and is in large predominately occupied by the Il Chamus. It is a vast land even worth being a district but the applicants request for a constituency first, because the applicants say the Il Chamus people need representation in the House of Commons. It does not mean that 'we are no longer part of Baringo District but we need at least our human rights and fairness'.

Absence and/or inadequacy of representation

[**11.**] The deponent Rangal Lemieguran deposes that since the creation of the constituency (Baringo Central), over forty years ago in 1963, no person from the Il Chamus community has been elected as Member of Parliament from among them, and that no person would be elected given the voting patterns in rural areas both in Baringo District, and nationally. Further because of the make up of the constituency, and the statistics shown and the current constituency boundaries, it is not statistically likely that the Il Chamus candidate will be elected in the next forty years.

[**12.**] In the circumstances, the deponent avers that the fundamental rights of representation in the National Assembly of the Republic under the provisions of section 1 and 1A of the Constitution of Kenya, has been effectively denied in the past and is being presently denied to the applicants and the Il Chamus community, and it is likely that the said right will continue to be contravened for the foreseeable future unless the circumstances are changed. The applicants also aver that although in theory it is not impossible for an Il Chamus candidate to be elected to Parliament in the circumstances as presently structured, in practice and in reality the likelihood is so infinitesimal as to amount to an effective denial of the right of representation; that the statistical chance of an Il Chamus candidate being successful as a Member of Parliament in the present Baringo Central constituency is in practice so minimal as to effectively

prevent any such membership of Parliament by any such candidate for the foreseeable (as it has been prevented in the past forty years).

The consequences of denial of, and the need for separate representation

[**13.**] The applicants also aver that the denial of an effective choice is also a contravention of the fundamental right of expression protected by section 79 of the Constitution of Kenya which has been, is being and is likely to be contravened in relation to the applicant and other applicants and the Il Chamus community, that all the circumstances and their resultant denial of an effective choice is also a contravention of the fundamental right of the unhindered enjoyment of the freedom of conscience protected by section 78 of the Constitution of Kenya, which has been, is being and is likely to be contravened in relation to the applicant and the Il Chamus community.

[**14.**] The applicants also aver that as a consequence thereof, the entitlement of the applicants and the Il Chamus community to the fundamental rights, freedom of expression, and freedom of conscience protected under section 70 of the Constitution of Kenya has resulted, having bee

[**15.**] The applicant also aver that numerous efforts have been made in the past ten years by the applicant and the Il Chamus community itself by petitions, representations, memoranda and submissions to the then President of the Republic, the Electoral Commission of Kenya and the defunct Constitution of Kenya Review Commission seeking representation, change of boundary and other equitable considerations, without ever getting any written response to any of these and no remedial measures have ever been taken in the past forty years. Such petitions and representations which haven been responded to include:

(1) A memorandum by Maa community to the Constitution of Kenya Review Commission, which highlighted the historical injustices against the Maasai as a people, such as the Maasai agreements of 1904 and 1911, under which the Maasai were made to cede over 16,000 sq kms including 11,500 sq kms of what became the White Highlands.

(2) At the Lancaster House Conference leading to agreement of Kenya's independence, the three Maasai representatives declined to sign the conferences document because the British declined to recognise the historical injustice committed against the Maasai people, and the agreements of 1904 and 1911 were never abrogated. Their attempts to safeguard their rights under regional or 'Majimbo' government ended in failure with the dissolution of KADU in 1964. (KADU, Kenya African Democratic Union, was the political party which sought to safeguard the rights of minorities through regional form of government as opposed to centralist form under KANU.)

(3) That boundaries in Rift Valley be redrawn to create three regions including one comprised of Maa speaking groups of Narok, Kajiado, Transmara Laikipia Samburu and Marigat Division of Baringo.

Of the criteria for adequate representation

[**16.**] The applicants aver that the last Parliamentary Constituency Boundaries by the Electoral Commission of Kenya was in 1997 and despite representation prior thereto, the Electoral Commission of Kenya did not revise the boundaries of Baringo Central constituency, nor alter its boundaries so as to take into account the several criteria contained in section 33(3) and (4) of the Constitution in their application to the Il Chamus community, and for those reasons and the law, there be a declaration that the present Baringo Central constituency be divided into two separate constituencies taking into account the appropriate demographic and numerical considerations and all powers set out in section 42 of the Constitution of Kenya, so as to prevent the electoral marginalisation of the Il Chamus from continuing.

[**17.**] Similarly the applicants pleaded that declaration that in so dividing the present constituency, the Electoral Commission of Kenya would take into account the requirements set out in section 42 aforesaid in particular the need to ensure adequate representation of sparsely populated rural areas, population trends and the community of interest so as to prevent the present electoral marginalisation of the Il Chamus from continuing.

Of special interest groups and nominated members of the National Assembly

[**18.**] The applicants say that in addition to the election of Members of the National Assembly, the Constitution also provides for nomination of twelve members under s 33(2) of the Constitution of Kenya which says: 'Subject to this section, there shall be twelve nominated members of the National Assembly appointed by the President following a general election, to represent special interests'.

[**19.**] The applicants aver and plead that the Il Chamus is a minority community and has been without representation in Parliament since independent Kenya. It is one of the few indigenous communities in Kenya, as recognised in international law with attendant rights and protections. The number of the community is very small in the context of the total population of 30 odd million in the Republic.

[**20.**] By virtue of this fact alone and other facts set out in the affidavit, the applicants believe that Il Chamus community constitutes a 'special interest' for purposes of section 33 of the Constitution of Kenya, and qualifies for representation in the National Assembly as such special interest. The applicants also aver and plead that despite this, no Nominated Member has been appointed in the National Assembly since 1963 to represent the special interest that the applicants and the Il Chamus are.

[**21.**] The applicants also aver that the constitutional machinery for the representation and protection of indigenous minorities, including the Il Chamus, that is to say, section 33 of the Constitution of Kenya has not been implemented in the past forty years as by the Constitution, envisaged, and despite the mandatory nature of that provision of the Constitution.

[**22.**] For those reasons, the applicants aver and contend under advice of their counsel that it is necessary that a person from the Il Chamus community ought to be appointed as a Nominated Member of the National Assembly to represent the special interest of the Il Chamus community under the mandatory provisions of section 33 of the Constitution of the Republic, ought to nominate a person from the Il Chamus community while taking into account the principle of gender equality; and that there be a declaration to this effect.

[**23.**] The applicants also seek a declaration that the principle of the representation of special interests has not been, or not sufficiently been, taken into account in the appointment of Nominated Members under section 33 of the Constitution of Kenya, to the current eighth Parliament to the detriment of the Il Chamus community.

[**24.**] Further the deponent urged, that he has followed the appointment of Nominated Members over the general elections since the establishment of the Electoral Commission of Kenya and observes by the lists of those nominated, that the primary principle of the representation of special interests, which s 33(1) of the Constitution of Kenya mandatorily provides for has been ignored or overlooked and not been complied with. By virtue of all the foregoing the applicants seek:

> (i) A direction by this Court to the Electoral Commission of Kenya that in complying with its duties under section 33(5) of the Constitution of Kenya it ensures observance also with the primary principle of the representation of special interests which section 33(1) of the Constitution of Kenya mandatorily provides;
>
> (ii) A declaration that the Electoral Commission of Kenya in the performance of its functions under section 33(5), Constitution of Kenya in respect of the current eighth Parliament has failed to ensure any or any adequate observance of the primary principles of the representation of special interests which section 33(1) of the Constitution mandatorily provides for, is necessary to protect the fundamental rights of the applicant, the other applicants and the Il Chamus community;
>
> (iii) A declaration that in any future review of the Constitution of Kenya that provision for representation of all communities constituting the people of the Republic and in particular of the Il Chamus be taken into account by whatever body undertaking the review of the Constitution;
>
> (iv) A direction be given to the Electoral Commission of Kenya that all the orders, declarations and directions made by this Court be taken into account by such body charged with the review of the Constitution of the Republic;

[**25.**] The applicants urge that such declarations and directions under section 84(2) of the Constitution of Kenya will prevent future problems and ethnic apathy, that Il Chamus community, needs to

have a voice of its own in Parliament so as to protect its interests in the future, that land pressures on the dominant communities around it will predictably impact both upon the present usable land areas as well as upon the economic activity and way of life of the Il Chamus; that the Il Chamus being an indigenous community is entitled to safeguard its own cultural values, its traditions and its social patterns, and that the territorial identity of the Il Chamus as an indigenous people is critical to its flourishing and its survival.

Of the protection and rights of indigenous peoples

[**26.**] The applicants also pleaded that the protection and rights of indigenous peoples are the subject of national and international concern and debate all over the globe, resulting in the drafting of the Declaration of the Rights of Indigenous Peoples. These other instruments include:

(i) International Covenant on Civil and Political Rights (1966);

(ii) Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities (adopted by UN General Assembly resolution 47/135 of 18 December 1992);

(iii) Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, Copenhagen, 29 June 1990;

(iv) Framework Convention for the Protection of National Minorities (1995);

(v) International Labour Organisation, Convention concerning Indigenous and Tribal Peoples in Independent Countries, 169 (1989).

[**27.**] The primary theme and thread of all these instruments, the majority of which Kenya has taken part in discussion and formulation by virtue of being a member of the United Nations, is that every citizen shall have the right and opportunity without any distinction or restriction to take part in the conduct of public affairs, directly or indirectly through their chosen representatives (ICCPR), that persons belonging to minorities have the right to participate effectively in cultural, religious, social, economic and public life (UN Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities, 1992), the right of persons belonging to national minorities to effective participation in public affairs, including participation in the affairs relating to the protection and promotion of the identity of such minorities, and the participating states have the duty to protect and create conditions for the promotion of the ethnic, cultural, linguistic and religious identity of certain national minorities by establishing, as one of the possible means to achieve these aims, 'appropriate local or autonomous administrations corresponding to the specific historical and territorial circumstances of such minorities and in accordance with the policies of the state concerned.' (Copenhagen meeting of the Conference on the Human Dimension, 1990).

[**28.**] The ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries is to the same effect, article 61(b) thereof

requires governments in applying this convention to establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision making, in elective institutions and administrative and other bodies responsible for policies and programmes which concern them.

[**29.**] The applicants plead that without a prominent voice of its own from a national platform the community will not be able to protect its rights, social or cultural, that by the lack of such a voice in Parliament, the Il Chamus community has suffered much obvious and non-obvious marginalisation, and prejudice in matters political, social and economic.

Of political suffering

[**30.**] The applicants also plead that politically the community has suffered as the division of boundaries was done discriminatorily. Baringo District has three different communities, the Pokot, the Il Chamus and the Tugen, and three constituencies, the boundaries whereof have been so drawn that the Pokot are adequately represented through Baringo East and the Tugen through Baring Central and Baringo North. The Il Chamus have no such representation through any of the said constituencies.

[**31.**] The applicants plead that since Uhuru (independence) the Baringo Central constituency has been represented by only one Member, former President Daniel Arap Moi, who the applicant deposes on oath rarely visited the Il Chamus community and that it was difficult to see him, and operated through a small clique of person who not being Il Chamus, never considered the interests or the plight of the Il Chamus. The effect of this lack of interest marginalised the community in the constituency, and consequently nationally.

[**32.**] Consequently therefore, the interests, of the Il Chamus community have never been articulated in Parliament so as to capture the attention of the necessary institutions of government and parastatals and to obtain the application of the machinery for solutions and resources. The deponent also avers that the current Member of Parliament for Baringo Central constituency has not visited the areas inhabited by the Il Chamus and this perpetuating the said marginalisation and prejudice.

[**33.**] All this is best reflected in the fact that at the time of filing the originating summons herein, the subject of this judgment, no member of the Il Chamus community has ever been appointed to a senior post since independence and the senior-most position held by a person from the Il Chamus is a District Officer.

[**34.**] The deponent avers that he, the other applicants herein and other members of the Il Chamus community would want to stand for

Parliament, within the constituency, but that with the current constituency boundaries it would be an exercise in futility.

Of social consequences

[**35.**] The applicants say that the absence of such adequate and effective representation has lead to very adverse social consequences. The upper part of Baringo Central constituency, where the current and last Member of Parliament comes from is equipped with better schools, health facilities and roads. It has electricity and telephone access. The Il Chamus area has only one secondary school, while the situation with regard to primary schools has deteriorated over the past fifteen years.

[**36.**] Instead, there has been cattle rustling in the district and that the Il Chamus have borne the brunt of this rustling by Pokot from the east, and Tugen from the east, and Tuguen from both west and north, that whenever security forces are deployed in the district, it is the Il Chamus who have been beaten and maimed, their women raped and people displaced, and that no concern has been voiced by their Member of Parliament on such occasions.

[**37.**] There is therefore, the applicants plead a clear sense of alienation from the Member of Parliament and from the institution of representation to Parliament.

Of economic and social alienation

[**38.**] The applicants avers, and the applicants plead, that the land grabbing of Ole Kokwa Island and Parmalok Island has taken place knowing that Il Chamus have no voice capable of effectively protesting or bringing remedy to these wrongs, and that as a result of the land grabbing 200 persons were displaced, that is a significant proportion of a small population, and that there was no protest on behalf of the Il Chamus from their Member of Parliament either in or outside Parliament.

[**39.**] The applicants plead that during droughts in the past years, the Il Chamus have been unfavourably discriminated against when relief food has been distributed, and have been left out at other critical times.

[**40.**] As a consequence therefore and due to lack of outside information, and of general information and due to isolation from the national and even district political mainstream, the community sees itself as occupying a very dark corner of the nation and in comparison with the democratic gains and openness that other parts of the country now have as a foundation to build on, the community sees itself as neglected and improperly being handicapped in the task of undertaking its own development.

[**41.**] The applicants also plead that the Perkera irrigation scheme, an old scheme set up during the colonial period for the benefit of the pastoralist communities including the Il Chamus no longer benefits the Il Chamus people though situated within their area. Now the majority of the tenants within the scheme are members of the Tugen community. The valuable horticultural production taking place and experience being accumulated is to the exclusion of the Il Chamus, and it is not to their economic benefit.

[**42.**] Similar economic alienation is experienced by the applicants and the Il Chamus community with regard to allocation of commercial and residential plots in both Marigat and Kampi yo Samaki market centres, and that they have no voice politically to speak up on important platforms and to important bodies and persons to contain this end. Their attempt at any economic activity within the constituency is greatly hampered by lack of effective representation.

Of environmental degradation

[**43.**] The applicants also aver that there is serious deforestation, going on in the upper part of central Baringo which is the source of the Pekera and Molo rivers, which are the source of water in the places inhabited by the community and the unchallenged deforestation has seriously affected the volume of water available to the community from the said rivers.

[**44.**] Lake Baringo has been itself affected by siltation. This directly affects the volume of fish and has a direct and negative impact on the well-being of the Il Chamus community, and threatens its very livelihood.

Conclusion of submission of Il Chamus and applicants case

[**45.**] The applicants say in conclusion of both the affidavit of the first applicant Rangal Lemeiguran on behalf of the other three applicants, and the submissions of Pheroze Nowrojee, learned counsel for the applicants, and the Il Chamus community, that these deep-seated political, social and economic problems are the result of continuous neglect over a forty years period that is premised on the absence of accountability in representation to a community that cannot affect the polls, and to which a member of Parliament from an overwhelming majority owes no allegiance to speak up, or to fight for any resources or to bring any betterment.

[**46.**] The applicant, also plead that neither re-election nor popularity are dependent upon any effective representation of the community's interest or protection of its rights.

[**47.**] The applicants further plead in conclusion that their situation would be worsened in the event that oil or other mineral wealth is found to be present within the areas of the Il Chamus community,

representation is even more necessary to prevent the exclusion of the community from proper benefits and from needless and exploitative development and/or irreversible destruction of their values traditions and social patterns.

Il Chamus are not the least in numerical strength or area for grant of a constituency

[**48.**] Using the 2nd respondent's own List of Authorities dated 13 November, and filed on 14 November 2006, Annexure 3 entitled Electoral Commission of Kenya Parliamentary Constituencies Population (1999 Census) in descending order, Embakasi constituency 8 with a population of 434 884 and area of 208 sq has the largest population in the 210 constituencies while Lamu East constituency 210 has the least population of 16 794 and covering an area of 1 663 sq kms. In between theses extremes are for instance Kuria constituency 80 with a population of 151 857 and an area of 581 sq km, Ijara constituency 205 with a population of 41 811, and an area of 6 198 sq kms, North Horr, constituency 204, with a population of 43 057 and an area of 38 953 sq kms.

[**49.**] The Il Chamus population according to 1999 census is over 27 500 people and the votes for the election were over 10 000 people. They are certainly occupying more area than the constituencies of Kilome at 630 sq km, Mbita at 416 sq km, Tetu at 419 sq km, Kangema at 289 sq km, Kipipiri at 644 sq km, Gwasi at 640 sq km, Funyula at 264 sq km, Siakogo at 777 sq km, Keiyo North at 541 sq kms. The area occupied by the applicants and the Il Chamus community is well over approximately 1 500 sq kms.

[**50.**] For these reasons and on the basis that section 42(3) of the Constitution of Kenya, the Commission is required to depart from the principle of equal numbers of inhabitants in all constituencies, to the extent that it considers it expedient in order to take account of:

(a) the density of population, and in particular the need to ensure adequate representation of urban and sparsely populated rural areas;
(b) population trends;
(c) the means of communication;
(d) geographical features;
(e) community of interest; and
(f) the boundaries of existing administrative areas.

The applicants therefore pray that this court in exercise of its jurisdiction under section 84 of the Constitution do issue the necessary declarations and directions prayed for herein.

[51.] In support of its case, the applicants relied on *inter alia*:

(1) Kenya – report of the Constituencies Delimitation Commission (presented to Parliament by the Secretary of State for the Colonies by command of Her Majesty, January 1963; which set out the basis of the delimitation of constituency boundaries, incorporating the current provisions of section 42(3) of the Constitution;

(2) The Kenya population census 1989, vol 1, showing at page 633 the tribes by sex in Baringo district setting out the Kalenjin at 143 226, or 83.79 % of the district's population, while the Njemps at 11 569 or 3.32 % of the population and therefore a clear district group from either the Masai shown at 324 or 0.09 % of the population;

(3) Numerous clips and newspaper cuttings attached to the supporting affidavit of Thomas Letangule, advocate, one of the counsel for the applicants, sworn on and filed on 31 January 2005;

(4) Draft Declaration on the Rights of Indigenous Peoples, United Nations Commission on human rights – Sub-Commission on Prevention of Discrimination and Protection of Minorities 45th session, article 25: Indigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied or used, and to uphold their responsibilities to future generations. Such rights are not akin to self-determination and cession.

(5) Indigenous people – Challenges facing the international community UN Department of Public Information – 1997 on indigenous people and issues.

(6) Poverty tends to have a disproportionately severe effect on indigenous people. They tend to be among the poorest of the poor, the most vulnerable and the most deprived of the groups of society.

(7) Draft United Nations Declaration of the Rights of Indigenous Peoples, General 13-24 2004: That around the world indigenous people face widespread discrimination impoverishment and ill-health. Indigenous people are routinely excluded from decisions vital to their well-being and to the survival of their unique ways of life. Unjust and illegal dispossession of their lands and recourses have often severely undermined the health and livelihoods of indigenous peoples and eroded the foundation of their distinctive cultures.

(8) Convention 169, Convention concerning Indigenous and Tribal People in Independent Countries: articles 1, 2, 6 place certain obligations on governments parties to the convention and article 7(1) requires governments to allow indigenous peoples to participate in the foundation, implementation and evaluation of plans and programmes for national and requirement development which may affect them directly, and protection from abuse of their rights. (Article 2). Measures to give effect to the convention are to be taken in a flexible manner having regard to the conditions of each country.

(9) *Njoya & Others v Attorney General & Others* (2004) 194 per curriam Ringera J: the fundamental, principles according to which the Constitution must be interpreted are constitutionalism (limited government under the rule of law), equality of all citizens, the doctrine of separation of powers and the enjoyment of fundamental rights, none is inferior or superior to the other, none is supreme, the Constitution is supreme and they all bow to it; I would also include the thread that runs throughout the Constitution, the equality of all citizens, the principle of non-discrimination. It is the eye or prism through which issues concerning the Constitution should he seen, read and acted upon.

(10) *Reynolds v Simms* 377 US 533, 12 L Ed at 506 (cited in the *Njoya* case), writing for the majority, Chief Justice Warren, said of the equality of citizens at 527-528:

> Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities of economic interests. As long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and in unimpaired fashion is a bedrock of our political system. Weighing the votes of the citizens differently, by any method or means, merely

because of where they happen to reside hardly seems justifiable. One must be aware that the Constitution forbids "sophisticated as well as simple-minded modes of discrimination.

Then again at page 529, Warren Chief Justice wrote:

'Logically, in a society ostensibly grounded on representative government it would seem reasonable that a majority of the people of a state could elect a majority of the state's legislators. To conclude differently and to sanction minority control of state legislative bodies would appear to deny majority rights in a way that far surpasses any possible denial of minority rights and might otherwise be thought to result.'

The essence of Chief Justice Warren decision was as we understand it is that equality of citizenship calls for equality of the votes, to accord some votes greater weight than others for any reason, is discriminatory and offensive to the character of representative democracy, while there must be minority protection it should not lead to minority control of legislative bodies and thereby deny the majority of their rights and to underweight any citizen's vote is to degrade his citizenship.

Further commenting on the *Reynolds v Simms* (*supra*) decision Ringera said pages 215-216 of the *Njoya* case:

'The concepts of equality of before the law, citizens rights in a democratic state and of the fundamental norm of non-discrimination all call for equal weight for equal votes and the dictates that minorities should not be turned Into majorities in a decision making bodies of the state.

... that cannot however be the only consideration in a democratic society. The other considerations is that minorities of whatever tribe and shade are entitled to protection. And In the context of Constitution making it is to be remembered that the Constitution is being made for all, majorities and minorities alike and accordingly, the voice of a all should be heard.

Furthermore in a multi-ethnic society such as ours which is still struggling towards a sense of common nationality and unity of purpose, it is important that all tribes should participate In the process-making so that they can all own the constitution which will be the glue binding them together. It should also be borne in mind that justice is the foundation of peace. If in the making of a new Constitution some minorities feel that they have been denied political justice they will resent the Constitution and may if they could, thwart it by resort to arms.

Other factors which should not be ignored are the terrain and size of the various political units. Representation must be effective and it cannot be so if the representative has either too vast a territory to traverse or too many people to attend to, what is called for a society such a ours is a balance between majoritarian principle of one person one vote and the equally democratic dictates of minority accommodation in the democratic process.'

Lady Justice Kasango was of the same view in the *Njoya* case at page 235:

'Mr Ndubi was of the view that the issue of discrimination was a question of equity and equality, that to propose that the (then) selection of National Constitutional Conference delegates on the basis of one person one vote would itself promote inequity, yet equality was a value of justice, that to do justice there is need of equity between the powerful and the not powerful. If the process was to be based on numbers it would not bring equity to the citizens of Kenya The Court is inclined to accept these submissions of Mr Ndubi.'

Lady Justice Kasango went on to observe that even though on the face value there was discrimination on the number of delegates representing each province as argued by the applicants' advocates, said at page 235:

'We are of the firm view that the number of population per province cannot be the only criterion for deciding the number of delegates to represent each province.

> ... Kenya is a multiracial society, and when one considers that the Constitution is a permanent document it is necessary to ensure that those with less population in their province are not denied a say in the input of that document. If the criterion was numbers of population alone It would mean that the province with less population would be disadvantaged. What criterion should we use? ... As a nation we should remember that constitution making is not a fight where one would try to get a large number on his side in order to win. However as a nation involved in the most important task touching all our lives, we use a process that will lead to a well written constitution that will ensure good governance The Constitution of our nation ought to be broad, balanced and representative of the views of Kenyans. This representation cannot be based on numbers of population alone.'

In his judgment, Hon Mr Justice Kubo, although over all dissenting from the views held by Lady Justice Kasango, and Hon Mr Justice Ringera observed that section 3 of the Constitution of Kenya Review Act, (Cap 14 Laws of Kenya) giving the objects and purposes of the review was instructive. They included promoting and facilitating cooperation to ensure economic development, peace, and stability, to strengthen national integrity; ensuring the full participation of people in the management of public affairs, etc. And noting that section 5(b) which enjoined 'the organs of the review process was conducted so as to ensure that the review process accommodates the diversity of the Kenyan people including the socioeconomic status, race, ethnicity, gender, religious, faith, age, occupation, learning, persons with disabilities and the disadvantaged.'

Hon Justice Kubo said at page 256:

> The concept is not new. Section 42(3) of the Constitution dealing with constituencies provided for their boundaries to take into account not just population density but also population trends, means of communication, geographical features, community of interest and the boundaries of existing administrative areas and the periodical review of boundaries.
>
> The diversity of Kenya is a reality and cannot he ignored, The majoritarian principle espoused by the applicants as the only factor to inform boundary setting process ... cannot be the sole criterion in constituting districts or public bodies. It has to be. balanced with other principles, for example ...

Zola and Another v Ralli Brothers Limited & Another (1969) EA 691:

> For the proposition that any defendant or respondent who takes a passive attitude to an application and fails to answer it fully or at all do so at their own peril and they only have themselves to thank if their reticence results in the court taking an adverse view of their side of the case.

[**52.**] That was the case of the applicants and essentially also the submissions of their counsel, Mr Pheroze Nowrojee, It now remains for us to consider the respondents' case.

The respondents' case

The Attorney-General's case

[**53.**] In this case, the Attorney-General, the first respondent, failed to file any affidavit. Instead, the first respondent's response consisted merely of the memorandum of appearance dated 19 March 2004 and filed on 1 April 2004. Thereafter the first respondent failed to file any affidavit so that so far as the first respondent is concerned, there is no contest to the various contentions set out in the first applicant's (Lemeiguran's) affidavit. The first applicant's response

otherwise consisted. in the list authorities dated and filed on 10 May 2006. Those authorities were:

(1) The Constitution of Kenya

(2) *Kisay Investments Ltd v Attorney-General* (HCCC 2832 of 1990)

(3) *William K Chelashaw v Republic* (Nairobi misc criminal appeal 93 of 2003)

(4) *Paul Imison v Attorney-General* (Nairobi HC misc application 1604 of 2003)

We will refer to those cases as necessary in the latter passages of this judgment.

The case of the Electoral Commission of Kenya

[**54.**] The case of the Electoral Commission of Kenya, the second respondent was more robust. It comprised of

(1) A notice of preliminary objection dated 25 June 2004 and filed on 28 June 2004 on the grounds that the application is bad in law, application lacks merit In law and facts, the application is frivolous, vexatious and an abuse of the court process.

(2) The replying affidavit of Gabriel Mukele, the vice- chairman of the second respondent (ECK) sworn and filed on 11 August, 2004 (the Mukele affidavit).

(3) Further affidavit of Samuel Mutua Kivuitu was sworn and filed on 3 October, 2006. So far as the Mukele affidavit is concerned, the material paragraphs were 5, 6 and 7 thereof:

> 5. That in reply to paragraphs 4 of the affidavit of the first applicant, I deny that Il Chamus are a distinct community and that it numbers between 25 and 30 000 members and put the applicants to strict proof thereof.
>
> 6. That in reply to paragraphs 5, 6 and 7 of the said affidavit I state that the Il Chamus are a Masai clan in Kenya. There are thousands of clans in Kenya Representations cannot be based on clans.
>
> 7. In reply to paragraphs 8, 9 and 10 of the said affidavit, although the number of registered voters in Baringo Central constituency is about 48 000, the voters are not registered on the basis of the communities, if any. The applicants are put to strict proof that their community occupies certain wards exclusively and that the said community registered in those particular wards exclusively.

[**55.**] The further affidavit on behalf of the ECK. was sworn and filed on 3 October 2006 by the ECKs Chainnan, Samuel Mutua Kivuitu, and so far as is material to this judgment, the Chairman says on oath at paragraphs 11, 12 and 13 of his affidavit as follows:

(1) That section 42(3) of the Constitution confers to the ECK a broad discretion when creating or reviewing parliamentary constituencies and it does in fact take into account tribal or clan welfare as part of the community of interest but it has to be careful not to ignore population criterion and ill-effects of over stressing tribal or clan interests which are generally emotional (paragraph 13).

(2) That by 1999 population census the population of Baringo Central was assessed 199 152 and it covers an area of approximately 2 426 sq kms (paragraph 10).

(3) That according to information obtained and provided by the ECKs District Election Coordinator for Baringo District the total number of Il Chamus is 16 012 living with Samburus and Maasais in five administrative locations (paragraph 12).

(4) That the said ECKs District Election Coordinator for Baringo District has informed me that the Il Chamus share the same language with the Maasai (paragraph 12).

[**56.**] Mr Onsando and Ogonyi, learned counsel for the Electoral Commission of Kenya, relied upon the said affidavits of Mr Gabriel Mukele, the learned vice chairman of the Commission, and the further affidavit of Samuel Mutua Kivuitu the learned chairman of the said Commission.

[**57.**] In his submissions to us Mr Onsado firstly sought to clear the apparent contradiction between the averments in the chairman's and his vice -chairman's respective affidavits as to the identity of the Il Chamus where the latter averred in paragraph 14 of his affidavit that ethnic or tribal and indigenous community consideration are not part of the special interest criteria used by the second respondent in determining boundary issues, whereas the chairman in paragraph 13 (*supra*) says that under section 42(3) of the Constitution the Commission in reviewing parliamentary constituencies does in fact take into account tribal or clan welfare as part of community interest while not ignoring population criterion and the ill-effects of over-stressing tribal or clan interests.

[**58.**] As Mr Onsando learned counsel for the Commission stated that this was merely a preliminary point, it is perhaps in order of us to pronounce on the conflict between the averments of the commission and vice-chairman, and say that the question of clan, tribe and being a minority and an indigenous community is an important element in the definition of special interests. For even in the tribe there are specialties only a particular clan may have the attribute of being rain-makers and yet another to administer curses and oaths. They are aspects which define one community from another and indeed even one clan from another. It is the particular social-economic organisation, language and custom which defines one community as being distinct from the other. To say otherwise would be to ignore the reality of the face of Kenya, as the vice-chairman, appears to suggest in paragraph 14 of his affidavit.

[**59.**] Having disposed of that issue, Mr Onsando made a four pronged submission to the applicant's case *vis* -

(1) *Locus standi:* Mr Onsando' s submissions was that *vis-à-vis* section 84 of the Constitution, and the authority of the *Njoya* case (*supra*), the applicants had no *locus standi;*

(2) The role of the Electoral Commission of Kenya in relation to the determination of boundaries and creation constituencies;

(3) The role of the Electoral Commission in respect of the applicants; and

(4) The relevance of the authorities presented to the Court *vis-à-vis* the law on creation of constituencies.

Of *locus standi*

[**60.**] Mr Onsando noted that he had raised the issue of *locus standi* in the notice of preliminary objection dated 25 June 2005 and filed on 28 June 2005, and which matter had not been considered and ruled upon. It must however be restated as it was observed in the *Njoya* case at page 216, that although those cases were decided at the time when few Kenyans were brave enough to fight for democratic space, the language of section 84(1) of the Constitution admits of no representative action except for a detained person, every other complainant of an alleged contravention of fundamental rights must relate the contravention of such right to himself as a person, indeed the entire Chapter V of the Constitution is headed 'Protection of fundamental rights and freedoms of the individual.'

[**61.**] There is, however, nothing in our view to prevent an individual or a group of individuals with a common grievance, alleging in one suit that their individual fundamental rights and freedoms under section 70 and 83 inclusive of the Constitution have been infringed in relation to each one of them, and to them collectively. In this case the applicants are also not restricted to a person, to seek a declaration that each and every one of them, and their community represent or constitute a special interest in terms of section 33 of the Constitution. Hence it would be a violation of the right to self expression under section 79 of the Constitution if either applicant were denied a right to be heard whether individually or in turns, or chose to express themselves through one representative. The applicants individually, like a corporation, have *locus standi* to bring this application.

Of the role of the Electoral Commission of Kenya under section 42(2) of the Constitution

[**62.**] To understand the role of the Electoral Commission of Kenya, it is essential to state that the Commission is a creature of the Constitution of Kenya under section 41. It is comprised of a chairman and not less than four and not more than 21 members appointed by the President. The Commission itself elects a vice-chairman. In the exercise of its functions under the Constitution the Commission is not subject to the direction of any other person or authority subject only as Parliament may provide for the orderly and effective conduct of operations and business of the Commission and for the powers of the Commission to appoint staff and establish committees and regulate their procedure. Any decision of the Commission is required to be made with concurrence of a majority of all its members. That is provided for in section 41(4), (10) and (11) of the Constitution.

[**63.**] Section 42(1) of the Constitution provides that Kenya shall be divided into such number of constituencies having such boundaries and names as may be prescribed by order made by the Electoral

Commission. Under section 43(2) Kenya is currently divided into a minimum of 188 constituencies, and the maximum of 210. Section 42(3) provides:

> All constituencies shall contain a nearly equal numbers of inhabitants as appears to the Commission to be reasonably practicable but the Commission may depart from this principle to the extent that it considers expedient in order to take account of (a) the density of population, and in particular the need to ensure adequate representation of urban and sparsely populated rural areas; (b) population trends; (c) the means of communications; (d) geographical features; (e) community of interest; and (f) the boundaries of existing administrative areas; and, for the purpose of this subsection, the number of inhabitants of any part of Kenya shall he ascertained by reference to the latest census of the population held in pursuance of any law.

[**64.**] Section 42(4) empowers the Commission at intervals of not less than eight years and not less than ten years and whenever directed by Parliament, to review the number, the boundaries and the names of the constituencies into which Kenya is divided, and may, by order, alter the number, the boundaries or the names, subject to and in accordance with this section, to the extent that i considers desirable in the light of the review.

[**65.**] Under section 42(5) it is provided that whenever the census of the population has been held in pursuance of any law, or whenever a variation has been made in the boundary of an existing administrative area, the Commission may carry out a review and make alterations to the extent which it considers desirable in consequence of that census or variation.

[**66.**] The other functions of the Commission are set out in section 42A – registration of voters and maintenance and revision of the register of voters, directing and supervising presidential, National Assembly and local government elections, promoting free and fair elections, promoting voter education throughout Kenya and such other functions a may be prescribed by law.

[**67.**] The other important and constitutional functions of the Electoral Commission of Kenya are set out in section 33 of the Constitution, and are as follows:

> (1) Subject to this section there shall be twelve nominated members of the National Assembly appointed by the President following a general election, to represent special interests.
>
> (2) The persons to be appointed shall be persons who, if they had been nominated for a parliamentary election would be qualified to be elected as members of the National Assembly.
>
> (3) The persons to be nominated shall be nominated by the parliamentary parties according to the proportion of every parliamentary party in the National Assembly, taking into account the principle of gender equality.
>
> (4) The proportion under subsection (3) shall be determined by the Electoral Commission after every general election and shall be signified by the Chairman of the Commission to the leaders of the concerned parliamentary parties, the President and the Speaker.

(5) The names of the nominees of parliamentary parties shall be forwarded to the President through the Electoral Commission who shall ensure observance of the principle of gender equality in the nominations.

[**68.**] Unless and until Parliament defines other roles for the Commission, the Commission is bound and mandated to carry out its functions in accordance with the provisions of sections 41(10), 42(3) and 42(A) and section 33(4) and(5) without the direction of any person or authority (Section 41(9) of the Constitution.

So how does the Commission go about ensuring that there are an equal number of inhabitants in every constituency?

[**69.**] According to submissions of Onsando, and by letter dated 18 November 2004, the Electoral Commission of Kenya engaged all registered political parties (and not merely parliamentary parties as would be required under section 33 of the Constitution), on the review of parliamentary constituencies under section 42(3).

[**70.**] That letter was an excellent effort by the second respondent to define the criteria for both the creation and distribution of additional constituencies in terms of section 42(2) of the Constitution. According to the Commission's proposals to the registered political parties inclusive of parliamentary parties, the most equitable way of achieving an equal number of inhabitants in every constituency is to ascertain the total population at the end of review of boundaries every ten years, following a population census over the same period of time and to divide the total population by the number of available or prescribed constituencies, and thereby establishing the optimum number of inhabitants in every constituency.

[**71.**] Similarly to obtain the optimum area to be occupied by each constituency, the total area of the country is taken and divided by the total population at the end of the circle of review and population census after every said ten years.

[**72.**] For instance applying the population of Kenya 28 656 607 after population census carried out in 1999, the increase over the population of 21 448 774 in 1989, when the number of Members of Parliament was 188, the percentage increase would be 34 % which if multiplied by the same number of members of Parliament would work at 34% x 188 = 64.92, or 64 new or additional members of Parliament. In our case since the number of constituencies was increased by 42 in 1996, that is before the ten year cycle, and unless Parliament decided otherwise, the number of new constituencies would be 64, less by 22 already created. It would thus mean that only 42 new constituencies would be created.

[**73.**] To distribute such new constituencies, the Commission again, quite sensibly we agree with Mr Onsando's submission applied the average population divided by the number of current constituencies,

so that the current constituency quotient would be the population divided by the number of constituencies to find or establish the average number of inhabitants in every constituency, ie 28 886 607 divided by 210 = 137 555 inhabitants per constituency.

[**74.**] If Parliament were to enact a law increasing the total numbers of member of Parliament by 42, the total number of members would increase to 252, which number if applied to divide the population per the last census (of 1999) of 28 886 607 would be 28 886 607 divided by 252 = 114 630 inhabitants per constituency.

[**75.**] If this formula were applied, only a few city and major municipalities would qualify in terms of population to have an equal number of inhabitants per constituency, and perhaps with this group would fall a few other peri-urban centres, mostly around the city of Nairobi, Nakuru, Kisumu, Mombasa and Eldoret. These areas would take the majority of the new seats. This would clearly be inequitable. So other criteria would need to be applied.

[**76.**] The deviation away from the population would take into account both the area of the country, divided by the number of constituencies 210 (without the increase ie 581 677 sq kms: 210 = 2 770 sq kms per each constituency, or if the number of constituencies were increased if approved by Parliament to 252 = 2 304 sq kms per constituency.) Either way, only constituencies with large areas and sparse populations would qualify in terms of an average area for every constituency, but would fall below the national optimal average of population per constituency, and so would the urban constituency in terms of average area of a constituency. So what is the solution? The solution lies in the deviation from the population principle to the equally important, and not in any way subordinate or implied but express constitutional principles permitting the Commission under section 42(3) to depart from the principle of equality of number in every constituency to the extent that it considers expedient in order to take account of:

> (a) density of population, and in particular the need to ensure adequate representation of urban and sparsely populated rural areas; (b) population trends; (c) means of communication; (d) geographical features; (e) community of interest, and (f) boundaries of existing administrative areas by reference to the latest population census.

[**77.**] In the case in point, the Il Chamus community occupy an area of approximately 1 500 sq kms out of the total area of 2 426 sq kms occupied by Baringo Central constituency, or just over one half of the constituency, the area is semi-arid, it is prone to banditry, and because of aridity, the population is semi-nomadic, pastoralist.

[**78.**] In terms therefore of the national average area of every constituency, of 2 770 sq kms only 48 constituencies attain that average, and 162 of the 210 constituencies are well below that average.

[**79.**] For instance taking Baringo Central with a population of 119 233, but with an area of 2 436 sq kms is less than the national average. Ijara constituency 33 bordering the Tana river, a national reserve and Boni national reserves an area of over 6 348 sq kms is not only large but also sparsely populated in the middle of a wildlife sanctuary.

[**80.**] Saboti constituency 115 with a population of 269 000 but an area of 741 well below the national average, Kuria constituency 200 which borders Tanzania to the south of the country with an area of 581 sq kms, but a population of 151 887 has its own constituency because it is a distinct community in the midst of the large Luo-Suba populations and the Maasai Mara district with large areas.

[**81.**] With this kind of diversity we cannot say the Electoral Commission of Kenya has acted unreasonably in the past or has failed badly either. More so because of the absence of other criteria balancing the requirements of section 42(3) of the Constitution.

[**82.**] The suggestion by the Commission in its letter of 18 November 2004 to the political parties for the basis of increase of constituencies is a good beginning for the creation and distribution of new constituencies if created between the urban and rural areas of the Republic.

[**83.**] The driving force to behind this formula for creation and distribution of new constituencies is still skewed in favour of numerical strength. This obsession with numbers is neither realistic nor feasible because the arid and semi-arid areas with their sparse population will always be part of the Republic. On the numbers alone, it is clear that only about 48 out of the 210 current constituencies meet the minimum area of 2 770 sq kms per constituency. Equally the few constituencies which meet the mean average of 113 396 inhabitants per constituency would not meet the requirement of the average of area of representation. The Electoral Commission has therefore to give effect to the provisions of section 42(3) of the Constitution, a broader interpretation than merely numbers, whether of inhabitants or areas they occupy. Because of better infrastructure, roads, education, and health facilities, the urban populations will always increase more rapidly than rural areas, more so those like where the applicants hail from where similar facilities are yet to be so developed, and life is itself precarious. For that reason the case for the applicants to be considered for effective and adequate representation becomes even more urgent. The issue is neither population numbers, nor as Mr Onsando, learned counsel for the second respondent submitted and indeed the Commission's Vice-Chairman suggested, clanism or tribalism.

[**84.**] To suggest any of these epithets and attach them to the applicants is to totally to misapprehend the concept of republicanism

as is enshrined in section 1 of the Constitution of Kenya. It is also to totally misapprehend the constitutional duty and obligation imposed upon the Commission under section 42(3) of the Constitution in the review of constituencies to depart from the equality of numbers, and objectively consider the other criteria, in section 42(3)(a)-(e) as stated above.

[**85.**] To say and rely on numbers merely is also to fail and misapprehend the applicants' case and the role of the Commission, and of the parliamentary political parties under section 33 of the Constitution.

[**86.**] It is applicant's case that the applicants themselves and their community the Il Chamus are a distinct and separate community from their surrounding neighbours and compatriots the Tugen and Pokot in Baringo District. They speak the 'Maa' languaue like the Samburu to their north and Laikipia Maasai to their east, but they are not either a clan or Maasai tribe. The applicants and their communitv are the Il Chamus according to their perhaps close cousins the Maasai, the 'people who see far tob the future'. They say that they are an indigenous and a minority protected under the various instruments in international law. From the point of view of an indigenous and a minority people the applicants claim that their quest for representation as 'a special interest' group is a matter of consideration both under section 1A and section 33 of the Constitution by parliamentary political parties.

[**87.**] In Canada, unlike Kenya which has scattered minorities like the Eskimos and other indigenous peoples of North America, referred to as the Red Indians, there is Electoral Boundaries Readjustment Act, 1985.

[**88.**] This Act echoes what the provisions of section 42(3) of our Constitution provides, equality of inhabitants in every constituency, in accordance with the number of seats allocated to each province of Canada, and no constituency is permitted by law to have a population smaller than 75% of the allocated figure or greater than 125%. The electoral commissions of the provinces are permitted to vary the size of the constituencies within the range on the basis of 'special geographic considerations, and density of population in various regions of the province and the accessibility, size and shape of such regions variations are allowed if any special community or diversity of interests of the inhabitants of various regions' appears to warrant them.

[**89.**] The Commission itself observes that a look at the guidelines under the Electoral Boundaries Act (of Canada) makes it clear that 'readjustment exercise is not simply a mathematical computation but, rather, a delicate balancing act that must take into account human interests as well as geographic characteristics'.

[**90.**] So in fixing electoral districts or in our case, constituency boundaries, the Commission must take into account the of interest or community of identity or the historical pattern of an electoral district (constituency) and a manageable geographic size of electoral constituencies on sparsely populated rural and indeed in our case in northern and north western districts of Kenya.

[**91.**] To accommodate those human and geographic factors, the Commission is constitutionally mandated to deviate from the average population figure when setting their boundaries. In Canada, while generally restricted to a quotient of 25 % or less, a commission may exceed this but 'in circumstances viewed by the Commission as being extraordinary.'

[**92.**] So what are the issues here? Firstly, the applicants plead that they, as a distinct indigenous and minority group in a district dominated by the populous Tugen and Pokot on either side, whose language, culture, and customs are different from theirs are a special interest group in terms of section 33 of the Constitution.

[**93.**] Secondly, the applicants have urged that in considering the creation of boundaries under section 42(3) of the Constitution the majoritarian or population principle is not the only, or indeed the dominant criterion for the creation or distribution of new constituencies. The other criteria, the density of population, and in particular the need to ensure adequate representation of urban and sparsely populated rural areas; population trends, the means of communication, geographic features community of interest and the boundaries of existing administrative areas are equally important. These are the same criteria which the first Commission on Delimitation of Constituency Boundaries, used in 1963 on the eve of Kenya's Independence from Britain. Population alone, though the principal criterion, cannot have more weight than the other criteria combined. The other criteria are all co-equal, one dovetails into the other. Like we stated elsewhere in the course of this judgment, to say otherwise would be to fly into the face of Kenya. The rural constituencies speak for themselves, and so do urban constituencies.

[**94.**] What then is our answer to the applicants' case? We set out in the subsequent passages of this judgment our view of the requirements of section 33 and section 42(3) of the Constitution, in relation to minorities and indigenous people, and special interests, the role and obligations of the Electoral Commission of Kenya, the concept of republicanism and democracy as is envisaged in section 1 of the Constitution, the mandate of the Commission and the role of parliamentary parties as is envisaged in section 1A in conjunction with section 33 and 42 of the Constitution. Thereafter we will draw our conclusions, and final recommendations.

Of minorities and indigenous people

[**95.**] On the basis of the evidence presented to this court which included books and articles written on the Il Chamus we find their description by the ECK as a sub-clan of the Maasai extremely casual and unfortunate. Their description by the ECK as a sub-tribe goes against historical evidence and even the ECK census records. We find that the evidence they have presented to this court sufficiently points to a unique cohesive homogenous and a cultural distinct minority which is also quite conspicuous by any standards. The literature presented to us demonstrates exceptional solidarity in preserving their culture. In addition they proudly have all the attributes of the internationally recognised indigenous peoples.

[**96.**] To reinforce the above, we adopt the definition of minority proposed by the UN Special Rapporteur Fransesco Capotorti in the context of article 27 of the International Covenant on Civil and Political Rights (CCPR) in the following words:

> A group numerically inferior to the rest of the population of a state, and in a non- dominant position whose members — being nationals of the state — possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions religions and language.

[**97.**] An equally eloquent definition is that of Jubs Deschenes also recommended to the UN in 1985, (Doc E/CN.4/Sub./1985/31)as follows:

> A group of citizens of a state, constituting a numerical minority and in a non dominant position in that state, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population having a sense of solidarity with one another, motivated, If only implicitly, by a collective will to survive and whose aim is to achieve equality with the majority in fact and in law.

[**98.**] We find that the Il Chamus do qualify as indigenous people under both definitions. We must however add that the above definitions are deficient in one aspect, and that is confining the definitions to citizens. Minorities under modem and forward looking jurisprudence should include non-citizens as well. In this we believe we have the support of UN general [comment] 23 at the 50th session, 1994, paragraph 5.1 which clearly states that article 27 should not be confined to citizens only. Paragraph 5.2 of the Human Rights [Committee] general comment 23 referred to above has added what we consider most relevant to the mater before us in these words:

> the existence of an ethnic religious or linguistic minority in a given state party does not depend upon a decision by the state party but requires to be established by objective criteria.

[**99.**] On the contrary in this case the ECK has come up with a sub-clan description of the applicants without any credible evidence to support their argument and as stated above they have taken a position that has no historical or any factual basis on the ground. In fact the ECK was so casual on the issue as to rely on a fax description

by an electoral officer! Yet they should under the Constitution and in order to discharge their constitutional mandate have come up with an objective criteria. There is nothing to demonstrate or show that the ECK did consider the applicants minority status. Instead they said that the applicants were advocating tribalism.

[**100.**] Surely, a constitutional classification should not be seen in tribal lens but such a classification should be undertaken and aimed at the furtherance of the rights of minorities to exist, to be treated without discrimination to the preservation of their cultural identity and to their participation in public life. All these rights and values may not be expressly provided under sections 33 and 42 of the Constitution but they are rights and values recognised by our Constitution. For example s 1A makes Kenya a democratic and multiparty democracy. The above rights and values are in our view covered by the section. Similarly the principle of non discrimination has the pride of place in section 82 of the Constitution, the right of association and assembly under s 80 the rights of expression under s 79, the right of conscience under s 78. In interpreting the rights and freedoms, the Constitution should be read as a whole and it is not right for the ECK to have lamented that their scope only extends to s 33 and 42 of the Constitution. We would like to declare and hold that constitutional rights and especially human rights and freedoms are interdependent and indivisible and their interplay has to be fully reflected in the electoral process and in every field allocated power by the Constitution. The Constitution job holders have a Constitutional mandate to embrace their responsibilities with the above in view while discharging their mandate.

[**101.**] The minorities and indigenous people include the following:

- Religious minorities
- Ethnic minorities
- Linguistic minorities
- Indigenous peoples

[**102.**] The indigenous peoples contrary to ECK's counsel contention that all the 42 Kenyan tribes are indigenous is contrasted with the indigenous ones having a strong attachment to their culture as opposed to the homogenous ones who have adopted to change with very little attachment to the old ways. The other distinguishing trait is that the indigenous ones are generally minorities.

Minorities and special interest

[**103.**] Section 33(1) of the Kenya Constitution states: 'there shall be twelve nominated members of the National Assembly appointed by the President following a general election to represent special interests'.

[**104.**] Although the Constitution does not define special interests contemplated by section 33(1), it includes those interests which have not been taken care of by the election process and which are vital to the effectiveness of the democratic elections in terms of adequate representation for all in a democracy. In other words the special interests mean those interests which the normal electioneering process has failed to capture and represent. Thus a constituency which is otherwise well represented by a representative and has a distinguishable minority who cannot on their own make any difference to the outcome of the election has obviously a special interest in the minority. It is a democratic principle that the minorities should be fully embraced to enable them to become a majority. It is also a vital interest in terms of democracy to protect their rights so that they are never ever overwhelmed by the majority. The minorities' empowerment to participate fully in the entire democratic process and the organs of a democratic society achieves even greater integration in terms of vision, programmes and goals whereas on the contrary denying them participation leads to isolation.

[**105.**] Recognition of the indigenous peoples' right is expressed in unequivocal terms in international Instruments.

ILO 169 Indigenous Tribal Peoples Convention articles 3 and 7 provides:

> Article 3
>
> Indigenous and tribal peoples shall enjoy the full measure of human rightc and fundamental freedoms without hindrance or discrimination. The provisions of the Convention .shall he applied without discrimination to male and female members of these peoples.
>
> Article 7
>
> The peoples concerned shall have the right to decide their priorities for the process of development as it affect their lives, beliefs, institutions and spiritual wellbeing and the lands they occupy or otherwise use, and to exercise control to the extent possible, over their economic development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.

And the African Charter on Human and Peoples' Rights articles 19 and 22 declare:

> Article 19
>
> All peoples shall be equal they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.
> Article 22
>
> (1) All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.
>
> (2) States. shall have the duty, individually or collectively to ensure the exercise of the right to development.

[**106.**] Counsel for the ECK Mr Osando has strongly argued that the case for the applicants is that of tribalising the electoral process. We

do not agree. At this time and age even members of the majority communities who are concerned about democracy, long term equity, stability and peace readily accept, that the advancement of all these values largely depend on how the governmental system handles the rights of minorities. It is an issue of justice because the aforesaid values constitute the foundation of justice. All civilized systems of governance must perpetually open all doors to justice.

[**107.**] The other reason why we were alarmed when the ECK sees the issue from tribal lens is that while the majoritarian view must be given top priority even in the allocation of constituencies (as the population is the major criterion) an enlightened society such as ours must recognise the difference and diversities of our nation and therefore encourage integration or mutual accommodation between minority and majority. One would have expected the ECK to have appreciated that it has a constitutional role in the electoral process to consider the minority interests and indigenous peoples participation without undermining the common values and loyalties that are essential to a cohesive society and a solid nationhood. The cornerstone of nationhood is the ability to achieve cohesiveness in diversity. Fair treatment of minorities is essential to social peace and stability. Special measures to accommodate minorities provide cultural diversity from within, thereby enriching the wider society. The diversity in turn challenges the dominant ideas and values of society. We take the view that this nation is a rainbow democracy of 42 colours and the argument that special recognition of the minority will open the floodgates of minorities is in our view misplaced. The nomination for example of 15 members of Parliament from the minorities can only enrich our democracy and give strength to our diversity by providing the necessary linkages. Any floodgates would be floodgates of inclusion not exclusion. In any event as indicated elsewhere by the Human Rights Committee each case of a minority would have to satisfy an objective criteria and this counters the floodgate argument.

[**108.**] It is in the light of the above that we hold that minorities such as the Il Chamus have the right to influence the formulation and implementation of public policy, and to be represented by people belonging to the same social cultural and economic context as themselves. This holding has the backing of the African Charter and other instruments and also s 1A of the Constitution especially taking into account that ours is a one chamber Parliament. We further hold that for a political system to be truly democratic, it has to allow minorities a voice of their own, to articulate their distinct concerns and seek redress and thereby lay a sure base for deliberative democracy. Only then would a state or nation such as ours, truly claim to have passed the democratic audit test as set out elsewhere in this judgment. We find and hold that this is the spirit of section 1A of the Constitution. This is what will bring out eloquently as possible

the values and principles contemplated and captured by s 1A of our constitution.

[**109.**] With due respect, in this matter we have formed the view that the ECK has not fully grasped its constitutional role. ECK has viewed the Il Chamus claim to representation as a. tribal or clan claim. It is not and the Constitution does support their claim. Their claim stems on special interest as a minority under s 33 of the Constitution and as embraced by the community of interest criterion under section 42 and also as that of an indigenous and distinct community and on the additional ground of inadequate representation. In a democracy such as ours, representation must of necessity be a major instrument for participation that should enable the voice of a minority group to he heard in official bodies. Participation is the lifeline of democracy.

[**110.**] In our view the process of electing representatives has a mobilising effect on a minority and if the election is properly conducted and they fully believe in it, it reinforces or strengthens their identity and corporate character. To illustrate this point had the ECK come up with proper constitutional criteria on nomination that identifies the minorities as one of the special interests and availed it to the political parties the political parties would have by now have taken interest in the issue of minorities and they could have nominated from, amongst the minorities including the Il Chamus. The reverse process would also have taken root, ie the minorities could have seen the party system as an effective tool of representation and the minorities could have identified with a party or parties. The absence of clear constitutional criteria guidelines has greatly contributed to lack of understanding by those who have the power to nominate disregarding or overlooking special interests. The ECK itself appears to have taken a very narrow view of its role both under s 33 and s 42 of the Constitution and we are compelled to so declare pursuant to the powers conferred on this Court under s 123 of the Constitution. During the hearing for example the ECK has not demonstrated clarity of thought as regards its role. On the other hand the applicants were able to demonstrate that in the history of nominations under s 33 it is only the blind who were represented in one of the terms of Parliament. No doubt, each age will have its fair share of minorities and special interest groups but in our time they include the blind, the deaf, the physically disabled and the youth in addition to the groups identified earlier. We hold that the ECK has a responsibility of identifying all the categories and to ensure that the lists reach the political parties and other organs with the power to appoint under s 33. In our view the current position of letting the parties nominate a candidate of their choice who does not satisfy the constitutional criterion is in our view challengeable and patently unconstitutional. The criteria guidelines would have created incentives for political parties to reach out in terms of appeal to all communities including minorities. Similarly where the ECK

deliberately demarcates the constituencies or curves them in a manner that creates a voiceless minority vote — a larger Parliamentary constituency is also equally unconstitutional. Similarly ignoring the criterion of community of interest when undertaking its task and only taking it into account some of the communities in a particular district or constituency is equally unconstitutional.

[**111.**] Representation is a clear constitutional recognition of a positive right of the minority — to participate in the state's political process and to influence state policies. [ILO Convention] 169 has said it all in the following words:

> Recognising the aspiration of these peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identity languages and religions within the framework of the states in which they live.

[**112.**] We would now wish to turn to the position as handled by others including the relevant case law. Here at home we start with that great judgment of Ringera J in the *Njoya* case. Perhaps we should take the earliest opportunity to respectfully declare that we do not agree with the Judge on his definition of the word 'person' in the Constitution. Instead we endorse the definition in terms of s 123 of the Constitution which gives standing to corporate and unincorporated associations in respect of the enforcement of some fundamental rights and freedoms and we did demonstrate this departure from *Njoya* in our earlier ruling on *locus standi* or standing in this matter. The second aspect where we part ways with the Ringera judgment is on his view on combination of constitutional and judicial review applications. As the main application in the case was a constitutional application in our view even judicial review issues ought to have been ventilated under the umbrella of the constitutional application which should never be fettered under s 84. In addition and by way of analogy there is an expressed although somewhat limited judicial review jurisdiction, both in civil and criminal matters over subordinate courts under s 65(2) of the Constitution. Having observed as above we wish to endorse the illuminating statement, in the Ringera judgment in the *Njoya* case appearing at page 206 (letters f to g):

> And what are those values and principles. I would rank constitutionalism as the most important. The concept of constitutionalism betokens limited government under the rule of law. Every organ of government has limited powers, none is inferior or superior to the other; none Is supreme; the Constitution is supreme and they all bow to it. I would also include the thread that runs throughout the Constitution — the equality of all citizens, the principle of non-discrimination. The doctrine of separation of powers is another value of the Constitution. And so is the enjoyment of fundamental rights and freedoms. Those to my mind are the values and the principles of the Constitution to which a court must constantly fix its eyes when interpreting the Constitution.

[**113.**] In adopting or taking a broad and purposeful approach to the interpretation of the Constitution, Justice Ringera did give sections 1, 1A and 3 of the Constitution wider meaning than the brevity of the

words used namely sovereignty and democracy. In these sections of the Constitution he located the constituent power of the people in these memorable words at page 210:

> In a democracy and Kenya is one, the people are sovereign. The sovereignty of the Republic is the sovereignty of its people. The Republic is its people not its mountains, rivers, plains, its flora and fauna or other things and resources within its territory.

[**114.**] Again at page 214 the learned Judge made the following finding:

> the principle of equality of citizens which is implied In a multiparty democratic state (and Kenya is proclaimed as such in article 1A of the Constitution) was not honoured and accordingly the representation of provinces and districts was blatantly discriminatory.

[**115.**] It is also apt for us to reproduce here Justice Ringera's endorsement and our approval of the following holdings and observations of Chief Justice Warren in the United States case of *Reytons v Simms* 377 US 53312, led at pages 506 and 509:

> Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests. As long as ours is a representative form of government: and our legislature are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system. Weighting the votes of citizens differently, by any method or means merely because of where they happen to reside hardly seems justifiable. One must be ever aware that the Constitution forbids sophisticated as well as simple minded modes of discrimination ...
>
> Logically, in a society ostensibly grounded on representative government, it would seem reasonable that a majority of the people of a state could elect a majority of the states legislators. To conclude differently and to sanction minority control of state legislative bodies would appear to deny majority rights in a way that far surpasses any possible denial of minority rights that might otherwise be thought to result.

[**116.**] We fully endorse the observation in the *Njoya* çase that to underweigh any citizens vote is to degrade his citizenship and that minorities of whatever hue and shade are entitled to protection and that representation must be effective. And that what is called for in our society is a balance between the majoritarian principle of one person one vote and the equally democratic dictates of minority accommodation in the democratic process. Naturally the predominant principle of application should be majoritariasm, but it is equally correct that accommodating minorities does not entail reversing the democratic equation by having minority dominance in representative forums. Indeed, the Il Chamus are not asking for dominance but for effective representation.

[**117.**] In other words, the Il Chamus seek adequate representation. This cannot be a threat to any of the cherished values of any democracy. On the contrary it adds value and gives true meaning to the democratic ideals.

[**118.**] In our view the ECK in its narrow interpretation has failed to explain or to grasp the true meaning of concepts such as community of interest and adequate representation. As a result they have failed to give proper weight to these factors in determining whether or not to give them a constituency. It has strongly argued that the ECK has in the past curved constituencies in the district on the basis of community of interest and the population criterion and left the Il Chamus. This, in our view violates the principle of equality since the same criteria should have been uniformly applied. The ECK did not counter this in its reply.

[**119.**] The Constitution does not define or fetter the power of ECK to depart from the population criterion and it has set out the criteria for departure. The criteria of adequate representation and the community of interest would in our view justify reasonable departure from the population criterion since the size of the contested area is above average for the area in question. We hold that the narrow view taken by the ECK does not create and enhance the democratic space in terms of adequate and effective representation and we further hold that this spirit is evident in s 1A, 33 and 42 of the Constitution. We have endeavoured we hope to inject both flesh and spirit to the sections, in the interpretation we have embraced in this judgment. In our view any representation that does not fully articulate the community of interest corporate character and distinct character of Il Chamus, would be inadequate. Their needs and aspirations to be represented taking into account that ours is a one chamber Parliament. Effective or adequate representation is that which minimises or eliminates their marginalisation in the spirit of sections 1A and 42 of the Constitution.

Constitutional interpretation

[**120.**] In this country the preferred method of the interpretation of the constitution is the generous and purposeful approach. However the application of this approach to the concrete situations that come before constitutional courts is not an easy task. If the courts do not find the task that easy, it seems evident in this case that some of tie constitutional organs and constitutional job holders hardly go beyond the letter of the Constitution. The task before us is based on the contention that the Electoral Commission of Kenya (ECK) has failed to properly discharge its constitutional responsibilities by misinterpreting or failing to properly understand its constitutional role under s 1A, s 33 and s 42 of the Kenya Constitution as they affect the applicants as representatives of the Il Chamus who constitute a minority group, and/or are a community of interests and are a special interest as an indigenous people. It is alleged that the ECK has given too much weight to the equality of population criterion in the establishment of electoral constituencies in the district at the expense of the other constitutional factors and as regards nomination

of members of Parliament to represent special interests the ECK has failed to grasp its role, in terms of ensuring that parties who nominate under section 33 do use the constitutional criterion of special interest. As a guide we shall use the principle of constitutional interpretation in these cases:

[**121.**] *The State v T Makwanyane and Machunu*, Chaskalson P, CCT, South Africa:

> Public opinion may have some relevance to the enquiry, but in itself is no substitute for the duty vested in the courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be the decision there would be no need for constitutional adjudication. The protection of rights could then be left to Parliament, which has a mandate from the public and is answerable to the public for the way its mandate is exercised, but this would be a return to parliamentary sovereignty and a retreat from the new legal order established by the 1993 Constitution. By the same token the issue of the constitutionality of capital punishment cannot be referred to a referendum in which the majority view would prevail over the wishes of any minority. The very reason for establishing the new legal order and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalised people of our society. It is only if there is a willingness to protect the worst and the weakest amongst us, that all of us can be secure that our own rights will be protected.

Boyce & Anor v R (Barbados) (2004) UKPC 32 07 July 2004, Lord Hoffmann:

> Parts of the Constitution, and in particular the fundamental rights provisions of Chapter III are expressed in general and abstract terms which invite the participation of the judiciary in giving them sufficient flesh to answer concrete questions. The framers of the Constitution would have been aware that they were invoking concepts of liberty such as free speech, fair trials and freedoms from cruel punishments which went hack to the enlightenment and beyond. And they would have been aware that sometimes the practical expression of these concepts, what limits on free speech are acceptable, what counts as a fair trial, what is a cruel punishment had been different in the past and might again he different in the future. But whether they entertained these thoughts or not, the terms in which these provisions of the Constitution are expressed necessarily co-opts future generations of judges to the enterprise of giving life to the abstract statements of fundamental rights.
>
> The judges are the mediators between the high generalities of the constitutional text and the messy detail of their application to concrete problems. And the judges in giving body and substance to fundamental rights will naturally he guided by what are thought to be the requirements of a just society in their own time. In so doing they are not performing a legislative function. They are not doing work of repair by bringing an obsolete text up to date. On the contrary, they tire applying the language of these provisions of the constitution according to their true meaning. The text is a 'living instrument' when the terms in which it is expressed in their constitutional context invite and require periodic re-examination of its application to contemporary life.

Reyes v the Queen (2002) 2 AC 235, Lord Binghan of Cornhill:

> Decided cases around the world have given valuable guidance on the proper approach of the courts to the task of constitutional

> interpretation. It is unnecessary to cite these authorities at length because the principles are clear. As in the case of any other instrument, the court must begin its task of constitutional interpretation by carefully considering the language used in the Constitution. But it does not treat the language of the Constitution as if it were found in a will or a deed or a charterparty. A generous and purposive interpretation is to he given to constitutional provisions protecting human rights. The court has no licence to read its own predilections and moral values into the Constitution, but it is required to consider the substance of the fundamental right at issue and ensure contemporary protection of that right in the light of evolving standards of decency that mark the progress of a maturing society.

[**122.**] If we may add our own — the dry bones-approach to the interpretation is to be tolerated only where it is evidently and crystal clear that the framers intended to retain the frames only. Otherwise it is the task of the court in each generation to give flesh and spirit to the bones. Section 1 A on democracy has flesh and spirit.

[**123.**] Ours is an endeavour to give flesh and to breathe in a positive spirit into this democratic provision of our country's Constitution.

Democracy and its meaning

[**124.**] We have carefully studied the affidavits sworn by Gabriel Mukele, the vice-chairman of ECK and Mr SM Kivuitu, chairman of ECK, in opposition to the originating summons. In this regard, we have taken the contents of the affidavits as ECK's answer to the points raised by the applicants and a written explanation of how they have interpreted their constitutional role. We have also taken into account the letter dated 18 November 2004 written to the political parties by ECK at a meeting convened for the purpose of discussing the increase of constituencies in the county. The letter is a revelation of the factors the ECK has considered important for the purpose of undertaking its constitutional task or duties. Thus, it has highlighted in the letter the overriding consideration of achieving population equality in the constituencies and it has come up with the population quotient of 136 603 people and the average size of a constituency as 2 770 sq kilometers 162 constituencies are below the average population and 115 constituencies are below the avenge size. The ECK has also mentioned the other constitutional factors that are set out in s 42. It has also quite rightly touched on the practice in other countries and in particular Canada. However in both the affidavits and that important letter there is no mention of section 33 concerning the nomination of members on the stated constitutional criterion of special interest nor has the ECK defined what special interest means. Even as regard s 33 the ECK seems to take the view that its role is to ensure gender equality only otherwise it has to rubberstamp the nominee of the parliamentary political parties by automatically forwarding their names to the President for appointment.

[**125.**] However since the challenge to the ECK is based on the meaning of democracy and the role of minorities whether or not the ECK has acted in breach of the equal protection provision in the Constitution namely s 70, whether it has violated the applicants rights under s 80 (freedom of conscience) s 79 (freedom of expression), whether it has property considered what adequate and effective representation means; and whether its practice in the past is an acceptable democratic practice as envisaged in s 1A of the Constitution, we consider it important to define what democracy entails under s 1A of the Constitution.

[**126.**] Writing on *Political legitimacy and the state*, R Barker (1990) pp 141-143 has observed:

> It is difficult to determine in any precise way the contribution of elections to the maintenance of legitimacy. By comparing the history of Northern Ireland with that of the rest of the United Kingdom it is clear that the mere fact of elections is not sufficient. If the result is never in any doubt, so that it is not 'the people' but always and only a section and that the same section of them which confers consent on governance, then those who feel themselves permanently excluded will also feel no great obligations to the regime. No legitimacy without representation.

[**127.**] While the ECK appears to properly recognise the principle of population equality in s 42 of the Constitution we find that it has not properly appreciated the other factors which necessitate departure from the principle. Our Constitution does in our view go beyond the 'rightness' of the majority and does specifically recognise the minorities and the need to protect them by for example using the nomination tool under s 33.

[**128.**] To underline the importance of striking a proper balance under sections 33 and 42 a definition of the terms used is critical and for this reason we set out the definitions as under:

> *Community of interest*
>
> Common grievance that must be shared by all class members to maintain the class action. Usually a group of similarly placed persons.
>
> *Special interest group*
>
> An organisation that is to influence legislation or government policy in favour of a particular interest or issue especially lobbying — also termed special interest!

The meaning of adequate representation will appear in the text of this judgment.

[**129.**] David Beetham in 'Key principles and indices for a democratic audit in defining and measuring democracy' 1994, pp 25-30, set out principles and indices of democracy as under:

> Democracy is a political concept, concerning the collectively binding decisions about the rules and policies of a group, association or society. It claims what such decision making should be, and it is realised to the extent that such decision-making actually is subject to the control of all members of collectivity considered as equals. That is to say, democracy embraces the related principles of popular control and political equality. In small-scale and simple associations people can control

> collective decision-making directly, through equal rights to vote on law and policy in person. In large and complex associations they typically do so indirectly, for example through appointing representatives to act for them where popular control usually takes the form over decision makers rather than over decision making itself; and typically it requires a complex set of institutions and practices to make the principle effective. Similarly political equality, rather than being realised in an equal say in decision making directly, is realised to the extent that there exists an equality of votes between electors an equal right t:o stand for public office, an equality in conditions for making ones voice heard and in treatment at the hands of legislators and so on ... These two principles of popular control and political equality form the guiding thread of a democratic audit ... they also provide a standard against which the level of democracy can be assessed.

[**130.**] Beetham has therefore identified several segments for democratic audit as:

- Free and fair elections;
- How far each vote is equal in value;
- How far there is equality of opportunity to stand for public office regardless of which section of society a person comes from;
- Open and accountable government;
- Whether individuals or groups are systematically excluded from access to, or influence upon government or redress from it; under civil and political rights or liberties and whether these are effectively guaranteed to all sections of society under a democratic society; the degree of equal opportunity for self organisation; access to the media; redress from powerful corporations.

[**131.**] One may ask why would the applicants want or seek representation by one of their own. What is Parliament? Dicey, *An introduction to the study of the law of the Constitution* 10th edition, 1959 states:

> A Parliament duly elected on the extended franchise represented the most authoritative expression of the will of the nation, and the exercise of public power was channelled through such a Parliament. Parliament also controlled the executive.

[**132.**] In our view ECKs role as regards its constitutional mandate under s 33 and 42 respectively must be discharged with full realisation that both sections deal with constitutional rights as opposed to other rights where there is a discretion. As regards constitutional rights in public authority or a constitutional job holder must have a compelling reason to override it or to decline to enforce it according to the mandate. In this regard we endorse fully Justice Law's observation in the case of *Chester Field Plc v Secretary of State* (1998) JPC 568 at 578-80 where he said:

> In many areas of public discretion, the force to he given to all and any factors which a decision maker must confront is neutral in the eye of the law; he may make of each what he will, and the law will not interfere because the weight he attributes to any of them for him and not the court. But where a constitutional right is involved, the law presumes it to carry substantial force. Only another interest, a public interest, of greater force may override it.

[**133.**] In the case of *R v Lord Saville ex parte A and others* (1999) 4 ALL ER 860, Lord Woolf (MR) restated the same principle as follows: 'Even the broadest is constrained by the need for there to be

countervailing circumstances justifying interference with human rights ...'.

[**134.**] Thus, in a democracy such as Kenya, the ECK in making its past decisions under both S 33 and 42 should not have sheltered itself behind any discretionary power or lament that it had no powers to scrutinise or ensure that the nominations under section 33 meet the criterion of special interest or give due weight to the consideration of community of interest and adequate representation under s 42. There is no mention at all of special interest or community of interest in the two affidavits or the letter to the parties.

[**135.**] In our view sections 33 and 42 should be read together with section 1A of the Constitution and Chapter 5 on the fundamental rights and freedoms. A multiparty democratic state practices tolerance, fair play and values civil liberties. It has the hallmarks of broadmindedness and pluralism. However, apart from demonstrating that it has as far as is practicable stuck to the principle of the equality of population under section 42, it has not shown how it has dealt with the other factors set out in the section in the establishment of constituencies including the one where the applicants hail from. The concept of democracy is not a static one it must accommodate and embrace the minorities, social outcasts and the down-trodden of each age. It must constantly devise strategies and processes to improve the status of minorities and to protect minority interests and others who cannot effectively have a voice in the competition of the majority in the electoral process and other democratic processes in a democracy. The minorities shall always have a room in democracies and their room should never be shut or emptied just as the concepts of justice and equity shall never be spent.

[**136.**] SE Finer in *Comparative government* (1970) pp 63-66, has expressed the same theme this way:

> But even majority rule is seriously qualified in the liberal democracy ... But being a liberal democracy also implies that the minorities must be given a chance to become a majority; and that means, therefore, that they must be given a chance, status and a means to covert the majority. In order to make this possible, certain guarantees and machinery would have to be established.

[**137.**] In our view the machinery envisaged is like what needs to be done for the minorities under s 33 and 42 of the Constitution. Sir Stephen Sedley, in the *Making and remaking of the British Constitution* (London 1997) at page 5, takes the concept of democracy to an even higher plane in this eloquent statement:

> A democracy is more than a state in which power resides in the hands of a minority of elected representatives: it is a state in which individuals and minorities have an assurance of certain basic protections from the majoritarian interest and in which independent courts of law hold the responsibility for interpreting, applying and importantly — supplementing the law laid down by Parliament in the interests of every individual, not merely the represented majority.

[**138.**] In the context of Kenya, we as a Constitutional Court have a responsibility in interpreting the Constitution in a manner that protects and enhances the rights of the minorities and other disadvantaged groups and individuals. We believe the ECK as a creature of the Constitution had the same responsibility. The ECK cannot fold its hands and say it is a rubber stamp in the nominations under section 33. No, it is entitled to define special interests and also issue guidelines to the political and parliamentary parties on the criterion of nomination and also decline to forward to the President any nominees who do not satisfy the constitutional criterion under section 33. Similarly it can issue guidelines on how it has in the past complied with the provision of section 42 as regards minorities and others and what weight it has attached to each of the factors. What meaning has it for example attached to the factor or criterion of community of interest? What considerations led to the establishment of the constituencies in the former unsplit Baringo District? What informed ECK decision in accommodating the other homogeneous communities in Baringo? Did this method of separate accommodation of the communities dilute the voting power of the Il Chamus? Did the past alignment of boundaries reduce their voice? Did it occur to the ECK that a minority in any district in Kenya could still participate in elections as a five year ritual and without their votes having any value? What does effective or adequate representation mean under the Constitution?

[**139.**] The above questions do not appear to have informed the decision making by the ECK and this explains why this court must intervene.

ECKs constitutional mandate

[**140.**] From the letter addressed to the political parties we are certain that the ECK has systematically addressed correctly the principle of equal population in all created constituencies as is practically possible as stipulated although in real life it is difficult to attain mathematical precision. In terms of the explanation of this principle the case of *Wesberry v Sanders* 376 US 481 is unrivalled. At 483 the principle is described as under:

> The fact that it is not possible to draw congressional districts with mathematical precision is no excuse for ignoring the federal Constitution's plain objective of making equal representation for equal number of people the fundamental goal for the House of Representatives.

In this case the Georgia districting statute was held by the majority judgment of the Supreme Court to have been invalid as the fifth congressional district had a population of 823 680 qualified voters as contrasted with the 394 312 population of the average Georgia congressional district. One of the other districts had slightly over 200 000 qualified voters.

[**141.**] In the case the same principle based on population is stated in different words as follows:

> We do not believe that the framers of the Constitution intended to permit the same vote diluting discrimination to be accomplished through the device of districts containing widely varied numbers of inhabitants, To say that a vote is worth more in one district than another would not only run counter to our fundamental ideas of democratic government. It would cast aside the principle of a House of Representatives elected 'by the people' a principle tenaciously fought for and established at the Constitutional Convention. The history of the Constitution particularly that part relating to the adoption of art 1 and 2 reveals that those who framed the Constitution meant that, no matter what the mechanics of an election whether state made or by districts it was population which was to be the basis of the House of Representatives.

We believe this is the same principle which is set out in s 42 of the Constitution and as stated herein we salute ECK fidelity to the principle.

[**142.**] However as expressed elsewhere where ECK has misdirected itself on its constitutional mandate is failure to grasp or to correctly interpret or to properly give proper weighting as regards the other criteria in s 42 which allow departure from the population principle. Because of our uniqueness as a multiethnic and multiparty democracy our position as set out in s 42 allows departure from the population criteria unlike the American position where there are two houses. The ECKs contention has been that they have discharged their constitutional responsibility under the section over the years and that their discretion on the departure criteria under section 42 cannot be challenged in court. However our finding on this is that whether or not the ECK has adopted the concerned criteria in departing from the population principle or refusal to depart is in our view a justiciable issue under the Constitution and it is not an insulated discretionary power beyond challenge in a constitutional court because ECK's error could adversely affect the democratic process of representation. On this point of challenge we endorse the observation made in *Wesberry v Sanders* at 486:

> Nothing in the language of article 1 gives support to a construction that would immunise state congressional apportionment laws which debase a citizen's right to vote from the power of the Court to protect the constitutional rights of individuals from legislative destruction, a power recognised at least since the decision in *Marbury v Madison* ...

[**143.**] The hallmarks of democracy under section 1A are pluralism, tolerance and broadmindedness. The section contemplates an open and democratic society based on freedom and equality.

[**144.**] The principle of population equality and the weight of votes can be violated in several ways:

> (1) Weighting the votes of residents of one part of the country more heavily than those of residents in another part of the country or;
>
> (2) Accomplishing the same vote diluting through the devise of constituencies containing widely varied numbers of inhabitants;

(3) Refusing as in this case to depart from the population principle even in the face of the existence of a distinct minority that has a substantive community of interest while doing the same in other neighbouring constituencies in other words failing to determine on the basis of equality and thereby violating the non-discrimination principle;

(4) Failing to consider what adequate representation entails under the Constitution in relation to distinct minorities;

(5) Failing to fully appreciate that in relation to a minority the principle of population equality is hollow because it requires that as nearly as practicable one man 's vote in an election must he worth as much as another's, It cannot have the same value when a distinct minority is tucked away in some administrative divisions *vis-à-vis* other divisions with dominant communities who dilute the minority vote proportionally and thereby converting the minority vote to an election ritual that is not adequate or effective because it cannot make any difference to the minority representation and cannot confer on them adequate and effective representation. The departure criteria under section 42 is meant to give value and weight to among others minority interest;

(6) Failing to consider equal protection provisions of the Constitution as impacting on sections 42 including the democratic provision 1A of the Constitution;

(7) Failing to recognise that although the principle of equal weight for each vote is automatically achieved by a direct election of a representative in each constituency to a single Parliament (as contrasted with a two chamber House of Representatives] such an election might lead to domination and denial of representation to minority interests, In a constituency for example with dominant communities the apportionment of constituencies on the basis of these dominant communities has the potential of leaving the minority interest in that constituency not adequately represented because such an apportionment does, in our view result in an arbitrary impairment of votes because it is inherently discriminatory – see *Reynod v Simms* 12L ed 506.

[**145.**] We are also firm in adding that one reason why we found that the applicants on behalf of the Il Chamus had standing is because the right to an effective vote is too important in a free society such a Kenya to be stripped of judicial protection. To affirm this position we would like to borrow from the immortal words of James Wilson of Pennsylvania recorded in *Wesberry v Sanders* and also the words of Madison in the same judgment:

Wilson

No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights even the most basic are illusionary if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right.

Madison

Who are to be the electors of the federal representatives? Not the rich more than the poor; not the learned more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscure and unpropitious fortune. The electors are to be the great body of the people of the United States.

[**146.**] The Constitution of Kenya provides for electoral equity and justice under the equal provision of the Constitution, the democratic provision clause section 1 of the Constitution and as regards minority

interests more eloquently under both s 33 and 42. In our view failure to properly apply all these provisions undermines the electoral and representative justice and the Constitution itself. As this Court has in one or two past decisions held, constitutional rights are in some respects interdependent and indivisible and the violation of one could lead to the automatic violation of others. In the case of human rights the violation of one has a replica effect on the others due to the interdependency and indivisibility. It is the grasp of these constitutional principles which is sadly lacking in the affidavits filed on behalf of the ECK.

[**147.**] There is a duty on the part of ECK to protect minority interests — the principle of one man one vote notwithstanding. In the case of Kenya the protection is expressly provided and the method of achieving it also stipulated. Unlike America, the protection does not have to necessarily depend on a judgment of a Constitutional Court but there was nothing to stop ECK when in doubt to seek this court's declaration on any point nor is there an obstacle in any Kenyan challenging anything undemocratic under s 1A of the Constitution.

Fair and effective representation

[**148.**] Under section 42 our finding is that the ECK has properly demonstrated that it has complied with the population criterion but it has not probed into the qualitative dimension of the other factors justifying departure in the section for example the criterion of community of interests and adequate representation. To demonstrate the importance of proving that the ECK ought to have done more than coming up with a population criterion only we wish to adopt Chief Justice Warren holding in the case of *Reynolds v Simms* 388 US 533 565-66 (1964) where he stated 'achieving – fair and effective representation of all citizens is ... the basic aim of legislative appointment'.

[**149.**] In the context of Kenya in a multi-ethnic society the term 'representation' imports or means more than the mere right to cast a vote that will he weighed as heavily as the other votes cast in the election. Thus, in drawing boundaries plans minority groups should not he submerged. In addition gerrymandering the drawing of constituency lines so as to dilute the voting power of a minority or other groups is not permissible because the effect of this is to dilute the voting power of a minority by their votes being confined or restricted in one or three ineffective administrative divisions. They cannot have an impact on the choice of a constituency representative. Our Constitution prohibits this in s 42 and further endeavours to achieve electoral equity by providing for nominations of minority interests under s 33 of the Constitution. The ECK argument that it has in the past done all that it could do, did not impress us at all. Under s 42 it ought to have struck the balance by

properly evaluating the departure criteria expressly set out. Under section 33 the ECK is not a rubber stamp. It had the constitutional duty to vet the nominees from the parliamentary parties to ensure that each and every nominee answers the description of special interests or that he or she represents special interest including gender. To demonstrate the lack or the misuse of the nomination provision under the very nose of the ECK, the applicants have exhibited a newspaper cutting where one of the election candidates in a general election was promised a nomination under section 33 if she stood down for another candidate. The candidate was subsequently nominated. The ECK did not deny this.

Vote dilution

[**150.**] In our view the voting power of a minority cannot he ignored under section 1A and section 42 of the Constitution in apportioning constituencies and ignoring it, is in our view unconstitutional as offending equal protection provision of the democratic provision of the Constitution and also being discriminatory. Thus in the case of *Gomillion v Lightfoot* 364 US 339 (1960) the Alabama law contested had redrawn the boundaries of the City of Tuskegee so as to exclude almost all of the city's black population from the city limits. Justice Frankfurter, writing for the Court declared the law unconstitutional using these words: 'When a legislature thus singles out a readily isolated segment of a racial minority for special discriminatory treatment, it violates the Fifth Amendment'.

Conclusion

[**151.**] The principle of representation for special interest is not merely that persons be nominated by parliamentary parties but that, the person nominated do represent special interests. It is not that parliamentary parties nominate those who belong to their parties or philosophy of thought, their nominee must represent special interests whether the blind, trade unions, industry, or religious groups.

[**152.**] Il Chamus, we are told, means 'people who see far'. Perhaps the words were prophetic because they have sought from a constitutional court, constitutional justice for themselves and implicitly for others in the future. They appear to have looked to the distant future as to what special interests, minority interests, community of interest and adequate representation mean under the Constitution in their quest to firmly define their destiny in the nationhood of Kenya. As a result they have in a humble style greatly helped in opening up the channels of electoral and constitutional justice including testing and making this court undertake a democratic audit implied by s 1A of the Constitution.

[**153.**] In this task we must add they have in their determined and humble way lived not only for themselves but also for the others by

giving meaning to concepts which have no doubt enriched the jurisprudence of this great nation. We salute their enlightened corporate effort.

[**154.**] In conclusion we hold that s 33 and 42 of the Constitution must be read together with all the other related provisions in the Constitution, and in particular section 1A of the Constitution, in order to correctly address the constitutional objectives values and principles which the framers intended and contemplated.

In the result we grant relief as follows:

(1) A declaration that the constitutional machinery for the representation and protection of minorities including the Il Chamus community to wit the provision of section 53 of the Constitution of Kenya has not in the past been implemented as by the Constitution required and the ECK should re-look at the provision and as mandated the Constitution implement the provision as interpreted;

(2) A declaration that in the particular circumstances described to the Court the Il Chamus community along with others constitute a special interest as contemplated by the mandatory provision of section 33 of the Constitution of Kenya;

(3) A declaration that parliamentary parties nominating persons to be appointed as nominated members under section 33 of the Constitution of Kenya, should note the meaning of special interest as defined and in exercise of their constitutional mandate in future nominate on the basis of the criterion of special interests. Subject to the usual party enrolment requirements it is hereby declared that minority groups and all the other minority interests including the Il Chamus do constitute such a special interest for the purpose of nomination;

(4) A declaration that the ECK is constitutionally empowered to vet the party nominations to ensure compliance with the special interest criterion and gender equality before transmitting the names for appointment by the President;

(5) A direction that the Electoral Commission of Kenya at its next Boundary Review does take into account all the requirements set out in section 42 of tire Constitution of Kenya and, in particular, the need to ensure adequate representation of sparsely-populated rural areas, population trends and community of interest, including those of minorities especially the Il Chamus of Baringo Central constituency. In the event of any future constituencies being created by an Act of Parliament or any other review being undertaken, the Il Chamus claim be processed by the ECK with the defined criteria herein in view. In this regard we declare that reasonable departures from the population and size quotients are constitutionally valid whether below or above provided the

apportionment is based on the criteria set out in section 42 and the democratic provision of section 1A of the constitution;

(6) We make no order as to costs, the ECK having correctly addressed the population criterion and the size.

SOUTH AFRICA

EN and Others v Government of RSA and Others

(2006) AHRLR 326 (SAHC 2006)

EN and Others v Government of RSA and Others

High Court, Durban and Coast Local Division, 22 June 2006
Judge: Pillay
Previously reported: 2006 (6) SA 575 (D), 2007(1) BCLR 84 (D)

Insufficient measures taken by government to ensure access of anti-retroviral treatment for prisoners with AIDS

Locus standi (public interest, 7, 9, 10)
HIV and AIDS (access to anti-retroviral treatment for prisoners, 18, 20, 23; reasonable measures, 25, 27, 28, 30-32)
Cruel, inhuman or degrading treatment (HIV and AIDS in prisons, 29)

[**1.**] The first to the fifteenth applicants, were at the launch of these proceedings all serving prison sentences in the Medium B Section at the Westville Correctional Centre (WCC). The sixteenth applicant is the Treatment Action Campaign (TAC), a duly-registered section 21 not for profit company. Its objectives *inter alia* and relevant for present purposes are the following:

> (1) Campaign for equitable access to affordable treatment for all people with HIV/AIDS;
>
> (2) Campaign for and support the prevention and elimination of all new HIV infections;
>
> (3) Promote and sponsor legislation to ensure equal access to social services for equal treatment of all people with HIV/AIDS;
>
> (4) Challenge by means of litigation, lobbing, advocacy and all forms of legitimate social mobilisation, of any barrier or obstacle, including unfair discrimination that limits access to treatment for HIV/AIDS in the private and public sector;
>
> (5) Educate, promote and develop an understanding and commitment within all communities of development in HIV/AIDS treatment;
>
> (6) Campaign for access to affordable and quality health care for all people in South Africa;
>
> (7) Train and develop a representative and effective leadership of people living with HIV/AIDS on the basis of equality and non-discrimination irrespective of race, gender, sexual orientation, disability, religion, sex, socio-economic status, nationality, marital status or any other ground;

(8) Campaign for an effective reasonable and global network comprising of organisations with similar aims and objectives.

It is not disputed that Anneline Michelle Govender is employed by the AIDS Law Project (ALP) and is authorised by them to depose to the affidavits on behalf of the applicants. The ALP is a legal services provider with in-house attorneys and advocates.

The government of the Republic of South Africa, nominally cited as the first respondent, is the umbrella body of the various national and provincial governments responsible for the health and care of incarcerated persons. The second, third, fourth, fifth and sixth respondents are all cited in their official capacities as representatives of those state departments.

The first to the fifteenth applicants act in their personal capacities as persons infected by the HIV/AIDS virus and also in the interest of all prisoners with HIV/AIDS who need or will need to access antiretroviral (ARV) treatment as fellow inmates at the WCC. They also, as the sixteenth applicant does, act in the public interest for the purposes of securing the effective enforcement of constitutional rights. The sixteenth respondent also acts in the interest of its members who include persons with HIV/AIDS. The *locus standi* of the applicants to act on behalf of all the inmates with HIV/AIDS at WCC and in the public interest, is disputed by the respondents. I will return to that aspect later.

The background

[2.] The application has its beginnings, it would seem, in a letter dated 28 October 2005 addressed by the ALP acting on behalf of approximately twenty offenders suffering from HIV/AIDS serving sentences at the WCC and unable to access proper treatment. This letter is annexed to the founding affidavit deposed to by Anneline Michelle Govender. The letter seeks answers from the WCC to the following questions:

(a) What steps, if any have been taken to ensure that offenders at Westville Correctional Centre who need access to ARV treatment are indeed able to access it immediately? If no steps have been taken, why not?

(b) When and where will our clients and other offenders who are eligible for ARV treatment be able to access it?

The letter concludes with the following statement:

We look forward to hearing from you by no later than Monday 7 November 2005, failing which we will assume that you are not taking any steps to ensure that offenders living with HIV/AIDS at Westville Correctional Centre and who are eligible for ARV treatment can access it immediately. In such a case we will have no option but to institute appropriate legal proceedings against the Minister of Correctional Services, the Westville Correctional Centre and any other relevant party. We sincerely hope that this is not necessary.

Copies of this letter were faxed to:

(1) Mr N Balfour, Minister of Correctional Services
(2) Dr ME Tshabalala-Msimang, Minister of Health
(3) Mr L Mti, National Commissioner of Correctional Services
(4) Mr V Peterson, Area Commissioner of Correctional Services, KZN
(5) Judge Fagan, Office of the Inspecting Judge

[3.] No response was received either from the WCC or from any of the other parties to whom the letter was telefaxed. It is apparent from further correspondence that the assistance of the State Attorney was elicited in order to get a response.

The State Attorney, in response to the plea for his intervention, addressed a letter to the ALP dated 6 December 2005. It reads as follows:

> The Aids Law Project
> c/o Docex 197
> JOHANNESBURG
> Dear Madam
> OFFENCERS LIVING WITH HIV/AIDS AND ACCESS TO APPROPRIATE TREATMENT
> I acknowledge receipt of your telefax of even date with enclosures. I also refer to my telephonic conversation with you and confirm that I have asked you to contact the Legal Services Official in Correctional Services based in Pietermaritzburg for the purposes of facilitating a meeting with you and your team with a view of finding a solution to the present impasse.
> I do not believe that it is in the interest of all concerned to have this matter dealt with in the High Court.
> Should any serious impediment arise in granting access to medication to HIV positive prisoners, then the need to approach the Courts may arise.
> K GOVENDER
> STATE ATTORNEY (KWAZULU-NATAL)

This intervention by the State Attorney appears to have resulted in a round table meeting on 15 December 2005 at which a way forward was discussed. On the 11 January 2006 the ALP wrote to the Head of Legal Services at the WCC, *inter alia*, seeking a progress report on the undertakings given and placing on record what was agreed to at the meeting on 15 December 2005.

With no progress being made, the ALP placed the WCC on terms. The Deputy Director of Legal Services of the Department of Correctional Services (RSA) (DCS), responded by letter dated 20 January 2006. Whilst disputing one aspect of the agreement reached on 11 January 2006, he went on to state that for various reasons, the WCC was unable to give a feedback on progress. Further correspondence ensued between the ALP and Correctional Services, relating to the issue now before Court and difficulties experienced in arranging consultations with the affected prisoners. With still no progress in sight, the ALP gave notice on 8 March 2006 of its intention to launch these proceedings. The correspondence is not detailed here for the sake of brevity. Reference will be made, if need be, when dealing

with the merits. Suffice it to say that from the viewpoint of the applicants, nothing significant was achieved through the negotiation process preceding the launch of this application. The application was launched on 12 April 2006.

Relief claimed

[**4.**] The main relief claimed as set out in paragraphs 3, 4 and 5 of the notice of motion reads as follows:

> (3) That the respondents are hereby ordered with immediate effect to remove the restrictions that prevent the first to the fifteenth applicants, and any and all other similarly situated prisoners at Westville Correctional Centre, who meet the criteria as set out in the National Department of Health's Operational Plan for Comprehensive HIV and AIDS Care, Management and Treatment for South Africa, from accessing antiretroviral treatments at an accredited public health facility.
>
> (4) That the respondents be and are hereby ordered with immediate effect to provide antiretroviral treatment in accordance with the aforesaid Operational Plan, to the first to fifteenth applicants, and any and all other similarly situated prisoners at Westville Correctional Centre, at an accredited public health facility;
>
> (5) That the respondents are ordered on or before the _____ day of _____ 2006 to serve on the applicants' attorneys and lodge with the Registrar of this Court, an affidavit setting out the manner in which it will comply with paragraph 4 of this order.

The relief claimed in paragraph 5 (*supra*) has been referred to by Ms Gabriel who appeared together with Ms Hassim for the applicants, as a 'structural interdict', in terms of which the Court is required to compel the respondents to expedite time frames within which they will ensure that the applicants receive ARV treatment. It is contemplated that, by virtue of the fact that the applicants seek relief in a class action, and in the public interest, similarly situated offenders at WCC also receive ARV treatment.

Mr Moerane, SC, who appeared together with Ms TS Norman for all the respondents, did not argue against the principle of a structural interdict. He did however oppose the granting of such an interdict.

That a court can in suitable cases resort to the granting of such an interdict in appropriate cases to secure compliance with a court order has been accepted by our courts. See *City of Cape Town v Rudolph and Others* 2004 (5) SA 39 (C) at 88; *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* 2002 (5) SA 721 (CC).

No relief is claimed in respect of the fourth and eighth applicants because of events which have happened just before or subsequent to the launch of this application.

Interlocutory applications by respondents

[**5.**] There were two interlocutory applications by the respondents about which much need not be said. The first relates to the acceptance of a further affidavit on behalf of the respondents to

respond to new matters, so it is alleged, raised by the applicants in their replying affidavit. The second interlocutory application seeks condonation for the late filing of the respondents' heads of argument.

With regard to the filing of the further affidavit, no serious objection was raised by Ms Gabriel save to place on record, as she put it, 'the so-called new matters were actually in response to the averments in the answering affidavit'. I was not called upon to make a ruling on the application as the parties were *ad idem* that in the interests of justice, I should have before me a full as picture as possible of the dispute. On that basis a very short affidavit from the applicants was also accepted dealing with the appointments made by WCC for certain of the applicants at treatment centres. No issue was made either by the Court or Ms Gabriel as to the late filing of the respondents' heads.

Urgency

[**6.**] Although the respondents, on the papers, objected to the matter being heard as one of urgency in terms of rule 6(12) of the Uniform Rules of Court, it was not pursued in argument. Mr Moerane very correctly and rightly conceded that he was not pursuing that aspect. Argument on the merits therefore proceeded.

Before dealing with the merits of the case, it would be prudent and convenient to deal with two preliminary points raised by the respondents. The first relates to the *locus standi* of the applicants and the other relates to what Mr Moerane termed as the 'defective founding papers'.

Locus standi

[**7.**] The respondents contest the *locus standi* of the applicants to seek relief on behalf of all HIV positive prisoners at the WCC. They further deny that the applicants act in the public interest. It is not in issue that the applicants have the *locus standi* to bring the application in their own names. Mr Moerane submitted that on the papers, no case has been made out for the applicants to act in any capacity other than their own although in the notice of motion relief is claimed for other similarly situated prisoners.

To the extent that it is submitted on behalf of the respondents that the applicants had not identified a clearly defined group or class of persons who are not able to access ARV treatment and that no case has been made out on the papers entitling the applicants to act in the public interest, two letters attached to the founding affidavit are both relevant and telling. The first is annexure 'AMG 35' to the founding affidavit addressed by the Regional Commissioner of Correctional Services KZN to the ALP. Paragraph 4 of the letter dated 23 January 2006 reads as follows:

> Statistics required on the number of offenders in Medium-B with CD 4 count of less than 200 is 50 and the number of offenders who died with HIV/AIDS related conditions in Medium B last year were 78 (this number includes offenders who were transferred in Medium B 24 hour nursing facility from other management areas in the Region).

Attached to this letter is an earlier letter, once again by the Regional Commissioner, dated 20 December 2005 addressed to the Ethekwini Health District in which he expresses the need to fast-track the 'whole ART issue at Westville'. Pertinent to the contention that the applicants have not made out a case on the papers that they are acting in the public interest and in the interest of other prisoners similarly situated, are the following extracts from the same letter:

> 2.1 It is basically only Westville Correctional Services which happen not to be participating in the government ART program, and the reasons cited in this regard are that the surrounding Public Health Hospitals are not keen at all to render such services to offenders incarcerated at Westville Correctional Services.

and further on he says the following:

> 2.4 The issue of HIV and AIDS at Westville Correctional is a reality with ± 110 HIV and AIDS related deaths since the beginning of 2005 ± 50 offenders whose CD 4 cell count of less than 200 etc.

and at paragraph 6 he says:

> Looking at the seriousness of the whole exercise, which is a matter of life and/or death, and the urgency that it deserves this office deems it necessary to urge your office to fast track the ART issue at Westville Correctional Services on receipt of this communication.

Now, if that does not constitute a reason to act in the public interest and in the interest of other similarly situated prisoners, I do no know what could be more compelling.

At paragraph 102 of the founding affidavit, the deponent makes the following point:

> I believe that it is clear from what has been set out in the paragraphs above that the applicants have made every effort to resolve the issue with the DCS, WCC and DOH without resorting to litigation. At this stage, given the deterioration of the health of the first to the fifteenth applicants and *other similarly situated prisoners*, our only option is to ask this Honourable Court to intervene and order the WCC to meet its commitments. (My emphasis.)

There is therefore no merit in the submission that no case is made out in the papers for a class action or the applicants' right to act in the public interest. Incarcerated persons are wards of the state. There can be no doubt that from a reading of the letters emanating from the Regional Commissioner of Correctional Services, the group which could benefit from any order which the Court chooses to make is clearly identifiable. I associate myself with the submission made by counsel for the applicants that the applicants suffer a disadvantage in that they suffer physical and financial constraints and it would be unreasonable to expect that each prisoner with a similar case act individually.

[**8.**] It is common cause that the respondents are legally and constitutionally bound to provide adequate medical treatment to prisoners who need it. Section 35(2)(e) of the Constitution provides:

> Everyone who is detained, including every sentenced prisoner, has the right to conditions of detention that are consistent with human dignity, including at least exercise and the provision at state expense, of adequate accommodation, nutrition, reading material and medical treatment.

It is also common cause that the applicants have a right to ARV treatment.

[**9.**] Relevant to the issue of a class action or the right to act in the public interest in cases alleging infringement of Constitutional rights is clearly spelled out in section 38 of the constitution. The grounds for *locus standi* in such cases include:

> anyone acting in their own interest;
>
> anyone acting as a member of, or in the interest of, a group or class of persons;
>
> anyone acting in the public interest; and
>
> an association acting in the interests of its members.

[**10.**] There is ample authority for the proposition that *locus standi* requirements are meant to be expansively interpreted and should be read so as to avoid obstructions on its invocation. (See *Ferreira v Levin NO; Vryenhoek v Powell NO (2)* 1996 (2) SA 621 (CC) and *Beukes v Krugersdorp Transitional Local Council* 1996 (3) SA 467 (W) at 474C–H). Both these cases dealt with section 7(4) of the Interim Constitution which is similar in all material respects to section 38 of the Constitution.

More recently Cameron JA, dealing with the judgment of Froneman J in *Permanent Secretary, Department of Welfare v Ngxuza* 2001 (4) SA 1184 (SCA) (upheld on appeal), held in relation to section 38 of the Constitution that:

> It is precisely because so many in our country are in a 'poor position to seek legal redress' and because the technicalities of legal procedure, including joinder, may unduly complicate the attainment of justice that both the interim Constitution and the Constitution created the express provision that 'anyone' asserting a right in the Bill of Rights could litigate 'as a member of, or in the interest of a group or class of persons.

The respondents' objections articulated by Mr Moerane in his heads that :

> (i) the applicants have not mentioned any inmate at the WCC who is not able to access ARV treatment;
>
> (ii) there is no evidence that such inmates were unable to join in this litigation;
>
> (iii) there is no evidence that any such inmates wish to join in this litigation;
>
> (iv) there is no evidence that any such inmates would wish to be bound by any order that this Honourable Court might make,

are met by what Froneman J in the court *a quo* had to say in *Ngxuza* (*supra*) at 629E:

> … our common law was the poorer for not allowing the representative or class action. The Constitution seeks to rectify that deficiency in section 38 of the Constitution and there is no reason to interpret that section in a narrow and restrictive manner. A flexible approach is required. Making it easier for disadvantaged and poor people to approach the Court on public issues to ensure that the public administration adheres to the fundamental constitutional principle of legality in the exercise of public power serves our new democracy well.

I am respectfully in full agreement with the views as articulated by Froneman J and Cameron JA and consequently come to the conclusion that the objection to the *locus standi* of the applicants in so far as they seek to act in the public interest and in the interests of other inmates at WCC who are similarly affected, is without merit.

The sixteenth applicant acts in the interests of its members, some of whom are HIV positive and incarcerated at WCC. The relief sought is consistent with its aims and objectives as set out in its constitution. Its *locus standi* has been accepted by our courts in similar matters. (see *Minister of Health v TAC and Others (No 2)* (*supra*) I see no reason why its *locus standi* should, in a like manner, not be accepted by this Court.

Defective founding papers

[**11.**] The respondents attack the founding affidavit as being irregular on account of the fact that Anneline Michelle Govender deposed to it on 10 April 2006, and much of which she says about the case of the first to the fifteenth applicants could not possibly have been confirmed by them because the confirmatory affidavits are all dated 16 March 2006.

Each of the applicants in the confirmatory affidavits, make the following averment on oath: 'I have read the affidavit of Anneline Michelle Govender and as far as it pertains to me, confirm the contents of the affidavit'.

This statement, Mr Moerane submitted, is patently incorrect because Govender's affidavit was only produced a month later. Therefore the papers are fatally defective.

He wished to place on record, however, that this point is taken not because of the respondents' predilection for being technical, but because they raise important issues regarding motion proceedings and duties owed to the court by practitioners. By the latter, I assume that the complaint is because the defect in the papers was not brought to the attention of Levinsohn J on 3 May 2006 when preference was sought for the matter to be heard as one of urgency and the rules dispensed in accordance with rule 6(12) of the Uniform Rules of Court.

The complete answer to Mr Moerane's objection to the acceptance of the founding affidavit is to be found at paragraphs 9–11 of the founding affidavit itself, which reads as follows:

> (9) As a result of obstruction by the DCS (as set out in paragraphs 80–83 below) in allowing us access to our clients we have not been able to bring the necessary amendments to this affidavit to their attention. These amendments were made to take into account recent events as well as correspondence between the AIDS Law Project and both the DoH and DCS (referred to from paragraph 76 onwards).
>
> (10) Due to the urgency of this matter and to ensure availability of counsel at the hearing we believe that it is necessary to set this matter down without further delay.
>
> (11) *Supplementary affidavits from the first to the fifteenth applicants will be filed with this Honourable Court as soon as we are provided with an opportunity to consult with them.* (My emphasis)

The supplementary confirmatory affidavits were indeed filed and form part of the papers from 214–243. They were filed on 10 May 2006.

I accept Ms Gabriel's submission that if counsel for the respondents who was present when the approach was made to Levinsohn J for an expedited hearing in terms of rule 6(12), had read the papers, he or she would have seen in the opening paragraphs that there was a problem which the applicants undertook to put right – as indeed they did. The problem was foreshadowed in the founding affidavit.

I have a discretion in such matters and having regard to the problems encountered by the legal representatives of the applicants in arranging consultations with their clients at WCC, as is apparent from a reading of the correspondence attached to the founding papers, the so-called 'defect' is understandable. To the extent that condonation is required, the 'defect' if it is that, is accordingly condoned in the interest of fairness and justice. To be charitable to counsel for the respondents, I would like to believe that he had overlooked paragraphs 9–11 of the founding affidavit and took the point not knowing that when Levinsohn J was approached, both counsel for the applicants and respondents were present, and the order taken by consent.

In the ensuing paragraphs, I deal with terminology, as understood by me, used frequently in the papers and in argument and about which there is consensus, unless otherwise indicated.

HIV and HIV/AIDS and the CD 4 Count

[**12.**] There is no dispute about what HIV and HIV/AIDS is all about. Dr Willem Daniel Francois Venter who deposed to an affidavit forming part of the founding papers and whose expertise is impressive and not challenged, states that:

> (11) Infection with Human Immunodeficiency Virus (HIV) ultimately results in a condition known as Acquired Immune Deficiency Syndrome (AIDS). This is an invariably fatal condition that is marked by the

development of largely predictable set of opportunistic illnesses that lead over time to a deterioration of the immune function and the premature death of people with HIV.

(12) ARV medicines target either a particular step in the life cycle of HIV or its interaction with host cells. They arrest the progression of HIV and allow the immune system to recover in the majority of treated patients, and thereby keep patients both alive and productive.

(13) A marker called the CD 4 count measures the deterioration of immune function. A CD 4 count, which is commonly used as an indicator of immune strength, is a measure of white blood cells. It is used to determine how seriously a person's immune system has been damaged by HIV. It is a rough although very useful measure, as it can vary by 10/15% in a short period, both due to internal physiology and due to laboratory variation. It is therefore used as a guide in conjunction with clinical and other considerations, specifically the risk of developing opportunistic infections.

Further relevant is the following paragraph:

(16) There is a broad international and local scientific consensus on when to commence ARV treatment. A person living with HIV/AIDS *who has demonstrated the requisite commitment to taking ARV medicines should commence ARV treatment no later than the point when his or her CD 4 count is below 200 cells/ml* and/or he or she has already contracted a stage IV illness, as defined in the internationally accepted World Health Organisation (WHO) staging system. *The only debate on the initiation of ARV treatment is whether or not this should begin earlier, and if so at what point*. (My emphasis.)

He goes on to say at paragraph 17:

(17) The approach to the initiation to ARV treatment has been adopted by the Department of Health ARV Treatment Guidelines, which in turn confirm the approach to ARV treatment that is included in the Operational Plan for Comprehensive HIV and AIDS Care Management and Treatment for South Africa (the plan) ...

I will make further reference to Dr Venter's evidence later in this judgment. In *Hoffmann v SA Airways* 2001 (1) SA 1 (CC) at paragraph 11 there is a useful analysis of the four stages of untreated HIV infection. About the fourth stage, (on which there is consensus) the following appears:

AIDS (Acquired Immune Deficiency Syndrome) stage – this is the end stage of the gradual deterioration of the immune system. The immune system is so profoundly depleted that the individual becomes prone to opportunistic infections that may prove fatal because of the inability of the body to fight them.

The operational plan

[**13.**] It is not disputed that the Operational Plan was put in place by the Cabinet of the first respondent on 19 November 2003 and contains a comprehensive strategy for the management of HIV/AIDS, the care and treatment of patients living with HIV/AIDS described as a 'National Pandemic'. The Operational Plan recognises the critical role of ARV medicines in the treatment of the virus and the need to make it progressively available especially to those less fortunate than others in the private sector who can afford it and to whom it is readily available. Importantly, the Operational Plan acknowledges that patients with a CD 4 count of below 200 need to commence ARV

treatment as well as those patients who present with certain particularly serious illnesses designated as World Health Organisation (WHO) Stage IV Illnesses. In the case of the latter illnesses, ARV treatment should commence regardless of the CD 4 count. It is accepted that the lower the CD 4 count the higher the risk of AIDS and consequently more the urgency for treatment. It is further recognised that an important precondition before starting ARV treatment is a patient's readiness and commitment to adhere to the treatment over the long term. This assessment is tasked to the Multi Disciplinary Team.

The national antiretroviral treatment 'guidelines'

[**14.**] The guideline was published by the National Department of Health in 2004 and deals, *inter alia,* with patient selection criteria and 'psycho-social considerations' which are expressly stated to be non-exclusionary criteria. It is to be noted that the only instance contemplated in the Guidelines where treatment will not commence is when a patient is found not to meet the readiness criteria. The suitability and readiness for the initiation of treatment is taken by a multi disciplinary team at the applicable ARV treatment centre. It is to be further noted that not all hospitals or clinics are accredited centres. Only those designated as such can initiate treatment. Relevant for present purposes is that the guidelines list the following criteria for ARV initiation in adults, adolescents and pregnant women:

> CD 4 200 cells/mm^3 irrespective of stage,
> or WHO stage IV AIDS defining illness, irrespective of CD 4 count,
> or *Patient expresses willingness and readiness to take ARV adherently.*
> (My emphasis).

Multi-disciplinary team

[**15.**] The multi-disciplinary team as described by the respondents is a team which consists of doctors, social workers, nutritionists, professional nurses etc. They assess social support of the patient and his readiness to take the ARV treatment. The first decision to treat the patient with ARV's at an accredited site is taken by this team.

The six psycho-social criteria to be considered by the multi-disciplinary team are not exclusionary. The list is as follows:

> (i) demonstrated reliability, meaning the attendance at three or more scheduled visits to an HIV clinic;
>
> (ii) disclosure of HIV status to at least one friend or family member, or joining a HIV/Aids support group;
>
> (iii) acceptance of HIV status, and insight into the consequences of HIV infection and the role of ARV treatment;
>
> (iv) ability to attend the ARV treatment centre on a regular basis or access to services for maintaining the treatment chain;
>
> (v) no active alcohol or other substance abuse; and finally
>
> (vi) no untreated active depression.

It is worth observing that not all can be applied in the prison context.

ARV treatment / ART (therapy)

[**16.**] There does not appear to be unanimity between the applicants and respondents as to whether ARV treatment and anti-retroviral therapy are one and the same thing. The terminology is not defined as being a reference to two separate procedures in either the Operational Plan or the Guidelines. They are used interchangeably. Mr Moerane submitted however that they are distinct terms – the treatment with ARV medicines follows the therapy. What is not in dispute however, whether you use the term ARV therapy of ARV treatment, the actual administering of medication has to be preceded by a clinical assessment by a qualified medical practitioner. It is common cause that treatment must take place as soon as possible once the CD 4 Count reached 200.

What is this case all about?

[**17.**] We have two divergent views on what this case is all about. From the applicants' viewpoint, two constitutional issues are involved. The one is that the respondents have failed to discharge their constitutional obligation to the applicants and others similarly affected by the HI virus. The first of these obligations is set out in section 27 of the Constitution, the relevant portions of which read as follows:

> (1) Everyone has the right to have access to - (a) health care services, including reproductive healthcare; (b) ...; (c) ...
>
> (2) The state must take reasonable legislative and other measures within its available resources to achieve the progressive realisation of each of these rights.

The second of these obligations, directly applicable to the class of persons such as the first to the fifteenth applicants is section 35(2)(e) of the Constitution which at the risk of repeating myself, reads as follows:

> Everyone who is detained, including every sentenced prisoner has the right to conditions of detention that are consistent with human dignity, including at least exercise, and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment.

It is not in issue that the applicants have these rights and that the respondents bear a corresponding obligation to fulfil these rights.

[**18.**] Counsel for the applicants was at pains to point out that what the applicants want is a declarator ordering the respondents to remove such restrictions as there are that prevent the first to the fifteenth applicants and all other similarly situated prisoners, from benefiting from treatment in accordance with the Operational Plan and Guidelines. Pursuant upon removal of these restrictions the applicants seek a declarator that the respondents be ordered to

provide ARV treatment to the fifteen applicants and all other similarly situated prisoners, again in accordance with the Operational Plan and Guidelines.

There is in my view, a fundamental misconception on the part of the respondents on the interpretation of the relief claimed by way of the declarator. Mr Moerane submitted that what the applicants seek to do is to ask the Court to override the Operational Plan and Guidelines and prescribe ARV treatment. His submission is that the respondents are bound by the Operational Plan and Guidelines and that is what in fact the respondents are doing.

I accept without hesitation that the Court cannot prescribe treatment. That is the function of the medical fraternity. My understanding of the relief claimed, and what the applicants seek to do, is to remove impediments and to fast track the procedures because it is a matter of urgency that the first to fifteenth applicants and other similarly situated prisoners be assessed for ARV treatment in accordance with the Operational Plan and Guidelines. I do not see the applicants as seeking an order that the Court write out a medical prescription as Mr Moerane has suggested. My understanding is that what the applicants seek to do is to avoid unnecessary delays in the treatment of prisoners because such delays, especially in the context of their incarceration and vulnerability, compromise their already serious health status, which Ms Gabriel has stated, in her heads of argument are, 'a matter of life and death'.

Justification that the matter is 'a life and death one' is to be seen from an examination of Dr Venter's evidence and annexure 'AMG 19' attached to the founding affidavit which shows that the applicants are seriously ill. All fifteen applicants have CD 4 cell counts of below 200. Eight have CD 4 cell counts of below 100 and of these, five applicants have CD 4 cell counts of below 50.

[**19.**] It is not disputed that Venter was one of a group of expert clinicians who contributed to the development of the ARV Treatment Guidelines for the public sector that was adopted by the government in March 2004. He says that people with CD 4 counts of below 200 cells/ml are by definition severely ill and require immediate assessment for ARV treatment. He qualifies this by saying that this is not a rigid requirement and would depend on other circumstances of the particular patient, for example, whether the patient is showing symptoms of opportunistic infections and the CD 4 cell count. What he makes clear is that they need to be immediately assessed. He comes to the conclusion that if ARV medicines are not made available to offenders at WCC immediately, many of them will suffer irreparable harm and in all likelihood premature death.

Are the respondents complying with their constitutional obligations?

[**20.**] The respondents say that they are complying with their constitutional and legislative obligations and have taken the Court through the medical history of each of the fifteen applicants to illustrate this. I will return to this later.

The courts have, as far back as 1912 and possibly even earlier upheld the rights of prisoners to have access to health care despite their incarceration. In *Whittaker v Roos & Bateman; Morant v Roos & Bateman* 1912 AD 92 at 122, Innes CJ said the following:

> True, the plaintiffs' freedom had been greatly impaired by the legal process of imprisonment; but they were entitled to demand respect for what remained. The fact that their liberty had been curtailed could afford no excuse for a further illegal encroachment upon it.

More recently the sentiments of Innes CJ were echoed by Hoexter JA in *Minister of Justice v Hofmeyr* 1993 (3) SA 131 (A) at 141C–D. More to the point, the right of a prisoner to ARV treatment where it was medically prescribed, was enforced in *Van Biljon v Minister of Correctional Services* 1997 (4) SA 441 (C).

To emphasise the seriousness of the issue before me it is worth reiterating what was said by the Constitutional Court in relation to the HIV/AIDS Pandemic at paragraph 1 in *Minister of Health v TAC and Others (No 2)* (*supra*):

> The HIV/AIDS pandemic in South Africa has been described as 'an incomprehensible calamity' and 'the most important challenge facing South Africa since the birth of our new democracy' and government's fight against 'this scourge' as 'a top priority'. It has claimed millions of lives, inflicting pain and grief, causing fear and uncertainty, and threatening the economy. These are not the words of alarmists but are taken from a Department of Health publication and a Ministerial foreword to an earlier Departmental publication.

[**21.**] The respondents do not dispute their obligation both in terms of the Constitution and in terms of section 12 of the Correctional Services Act 111 of 1998 – the relevant part of which reads as follows:

> (1) The Department must provide, within its available resources, adequate health care services, based on the principles of primary health care, in order to allow every prisoner to lead a healthy life.
>
> (2)(a) every prisoner has a right to adequate medical treatment; (b) ...
>
> (3) ...
>
> (4)(a) every prisoner should be encouraged to undergo medical treatment necessary for the maintenance or recovery of his/her health; (b) ...

The fifth and sixth respondents are joined in the application because they too share a responsibility for health care of convicted and awaiting-trial prisoners. Section 21(2)(b)(iv) of the National Health Act 61 of 2003 provides: 'The Director-General [of Health] must, in accordance with the national health policy ... issue and promote ... health services for convicted persons awaiting trial.'

[**22.**] A good starting point is whether there is any evidence that prior to the first intervention by the ALP the respondents had acted reasonably in the implementation of their constitutional statutory and policy obligations. The first intervention by the ALP is by way of the letter of 28 October 2005. As at that day we know that each of the fifteen applicants had a CD 4 count of less than 200 – the date of the count being taken in each case, save for the sixth, seventh, tenth and eleventh applicants, in March 2005. The sixth and eleventh applicants' count was taken in April 2005 and that of the tenth applicant in August 2005. The seventh applicant's count was taken in November 2004. In March 2006 all of them with the exception of the fifteenth applicant showed a CD 4 cell count of less than 200. It is common cause that by March 2005, the Operational Plan and Guidelines were already in place.

Jabulile Elizabeth Sishuba deposing to the answering affidavit on behalf of the respondents, admits that all the applicants meet the criteria for ARV Therapy, but in dealing with each of the applicants she does not say when therapy started. Even in referring to the 'wellness programme', she makes no mention when each applicant was inducted into the said programme. This programme is described as a support group where the offender receives counselling on HIV and at which the offender will receive a health supplement called 'philani'. It would have, in my view, been a simple matter to state when each of the applicants were put on the programme. It is not surprising therefore that the fifteen applicants with the sole exception of one deny any knowledge of the wellness programme. Most deny even knowledge of the existence of the programme. It was contended by counsel for the respondents that this was a factual dispute. I point out later that this is more apparent than real.

It would seem to me that the supply of 'philani' is seen by the respondents as part and parcel of the wellness programme, whereas the applicants see them as being different, one of which they have no knowledge of whatsoever. Interestingly enough, Sarel Francois Marais employed by the third respondent as Assistant Director responsible for making bookings for prisoners at King Edward VIII Hospital (KEH) refers to the 'philani clinic' as being the place at which 'philani' is distributed. He says that it is part and parcel of the wellness 'clinic' referred to by Sishba. The denial by the applicants of any knowledge of the wellness programme seems to me to arise out of this confusion. The denial therefore makes sense in this context. There is therefore no genuine dispute of fact.

[**23.**] I have looked carefully at the answering affidavit with particular reference to what Sishuba says in respect of each of the applicants and find only a single reference to anything possibly being done before 28 October 2005, and that sole reference is to the fifteenth applicant where she says that *during* 2005 he did not qualify

to be placed on the ART programme because his CD 4 count was above 200/mm^3. (My emphasis.)

Not in respect of any of the other applicants does she make any reference whatsoever to them being on the ART programme. If the ART programme is somehow given the same appellation as the 'wellness programme' she should have said so. In any event at paragraph 6(b) of her answering affidavit she draws a clear distinction between the two. She says the following:

> (b) If the offender's results are positive the doctor will then direct that a CD 4 cell count test be done. Irrespective of the result of the CD 4 count test the doctor will refer the offender to the *wellness programme*. This is where he will receive counselling and support from the support groups. If the offender has an opportunistic infection the doctors at WCC will treat it. If the CD 4 count is less than 200/mm^3 the offender will be enrolled on the *Anti-Retroviral Therapy (ART) programme*. This programme is offered by the institution of cites which have been accredited by the Department of Health (DoH) as ART cites. (My emphasis.)

There is not one iota of evidence forthcoming from the respondents that any of the applicants were enrolled in the ART programme prior to October 2005. We do know now after the ALP letter of 28 October 2005 and the launch of this application in April 2006, that:

> (i) The first applicant has an appointment with the family clinic at KEH on 27 June 2006;
>
> (ii) The second applicant has an appointment with KEH on 14 June 2006;
>
> (iii) The third applicant has an appointment with KEH on 23 May 2006;
>
> (iv) The fourth applicant is already on ARV treatment and his appointments were on 28 February 2006, 14 March 2006, 26 March 2006 and 24 April 2006;
>
> (v) The fifth applicant has an appointment at KEH on 22 June 2006;
>
> (vi) The sixth applicant has an appointment for 21 June 2006 and it was only made when the ALP brought it to the notice of the respondents in March 2006 that he had a CD 4 cell count of less than 200. This is an admission that the respondents make;
>
> (vii) The seventh applicant has an appointment at KEH for 18 May 2006. He was first referred to McCords Hospital on 9 December 2005;
>
> (viii)The eighth applicant was released on parole from WCC on 11 April 2006. On 5 May 2006 he reported to the Maphumulo Correctional Unit as part of his confirmatory process;
>
> (ix) The ninth applicant has an appointment at KEH for 19 June 2006. He had been referred to King George Hospital in 2005. We do not know if this was before the ALP's interest in the matter in October 2005. The respondents do no say when in 2005 that he was so referred;
>
> (x) The tenth applicant has an appointment at KEH for 26 June 2006;
>
> (xi) The eleventh applicant has an appointment at KEH for 28 June 2006;
>
> (xii) The twelfth applicant has his appointment at KEH for 29 June 2006;
>
> (xiii)The thirteenth applicant has been prescribed ARV Treatment on 6 of April 2006 and had gone through the ART programme (presumably Therapy). But we do not know from when;
>
> (xiv)The fourteenth applicant has an appointment with KEH on 20 June 2006. We know that he has been treated for TB since June 2005;

> (xv) The fifteenth applicant is now on the ART programme and has an appointment with KEH on 20 June 2006. During 2005, (we do not know which month), he was placed on the ART programme.

What is significant about what is detailed above is that, apart from the fourteenth applicant for whom some tests were done in June 2005, there is not a single mention of anything being done for any of the other applicants, by reference to month or date between November 2004, March, April and August 2005 up to October 2005 when the ALP showed an interest in the matter or until 12 April 2006 when this application was launched.

I am therefore inclined to accept the submission by Ms Gabriel that it was only after the launch of these proceedings that some movement on the part of the respondents is detected. The applicants' case, as Mr Moerane suggested, has not changed. It has always been, as I perceive it, that the respondents have delayed without good cause in circumstances where life and death mattered.

The parties may not be too apart right now, but as I see it intervention by this Court is called for to ensure that the respondents urgently comply with their constitutional and statutory obligations not only to the first fifteen applicants (except for the two in respect of whom relief is no longer claimed), but also to similarly situated prisoners.

[**24.**] The dilatoriness and lack of commitment by the respondents as evidenced by the correspondence forming part of the founding affidavit is quite evident. It seems to me that but for the intervention of the State Attorney, who used his good offices to convene the round table meeting which took place on 15 December 2005, the ALP may well have had good cause to have launched this application earlier. It is not necessary for me to detail the correspondence that passed between the ALP, the WCC and other state departments. They are on record. I observe a singular lack of any commitment to appreciate the seriousness and urgency of the situation by anyone apart from the Regional Commissioner of Correctional Services who, in his letter to the ALP dated 13 January 2006 ('AMG 35') and also his letter of 20 December 2003 addressed to the Ethekweni Health District, says *inter alia*, that:

> Looking at the seriousness of the whole exercise, which is a matter of life and/or death, and the urgency which it deserves this office deems it necessary to urge your office to promptly fast track the whole ART issue at Westville Correctional Services on receipt of this communication.

He makes the point that HIV and AIDS at WCC is a reality, with ± 110 HIV and AIDS related deaths since the beginning of 2005, and ± 50 offenders with a CD 4 count of less than 200.

[**25.**] The respondents have not made the lack of resources an issue. Their case is that they are complying with their obligations. The issue boils down to whether the respondents are taking reasonable steps or measures to ensure whether the applicants are receiving adequate

medical treatment. Ms Gabriel's illustration of the irrationality of the arrangement which WCC had reached with Dr De Villiers Zita, the head of the ARV roll-out at KEH with regard to the four counselling sessions is well made. The evidence in this regard is that KEH is only able to book an appointment for one offender per day for four days a week, being Monday to Thursday. What is contemplated is that the sessions are held a week apart with the hope that during this process the patient will have had enough time to reflect on the implications of starting the ART programme.

Disregarding the two applicants who are no longer concerned with this application, there are thirteen others. Ms Gabriel has illustrated, convincingly, that on the basis that KEH can see only four offenders in one week, it will take 3¼ weeks for all thirteen to get only their first counselling. The plan she submitted, is simply unworkable. If the pattern is followed, it will take approximately a year before all 50 similarly affected prisoners are on treatment.

[**26.**] We know from Dr Venter's evidence that there is need to fast track the process in respect of *those who show a willingness* to take the treatment, if medically indicated. (My emphasis.) We know also that there are other designated sites apart from KEH which the WCC has still not accessed and afford no reason for not doing so. These are RK Khan, Wentworth Hospital, Clairwood Hospital, Prince Mshiyeni Hospital, Addington Hospital and Osindweni Hospital.

[**27.**] Dr Venter says that a person with HIV/AIDS who has demonstrated the requisite commitment to taking ARV medicines should commence ARV treatment no later than the point when his/her CD 4 count is below 200. People with CD 4 counts of less than 200, he says, require immediate assessment for ARV treatment. Now, it does not seem to me that the steps taken by WCC are in the least bit adequate. The plan envisaged by them is patently unworkable unless other designated sites are accessed immediately. There is no commitment by the respondents to adhere to any workable or rational time frames. Notwithstanding an appreciation by the Regional Commissioner of the third respondent that the whole issue at WCC be fast tracked, the only obstacle that so far has been removed, which is now common cause, is the issue that all prisoners no longer have to have ID books to access treatment.

More pertinent to this application we hear of no commitment on the part of the respondents committing themselves to time frames in respect of those other similarly situated prisoners. There is a deafening silence on this issue. This is perhaps understandable because they deny that the fifteen applicants have *locus standi* to represent other prisoners in a class action.

[**28.**] The applicants say that the respondents' undertakings given at the round table meeting on 15 December 2005, have not been

honoured. The respondents say that they have taken reasonable and adequate steps to ensure that the applicants are placed on the ART programme expeditiously in terms of the agreements reached. I do not see any evidence of this and what they now propose has been illustrated by the applicants' counsel to be illogical and unworkable.

The special circumstances prisoners and the reasonableness of policy and statutory obligations

[**29.**] I am acutely conscious, speaking from my own experience, that when sentencing a prisoner to a long term of imprisonment, that his or her prospects of emerging from prison alive is seriously compromised because of the HIV/AIDS pandemic. I believe that that thought would also engage most of my colleagues in this division. Much has been said and continues to be said about severe overcrowding from official sources. This is something about which I believe I can take judicial notice of – as did the court in *Stanfield v Minister of Correctional Services and Others* 2004 (4) SA 43 (C) where the Court associated itself with the call by the Judicial Inspectorate of Prisons (headed by Fagan J). This is what appears at paragraph 128 of that judgment at 80:

> The facts set forth in the most recent annual report of the Judicial Inspectorate of Prisons (paragraph [51] above) indicate a shocking state of affairs. Despite the huge increase in the prevalence of HIV/AIDS and other terminal diseases in our prisons, only the tiniest percentage of prisoners suffering from such diseases were released on medical grounds during 2002. I associate myself fully with the call by Inspecting Judge JJ Fagan that the release of terminally ill prisoners should receive far more attention, if not priority attention, than is the case at the present time. The alternative is grotesque: untold numbers of prisoners dying in prisons in the most inhuman and undignified way. Even the worst of convicted criminals should be entitled to humane and dignified death.

It is regrettable that prisoners, being of a class, very vulnerable to infection, were not given special consideration in the Operational Plan and Guidelines. Applicants' counsel drew attention to the fact that when the Operational Plan and Guidelines were drawn, it was manifestly drawn with the general public in mind. I agree. This explains why there is only a passing reference to prisoners in both documents.

The Operational Plan provides as follows:

> In order to offer HIV and AIDS care and treatment, tight linkages with the public health system will be needed, so that patients requiring evaluation for Anti-Retroviral Therapy can be appropriately assessed and started on ARV's by skilled clinicians. The health care team will refer prisoners back to Correctional Services for ongoing primary care follow-up for HIV, with referrals for specialised care in public facilities according to National Treatment Guidelines.

It is plain to see from that statement that the public health system should be involved. The Guidelines on the other hand are completely silent on the matter. The Guidelines do not, for example, deal with

the relevance and/or the application of the psycho-social criteria (paragraph 15 (*supra*) in a prison context.

This to my mind, is important, to take but two examples:

(i) Prisoners are at the mercy of prison officials to ensure regular and timeous attendance at HIV/AIDS clinics or hospitals;

(ii) House visits, provided for in the psycho-social criteria, is not possible in the prison context and there may well be room for abbreviated time periods between visits to ensure earlier assessment.

All this indicates that there is room for flexibility in the contexts of HIV/AIDS victims in the prison context. Guidelines are what they purport to be – guidelines and no more. They are not cast in stone as the respondents seem to suggest. So too, I imagine would be the Operational Plan in the prison context because the ordinary process, if followed to the letter, in the prison context, would result in unnecessary delay and put the applicants and similarly situated prisoners, who succumb to the virus, at the risk of losing their lives.

[**30.**] A good starting point to the enquiry into whether the conduct of the respondents was and is reasonable or not would be to take note of the comment of Yacoob J in *Government of the RSA v Grootboom* 2001 (1) SA 46 (CC), bearing in mind of course that the implementation of law and policy and fulfilment of legal duties, must be reasonable. This is what Yacoob J said in *Grootboom* (*supra*):

> The state is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programs implemented by the executive. These policies and programs must be reasonable both in their conception and their implementation. The formulation of a program is only the first stage in meeting the state's obligation. The program must also be reasonably implemented. An otherwise reasonable program that is not implemented reasonably will not constitute compliance with the state's obligations.

In the context of the factual position about which much has already been said, I am in full agreement with the applicants' contentions as articulated by their counsel in her heads of argument that the respondents' implementation of the laws and policies is unreasonable in that:

(a) It is inflexible;

(b) It is characterised by unjustified and unexplained delay, and

(c) Some of the steps taken by the respondents after the institution of these proceedings, in particular the manner in which the appointments were set up, are irrational.

[**31.**] The applicants have come to court on the basis that their fundamental constitutional rights are being infringed. Section 237 of the Constitution provides that all constitutional obligations must be performed diligently and without delay. In *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others*10 2005 (2) SA 359 (CC), O'Regan J in the context of a threat to fundamental rights said that each case must be judged according to its own circumstances. One of the considerations would be that the graver

the threat to fundamental rights, '... the greater is the responsibility on the duty bearer'. That observation is a salutary one. On the facts of this case, I come to the conclusion that the treatment and medical care afforded to the first to the fifteenth applicants and other similarly situated prisoners at WCC is neither adequate nor reasonable in the circumstances. The respondents have, I find, fallen short of their constitutional and legislative obligations to the applicants. Had steps been taken as early as November 2004 in the case of one applicant or in March, April or August 2005 in the case of the others, the current serious impasse could well have been avoided.

The structural interdict

[**32.**] My initial reaction to the idea of a structural interdict, when first I read the papers was one of scepticism because in respect of the first to the fifteenth applicants, the respondents had shown some sense of commitment, however inadequate and irrational, to redress their plight. I was also conscious of the submission by Mr Moerane in his heads and in argument before me that courts are reluctant to make such orders because, depending on the circumstances, it may amount to an unwarranted interference with the authority and discretion of the executive arm of government, thereby violating the principle of the separation of powers. I am conscious of these sensitivities and the debate surrounding the issue. However, nothing rational or workable has been forthcoming from the respondents with regard to the applicants and nothing at all about similarly situated prisoners at WCC, presumably because of the stance the respondents have taken that the sixteen applicants have no *locus standi* to bring the application on their behalf. I am of the view therefore that structured relief is justified based on the facts before me and the circumstances of the case.

The respondents submit that this application was unnecessary because they are implementing the Operational Plan and Guidelines. Having carefully considered the evidence before me, I come to the conclusion that such steps that have been shown to be taken by the respondents are unworkable and characterised by delays, obstacles and restrictions which seriously compromise the health of the thirteen remaining applicants.

An order that does not take into consideration the plight of other similarly situated prisoners at WCC will result in continued denial of access to ARV treatment for them and consequently an infringement of their constitutional rights.

Dr Venter's uncontested evidence is that there is room for flexibility. In my mind such an order is justified in the special circumstances of this case, more especially, as I see it, there has been and continues to be a violation of the applicants' constitutional rights. There is nothing forthcoming from the respondents despite the evidence, on

their own version, that there are other prisoners at WCC who are affected by the virus and that there are problems associated with their access to assessment for therapy or treatment. A structured order with a supervisory component is therefore just, equitable and appropriate.

[**33.**] The time limit of one week suggested to which the respondents should be committed to file an affidavit setting out the manner in which they will comply with paragraph 4 of the order, as suggested by Ms Gabriel, even given the urgency, is somewhat optimistic and impractical. There will have to be consultations within and between departments of state, and no doubt with legal counsel and with accredited hospitals and clinics in order to come up with a comprehensive and workable plan not only having regard to the applicants but other similarly situated prisoners at WCC. A two-week period, I believe will be more realistic. I expect that during this period, counselling and treatment of those affected will continue. I should also make provision in the order for the applicants to approach the Court again in the event that the steps proposed by the respondents in compliance with paragraph 4 of the order are unreasonable. Such an approach could be made on submission of further affidavits before any judge of this division as I do not consider myself in such eventuality, to be seized with the matter.

I must however express the hope that whatever plan the respondents come up with, if there is any disagreement, good sense will prevail and a settlement reached through negotiation in the interest of those affected prisoners whose vulnerability cannot be denied. Any protracted litigation can only be counter-productive and harmful to those in whose interest this application was launched.

Costs

[**34.**] There can be no reason why a costs order should not follow the usual course and be awarded to the successful party.

Order

[**35.**] I accordingly make the following order:

(1) That the respondents are hereby ordered with immediate effect to remove the restrictions that prevent the first, second, third, fifth, sixth, seventh, ninth, tenth, eleventh, twelfth and fifteenth applicants, and all other similarly situated prisoners at Westville Correctional Centre, who meet the criteria as set out in the National Department of Health's Operational Plan for Comprehensive HIV and AIDS Care, Management and Treatment for South Africa, from accessing Anti-Retroviral Treatment at an accredited public health facility.

(2) That the respondents be and are hereby ordered with immediate effect to provide Anti-Retroviral Treatment in

accordance with the aforesaid Operational Plan to the first, second, third, fifth, sixth, seventh, ninth, tenth, eleventh, twelfth and fifteenth applicants and all other similarly situated prisoners at Westville Correctional Centre at an accredited public health facility;

(3) That the respondents are hereby ordered on or before 7 July 2006 to serve on the applicants' attorneys and lodge with the Registrar of this Court, an affidavit setting out the manner in which it will comply with paragraph 2 of this order.

(4) The applicants may within five (5) days of the delivery of the affidavit by the respondents contemplated in paragraph 3 of this order, deliver a commentary thereon, under oath.

(5) The respondents may within five (5) days of the delivery of the commentary contemplated in paragraph 4 of this order, deliver a reply under oath.

(6) Thereafter the matter may be enrolled for hearing in consultation with the Registrar of this Court.

(7) The respondents are ordered to pay the costs of the applicants jointly and severally.

ZIMBABWE

Marimo and Another v Minister of Justice and Others

(2006) AHRLR 349 (ZwSC 2006)

Claudious Marimo and Movement for Democratic Change v The Minister of Justice, Legal & Parliamentary Affairs, The Attorney-General, the Chief Justice and Herbert Murerwa

Supreme Court of Zimbabwe, application 160/05, SC 25/06, 25 July 2006
Judges: Sandura, Cheda, Ziyambi, Malaba, Gwaunza

Constitutionality of appointment of judges to electoral court

Fair trial (independence of courts, appointment procedure, 21, 26-31)

Malaba JA

[**1.**] This is an application in terms of s 24(1) of the Constitution of Zimbabwe (the Constitution) for redress of an alleged contravention of the Declaration of Rights contained in ss 18(1) and 18(9) of the Constitution.

[**2.**] The right guaranteed to any person under s 18(1) is the right to protection of the law whilst that entrenched in terms of s 18(9) is the right to a fair hearing within a reasonable time by an independent and impartial court established by law.

[**3.**] The first applicant was a candidate for election as a member of Parliament for Goromonzi constituency in the general election held on 31 March 2005. He was sponsored by the second applicant (the MDC) which is a registered political party. The seat in Parliament for Goromonzi constituency was won by the fourth respondent who was a candidate in the general election sponsored by the Zimbabwe African National Union – Patriotic Front (ZANU-PF).

[**4.**] The Parliamentary elections were conducted in terms of the Electoral Act [Chapter 2:13] (the Act) which came into operation on 1 February 2005. Section 161 of the Act established a new court called the Electoral Court (the Court) with jurisdiction to hear and determine election petitions and other matters in terms of the Act.

[**5.**] Section 162(1) of the Act provided for the appointment of persons to preside over the court. It reads as follows: 'The Chief Justice shall after consultation with the Judge President appoint one or more judges of the High Court to be judge or judges, as the case may be, of the Electoral Court.'

[**6.**] Section 172 of the Act provided that:

> (1) A decision of the Electoral Court on a question of fact shall be final.
>
> (2) A decision of the Electoral Court on a question of law may be the subject of an appeal to the Supreme Court.

[**7.**] On 15 April 2005 the first applicant filed a petition with the court challenging the validity of the election of the fourth respondent as a Member of Parliament for Goromonzi constituency. Fifteen other candidates sponsored by the MDC who had lost the election to candidates sponsored by ZANU-PF filed petitions challenging the results in their respective constituencies.

[**8.**] On 5 May 2005 the Chief Justice, acting in terms of s 162(1) of the Act, appointed five judges of the High Court to preside over the court to hear and determine the election petitions. On 23 May the applicants made an application to the Supreme Court attacking the constitutional validity of s 162(1) of the Act. They alleged that the Electoral Court was a 'special court' as defined in s 92(4)(b) of the Constitution.

[**9.**] The applicants contended that Parliament ought to have provided that persons to preside over the court had to be appointed in the manner prescribed under s 92(1) of the Constitution. It was their argument that s 162(1) of the Act was inconsistent with s 92(1) of the Constitution. For that reason, they contended that s 162(1) of the Act and the appointments of the judges of the High Court to preside over the court were void. The first applicant alleged that because of the constitutional invalidity of s 162(1) of the Act and the appointments of the judges to preside over the court, the rights guaranteed to him under ss 18(1) and 18(9) of the Constitution were likely to be contravened should the hearing of his election petition commence.

Section 92(1) of the Constitution reads:

> The power to appoint persons to preside over a special court shall vest in the President, after consultation with the Judicial Service Commission; provided that Parliament may provide that the Chief Justice may, after consulting the Judicial Service Commission, appoint a person holding the office of judge of the High Court to preside over a special court for such period as he may specify.

[**10.**] A 'special court' is defined in s 92(4) of the Constitution to mean:

> (a) the Administrative Court established by s 3 of the Administrative Court Act [Chapter 7:07].
>
> (a1) the Fiscal Appeal Court established by s 3 of the Fiscal Appeal Court Act [Chapter 23:01].

(a2) the Special Court for Income Tax Appeals established by s 64 of the Income Tax Act [Chapter 23:06].

(a3) any court, or other adjudicating authority established by law which exercises any function that was vested in a court referred to in paragraph (a), (a1) or (a2) on the date of commencement of the Constitution of Zimbabwe Amendment (No 15) Act, 1998.

(b) any court or other adjudicating authority established by law other than –

(i) a local court; or

(ii) a court established by or under a disciplinary law or

(iii) a court established by or under an Act of Parliament for the adjudication of small civil claims;

if there is no right of appeal directly or indirectly from a decision of that court or adjudicating authority to the Supreme Court or the High Court;

(c) any court or other adjudicating authority established by law which is declared by that law to be a special court for the purposes of this section.

[**11.**] The application was served on the Chief Justice on 31 May. He appears to have accepted the validity of the contention advanced by the applicants because he thereafter consulted the Judicial Service Commission and the Judge President on the appointment of the judges of the High Court to preside over the court. On 1 June 2005, a letter was sent to each of the judges who had been appointed on 5 May. It reads:

It has been brought to my attention that some of the litigants in the electoral petitions are unhappy about your previous appointment as a judge of the Electoral Court because the Judicial Service Commission was not consulted in terms of s 92(1) of the Constitution.

In the event of my appointment of you as a judge of the Electoral Court on 5 May 2005 not being in accordance with the law it is hereby revoked.

Please be advised that I, in my capacity as Chief Justice of Zimbabwe and after consultation with the Judge President and the Judicial Service Commission have appointed you, as a Judge of the Electoral Court with effect from this day the 1st June 2005.

[**12.**] Acting on the authority of the letter of appointment, some of the judges refused applications by the petitioners to suspend the hearing and determination of the election petitions pending determination of this application. They also refused requests by the petitioners to refer the question of the contravention of the declaration of rights arising in that court to the Supreme Court for determination in terms of s 24(2) of the Constitution.

[**13.**] It was contended on behalf of the applicants that the re-appointment of the judges on 1 June 2005 was also invalid because there was no Act of Parliament authorising the Chief Justice to appoint the judges of the High Court after consulting the Judicial Service Commission and the Judge President. It was further argued that the insistence by the judges presiding over the court to hear and determine the election petitions and the refusal to refer the question of the contravention of the Declaration of Rights which had arisen in those proceedings to the Supreme Court for determination violated the petitioners' right to the protection of the law.

[**14.**] The applicants sought by way of relief a declaratory order in these terms:

> It is declared that:
>
> 1.1 The Electoral Court established by s 161 of the Electoral Act [Chapter 2:13] falls within the meaning of a 'special court' as defined by s 92(4) of the Constitution.
>
> 1.2 Accordingly the manner of appointment of judges to it as provided in s 162(1) of that Act be and is hereby declared to be inconsistent with s 92(1) and s 18 of the Constitution.
>
> 1.3 The initial appointments made by the third respondent to the Electoral Court without consulting the Judicial Service Commission on the specific appointments are accordingly invalid.
>
> 1.4 Additionally any appointments made by the third respondent to the Electoral Court without specifying the period of the appointment are invalid.
>
> 1.5 All appointments made by the third respondent to the Electoral Court after consulting the Judicial Service Commission without Parliament having provided for the same are also declared to be inconsistent with s 92(1) and hence s 18 of the Constitution and are accordingly invalid.
>
> 2. It is ordered that:
>
> 2.1 The appointments made by the third respondent to the Electoral Court, whether made in accordance with s 162 of the Electoral Act [Chapter 2:13] or made on 1 June 2005 are a nullity, and set aside.

[**15.**] Only the first and second respondents filed opposing affidavits. The first respondent is the Minister responsible for the administration of the Act. The second respondent was cited because s 24(6) of the Constitution gives him a right to be heard by the court on the question whether any law is in contravention of the Declaration of Rights arising for determination in any proceedings before it.

[**16.**] The contention advanced by the respondents in opposing the application was that the Electoral Court was not a 'special court' as defined in s 92(4) of the Constitution. The argument was based on the fact that s 172(2) of the Act gave to a party who felt aggrieved by a decision of the court on a question of law a right of appeal to the Supreme Court. There was a right of appeal from a decision of the court to the Supreme Court (so went the argument). The contention was therefore that Parliament was not obliged, in the exercise of legislative power, to provide for the appointment of persons to preside over the court after consulting with the Judicial Service Commission. Consequently the respondents denied that there was any inconsistency between s 162(1) of the Act and s 92(1) of the Constitution.

[**17.**] The first question for determination is whether on a true interpretation of s 172(1) of the Act there was no right of appeal from a decision of the Electoral Court within the meaning of s 92(4)(b) of the Constitution. An affirmative answer to the question will establish as a fact the applicants' contention that the Electoral Court is a 'special court' for the purposes of s 92(1) of the Constitution.

[**18.**] A right of appeal is a matter of substantive law. The fact of its non existence can only be established on the construction of the statute by which the court from a decision of which it is alleged that no right of appeal was created. In this case the fact to be established requires proof of a negative statement to the effect that there is no right of appeal from a decision of the Electoral Court. The contention advanced on behalf of the respondents to the effect that the Electoral Court is not a 'special court' because s 172(2) of the Act gives a party aggrieved by a decision of that court a right of appeal on a question of law does not assist in the proof of the negative fact in s 92(4)(b) of the Constitution.

[**19.**] It appears to me that one has to look at s 172(1) of the Act in the determination of the question whether there is no right of appeal from a decision of the Electoral Court. Section 172(1) does not expressly provide that there shall be no right of appeal from a decision of the court on a question of fact. It simply provides that a judgment of that court on a question of fact shall be final. Usually the draftsman adds such words as 'and not subject to appeal' to put it beyond doubt that the finality of the decision is not in respect of the court in the exercise of its jurisdiction only but binds the parties as well.

[**20.**] Where Parliament intends to vest a decision of a court with finality as was the case in s 172(1) of the Act, there is no right of appeal. Section 172(1) of the Act embodies the definitive criterion of a 'special court' set out in s 92(4)(b) of the Constitution. There is a decision of the court which would form the subject matter of that provision distinguished from the other type of a decision under s 172(2) of the Act from which an appeal would lie to the Supreme Court by the actual nature of the question on which the appeal would otherwise have lain to the Supreme Court but for the provisions of s 172(1). I accept the submission made on behalf of the applicants by Mr Matinenga that the Electoral Court established by s 161 of the Act is a 'special court' for the purposes of s 92(1) of the Constitution.

[**21.**] Having established a 'special court' under Chapter VIII of the Constitution and conferred on it the judicial power to hear and determine election petitions, Parliament was bound by s 92(1) of the Constitution to provide for the appointment of persons to exercise the powers of that court in the manner prescribed by the Constitution. The method of appointment of the persons to preside over a 'special court' prescribed under s 92(1) of the Constitution ensured that the same conditions of the discharge of the judicial functions of the court were secured for them as were guaranteed to persons appointed under Chapter VIII of the Constitution (dealing with the judiciary) as judges of the High Court.

[**22.**] It is common cause that our Constitution is based on the basic concept of the separation of the powers of the state into the

legislative, executive and judiciary spheres. In that regard the Constitution is divided into chapters dealing exclusively with the plenitude of each power and how parts of it may be conferred upon appropriate bodies within its sphere.

[**23.**] Judicial authority is dealt with under Chapter VIII of the Constitution. Section 79(1) which commences Chapter VIII declares that the judicial authority of the state shall vest in (a) the Supreme Court, and (b) the High Court, and (c) such other courts subordinate to the Supreme Court and the High Court as may be established by or under an Act of Parliament. The hierarchical structure of the courts has the Supreme Court at the apex to supervise the exercise of judicial power by subordinate courts through the system of appeals.

[**24.**] The structure of the distribution of judicial power also shows that the independence of the judiciary is more firmly safeguarded for persons presiding over superior courts, that is to say, the High Court and the Supreme Court, than it is for subordinate courts. To that end, judges of the High Court and the Supreme Court are appointed by the President after consultation with the Judicial Service Commission. They have security of tenure in that, [if well-behaved], they can remain in office until they voluntarily resign, retire at the age of sixty five or seventy. The office of a judge of the High Court and the Supreme Court cannot be abolished during his or her tenure of office. His or her salary cannot be reduced.

[**25.**] The two pillars of security of tenure and conditions of service firmly secure for the judges of the superior courts the necessary independence from interference by the other organs of the state, that is to say, the legislature and the executive in the discharge of judicial functions.

[**26.**] It was for the fundamental purpose of securing, for persons who preside over 'special courts', the independence in the discharge of judicial functions of those courts safeguarded by the two pillars of security of tenure and conditions of service, that the framers of the Constitution provided that they be appointed in the manner prescribed under s 92(1) which is one of the provisions of the Constitution falling under Chapter VIII.

[**27.**] Once it established a 'special court', Parliament was bound by s 92(1) of the Constitution to provide that persons who were to exercise the judicial power vested in that court, be appointed by the President after consultation with the Judicial Service Commission or provide in the Act that they be appointed by the Chief Justice after consulting the Judicial Service Commission.

[**28.**] It is clear from the provisions of s 92(1) of the Constitution that consultation with the Judicial Service Commission is a mandatory requirement for a valid appointment of a person to exercise judicial power conferred by Parliament on a 'special court'. Consultation with

the Judicial Service Commission by the President or the Chief Justice is such an integral aspect of the appointment of a person to preside over a 'special court' that without it there cannot be a valid discharge of the judicial functions of that court by the appointee.

[**29.**] The consultation by the President or the Chief Justice of the prescribed body, and not any one else, is so mandatory that Parliament cannot abridge the provisions requiring its enactment in the statute establishing the special court. In fact any method of appointment of persons to preside over a 'special court' which is different from that prescribed under s 92(1) of the Constitution would be invalid.

[**30.**] Under s 162(1) of the Act, Parliament empowered the Chief Justice to appoint sitting judges of the High Court to preside over the Electoral Court which is a 'special court', after consulting the Judge President. It transferred the right to be consulted on the appointment of judges of the High Court to exercise judicial power vested in a 'special court' from the Judicial Service Commission to the Judge President. Parliament had no power to do that. It was under a duty to provide that the judges of the High Court were to be appointed to preside over the Electoral Court in the manner prescribed under s 92(1) of the Constitution. Failure to so provide means that s 162(1) of the Act is inconsistent with s 92(1) of the Constitution.

[**31.**] Section 3 of the Constitution provides that the Constitution is the supreme law of Zimbabwe and if any other law is inconsistent with it that other law shall, to the extent of the inconsistency, be void. It must follow that to the extent of its inconsistency with s 92(1) of the Constitution s 162(1) of the Act was beyond the legislative competence of Parliament. The appointment of the judges to preside over the special court in the manner prescribed under s 162(1) of the Act was clearly invalid.

[**32.**] The last question for determination is whether the applicants established the contravention of the fundamental rights protected under s 18(1) and 18(9) of the Constitution as they approached this Court on an application under s 24(1) of the Constitution. The law, the right to the protection of which the applicants alleged they had been deprived of under s 18(1) of the Constitution, was s 92(1) of the Constitution. But for Parliament to purport to make a law which was void by virtue of s 3 of the Constitution did not in my view deprive anyone of the 'right to protection of the law'. That is the case as long as the judicial system of Zimbabwe provides a procedure, as it does, by which any person interested in establishing the invalidity of a statute, in this case s 162(1) of the Act, can obtain from the courts of justice in which the plenitude of the judicial power of the state is vested, a declaration of the invalidity that would be binding upon Parliament itself and upon all persons attempting to Act under, or enforce, the inconsistent law. Access to a court of justice for that

remedy is itself 'the protection of the law' to which all individuals including the election petitioners involved in this case would be entitled under s 18(1) of the Constitution. See *Attorney General of Trinidad & Tobago v Mcleod* (1985) LRC 81 (PC) at 90 C–E; *Harrikissoon v Attorney General* 1980 AC 265 at 269, 270.

[**33.**] I am however satisfied that the applicants established the contravention of their right to protection of the law by proving the contravention of the fundamental right guaranteed to them under s 18(9) of the Constitution. There is no doubt that the applicants in their capacity as election petitioners were entitled to a fair hearing and determination of their cases by an independent and impartial court established by law. The Electoral Court had to be a 'court established by law' before it could be able to afford the applicants the right to due process and to the protection of the law.

[**34.**] The phrase a 'court established by law' incorporated into s 18(9) of the Constitution includes two aspects. It refers to a court as an independent institution and a repository of judicial power. In that sense the Electoral Court was 'established by law' in that it was established by s 161 of the Act the validity of which was not attacked.

[**35.**] The second aspect relates to a court as it is constituted that is when a judge sits to exercise judicial power vested in the court and does so on the authority of a valid appointment. It is in the second sense that the phrase was used to allege a contravention of the Declaration of the Rights contained in s 18(9) of the Constitution. As pointed out earlier, the provision by Parliament for the appointment of the judges of the High Court to preside over the Electoral Court in the manner prescribed under s 92(1) of the Constitution was a necessary condition for validity of the appointments and the exercise by the judges of the jurisdiction of that court.

[**36.**] It must follow, that as the judges were not validly appointed, they had no authority to exercise the judicial power of the Electoral Court at the time they purported to hear and determine the election petitions. In other words, the court in which they sat was not properly constituted and was not a court 'established by law'. There was a violation of the right guaranteed to the applicants under s 18(9) of the Constitution.

[**37.**] A declaration by a validly constituted court as to the law applicable to a determination in a case becomes the law binding the parties to the proceedings until it is reversed on appeal. In that way the court affords to the parties the right to protection of the law. But in this case the rulings refusing the request for the reference of the question of contravention of the Declaration of Rights contained in s 18(1) and 18(9) were not only clearly wrong in view of the fact that there were indeed invalid appointments of the judges concerned but the court was itself not validly constituted.

[**38.**] The refusal of the application for reference of the question of the contravention of the Declaration of Rights in each case where it had arisen constituted a denial to the election petitioners involved, of the right to protection of the law guaranteed under s 18(1) of the Constitution. See *Martin v Attorney-General & Anor* 1993 (1) ZLR 153 (S) at 157 G-158 A; *Tsvangirai v Mugabe & Anor* S-84-05 at 19.

[**39.**] This court has power under s 24(4) of the Constitution to make such orders and give such direction as it may consider appropriate for the purpose of enforcing or securing the enforcement of the Declaration of Rights. What has exercised my mind in this regard is the question whether to order the suspension of the coming into effect of the declaratory order to which the applicants are clearly entitled, for a period in order to give Parliament the opportunity to correct the error in the exercise of its powers.

[**40.**] The problem I have faced is that such an order of suspension of the operation of the declaration of the invalidity of s 162(1) of the Act and the consequent effect thereof would not be 'for the purpose of enforcing or securing the enforcement of the Declaration of Rights'. It would have the effect of perpetuating a void. A court has no power to fill up such an empty space. It is for Parliament to put in place a valid law on the appointment of the persons to preside over the Electoral Court to hear and determine the election petitions filed with that Court.

[**41.**] The applicants are accordingly granted the following relief:

It is declared that:

1.1 The Electoral Court established by s 161 of the Electoral Act [Chapter 2:13] falls within the meaning of a 'special court' as defined by s 92(4) of the Constitution.

1.2 Accordingly the manner of appointment of judges to it as provided in s 162(1) of that Act be and is hereby declared to be inconsistent with s 92(1) and s 18 of the Constitution.

1.3 The initial appointments made by the third respondent to the Electoral Court without consulting the Judicial Service Commission on the specific appointments are accordingly invalid.

1.4 Additionally any appointments made by the third respondent to the Electoral Court without specifying the period of the appointment are invalid.

1.5 All appointments made by the third respondent to the Electoral Court after consulting the Judicial Service Commission without Parliament having provided for the same are also declared to be inconsistent with s 92(1) and hence s 18 of the Constitution is accordingly invalid.

1.6 All appointments made by the third respondent to the Electoral Court, whether made in accordance with s 162 of the Electoral Act [Chapter 2:13] or made on 1 June 2005, are a nullity and set aside.

1.7 The first respondent and second respondent are jointly and severally to pay the costs of the application, one paying the other to be absolved.

[**42.**] Sandura JA:I agree.

Cheda JA: I agree.

Gwaunza JA: I agree.

Ziyambi JA

[**43.**] I have read the judgment of Malalba JA and agree with the conclusions at which he arrived as well as the relief granted. I wish to add the following remarks.

[**44.**] Judges in Zimbabwe are appointed and hold office in terms of the Constitution of Zimbabwe. Their security and tenure of office is guaranteed by the Constitution. Thus the terms and conditions of their appointment cannot, without their consent, be altered during their tenure of office. These provisions make for the independence of the judiciary from the other arms of the state being the Executive and the Legislature.

[**45.**] Section 92(1) of the Constitution provides for judges of the High Court to be appointed to serve in a special court in circumstances limited to the manner of their appointment and the period of appointment. Section 92(2) ensures that during the term of office of such judges appointed to preside over a special court, their conditions of service shall not be amended and their office shall not be abolished without their consent.

[**46.**] No provision is made in the Constitution for judges of the High Court to serve in subordinate courts other than special courts. Thus it would be fair to say that if the Electoral Court is not a special court then the appointment of judges of the High Court to preside in that court is inconsistent with the provisions of the Constitution. The Chief Justice when acting in terms of s 91 of the Constitution can only assign a judge of the High Court to preside in an inferior court if that court is a special court.

[**47.**] In prescribing a manner of appointment by the Chief Justice, other than that enacted in the Constitution, Parliament contravened the Constitution and the offending provision, being s 162 of the Electoral Act (the Act), is invalid by reason of its inconsistency with the Constitution.

[**48.**] It follows from the above that the appointment of the judges of the High Court to preside in the Electoral Court, made by the Chief Justice acting in terms of s 162 of the Act, was contrary to the provisions of s 92(1) of the Constitution and therefore invalid.

[**49.**] The contention by the respondent that the Electoral Court is not a special court as defined by s 92(4) of the Constitution since there is a right of appeal on a point of law to the Supreme Court, does not assist its case. Apart from the fact that the right of appeal is, in my view, so limited as to be non existent, if the Electoral Court is not a special court, then the appointments of the judges of the High Court to preside in it are all invalid. If it is a special court then the

procedure set out in s 92(1) must be followed if the appointments are to be valid.

[**50.**] Whichever way one looks at it, the applicants' contentions are valid. If the Electoral Court is to be a special court then Parliament must enact the enabling legislation in conformity with the Constitution. If it is not a special court, then judges of the High Court cannot lawfully be appointed to preside in it.

[**51.**] The most favourable conclusion which can be arrived at in the circumstances, since Parliament is presumed to act in compliance with the Constitution, is that Parliament intended that the Electoral Court should be a special court. In order to give effect to that intention the necessary legislation in accordance with s 92 of the Constitution must be enacted to govern the appointment of judges of the High Court to preside in that court.