AFRICAN HUMAN RIGHTS LAW REPORTS 2007

Pretoria University Law Press
PULP

2008

African human rights law reports
2007

Published by:

Pretoria University Law Press (PULP)

The Pretoria University Law Press (PULP) is a publisher at the Faculty of Law, University of Pretoria, South Africa. PULP endeavours to publish and make available innovative, high-quality scholarly texts on law and related disciplines in Africa. PULP also publishes a series of collections of legal documents related to public law in Africa, as well as text books from African countries other than South Africa.

For more information on PULP, see www.pulp.up.ac.za

Printed and bound by:

ABC Press
Cape Town

To order, contact:
PULP
Faculty of Law
University of Pretoria
South Africa
0002
Tel: +27 12 420 4948
Fax: +27 12 362 5125
pulp@up.ac.za
www.pulp.up.ac.az

ISSN: 1812-2418

CONTENTS

TABLES AND INDEXES

CASES

EDITORIAL

The *African Human Rights Law 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. This eighth volume of the *Reports* for the first time also includes judgments that deal with human rights issues from the courts of African regional economic communities. 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.

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:

Centre for Human Rights
Faculty of Law
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
CAT	Committee Against Torture
CCPR	International Covenant on Civil and Political Rights
EAC	East African Court of Justice
ECOWAS	Economic Community of West African States Community Court of Justice
HRC	United Nations Human Rights Committee
KeHC	High Court, Kenya
NaSC	Supreme Court, Namibia
NgCA	Court of Appeal, Nigeria
SADC	Southern African Development Community Tribunal
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.oxfordlawreports.com

Interights
www.interights.org

Association des Cours Constitutionelles
www.accpuf.org

Commonwealth Legal Information Institute
www.commonlii.org

Southern African Legal Information Institute
www.saflii.org

High Court, Malawi
www.judiciary.mw

Court of Appeal, Nigeria
www.courtofappeal.gov.ng

Nigeria Internet Law Reports
www.nigeria-law.org/LawReporting.htm

Constitutional Court, South Africa
www.constitutionalcourt.org.za

TABLE OF CASES

Nigeria

Inspector-General of Police v All Nigeria People's Party and Others (2007) AHRLR 179 (NgCA 2007)

Zimbabwe

Dzvova v Minister of Education, Sports and Culture and Others (2007) AHRLR 189 (ZwSC 2007)

ALPHABETICAL TABLE OF CASES

SUBJECT INDEX

This index is divided into two parts: the first deals with general principles and procedural issues, and the second part with substantive rights.

GENERAL PRINCIPLES AND PROCEDURES

INTERNATIONAL INSTRUMENTS REFERRED TO

UNITED NATIONS

Universal Declaration of Human Rights

Abbassi v Algeria (2007) AHRLR 3 (HRC 2007), 2.7, 3.5

Essien v The Gambia and Another (2007) AHRLR 131 (ECOWAS 2007), 10,11, 27

Article 23

Essien v The Gambia and Another (2007) AHRLR 131 (ECOWAS 2007), 1

International Covenant on Civil and Political Rights

Article 2

Abbassi v Algeria (2007) AHRLR 3 (HRC 2007), 10, 11

Njaru v Cameroon (2007) AHRLR 21 (HRC 2007), 1, 6.1, 6.2, 6.3, 6.4, 7, 8, 9

Titiahonjo v Cameroon (2007) AHRLR 29 (HRC 2007), 1.1, 3.1, 5.5, 7, 8, 9

El Dernawi v Libya (2007) AHRLR 35 (HRC 2007), 8, 9

Article 3

Titiahonjo v Cameroon (2007) AHRLR 29 (HRC 2007), 1.1

Article 4

Abbassi v Algeria (2007) AHRLR 3 (HRC 2007), 3.4, 16, 22

Article 6

Titiahonjo v Cameroon (2007) AHRLR 29 (HRC 2007), 1.1, 3.1, 3.2, 5.5, 6.2, 7

Article 7

Article 19 v Eritrea (2007) AHRLR 73 (ACHPR 2007), 101

Njaru v Cameroon (2007) AHRLR 21 (HRC 2007), 1, 3.1, 3.2, 5.2, 6.1, 7

Titiahonjo v Cameroon (2007) AHRLR 29 (HRC 2007), 1.1, 3.1, 3.3, 5.5, 6.3, 6.4, 7, 8

Article 9

Abbassi v Algeria (2007) AHRLR 3 (HRC 2007), 1, 2.7, 3.1, 3.2, 3.4, 3.5, 7.4, 8.3, 8.4, 8.5, 9

Njaru v Cameroon (2007) AHRLR 21 (HRC 2007), 1, 3.3, 5.2, 6.2, 6.3, 7

Titiahonjo v Cameroon (2007) AHRLR 29 (HRC 2007), 1.1, 3.4, 5.5, 6.5, 6.6, 7

Article 10

Njaru v Cameroon (2007) AHRLR 21 (HRC 2007), 1, 3.2, 5.2, 6.1

Article 12
Abbassi v Algeria (2007) AHRLR 3 (HRC 2007), 1, 3.1, 3.5, 7.4, 8.6
El Dernawi v Libya (2007) AHRLR 35 (HRC 2007), 1, 3.1, 5.4, 6.2, 7

Article 14
Abbassi v Algeria (2007) AHRLR 3 (HRC 2007), 1, 2.7, 3.1, 3.3, 4.2, 4.6, 7.4, 8.7, 9, 12-17, 20-23, 32, 38, 39

Article 17
El Dernawi v Libya (2007) AHRLR 35 (HRC 2007), 1, 3.1, 3.2, 5.4, 6.3, 7

Article 18
Prince v South Africa (2007) AHRLR 40 (HRC 2007), 1, 3.1, 4.4, 4.5, 4.8, 5.3, 5.4, 5.5, 6.4, 6.5, 7.3

Article 19
Abbassi v Algeria (2007) AHRLR 3 (HRC 2007), 1, 3.1, 3.2, 3.5, 7.4, 8.8
Njaru v Cameroon (2007) AHRLR 21 (HRC 2007), 1, 3.4, 5.2, 6.4, 7
Titiahonjo v Cameroon (2007) AHRLR 29 (HRC 2007), 1.1, 3.5, 5.4

Article 20
Abbassi v Algeria (2007) AHRLR 3 (HRC 2007), 1

Article 21
Abbassi v Algeria (2007) AHRLR 3 (HRC 2007), 1

Article 22
Titiahonjo v Cameroon (2007) AHRLR 29 (HRC 2007),1.1, 3.5, 5.4

Article 23
El Dernawi v Libya (2007) AHRLR 35 (HRC 2007), 1, 3.1, 3.2, 5.4, 6.3, 7

Article 24
El Dernawi v Libya (2007) AHRLR 35 (HRC 2007), 1, 3.1, 3.3, 5.4, 6.3, 7

Article 26
Prince v South Africa (2007) AHRLR 40 (HRC 2007), 1, 3.3, 4.9, 4.10, 5.6, 6.4, 7.5

Article 27
Titiahonjo v Cameroon (2007) AHRLR 29 (HRC 2007), 1.1, 3.5, 5.4
Prince v South Africa (2007) AHRLR 40 (HRC 2007), 1, 3.4, 4.11, 5.8, 6.4, 7.4

International Covenant on Civil and Political Rights Optional Protocol
Abbassi v Algeria (2007) AHRLR 3 (HRC 2007), 7.1
Njaru v Cameroon (2007) AHRLR 21 (HRC 2007), 1, 4, 9
Titiahonjo v Cameroon (2007) AHRLR 29 (HRC 2007), 4, 5.1, 9
El Dernawi v Libya (2007) AHRLR 35 (HRC 2007), 4, 5.1, 9
Prince v South Africa (2007) AHRLR 40 (HRC 2007), 1, 3.6, 4.2, 5.1, 6.4

Article 2
Abbassi v Algeria (2007) AHRLR 3 (HRC 2007), 7.5
Titiahonjo v Cameroon (2007) AHRLR 29 (HRC 2007), 5.4

Article 5
Abbassi v Algeria (2007) AHRLR 3 (HRC 2007), 7.2, 8.1, 9
Njaru v Cameroon (2007) AHRLR 21 (HRC 2007), 5.1, 5.2, 7
Titiahonjo v Cameroon (2007) AHRLR 29 (HRC 2007), 3.6, 5.2, 5.3, 6.1, 7
El Dernawi v Libya (2007) AHRLR 35 (HRC 2007), 5.2, 5.3, 5.4, 6.1, 7
Prince v South Africa (2007) AHRLR 40 (HRC 2007), 6.1, 6.2, 6.3, 7.1, 8

Human Rights Committee, Rules of Procedure
Article 87
El Dernawi v Libya (2007) AHRLR 35 (HRC 2007), 5.1

Article 93
Abbassi v Algeria (2007) AHRLR 3 (HRC 2007), 7.1
Njaru v Cameroon (2007) AHRLR 21 (HRC 2007), 5.1
Titiahonjo v Cameroon (2007) AHRLR 29 (HRC 2007), 5.1
Prince v South Africa (2007) AHRLR 40 (HRC 2007), 6.1

Article 96
Abbassi v Algeria (2007) AHRLR 3 (HRC 2007), 7.3

General Comments of the Human Rights Committee

General Comment 13
Abbassi v Algeria (2007) AHRLR 3 (HRC 2007), 8.7, 16, 32

General Comment 20
Article 19 v Eritrea (2007) AHRLR 73 (ACHPR 2007), 101

General Comment 22
Prince v South Africa (2007) AHRLR 40 (HRC 2007), 3.1, 5.2

Convention Against Torture
Article 1
Ben Salem v Tunisia (2007) AHRLR 54 (CAT 2007), 1, 3.1, 8.6, 16.3, 16.4, 16.5, 17

Article 2
Ben Salem v Tunisia (2007) AHRLR 54 (CAT 2007), 1, 3.1, 8.6, 16.3, 16.4, 16.6

Article 11
Ben Salem v Tunisia (2007) AHRLR 54 (CAT 2007), 1, 3.2, 8.6, 16.3, 16.6

Article 12
Ben Salem v Tunisia (2007) AHRLR 54 (CAT 2007), 1, 3.3, 5.2, 8.6, 16.3, 16.7, 17

AFRICAN UNION

AU Constitutive Act

Chinhamo v Zimbabwe (2007) AHRLR 96 (ACHPR 2007), 47

African Charter on Human and Peoples' Rights

Prince v South Africa (2007) AHRLR 40 (HRC 2007), 2.6
Katabazi and Others v Secretary General of the East African Community and Another (2007) AHRLR 119 (EAC 2007), 36
Essien v The Gambia and Another (2007) AHRLR 131 (ECOWAS 2007), 10, 11, 27
Inspector-General of Police v All Nigeria People's Party and Others (2007) AHRLR 179 (NgCA 2007), 37

Article 1

Article 19 v Eritrea (2007) AHRLR 73 (ACHPR 2007), 9

Article 3

Article 19 v Eritrea (2007) AHRLR 73 (ACHPR 2007), 9

Article 5

Article 19 v Eritrea (2007) AHRLR 73 (ACHPR 2007), 9, 102
Chinhamo v Zimbabwe (2007) AHRLR 96 (ACHPR 2007), 10
Essien v The Gambia and Another (2007) AHRLR 131 (ECOWAS 2007), 1

Article 6

Article 19 v Eritrea (2007) AHRLR 73 (ACHPR 2007), 9, 90, 93
Chinhamo v Zimbabwe (2007) AHRLR 96 (ACHPR 2007), 10

Article 7

Article 19 v Eritrea (2007) AHRLR 73 (ACHPR 2007), 9, 93, 96, 103
Chinhamo v Zimbabwe (2007) AHRLR 96 (ACHPR 2007), 10

Article 8

Chinhamo v Zimbabwe (2007) AHRLR 96 (ACHPR 2007), 10

Article 9

Article 19 v Eritrea (2007) AHRLR 73 (ACHPR 2007), 9, 90, 104, 106, 107
Chinhamo v Zimbabwe (2007) AHRLR 96 (ACHPR 2007), 10

Article 11

Chinhamo v Zimbabwe (2007) AHRLR 96 (ACHPR 2007), 10
Inspector-General of Police v All Nigeria People's Party and Others (2007) AHRLR 179 (NgCA 2007), 1, 2, 4, 7, 10

Article 12

Chinhamo v Zimbabwe (2007) AHRLR 96 (ACHPR 2007), 10

Article 13

Article 19 v Eritrea (2007) AHRLR 73 (ACHPR 2007), 9

Resolutions of the African Commission on Human and Peoples' Rights

Guidelines on the Right to a Fair Trial
Chinhamo v Zimbabwe (2007) AHRLR 96 (ACHPR 2007), 33

REGIONAL ECONOMIC COMMUNITIES

ECOWAS Revised Treaty
Article 3
Essien v The Gambia and Another (2007) AHRLR 131 (ECOWAS 2007), 9

Article 4
Essien v The Gambia and Another (2007) AHRLR 131 (ECOWAS 2007), 6, 9, 20

ECOWAS Court Protocol
Article 9
Essien v The Gambia and Another (2007) AHRLR 131 (ECOWAS 2007), 14

ECOWAS Supplementary Court Protocol
Article 9
Essien v The Gambia and Another (2007) AHRLR 131 (ECOWAS 2007), 9

Article 10
Essien v The Gambia and Another (2007) AHRLR 131 (ECOWAS 2007), 9, 11, 20, 26, 27, 28

ECOWAS Court, Rules
Article 87
Essien v The Gambia and Another (2007) AHRLR 131 (ECOWAS 2007), 25, 28

Treaty for the Establishment of the East African Community
Article 5
Katabazi and Others v Secretary General of the East African Community and Another (2007) AHRLR 119 (EAC 2007), 35, 36

Article 6
Katabazi and Others v Secretary General of the East African Community and Another (2007) AHRLR 119 (EAC 2007), 5, 36, 42, 43, 45

Article 7
Katabazi and Others v Secretary General of the East African Community and Another (2007) AHRLR 119 (EAC 2007), 5, 37, 42

Article 8
Katabazi and Others v Secretary General of the East African Community and Another (2007) AHRLR 119 (EAC 2007), 5, 38, 42

Article 36

Mike Campbell (Pvt) Limited and Another v Zimbabwe (2007) AHRLR 141 (SADC 2007), 9

Article 61

Mike Campbell (Pvt) Limited and Another v Zimbabwe (2007) AHRLR 141 (SADC 2007), 1, 7

STANDARDS ADOPTED BY NON-GOVERNMENTAL ORGANISATIONS

IBA Minimum Standards of Judicial Independence

Article 1

Article 19 v Eritrea (2007) AHRLR 73 (ACHPR 2007), 66

Article 30

Article 19 v Eritrea (2007) AHRLR 73 (ACHPR 2007), 66

INTERNATIONAL CASE LAW CONSIDERED

UNITED NATIONS HUMAN RIGHTS TREATY BODIES

Human Rights Committee

Foin v France
Prince v South Africa (2007) AHRLR 40 (HRC 2007), 5.6

Gorji-Dinka v Cameroon
Abbassi v Algeria (2007) AHRLR 3 (HRC 2007), 8.3

Jaona v Madagacar
Abbassi v Algeria (2007) AHRLR 3 (HRC 2007), 8.3

Jayawardena v Sri Lanka
Njaru v Cameroon (2007) AHRLR 21 (HRC 2007), 6.3

JG v The Netherlands
Chinhamo v Zimbabwe (2007) AHRLR 96 (ACHPR 2007), 84

JGA Diergaardt et al v Namibia
Njaru v Cameroon (2007) AHRLR 21 (HRC 2007), 4

Kaaber v Iceland
Article 19 v Eritrea (2007) AHRLR 73 (ACHPR 2007), 67
Chinhamo v Zimbabwe (2007) AHRLR 96 (ACHPR 2007), 84

Khalilova v Tajikistan
El Dernawi v Libya (2007) AHRLR 35 (HRC 2007), 4

Khomidova v Tajikistan
El Dernawi v Libya (2007) AHRLR 35 (HRC 2007), 4

Könye v Hungary
Prince v South Africa (2007) AHRLR 40 (HRC 2007), 4.2

Kurbonov v Tajikistan
Njaru v Cameroon (2007) AHRLR 21 (HRC 2007), 4

Lovelace v Canada
Prince v South Africa (2007) AHRLR 40 (HRC 2007), 3.6, 5.1, 6.4, 7.4

MAB, WAT and JAYT v Canada
Prince v South Africa (2007) AHRLR 40 (HRC 2007), 4.8, 6.5

Maleki v Italy
Abbassi v Algeria (2007) AHRLR 3 (HRC 2007), 7.3

MK v France
Chinhamo v Zimbabwe (2007) AHRLR 96 (ACHPR 2007), 84

Mukong v Cameroon
Article 19 v Eritrea (2007) AHRLR 73 (ACHPR 2007), 73, 80, 93, 108
Njaru v Cameroon (2007) AHRLR 21 (HRC 2007), 6.4

Randolph v Togo
Article 19 v Eritrea (2007) AHRLR 73 (ACHPR 2007), 67

Committee Against Torture

UNITED NATIONS SPECIAL PROCEDURES

Working Group on Arbitrary Detention

AFRICAN UNION

African Commission on Human and Peoples' Rights

ORGANIZATION OF AMERICAN STATES

Inter-American Court of Human Rights

Judicial Guarantees during States of Emergency
Article 19 v Eritrea (2007) AHRLR 73 (ACHPR 2007), 75

Velasquez Rodriguez v Honduras
Article 19 v Eritrea (2007) AHRLR 73 (ACHPR 2007), 51, 75

COUNCIL OF EUROPE

European Court of Human Rights

Aksoy v Turkey
Ben Salem v Tunisia (2007) AHRLR 54 (CAT 2007), 3.8

Buchholz v Germany
Article 19 v Eritrea (2007) AHRLR 73 (ACHPR 2007), 97

Union Alimentaria Sanders SA v Spain
Article 19 v Eritrea (2007) AHRLR 73 (ACHPR 2007), 99

AFRICAN COMMISSION DECISIONS ACCORDING TO COMMUNICATION NUMBERS

UNITED NATIONS HUMAN RIGHTS TREATY BODIES

ALGERIA

Abbassi v Algeria

(2007) AHRLR 3 (HRC 2007)

Salim Abbassi (represented by Mr Rachied Mesli) v Algeria

Decided at the 89th session, 28 March 2007, CCPR/C/89/D/1172/2003

Detention of opposition leader following trial before a military court

Admissibility (consideration by other international body, 2.7, 7.2; complaint to be submitted by victim, 7.3; specificity of complaint, 7.5; release does not mean that complaint becomes moot, 7.6)
Personal liberty and security (arbitrary arrest and detention, house arrest, 8.3, 8.4; no legal remedies to challenge detention, 8.5)
Evidence (failure of state to respond to allegations, 8.3, 8.4, 8.5)
Fair trial (military courts, 8.7, 13-21, 38)

1. The author of the communication, dated 31 March 2003, is Salim Abbassi, born on 23 April 1967 in Algiers, who is submitting the communication on behalf of his father, Mr Abbassi Madani, an Algerian citizen, born on 28 February 1931, in Sidi Okba (Biskra). The author states that his father is the victim of violations by Algeria of articles 9, 12, 14, 19, 20 and 21 of the International Covenant on Civil and Political Rights (the Covenant). He is represented by Mr Rachid Mesli. The Covenant and the Optional Protocol entered into force for the state party on 12 December 1989.

The facts as submitted by the author

2.1. Abbassi Madani is one of the founding members and, at the time of the submission of the communication, president of the *Front Islamique du Salut* (Islamic Salvation Front) (FIS),[1] an Algerian political party approved by the state party as of 12 September 1989 following the introduction of political pluralism. With a view to forthcoming elections and in the wake of gains made by FIS during the local elections of 1990, the Algerian government had to push through

[1] FIS was disbanded in 1992, as the author confirms (see para 2.5 below).

a new electoral law, which was unanimously condemned by all Algerian opposition parties. Protesting against this law, FIS organised a general strike along with peaceful sit-ins in public squares. After a few days of strikes and peaceful marches, the parties agreed to end the protest movement in exchange for a review of the electoral law in the near future. Despite this agreement, on 3 June 1991, the head of government was requested to resign and public squares were stormed by the Algerian army.

2.2. On 30 June 1991, Abbassi Madani was arrested at his party's headquarters by the military police and on 2 July 1991 was brought before the investigating judge of the military court, accused of 'jeopardising state security and the smooth operation of the national economy'. In particular, he was reproached for having organised a strike, which the prosecution described as subversive, since it had allegedly done serious harm to the national economy. The lawyers appointed to defend Abbassi Madani challenged the grounds for his prosecution before the military court, and the lawfulness of the investigation conducted by a military judge under the authority of the public prosecutor's office. According to the defence, the court had been established in order to remove leaders of the main opposition party from the political scene, and it was not competent to hear the case, it could only adjudicate on offences under criminal law and the Code of Military Justice committed by members of the armed forces in the performance of their duties. The competence of the military court to deal with political offences under legislation dating from 1963 had been revoked with the establishment of the National Security Court in 1971. Since the latter had been abolished following the introduction of political pluralism in 1989, the general rule of competence should therefore apply.

2.3. FIS won the first round of general elections on 26 December 1991, and the day after the official results were released, the military prosecutor was to inform defence lawyers of his intention to end the proceedings against Abbassi Madani. On 12 January 1992, however, the President of the Republic 'resigned', a state of emergency was declared, the general elections were cancelled and so-called 'administrative internment camps' were opened in southern Algeria. On 15 July 1992, the Blida military court sentenced Abbassi Madani *in absentia* to 12 years' rigorous imprisonment. The application for judicial review of this decision was rejected by the Supreme Court on 15 February 1993, thereby making the conviction final.

2.4. During his detention in Blida military prison, Abbassi Madani was, according to the author, subjected to ill-treatment on numerous occasions, in particular for having claimed political prisoner status and the same treatment as other prisoners. He was subjected to particularly severe treatment, despite his perilous state of health,

spending a very long period of time in solitary confinement and being barred from receiving visits from his lawyers and family.

2.5. Following negotiations with the military authorities in June 1995, he was transferred to a residence normally used for dignitaries visiting Algeria. He was returned to the Blida military prison[2] for having refused to concede to the demands of army representatives, in particular that he should renounce his political rights. He was then detained in particularly harsh conditions[3] for the following two years until his release on 15 July 1997, on one condition 'that he abide[s] by the laws in force if he wished to leave the country'. Upon his release, he did not resume his political activity as president of FIS, since the party had been banned in 1992.

2.6. Initially, the authorities tried to restrict Abbassi Madani's liberty of movement, considering any peaceful demonstration of support for him a threat to public order. Subsequently, the Minister of the Interior launched a 'procedure' to place him under house arrest after he had been interviewed by a foreign journalist and had sent a letter to the Secretary-General of the United Nations[4] in which he expressed his willingness to help seek a peaceful solution to the Algerian crisis. On 1 September 1997, members of the military police informed him orally that he was under house arrest and forbidden to leave his apartment in Algiers. He was also informed that he was forbidden to make statements or express any opinion 'failing which he would return to prison'. He was denied all means of communicating with the outside world: his building was guarded around the clock by the military police, who prevented anyone, except members of his immediate family, from visiting him. He was not allowed to contact a lawyer or to lodge any appeal against the decision to place him under house arrest, which was never transmitted to him in writing.

2.7. On 16 January 2001, a communication was submitted to the Working Group on Arbitrary Detention on behalf of Mr Madani. On 3 December 2001, the Working Group rendered its opinion according to which his deprivation of liberty was arbitrary and contrary to articles 9 and 14 of the Covenant. The Working Group requested the state party 'to take the necessary steps to remedy the situation and to bring it into conformity with the standards and principles set forth in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights'.[5] No steps were taken by the state party.

2 Exact date not provided.
3 Conditions not explained.
4 Exact date not provided.
5 Opinion 28/2001 of the Working Group on Arbitrary Detention.

The complaint

3.1. The author claims that the facts as presented by him reveal violations of articles 9, 12, 14 and 19 of the Covenant in respect of his father, Abbassi Madani.

3.2. As far as the allegations under articles 9 and 19 of the Covenant are concerned, Abbassi Madani's arrest was arbitrary and politically motivated. The charge against him that he had jeopardised state security was political, since no specific act that could in any way be categorised as a criminal offence could be established by the prosecution. He was reproached for having started a political strike that the military, and not the civil legal authorities, had described as subversive. This strike was put down with considerable bloodshed by the Algerian army, despite its peaceful nature and the guarantees provided by the head of government. Even if a political protest movement could be categorised as a criminal offence, which is not the case under Algerian law, the protest movement had ended following the agreement between the head of government and the party headed by Abbassi Madani. His arrest by the military police and the charges brought against him by a military tribunal clearly served the sole purpose of removing the president of the main opposition party from the Algerian political scene, in violation of articles 9 and 19 of the Covenant.

3.3. As for the allegations relating to article 14, minimum standards of fairness were not observed. Abbassi Madani was sentenced by an incompetent, manifestly partial and unfair tribunal. The tribunal comes under the authority of the Ministry of Defence and not of the Ministry of Justice and is composed of officers who report directly to it (investigating judge, judges and president of the court hearing the case appointed by the Ministry of Defence). It is the Minister of Defence who initiates proceedings and has the power to interpret legislation relating to the competence of the military tribunal. The prosecution and sentence by such a court, and the deprivation of liberty constitute a violation of article 14.

3.4. With regard to article 9, there is no legal justification for the house arrest of Abbassi Madani. The Algerian government justified this decision by citing 'the existence of this measure in several pieces of Algerian legislation', in particular article 6(4) of Presidential decree 99-44 of 9 February 1992 declaring the state of emergency, which was still in force at the time the communication was submitted. According to the government, this decree was in conformity with article 4 of the Covenant. The government, however, never complied with the provisions of article 4(3) pursuant to which it should 'immediately inform the other states parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated'. Article 9 of the Criminal Code,

which prescribes house arrest as an additional penalty,[6] is applied together with article 11, which obliges a person convicted to remain within a geographical area specified in a judgment.[7] House arrest may thus only be handed down as an additional penalty in the sentence imposing the main penalty. In the case of Abbassi Madani, there is no mention of any decision to place him under house arrest in the sentence handed down by the Blida military tribunal. At any rate, article 11 of the aforementioned Act lays down five years as the maximum duration for house arrest from the moment of the release of the convicted person. Since at the time the communication was submitted Abbassi Madani had been under house arrest for considerably more than five years, it constitutes a violation of the Act itself, which the Algerian government is invoking to justify the imposition of that penalty.

3.5. The grounds for placing Abbassi Madani under house arrest are the same as those for his arrest and conviction by the military tribunal, namely the free exercise of his political rights enshrined in the Universal Declaration of Human Rights and the Covenant. This measure therefore constitutes a violation of articles 9, 12 and 19 of the Covenant.

State party's observations on admissibility and on the merits

4.1. On 27 June 2003, the state party pointed out that there is no indication in the communication that Abbassi Madani had given anyone the authority to act on his behalf, as provided for in the rules for submitting communications to the Committee. Mr Salim Abbassi who claims to be acting on his father's behalf has not submitted any documentary evidence of his authority to so act. The power of attorney given by Salim Abbassi to Rachid Mesli was not authenticated and should not therefore be taken into consideration. Furthermore, Rachid Mesli submitted the petition in his capacity as a lawyer, when he no longer practises as a lawyer in Algeria, having been disbarred by the disciplinary board of the Bar Association of the Tizi-Ouzou region on 3 October 2002. He is not a member of the Bar Association of the Canton of Geneva either, from where the communication was

6 Art 9 Act 89-05 of 25 April 1989: 'Additional penalties are: (1) house arrest; (2) banishment order; (3) forfeiture of certain rights; (4) partial confiscation of property; (5) dissolution of a legal person; (6) publication of the sentence.'

7 Art 11 Act 89-05 of 25 April 1989: 'House arrest is the obligation on a convicted person to remain in a particular geographical area, specified in a judgment. Its duration may not exceed five years. House arrest shall take effect from the day the prisoner completes his or her main sentence or upon his or her release. The conviction shall be communicated to the Ministry of the Interior, which may issue temporary permits for travel within the country.'
Ordinance 69-74 of 16 September 1969: 'A person placed under house arrest who contravenes or avoids such a measure shall be liable to a term of imprisonment from three months to three years.'

submitted. Accordingly, he is not entitled to act in this capacity. By using the title of lawyer, Rachid Mesli has acted under false pretences and wrongfully claimed a profession which he does not exercise. The state party also points out that an international arrest warrant (ref 17/02) for Rachid Mesli has been issued by the investigating judge of the Sidi M'hamed court for his involvement in allegedly terrorist activities carried out by the *Groupe Salafiste de Prédication et de Combat* (Salafist Group for Preaching and Combat) (GSPC), which is on the list of terrorist organisations drawn up by the United Nations.

4.2. On 12 November 2003, the state party recalled that Abbassi Madani was arrested in June 1991 following a call to widespread violence, which was launched by Abbassi Madani and others by means of a directive bearing his signature. This came in the wake of a failed uprising, which he and others had planned and organised, with a view to establishing a theocratic state through violence. It was in the context of these exceptional circumstances, and to ensure the proper administration of justice, that he was brought before a military tribunal, which, contrary to the allegations by the source, is competent to try the offences of which he is accused. Neither article 14 of the Covenant, nor the Committee's General Comment on this article or other international standards refer to a trial held in courts other than ordinary ones as necessarily constituting a violation of the right to a fair trial. The Committee has made this point when considering communications relating to special courts and military courts.

4.3. The state party also points out that Abbassi Madani is no longer being held in detention, since he was released on 2 July 2003. He is no longer subject to any restriction on his liberty of movement and is not under house arrest as the source claims. He has been able to travel abroad freely.

4.4. Abbassi Madani was prosecuted and tried by a military tribunal, whose organisation and competence are laid down in Ordinance 71-28 of 22 April 1971 establishing the Code of Military Justice. Contrary to the allegations made, the military tribunal is composed of three judges appointed by an order issued jointly by the Minister of Justice, *Garde des Sceaux*, and the Minister of Defence. It is presided over by a professional judge who sits in the ordinary-law courts, is subject by regulation to the Act on the status of the judiciary, and whose professional career and discipline are overseen by the Supreme Council of Justice, a constitutional body presided over by the head of state. The decisions of the military tribunal may be challenged by lodging an appeal before the Supreme Court on the grounds and conditions set forth in article 495ff of the Code of Criminal Procedure. As far as their competence is concerned, in addition to special military offences, the military tribunals may try offences against state security as defined in the Criminal Code, when the

penalty incurred is for terms of imprisonment of more than five years. Military tribunals may thus try anyone who commits an offence of this type, irrespective of whether he or she is a member of the military. Accordingly, and on the basis of this legislation, Abbassi Madani was prosecuted and tried by the Blida military tribunal, whose competence is based on article 25 of the aforementioned Ordinance. The state party notes that the competence of the military tribunal was not challenged by Abbassi Madani before the trial judges. It was called into question the first time with the Supreme Court, which rejected the challenge.

4.5. Abbassi Madani benefited from all the guarantees recognised under law and international instruments. Upon his arrest, the investigating judge informed him of the charges against him. He was assisted during the investigation and the trial by 19 lawyers, and in the Supreme Court by eight lawyers. He has exhausted the domestic remedies available under the law, having filed an application with the Supreme Court for judicial review, which was rejected.

4.6. The allegation that the trial was not public is inaccurate, and suggests that he was not allowed to attend his trial, or to defend himself against the charges brought against him. In fact, from the outset, he refused to appear before the military tribunal, although he had been duly summoned at the same time as his lawyers. Noting his absence, the president of the tribunal issued a summons for him to appear, which was served on him in accordance with article 294 of the Code of Criminal Procedure and article 142 of the Code of Military Justice. In the light of his refusal to appear, a report establishing the facts was drawn up before the president of the tribunal decided to dispense with the hearing, in accordance with the aforementioned provisions. Nevertheless, the defendant was kept abreast of all the procedural formalities relating to the hearings and relevant reports were drawn up. The trial of the accused *in absentia* is neither contrary to Algerian law nor to the provisions of the Covenant: although article 14 stipulates that everyone charged with a criminal offence shall have the right to be tried in his presence, it does not say that justice cannot be done when the accused has deliberately, and on his or her sole initiative, refused to appear in court. The Code of Criminal Procedure and the Code of Military Justice allow the court to dispense with the hearing when the accused persistently refuses to appear before it. This type of legal procedure is justified by the fact that justice must always be done, and that the negative attitude of the accused should not obstruct the course of justice indefinitely.

Comments by the author on the state party's observations

5.1. On 28 March 2004, counsel provided a power of attorney on behalf of Abbassi Madani, dated 8 March 2004, and informs the

Committee that the order for house arrest was lifted on 2 July 2003, and that he is now in Doha, Qatar.

5.2. On the admissibility of the communication, counsel points out that rule 96(b) of the Committee's Rules of Procedure allows a communication to be submitted by the individual personally or by that individual's representative. When the communication was submitted, Abbassi Madani was still under unlawful house arrest and unable to communicate with anyone except certain members of his immediate family. The house arrest order was lifted on 2 July 2003 and Abbassi Madani drew up a special power of attorney authorising counsel to represent him before the Committee. Counsel responds to the personal attacks by the state party against him and requests the Committee to reject them.

5.3. On the merits, the house arrest order against Abbassi Madani was lifted on the expiration of his 12-year sentence to rigorous imprisonment, ie on 2 July 2003. Upon his release, he suffered further violations of his civil and political rights. The initial request to enjoin the state party to comply with its international obligations by lifting the house arrest order against the petitioner becomes moot. Abbassi Madani's detention in the conditions described in the initial communication constitutes a violation of the Covenant.

Additional comments by the state party

6. On 18 June 2004, the state party noted that, while acknowledging that he is no longer a lawyer, Abbassi Madani's representative nonetheless signs comments submitted to the Committee in that capacity. It also notes that the representative, instead of responding to the state party's observations on the merits, gives details of his own situation, forgetting that he is acting on behalf of a third party. The state party notes the representative's acknowledgement that Abbassi Madani is no longer subject to any restriction order and argues, accordingly, that his request to the Committee is now moot. The communication must therefore be considered unfounded and inadmissible.

Issues and proceedings before the Committee

Admissibility considerations

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 the communication is admissible under the Optional Protocol to the Covenant.

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

7.3. On the question of the validity of the power of attorney submitted by counsel, the Committee recalls: 'Normally, the communication should be submitted by the individual personally or by that individual's representative; a communication submitted on behalf of an alleged victim may, however, be accepted when it appears that the individual in question is unable to submit the communication personally.'[8] In the present case, the representative stated that Abbassi Madani had been placed under house arrest on the date of the submission of the initial communication, and that he was only able to communicate with members of his immediate family. The Committee therefore considers that the power of attorney submitted by counsel on behalf of Abbassi Madani's son was sufficient for the purposes of registering the communication.[9] Furthermore, the representative subsequently provided a power of attorney signed by Abbassi Madani, expressly and unequivocally authorising him to represent him before the Committee in the case in question. The Committee therefore concludes that the communication was submitted to it in accordance with the rules.

7.4. As far as the complaints under articles 9, 12, 14 and 19 of the Covenant are concerned, in this case, the Committee considers that the facts as described by the author are sufficient to substantiate the complaints for the purpose of admissibility. It therefore concludes that the communication is admissible under the aforementioned provisions.

7.5. As for the decision to sentence Abbassi Madani *in absentia* to 12 years' rigorous imprisonment, the Committee, noting that the author only cites this matter when setting out the facts and does not take it up again when stating his complaint or respond to the detailed explanations furnished by the state party, considers that this aspect of the request does not constitute a claim that any of the rights enumerated in the Covenant have been violated, within the meaning of article 2 of the Optional Protocol.

7.6. The Committee notes the representative's request to restate his case, and his argument that his initial submission was made at a time when the author's father was under house arrest and before the order for house arrest had been lifted and that, although the request became moot as soon as the order for house arrest was lifted, this does not in any way affect the violation of the Covenant on the grounds of arbitrary detention. The Committee also takes note of the state party's request to deem the communication moot in the light of the representative's own admission that the author was no longer subject to any restriction order, and its call for the communication to be considered unfounded and inadmissible. The Committee considers

[8] Rule 96(b), Rules of Procedure of the Human Rights Committee (CCPR/C/3/Rev.8).
[9] See for example communication 699/1996, *Maleki v Italy*, views adopted on 15 July 1999, submitted by Kambiz Maleki on behalf of his father, Ali Maleki.

that the lifting of the house arrest order does not necessarily mean that the consideration of the question of arbitrary detention automatically becomes moot, and therefore declares the complaint admissible.

Consideration of the merits

8.1. The Committee has considered this communication in the light of all the information made available to it by the parties, as required by article 5(1) of the Optional Protocol.

8.2. The Committee notes that Abbassi Madani was arrested in 1991 and tried by a military tribunal in 1992, for jeopardising state security and the smooth operation of the national economy. He was released from Blida military prison on 15 July 1997. According to the author, on 1 September 1997, he was then placed under house arrest, without receiving written notification of the reasons for such arrest.

8.3. The Committee recalls that under article 9(1) of the Covenant everyone has the right to liberty and security of person, and no one shall be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established by law. It further recalls that house arrest may give rise to violations of article 9,[10] which guarantees everyone the right to liberty and the right not to be subjected to arbitrary detention. The state party did not respond to the author's allegations, except to point out that Abbassi Madani is no longer being held in detention and is not under house arrest. Since the state party did not cite any particular provisions for the enforcement of prison sentences or legal ground for ordering house arrest, the Committee concludes that a deprivation of liberty took place between 1 September 1997 and 1 July 2003. The detention is thus arbitrary in nature and therefore constitutes a violation of article 9(1).

8.4. According to article 9(3) anyone detained must be brought promptly before a judge or other officer authorised by law to exercise judicial power and is entitled to trial within a reasonable time or to release. The Committee recalls its jurisprudence that, in order to avoid a characterisation of arbitrariness, detention should not continue beyond the period for which the state party can provide appropriate justification.[11] In the present case, the author's father was released from house arrest on 2 July 2003, in other words after almost six years. The state party has not given any justification for

[10] Communication 132/1982, *Monja Jaona v Madagascar*, views adopted on 1 April 1985, paras 13-14; and communication 1134/2002, *Gorji-Dinka v Cameroon*, views adopted on 15 March 2005, para 5.4.

[11] Communication 900/1999, *C v Australia*, views adopted on 28 October 2002, para 8.2; and Communication 1014/2001, *Baban v Australia*, views adopted on 6 August 2003, para 7.2.

the length of the detention. The Committee concludes that the facts before it disclose a violation of article 9(3).

8.5. The Committee notes the author's allegations that for the duration of his house arrest the author's father was denied access to a defence lawyer, and that he had no opportunity to challenge the lawfulness of his detention. The state party did not respond to those allegations. The Committee recalls that in accordance with article 9(4) judicial review of the lawfulness of detention must provide for the possibility of ordering the release of the detainee if his or her detention is declared incompatible with the provisions of the Covenant, in particular those of article 9(1). In the case in question, the author's father was under house arrest for almost six years without any specific grounds relating to the case file, and without the possibility of judicial review concerning the substantive issue of whether his detention was compatible with the Covenant. Accordingly, and in the absence of sufficient explanations by the state party, the Committee concludes that there is a violation of article 9(4) of the Covenant.

8.6. In the light of the above findings, the Committee does not consider it necessary to deal with the complaint in respect of article 12 of the Covenant.

8.7. As far as the alleged violation of article 14 of the Covenant is concerned, the Committee recalls its General Comment 13, in which it states that, while the Covenant does not prohibit the trial of civilians in military courts, nevertheless such trials should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14. It is incumbent on a state party that does try civilians before military courts to justify the practice. The Committee considers that the state party must demonstrate, with regard to the specific class of individuals at issue, that the regular civilian courts are unable to undertake the trials, that other alternative forms of special or high-security civilian courts are inadequate to the task and that recourse to military courts is unavoidable. The state party must further demonstrate how military courts ensure the full protection of the rights of the accused pursuant to article 14. In the present case the state party has not shown why recourse to a military court was required. In commenting on the gravity of the charges against Abbassi Madani it has not indicated why the ordinary civilian courts or other alternative forms of civilian court were inadequate to the task of trying him. Nor does the mere invocation of domestic legal provisions for the trial by military court of certain categories of serious offences constitute an argument under the Covenant in support of recourse to such tribunals. The state party's failure to demonstrate the need to rely on a military court in this case means that the Committee need not examine whether the military court, as a matter of fact, afforded the full guarantees of

article 14. The Committee concludes that the trial and sentence of Abbassi Madani by a military tribunal discloses a violation of article 14 of the Covenant.

8.8. Concerning the alleged violation of article 19, the Committee recalls that freedom of information and freedom of expression are the cornerstones of any free and democratic society. Such societies in essence allow their citizens to seek information regarding ways of replacing, if necessary, the political system or parties in power, and to criticise or judge their Governments openly and publicly without fear of reprisal or repression by them, subject to the restrictions laid down in article 19(3) of the Covenant. With regard to the allegations that Abbassi Madani was arrested and charged for political reasons, the Committee notes that it does not have sufficient information to conclude that there was a violation of article 19 in respect of the arrest and charges brought against him in 1991. At the same time, although the state party has indicated that the author is enjoying all his rights and has been resident abroad since that time, and notwithstanding the author's allegations in this regard, the Committee notes that it does not have sufficient information to conclude that there was a violation of article 19 in respect of the alleged ban imposed on Abbassi Madani from making statements or expressing an opinion during his house arrest.

9. The Human Rights Committee, acting under article 5(4) of the Optional Protocol, is of the view that the facts before it disclose violations by the state party of articles 9 and 14 of the Covenant.

10. In accordance with article 2(3) of the Covenant, the state party is under an obligation to provide an effective remedy for Abbassi Madani. The state party is under an obligation to take the necessary steps to ensure that the author obtains an appropriate remedy, including compensation. In addition, the state party is required to take steps to prevent further occurrences of such violations in the future.

11. Bearing in mind that, by becoming a state party to the Optional Protocol, the state party has recognised the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the state party has undertaken to guarantee all individuals within its territory and subject to its jurisdiction the rights recognised in the Covenant, and to provide an effective and enforceable remedy when it has been determined that a violation has occurred, 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. It also requests the state party to publish the Committee's views.

Dissenting opinion by Committee member Mr Abdelfattah Amor

[**12.**] In this matter, the Committee, after affirming, in a style and language that it does not customarily employ, that:

> The state party's failure to demonstrate the need to rely on a military court in this case means that the Committee need not examine whether the military court, as a matter of fact afforded the full guarantees of article 14.

concludes that 'the trial and sentence of Abbassi Madani by a military tribunal discloses a violation of article 14 of the Covenant'.

[**13.**] I cannot associate myself with the approach followed and the conclusion underlying this paragraph 8.7 of the Committee's views. I believe that they exceed the scope of article 14 and deviate from the General Comment on this article.

[**14.**] Article 14 is essentially concerned with guarantees and procedures for the equitable, independent and impartial administration of justice. It is exclusively in that context that the body which administers justice is cited, and then only in the first paragraph of the article: 'All persons shall be equal before the courts and tribunals ... everyone shall be entitled to a fair and public hearing by a competent, independent and impartial *tribunal* established by law.'

[**15.**] Article 14 is not concerned with the nature of the tribunals. It contains nothing which prohibits, or expresses a preference for, any particular type of tribunal. The only tribunals which may not be covered by article 14 are those which have nothing to do with the safeguards and procedures which it provides. No category of tribunal is inherently ruled out.

[**16.**] In order to clarify the intent and the scope of article 14, in 1984, at its twenty-first session, the Committee adopted General Comment 13. As of the present time, namely, the end of the eighty-ninth session, at which the present views were adopted, this comment has never been amended or updated. Paragraph 4 of the General Comment is concerned, in particular, with military courts. The general thrust of this paragraph may be summarised as follows:

- The Covenant does not prohibit the setting up of military tribunals;
- Only in exceptional circumstances may civilians be tried by military courts and such trials must be held in conditions which fully respect all the guarantees set out in article 14;
- Derogations from the normal procedures required under article 14 in times of public emergency, as contemplated by article 4 of the Covenant, may not go beyond the extent strictly required by the exigencies of the situation.

[**17.**] In other words, and taking due account of article 14, the Committee's attention should be focused on guarantees of an equitable, impartial and independent administration of justice. It is

in this context, and this context alone, that the question of the legal body — the courts — can be taken up or apprehended.

[**18.**] The military tribunal which tried Abbassi Madani was set up under Algerian law. Its statutory jurisdiction covers military offences, as is the case in all countries which have military forces. In general, this jurisdiction also extends to non-military co-defendants or accomplices where military offences have been committed. In certain states it covers all matters in which members of the military are implicated.

[**19.**] In Algeria, in addition to their statutory jurisdiction, military courts have assigned jurisdiction, specifically established by law. Thus, Ordinance 71-28 of 22 April 1971 vests in military tribunals the authority to try offences against state security committed by civilians which incur penalties of more than six years' imprisonment. In other words, their powers go beyond the normal competence of military courts. This represents an exception to the general rules regarding the jurisdiction of military courts.

[**20.**] The Committee has always believed that, while the Convention may not actually prohibit the formation of military courts, these courts should only be used for the judgement of civilians in very exceptional circumstances and such trials should be conducted in conditions which fully respect all the guarantees stipulated in article 14. Is it really necessary to go a step further and to impose yet more conditions, requiring the state party to demonstrate (where civilians are being tried in military courts) that 'the ordinary civil courts are not in a position to take such steps and that alternative forms of special civil tribunals or high security courts have not been adapted to perform this task'?

[**21.**] This new condition imposed by the Committee raises some difficult legal issues. It certainly does not fall within the scope of article 14 and is not covered by General Comment 13. Submitting the state to conditions which have not been stipulated from the outset is not an acceptable way of applying the standards stipulated by or implicit in the Covenant. At the same time, this condition is questionable. It is questionable in that, save in the event of an arbitrary judgement or obvious error, the Committee may not replace the state in order to adjudicate on the merits of alternatives to military courts. By which reasoning is it possible for the Committee to adjudicate on the options before the state for special civil tribunals, high security tribunals or military tribunals? In accordance with which criteria can the Committee determine whether or not the special civil courts or high security courts have been suitably modified to try civilians prosecuted for breaching state security? The only possible yardsticks for the Committ*ee*, regardless of which courts are under consideration, are and shall remain the procedures and

guarantees provided in article 14. Only here is the Committee on firm ground, protected from shifting sands and unforeseen vicissitudes.

[**22.**] Nor can the Committee arrogate to itself the role of adjudicating on the exceptional nature of circumstances or determining whether or not there is a public emergency. The Committee is not the right authority to be passing judgment on situations over the extent or severity of which it has no control. In this context it can only exercise a minimal monitoring function, looking out for arbitrary judgments and obvious errors. When states of emergency are declared on the basis of article 4 of the Covenant, the Committee must make sure that the declaration has complied with the rules and that any derogations from the provisions of article 14 remain within the bounds strictly required by the exigencies of the situation and respect the other conditions stipulated in that article. It is most regrettable that, in its analysis, the Committee has cast aside all these considerations. In proceeding as it has, the Committee has ventured into uncharted waters.

[**23.**] Another fundamental issue, in addition to that of the nature of the trial body, has to do with respect for the guarantees and procedures stipulated in article 14 and clarified in General Comment 13. When, in exceptional circumstances, civilians are tried by military courts, it is essential that the proceedings should take place in conditions conducive to an equitable, impartial and independent administration of justice. This is a key issue, which the Committee has skirted around, when it should have made it the focus of its attention and the goal of its endeavours. In this context, a number of questions have remained unanswered.

[**24.**] Raising the issue of the composition of the military court, the author states that it is made up of military officers who report directly to the Ministry of Defence, that 'investigating judge and judges making up the court hearing the case are officers appointed by the Ministry of Defence' and that the president of the court, although himself a civilian judge, is also appointed by the Ministry of National Defence. In its response, on which the author makes no comment, the Algerian government states that 'the military tribunal is composed of three judges appointed by an order issued jointly by the Minister of Justice, *Garde des Sceaux*, and the Minister of Defence. It is presided over by a professional judge who sits in the ordinary-law courts, is subject by regulation to the Act on the status of the judiciary, and whose professional career and discipline are overseen by the Supreme Council of Justice'.

[**25.**] In another context, the author states that 'it is the Minister of Defence who initiates proceedings, even, as in the current instance, against the wishes of the head of government' and he explains that this minister also has the power to interpret legislation relating to the competence of the military tribunal. Without commenting on these

allegations, the state party makes reference, in general terms, to the application of the Criminal Code, the Code of Criminal Procedure and the Code of Military Justice.

[**26.**] The Committee should have given due attention to these issues, just as it should have dwelt on a number of other points, such as the reasons for Mr Madani's arrest, which are viewed in directly opposite ways by the author and by the state party — without any supporting facts or documents — and have submitted all elements of the case file to a more rigorous examination.

[**27.**] In another context, the author states that 'minimum standards of fairness were not observed. Abbassi Madani was sentenced by an incompetent, manifestly partial and unfair tribunal'. The state party asserts the opposite, without eliciting further comments from the author. It states that the military court was created by law, that its competence was not challenged before the trial judge and was only called into question the first time with the Supreme Court, which rejected the challenge. The state also indicates that the charges laid against Mr Madani were notified to him at the time of his arrest, that he had the assistance of counsel during the investigation and the trial, that he availed himself of the remedies provided under law, that the trial, contrary to the allegations by the author, was public, that Mr Madani's refusal to appear was dealt with in compliance with the procedures provided by law and that he was kept abreast of all the procedural formalities relating to the trial hearings and reports were drawn up of all such formalities.

[**28.**] All these arguments should similarly have been considered by the Committee and its decision to reject them on the grounds that the state has failed to demonstrate that it has developed acceptable alternatives to military courts was not the soundest decision in legal terms.

[**29.**] Attention is also drawn, in respect of the issue of the impartiality of justice, to the general rule that it is up to the appeal courts of states parties to the Covenant to consider the facts and the evidence in a particular case and that it is not, in principle, the business of the Committee to censure the conduct of hearings by a judge except where it might have been established that this was tantamount to a miscarriage of justice or that the judge had manifestly breached his obligation of the impartiality (see the Committee's decision in matter 541/1993, *Simms v Jamaica*, April 1995, paragraph 6.2).

[**30.**] Paragraph 8.7 of the Committee's views leaves certain essential questions unanswered. I feel duty-bound to point out that, on the one hand, the Committee has exceeded its remit in insisting that the state justify its choice of court from among a number of options available to it and, on the other, that it has not done what it

was called upon to do and which was incumbent upon it with regard to determining whether or not the guarantees of full protection of the rights of the accused were duly upheld.

Individual opinion of Committee member Mr Ahmed T Khalil

[**31.**] As I have indicated in the plenary meeting of the Committee in New York on 28 March 2007, I cannot accept the views spelled out in paragraph 8.7 of the communication 1172/2003 *Abbassi Madani v Algeria* which finds the state party in violation of article 14 of the Covenant. The reasons for taking this position on my part are based on the following considerations.

[**32.**] It is quite clear that the Covenant does not prohibit the establishment of military courts. Furthermore, paragraph 4 of General Comment 13 on article 14, while clearly stating that the trial of civilians by such courts should be very exceptional, stresses, I believe more importantly, that the trying of civilians by such courts should take place under conditions which genuinely afford the full guarantees stipulated in article 14.

[**33.**] In that light the issue before the Committee in the case at hand is whether those guarantees were duly and fully respected. In other words the concern of the Committee, as I see it, is to ascertain whether the trial of Mr Abbassi Madani meets the fundamental guarantees of equitable, impartial and independent administration of justice.

[**34.**] The author claims that the minimum standards of fairness were not observed and that Mr Abbassi Madani was sentenced by an incompetent, manifestly partial and unfair trial.

[**35.**] For its part the state party informs that Mr Abbassi Madani was prosecuted and tried by a military tribunal whose organisation and competence are laid down in Ordinance 71-28 of April 1971 and that, contrary to the allegations by the author, a military tribunal is competent to try the offences of which Mr Abbassi Madani was accused. The state party also points out that the competence of the military tribunal was not challenged by Mr Abbassi Madani before the trial judges. It was called into question for the first time with the Supreme Court which rejected the challenge.

[**36.**] In addition the state party indicated, *inter alia*, that upon his arrest Mr Abbassi Madani was informed by the investigating judge of the charges against him, that he was assisted during the investigation and trial and in the Supreme Court by a large number of lawyers and that Mr Abbassi Madani has availed himself of the domestic remedies under the law, etc. It should be noted that the observations of the state party cited above did not elicit any new comments from the author.

[**37.**] It seems quite clear that all these questions on the part of the author as well as on that of the state party should have received the primary consideration of the Committee in its endeavour to formulate its views in respect of article 14 in the light of the guarantees spelled out therein.

[**38.**] Unfortunately, as it appears from paragraph 8.7 of the communication, instead of giving serious consideration to these fundamental issues the Committee has chosen to claim that in trying civilians before military courts states parties must demonstrate that the regular civilian courts are unable to undertake the trials, ie a condition which I believe does not constitute part of the guarantees stipulated in article 14. The Committee found that in the present case, the failure by the state party to meet this new condition is sufficient by itself to justify a finding of a violation of article 14.

[**39.**] Furthermore the Committee, in the wording of paragraph 8.7, came to the conclusion that the state party's failure to demonstrate the need to rely on a military court in the case means that the Committee need not examine whether the military court, as a matter of fact, afforded the full guarantees of article 14. It seems to me that this last contention by the Committee could be read to mean that we cannot totally exclude the possibility that had the Committee chosen, as it should have done, to examine the question of guarantees it may conceivably have found that in fact the military trial in question did meet the guarantees stipulated by article 14 of the Covenant.

[**40.**] For all those reasons, I find myself unable to subscribe to the views expressed by the Committee in paragraph 8.7 of the communication.

CAMEROON

Njaru v Cameroon

(2007) AHRLR 21 (HRC 2007)

Communication 1353/2005, *Philip Afuson Njaru v Cameroon*

Decided at the 89th session, 19 March 2007, CCPR/C/89/D/1353/2005

Persecution of journalist

Evidence (failure of state to respond to allegations, 4, 5.2)
Admissibility (exhaustion of local remedies, complaints not investigated, 5.2)
Cruel, inhuman and degrading treatment (torture, conditions of detention, 6.1)
Personal liberty and security (arbitrary arrest and detention, no warrant or charges, 6.2; no reasons given for arrest, complaints not investigated, 6.2; death threats, 6.3)
Expression (persecution because of opinions expressed, 6.4)

1. The author of the communication is Mr Philip Afuson Njaru, a national of Cameroon. He claims to be a victim of violations by Cameroon of articles 7; 9(1) and (2); 10(1); and 19(2) all read in conjunction with article 2(3) of the International Covenant on Civil and Political Rights. He is represented by counsel, Mr Boris Wijkström of the World Organization Against Torture (OMCT). The Covenant and the Optional Protocol to the Covenant both entered into force for the state party on 27 September 1984.

The facts as presented by the author

2.1. The author is a journalist and well-known human rights advocate in Cameroon. Since 1997, the author has been a victim of systematic acts of persecution by various agents of the state. He recounts these incidents as follows. On 1 May 1997, Mr HN, Chief of Post for the Immigration Police in Ekondo-Titi (Ndia Division), in the presence of police constable PNE, warned the author that he would 'deal with him', should he continue to publish 'unpatriotic' articles, accusing police officers of corruption and alleging that constable PNE had raped a pregnant Nigerian woman.

2.2. On 18 May 1997, Mr HN met the author at the local government office at Ekondo-Titi Sub-Division, where he asked him why he had not reacted to summons by the police. When the author replied that he had never received any official summons, Mr HN asked him to come to his office on 28 May 1997, warning him that this was the very last time that he was inviting him and that the author would be arrested and subjected to torture, should he fail to report to his office.

2.3. On 2 June 1997, the author was again approached by Mr HN and constable PNE, who asked him whether he had received the summons. When the author answered in the negative, Mr HN stated that he 'would deal with him seriously'.

2.4. On 12 October 1997, Mr HN and Mr BN, Chief of Post for the Brigade Mixte Mobile, stopped their police car next to the author, who was standing on the street in Ekondo-Titi. Mr HN asked the author why he had never come to the police station, despite several summons, and again criticised him for having written press articles denouncing police corruption in the district. When the author answered that he had only received oral summons, which were of no legal relevance, Mr HN again threatened to arrest and torture him. He then assaulted the author, beating and kicking him to unconsciousness, removed the author's press ID, and left.

2.5. A medical report dated 15 October 1997, issued by the District Hospital of Ekondo-Titi (Ndia), states: 'Patient in agony with tenderness around the mandobulo-auxillary joint, thoracoabdominal tenderness, swollen tender leg muscles. Conclusion: Polytrauma.' As a result of his continuous head and mouth pain and hearing loss in his left ear, the author consulted an oral surgeon at the Pamol Lobe Estate Hospital on 17 December 1998, who, in a letter dated 4 April 1999, confirmed that the author's jaw bone was broken and partially dislocated and that his left eardrum was perforated, recommending surgery and antibiotics as well as anti-inflammatory treatment. Another medical report, issued by the District Hospital, dated 29 August 2000, states that the author suffers from memory lapses, stress, depression and distorted facial configuration and that his symptoms have not clinically improved since his torture on 12 October 1997.

2.6. The author complained about the events of 12 October 1997[1] to the prosecutor of the Ndian Division, South West Province (letters sent in October 1997 and on 5 January 1998), to the Delegate-General for National Security (letter dated 2 February 1998), to the Attorney-General of Buea, South West Province (letter dated 9 September 1998), and to the Ministry of Justice in Yaoundé (letters dated 19 and

[1] The author submits that these events are referred to in the report of the Special Rapporteur, Sir Nigel Rodley, submitted pursuant to Commission on Human Rights Resolution 1998/38, Addendum, Visit by the Special Rapporteur to Cameroon, 11 November 1999, Annex II, para 37.

28 November 2001). No investigation has to date been initiated by any of these authorities. The Attorney-General of Buea informed the author that his complaint had disappeared from the Registry.

2.7. On 20 February 1998, constable PNE and two other plain-clothes armed officers of the immigration service located the author at the District Hospital of Ekondo-Titi and told him that Mr HN urgently wanted to see him in his office, without producing a summons addressed to him. Shortly thereafter, Mr HN came to the hospital, arrested and handcuffed the author and brought him to the police station, where he asked the author to disclose his sources for several articles about bribery of the police by Nigerian foreigners and torture during resident permit controls. When the author refused to do so, Mr HN slapped his face several times, threatened to detain him for an indefinite time, to parade him naked in front of women and female children, and to kill him. Following this incident, the author was regularly summoned to the police station, but never showed up because he feared for his life. On 20 April 1998, he sent a complaint about the incident to the Delegate-General for National Security and, on 19 November 2001, to the Minister of Justice. No investigation was initiated.

2.8. On 22 May 1998, constable PNE came to Bekora Barombi, where the author was in hiding. The author refused to accompany him to receive a summons by the immigration police, arguing that it was the police's duty to serve summons. On 28 May 1998, the author returned to Ekondo Titi. The same day, Mr HN stopped his car in front of the author and drove off. Two minutes later, two plain-clothed armed policemen approached the author and gave him the summons carrying an 'urgent' stamp and re-dated three times (22 May, 28 May and 8 June 1998), each of the extensions signed by Mr HN. The author subsequently went into hiding again. On 8 May 1999, an Immigrations Police Commissioner, JA, arrested the author after the latter had published an article accusing him of corruption.

2.9. In or around May 1999, the author was threatened and harassed by soldiers of the 11th Navy Batallion in Ekondo-Titi after he had published a newspaper article, alleging ill-treatment of women and girls by members of that battalion during tax recovery raids in Ekondo-Titi. On 22 May 1999, Captain LD, commander of the battalion, asked the author to stop writing such articles and to disclose his sources. When the author refused, soldiers told him that they would shoot him for his accusations. On 27 May 1999, armed soldiers took up position around the author's house. The author managed to escape to Kumba. He complained about the events of 22 May 1999 in a letter dated 27 November 2000 to the National Human Rights Commission. More recently, the author was threatened by Mr LD in relation to other articles, including an article on abuses of the

civilian population in Ekondo-Titi by soldiers of a Buea-based military battalion.

2.10. On 8 June 2001, armed policemen ordered the author and his friend, Mr IM, to leave a bar in Kumba where they were having a drink. Police constable JT seized the author, pushed him to the ground, and inflicted him with blows and kicks. When Mr IM tried to intervene, the policemen assaulted him as well. The author was brought to the Kumba police station without any explanation. During the trip, a trainee police officer beat and kicked him on his head and leg, hit him with the butt of his gun and threatened to 'deal with him'. Upon arrival at the police station, the Police Commissioner of Kumba, Mr JMM, told him to go home. When the author asked for a written explanation as to why he had been arrested and ill-treated, he was pushed out of, and not readmitted to, the police station.

2.11. A medico-legal certificate issued by the Ministry of Public Health on 9 June 2001 states that the author 'presents ... left ear pains, chest pains, waist and back pains, bilateral hips and leg pains all due to severe beating by police'. On 9 June 2001, the author complained about these events to the State Counsel, Legal Department (Kumba), which forwarded the letter to the judicial police in Buea, and, on 19 November 2001, to the Minister of Justice. On 6 November 2001, the judicial police informed the author that his complaint had not been received and that, consequently, no judicial proceedings had been initiated.

2.12. On 7 October 2003, six armed policemen and a police inspector confronted the author in a carpentry shop. The inspector refused to disclose his name or the reason for searching the author, and threatening him with a baton. Outside the store, the author was threatened and pushed to the floor by two policemen. He reported the incident to the commander of the judicial police in Kumba, the provincial chief of the judicial police, and to the anti-riot police ('GMI') in Buea; he also sent a complaint to the State Counsel, Legal Department in Kumba.

2.13. On 18 November 2003, the Judicial Police Commissioner, Mr AY, called the author, asking him to come to his office in Buea. On 19 December 2003, the author reported to Mr AY, who expressed anger at the author's late arrival, subjected him to tiring and intimidating questioning and asked him to stop writing articles denouncing the police.

The complaint

3.1. The author submits that his beating on 12 October 1997, resulting in a fractured jaw and hearing damage, was so severe that it amounts to torture within the meaning of article 7. The repeated threats against his life by the police, often accompanied by acts of

brutality, caused him grave psychological suffering, which itself is said to violate article 7. He claims that, in light of the systematic practice of torture and unlawful killings in Cameroon,[2] he was fully justified in fearing that those threats would be acted upon. In accordance with the findings of various international bodies, these threats, as well as the state party's failure to put an end to them, were incompatible with the prohibition of torture and other forms of ill-treatment.[3]

3.2. The author submits that the blows and kicks that he received during the trip to the Kumba police station on 8 June 2001, resulting in severe pain to his head, chest, ears and legs, were inflicted while in detention, thereby violating article 10, in addition to article 7, of the Covenant.

3.3. The author contends that his arrests on 20 February 1998, 8 May 1999 and 8 June 2001, without a warrant or explanation as to the reasons for his arrest, were unlawful and arbitrary, in breach of article 9.

3.4. The author argues that the above acts were intended to punish him for the publication of articles denouncing corruption and violence of the security forces, as well as to prevent him from freely exercising his profession as a journalist. These measures were not provided for by law, but rather violated constitutional guarantees such as the prohibition of torture and cruel, inhuman or degrading treatment or punishment,[4] and pursued none of the legitimate aims under article 19(3).

3.5. On admissibility, the author submits that the same matter is not being examined by another procedure of international investigation or settlement, and that domestic remedies are unavailable to him, given that no investigation of his allegations of police abuse was initiated, despite his repeated complaints to different judicial authorities. Moreover, he claims that judicial remedies are ineffective in Cameroon, as confirmed by several United

2 Reference is made to the Concluding Observations of the Human Rights Committee on the third periodic report of Cameroon, 67th Session, 4 November 1999.

3 The author refers, *inter alia*, to the conclusions and recommendations of the Committee against Torture: Cameroon, 21st Session, 5 February 2004; to the report of the Special Rapporteur, Sir Nigel Rodley, submitted pursuant to Commission on Human Rights resolution 1998/38, Addendum, Visit by the Special Rapporteur to Cameroon, 11 November 1999; and to the interim report by the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment, 3 July 2001 para 8.

4 The author refers to the Constitution of 2 June 1972, as amended by Law 96-06 of 18 January 1996, preamble.

Nations bodies.[5]

3.6. For the author, the lack of effective remedies constitutes in itself a violation of the Covenant. By way of remedy, he claims compensation commensurate with the gravity of the breaches of his Covenant rights, full rehabilitation, an inquiry into the circumstances of his torture, and criminal sanctions against those responsible.

State party's failure to co-operate

4. By *notes verbales* of 1 February 2005, 19 May and 20 December 2006, the state party was requested to submit information on the admissibility and 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 the admissibility or substance of the author's 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 taken. In the absence of a reply from the state party, due weight must be given to the author's allegations, to the extent that these have been properly substantiated.[6]

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 Procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant. The Committee has ascertained, as required under article 5(2)(a), of the Optional Protocol, that the matter is not being examined under another procedure of international investigation or settlement.

5.2. With respect to the requirement of exhaustion of domestic remedies, the Committee notes that the state party has not contested the admissibility of any of the claims raised. In addition, it notes the information and evidence provided by the author on the complaints made to several different bodies, none of which, it would appear, have been investigated. Accordingly, the Committee considers that it is not precluded from considering the communication by the requirements of article 5(2)(b) of the Optional

[5] The author refers to the report of the Special Rapporteur, Sir Nigel Rodley, submitted pursuant to Commission on Human Rights resolution 1998/38, Addendum, Visit by the Special Rapporteur to Cameroon, 11 November 1999 paras 60 and 68, and to the Concluding Observations of the Human Rights Committee on the third periodic report of Cameroon, 67th Session, 4 November 1999 para 27.

[6] The author refers to the Committee's jurisprudence: Communication 1208/2003, *Kurbonov v Tajikistan*, views adopted on 16 March 2006, and communication 760/1997, *JGA Diergaardt et al v Namibia, v*iews adopted on 25 July 2000 para 10.2.

Protocol. As the Committee finds no other reason to consider the claims raised by the authors inadmissible, it proceeds with its consideration of the claims on the merits, under article 7; article 9(1) and (2); article 10(1), article 19(2); and article 2(3), as presented by the author. It also notes that an issue arises under article 9(1) with respect to the death threats to which the author was subjected by the security forces.

Consideration of merits

6.1. As to the claim of a violation of articles 7 and 10 of the Covenant with regard to his alleged physical and mental torture by the security forces, the Committee notes that the author has provided detailed information and evidence, including several medical reports, to corroborate his claims. He has identified by name most of the individuals alleged to have participated in all of the incidents in which he claims to have been harassed, assaulted, tortured and arrested since 1997. He has also provided numerous copies of complaints made to several different bodies, none of which, it would appear, have been investigated. In the circumstances, and in the absence of any explanations from the state party in this respect, due weight must be given to his allegations. The Committee finds that the abovementioned treatment of the author by the security forces amounted to violations of article 7 alone and in conjunction with article 2(3) of the Covenant.

6.2. As to the claim of violations of article 9, as they relate to the circumstances of his arrest, the Committee notes that the state party has not contested that the author was arrested on three occasions (20 February 1998, 8 May 1999, and 8 June 2001) without a warrant and without informing him of the reasons for his arrest or of any charges against him. It also notes that the author made complaints to several bodies which, it would appear, were not investigated. For these reasons, the Committee finds that the state party has violated article 9(1) and (2) alone and in conjunction with article 2(3) of the Covenant.

6.3. The Committee notes the author's claim that he was subjected to threats on his life from police officers on numerous occasions and that the state party has failed to take any action to ensure that he was and continues to be protected from such threats. The Committee recalls its jurisprudence that article 9(1) of the Covenant protects the right to security of the person also outside the context of formal deprivation of liberty.[7] In the current case, it would appear that the

[7] Communication 821/1998, *Chongwe v Zambia*, views adopted on 25 October 2000; communication 195/1985, *Delgado Paez v Colombia*, views adopted on 12 July 1990; communication 711/1996, *Dias v Angola*, views adopted on 18 April 2000; communication 916/2000, *Jayawardena v Sri Lanka*, views adopted on 22 July 2002.

author has been repeatedly requested to testify alone at a police station and has been harassed and threatened with his life before and during his arrests. In the circumstances, and in the absence of any explanations from the state party in this respect, the Committee concludes that the author's right to security of person, under article 9(1) in conjunction with article 2(3) of the Covenant has been violated.

6.4. As to the claim of a violation of the author's right to freedom of expression and opinion, with respect to his persecution for the publication of articles denouncing corruption and violence of the security forces, the Committee notes that under article 19, everyone shall have the right to freedom of expression. Any restriction of the freedom of expression pursuant to paragraph 3 of article 19 must cumulatively meet the following conditions: it must be provided for by law, it must address one of the aims enumerated in paragraphs 3 (a) and (b) of article 19 and it must be necessary to achieve the legitimate purpose. The Committee considers that there can be no legitimate restriction under article 19(3) which would justify the arbitrary arrest, torture, and threats to life of the author and thus the question of deciding which measures might meet the 'necessity' test in such situations does not arise.[8] In the circumstances of the author's case, the Committee concludes that the author has demonstrated the relationship between the treatment against him and his activities as journalist and therefore that there has been a violation of article 19(2) in conjunction with article 2(3) of the Covenant.

7. The Human Rights Committee, acting under article 5(4) of the Optional Protocol, is of the view that the facts before it disclose violations of articles 7; 9(1) and (2), and 19(2) in conjunction with article 2(3) of the Covenant.

8. The Committee is of the view that the author is entitled, under article 2(3)(a), of the Covenant, to an effective remedy. The state party is under an obligation to take effective measures to ensure that: (a) criminal proceedings are initiated seeking the prompt prosecution and conviction of the persons responsible for the author's arrest and ill-treatment; (b) the author is protected from threats and/or intimidation from members of the security forces; and (c) he is granted effective reparation including full compensation. The state party is under an obligation to ensure that similar violations do not occur in the future.

9. Bearing in mind that, by becoming a state party to the Optional Protocol, the state party has recognised the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the state party has undertaken to ensure to all individuals within its

8 Communication 458/1991, *Mukong v Cameroon*, views adopted on 21 July 1994.

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.

***

Titiahonjo v Cameroon

(2007) AHRLR 29 (HRC 2007)

Communication 1186/2003, *Dorothy Kakem Titiahonjo v Cameroon*

Decided at the 91st session, 26 October 2007, CCPR/C/91/D/1186/2003

Arbitrary arrest and death in detention

Evidence (failure of state to respond to allegations, 4, 6.2-6.6)
Life (lack of medical treatment, life-threatening conditions of detention, 6.2)
Cruel, inhuman and degrading treatment (conditions of detention, *incommunicado* detention, 6.3; anguish caused to spouse, 6.4)
Personal liberty and security (arbitrary arrest and detention, no warrant or charges, 6.5; no reasons given for arrest, not allowed to challenge detention, 6.6)

1.1. The author of the communication is Dorothy Kakem Titiahonjo, wife of the alleged victim, Mathew Titiahonjo, a citizen of Cameroon born in 1953. She claims that her husband was the victim of violations by Cameroon of his rights under article 6(1), article 7; article 9(1), (2), (3) and (4); article 19(1) and (2); article 22(1); and article 27 of the International Covenant on Civil and Political Rights. While the author alleges a violation of article 3(a) and (b), it transpires that she means article 2(3)(a) and (b), of the Covenant, read in conjunction with the above articles. She also claims to be a victim herself of violation by Cameroon of article 7 of the Covenant. The Optional Protocol entered into force for Cameroon on 27 September 1984.

1.2. The communication was sent to the state party for comments on 2 June 2003. Reminders were sent on 30 October 2006 and 31 May 2007. On 11 July 2007, the state party indicated that a response would be forthcoming without delay. At the time of the adoptions of the Views, the Committee had not received any response from the state party.

The facts as submitted by the author

2.1. On 19 May 2000, at 5:30 a.m., while the author and Mr Titiahonjo were sleeping, a group of police officers (*gendarmes*) broke into their house and began beating Mr Titiahonjo with an iron rod.

2.2. The author herself was at the time in an advanced state of pregnancy; she was also mistreated by the officers. She was dragged out of bed and pushed into the gutter and also slapped. The police officers stated that they were looking for a gun. While they were in the house they took 300 000 Frs that the family had saved in view of the forthcoming childbirth. No gun was found, but the officers promised to return.

2.3. On 21 May 2000, the same police officers, including one Captain Togolo, came in a car which stopped in front of the author's house. They took Mr Titiahonjo to the *Gendarmerie* cell. There, he was beaten and forced to sleep on the bare floor naked. He was beaten on the soles of his feet and on his head. As a result of his swollen feet, he could not stand up. The Captain refused to give him any food and the author was not allowed to bring him any. Mr Titiahonjo asked why he was arrested but he received no answer.

2.4. On several occasions in June 2000 she went to the police station to give her husband some food but she was 'chased' away. On 24 June 2000 the author went to the police station and saw Captain Togolo beat her husband but she was not allowed to visit him. The gun that the officers were looking for was found in the street on or about 25 June 2000. Mr Titiahonjo, however, continued to be held *incommunicado* and to be ill treated. As an answer to the author's question why Mr Titiahonjo was still being beaten after they had found the gun, Captain Togolo replied that it was because the victim belonged to the Southern Cameroon National Council ('SCNC'), which he qualified as a 'secessionist organisation'.

2.5. On an unspecified date, after a complaint filed by the author, a prosecutor ordered the release of Mr Titiahonjo, but Captain Togolo refused to comply. Following this incident the author was taken to hospital where she prematurely gave birth to twins. Mr Titiahonjo was transferred to Bafoussam military prison. In Bafoussam, physical ill-treatment stopped but Mr Titiahonjo continued to suffer moral and psychological torture. Captain Togolo told him that he would never

see the twins for he was going to be killed. He also had to provide for himself and live on his own supplies.

2.6. In Bafoussam prison, meningitis, cholera and cerebral malaria claimed the lives of 15 inmates between 10 September and 15 September 2000. The cells were unventilated and were infested with bedbugs and mosquitoes.

2.7. In the morning of 14 September 2000, Mr Titiahonjo complained of a stomach ache and asked for medication. However, the prison nurse could not enter his cell as no guard on duty had a key to the cell. Mr Titiahonjo continued to call for help throughout the day, but when his cell was finally opened at 9 pm the same day, he was already dead. His remains were taken to the mortuary and he was buried in his home town, but no post-mortem was allowed by the police officers who supervised his detention. The family requested an autopsy of the body but instead the coffin was sealed and the request was denied; no one was permitted to see the body.

The complaint

3.1. The author alleges a violation of article 2(3)(a) and (b) of the Covenant, read together with articles 6 and 7 on the grounds that Cameroon does not provide any remedy for acts such as torture and subsequent death, as in the case of her husband.

3.2. She alleges a violation of article 6 of the Covenant, as her husband was arbitrarily deprived of his life while in custody.

3.3. She alleges a violation of article 7 of the Covenant on account of the treatment she and her husband were subjected to between 19 May and 14 September 2000, and during her husband's detention in the *Gendarmerie* cell and at Bafoussam military prison.

3.4. The author alleges a violation of article 9**(**1), (2), (3), and (4) as her husband was never served with an arrest warrant. Charges were never brought against him, and he was never tried. In addition, Captain Togolo disregarded the release order issued by the prosecutor.

3.5. The author alleges a violation of article 19 in that Captain Togolo maintained that Mr Titiahonjo belonged to the SCNC, an allegedly 'secessionist organisation'. There is no law that prohibits membership in the SCNC and for this same reason the author also alleges violations of articles 22 and 27, as the SCNC is a linguistic minority in the state party and suffers persecution on that account.

3.6. The author claims that because her husband's detention involved the executive and the military, she could not sue or take action domestically, as required under article 5(2)(b) of the Optional Protocol. To file a civil suit, she would have had to pay costs in

addition to the five percent deposit of the award claimed in a civil suit.

Absence of state party co-operation

4. On 2 June 2003, 30 October 2006 and 31 May 2007, the state party was requested to submit information on the admissibility and merits of the communication. The Committee notes that this information has not been received, in spite of a note from the state party dated 11 July 2007 to the effect that such information would be submitted forthwith. It regrets the state party's failure to provide any information with regard to the admissibility or substance of the author's 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 taken. In the absence of a reply from the state party, due weight must be given to the author's 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 Procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

5.2. As it is obliged to do pursuant to article 5(2)(a) of the Optional Protocol, the Committee ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

5.3. With respect to the exhaustion of domestic remedies, the Committee recalls that the author filed a complaint on behalf of her husband and that the state prosecutor's order to release her husband was never implemented. In these circumstances, it could not be held against the author if she did not petition the courts again for the release of her husband or for the mistreatment she suffered from herself. In the absence of any pertinent information from the state party, the Committee concludes that it is not precluded from considering the communication under article 5(2)(b), of the Optional Protocol.

5.4. The author has claimed violations of articles 19, 22 and 27, on account of her husband's membership in the SCNC. The Committee considers that the author has not sufficiently substantiated, for purposes of admissibility, how her husband's rights under these provisions were violated by virtue of his detention. The Committee therefore declares them inadmissible under article 2 of the Optional Protocol.

5.5. The Committee finds the author's remaining claims of absence of effective remedies under article 2(3)(a) and (b); of arbitrary deprivation of her husband's life under article 6; of violations of article 9, paragraphs 1 to 4 in her husband's case; and of violations of article 7 in the case of her husband and her own case, admissible.

Consideration of the merits

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

6.2. The author contends that her husband's death in custody amounts to a violation of article 6 which requires a state party to protect the right to life of all persons within its territory and subject to its jurisdiction. In the present case, the author claims that the state party failed to protect the right to life of her husband by a) failing to allow a nurse access to his cell when he was clearly severely ill; and b) condoning life threatening conditions of detention at Bafoussam prison, especially the apparently unchecked propagation of life-threatening diseases. The state party has not refuted these allegations. In these circumstances, the Committee finds that the state party did not fulfil its obligation under article 6(1) of the Covenant, to protect Mr Titiahonjo's right to life.

6.3. The author claims that her husband's rights were violated under article 7 of the Covenant, because of a) the general conditions of detention; b) the beatings he was subjected to; c) the deprivation of both food and clothing in detention at the *Gendarmerie* cell and at Bafoussam prison; and d) the death threats he received and the *incommunicado* detention he suffered in both the *Gendarmerie* cell and at Bafoussam prison. The state party has not contested these allegations, and the author has provided a detailed account of the treatment and beatings her husband was subjected to. In the circumstances, the Committee concludes that Mr Titiahonjo was subjected to cruel, inhuman and degrading treatment, in violation of article 7 of the Covenant.

6.4. The author also claims violation of article 7 on her own behalf. She was in an advanced state of pregnancy and she alleges that she suffered from the treatment she and her husband were subjected to. She was mistreated by the police and pushed into the gutter and slapped when they arrested Mr Titiahonjo on 19 May 2000. She was not allowed to visit her husband and was 'chased' away when she visited the police station to give him food. The Committee finds that in the absence of any challenge to her claim by the state party, due weight must be given to the author's allegation. The Committee furthermore understands the anguish caused to the author by the uncertainty concerning her husband's fate and continued

imprisonment. The Committee concludes that under the circumstances she too is a victim of a violation of article 7 of the Covenant.

6.5. With regard to the claim under article 9(1), it transpires from the file that no warrant was ever issued for Mr Titiahonjo's arrest or detention. On 25 June 2000, Captain Togolo informed the author that her husband was kept in prison purely because he was a member of the SCNC. There is no indication that he was charged with a criminal offence at any time. In the absence of any relevant state party information, the Committee considers that Mr Titiahonjo's deprivation of liberty was arbitrary and in violation of article 9(1).

6.6. The author claims violations of article 9(2), (3) and (4). Nothing suggests that Mr Titiahonjo was ever informed of the reasons for his arrest, that he was ever brought before a judge or judicial officer, or that he ever was afforded the opportunity to challenge the lawfulness of his arrest or detention. Again, in the absence of relevant state party information on these claims, the Committee considers that Mr Titiahonjo's detention between 21 May and 14 September 2000 amounted to a violation of article 9(2), (3) and (4) 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 opinion that the facts before it reveal violations by Cameroon of article 6(1), article 7, article 9(1), (2), (3) and (4) of the Covenant and articles 6 and 7 read together with article 2(3) of the Covenant on account of Mr Titiahonjo and violation of article 7 in regard to the author herself.

8. In accordance with article 2(3)(a) of the Covenant, the state party is under an obligation to provide the author with an effective remedy, including compensation and institution of criminal proceedings against all those responsible for the treatment of Mr Titiahonjo upon arrest and in detention and his subsequent death, as well as against those responsible for the violation of article 7 suffered by the author herself. The state party is under an obligation to prevent similar violations in the future.

9. Bearing in mind that, by becoming a state party to the Optional Protocol, the state party has recognised the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the state party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights 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 180 days, information about the measures taken to give effect to the Committee's views.

LIBYA

El Dernawi v Libya

(2007) AHRLR 35 (HRC 2007)

Communication 1143/2002, *Farag El Dernawi v Libyan Arab Jamahiriya*

Decided at the 90th session, 20 July 2007, CCPR/C/90/D/1143/2002

Passport confiscated with the result of preventing family from reuniting with refugee

Evidence (failure of state to respond to allegations, 4, 6.2)
Movement (right to leave one's own state, confiscation of passport, 6.2)
Family (wife and children not allowed to reunite with refugee, 6.3)
Children (right to live with both parents, 6.3)
Refugees (right to reunite with family, 6.3)

1. The author of the communication is Farag El Dernawi, a Libyan national born on 1 June 1952 and resident in Olten, Switzerland. He brings the communication on his own behalf and on behalf of his wife, Salwa Faris, born on 1 April 1966, and their six children, Abdelmenem, born 26 July 1983; Abdelrahman, born 21 August 1985; Abdallah, born 27 July 1987; Abdoalmalek, born 4 October 1990; Salma, born 22 January 1993; and Gahlia, born 18 August 1995. He claims violations by the Libyan Arab Jamahiriya of articles 12, 17, 23 and 24 of the Covenant. He is represented by the World Organisation against Torture.

The facts as presented by the author

2.1. The author, a member of the Muslim Brotherhood, was persecuted in Libya on account of his political beliefs. In 1998, he was accompanying his brother and sick nephew to Egypt to seek medical treatment when he was warned that security personnel had been at his home, apparently seeking to arrest him. He decided not to return, separating him from his wife and six children in Libya.

2.2. In August 1998, the author arrived in Switzerland and applied for asylum. In March 2000, the Swiss federal authorities granted the author asylum and approved family reunification. On 26 September 2000, his wife and the three youngest children sought to leave Libya to join the author in Switzerland. She was stopped at the Libyan-Tunisian border and her passport, which also covered the three children, was confiscated. Upon return to her home city of Benghazi, she was ordered to appear before the security services, who informed her that she could not travel because the author's name was on an internal security wanted list in connection with a political case.

2.3. On numerous occasions, the author's wife has personally sought to retrieve her passport, including through friends and family with government influence, without success. Lawyers refuse to act for her on account of her husband's political activities. She, and her six children, have no income and face substantial economic hardship. In addition to the fear and strain, she has lately become ill, requiring medical treatment. Although the three eldest children have their own passports and could theoretically leave the country to join their father, they do not wish to leave their mother in difficulty.

The complaint

3.1. The author claims violations of articles 12, 17, 23 and 24 of the Covenant. He contends that the confiscation of passport and refusal of the state party to permit departure of his wife and the three youngest children amounts to a continuing violation of article 12 of the Covenant. The conditions of necessity and proportionality applicable to a legitimate restriction of the right to movement are clearly absent, as the state party's officials have not even claimed that the author's wife and children represent a risk to national security. On the contrary, they have explicitly admitted that the family are being prevented from leaving solely because the author is accused of a political crime.

3.2. The author contends that the frustration by the state party of his wife and three youngest children joining him in Switzerland does not originate in any legitimate concern for the affected individuals, but is apparently motivated by a desire to punish the author. The interference with family life is accordingly arbitrary and in breach of articles 17 and 23 of the Covenant. In addition, the state party's action has effectively impeded all six of the children from fully enjoying their right to family life, as even the three eldest children, who have their own passports and could theoretically leave, cannot do so without leaving their mother and younger siblings behind.

3.3. The author also argues that by not permitting family reunification, the state party has placed the children in dire economic need as they have been deprived of their sole means of support. Although they have been able to survive with the assistance

of family members, they have been forced to live in increasingly difficult conditions. By arbitrary and unlawful action to this effect that failed to give due consideration to the impact thereof on the well-being of the children under eighteen years of age, the state party violated article 24 of the Covenant.

3.4. As to the exhaustion of domestic remedies, the author argues that his wife has not been able to use any official instances, due to his situation, though her attempts as described to pursue such avenues as have been available to her have been without success. With reference to the material of a variety of international non-governmental organisations, the author contends that, in any event, there are no effective remedies in Libya for human rights violations that are politically motivated. In further support of this proposition, the author cites the Committee's concluding observations in 1998, seriously doubting the independence of the judiciary and freedom of action of lawyers,[1] and argues that the situation has not significantly changed. Instances of politically motivated arrest and trial, as well as harassment of victims' family members, are still routinely reported, and in cases of political persecution, the judiciary will not contradict decisions of the executive.

Absence of state party's co-operation

4. By *notes verbales* of 16 December 2002, 26 January 2006 and 23 April 2007, the state party was requested to submit to the Committee information on the question of admissibility and the merits of the communication. The Committee notes that this information has still not been received. It regrets the state party's failure to provide any information with regard to the author's claims, and recalls that it is implicit in the Optional Protocol that states parties make available to the Committee all information at their disposal.[2] In the absence of any observations from the state party, due weight must be given to the author's allegations, to the extent that these have been sufficiently 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 87 of its Rules of Procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

1 CCPR/C/79/Add.101 para 14.

2 See, *inter alia*, *Khomidova v Tajikistan*, communication 1117/2002, views adopted on 29 July 2004; *Khalilova v Tajikistan*, communication 973/2001, views adopted on 30 March 2005; and *Aliboeva v Tajikistan*, communication 985/2001, views adopted on 18 October 2005.

5.2. As it is obliged to do pursuant to article 5(2)(a) of the Optional Protocol, the Committee ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

5.3. With respect to the exhaustion of domestic remedies, the Committee notes that the state party has offered no argument to refute the author's contention that all his wife's approaches to the authorities have been futile, and that, in the circumstances of the case, effective remedies are unavailable. Accordingly, the Committee considers that it is not precluded by the provisions of article 5(2)(b) of the Optional Protocol from consideration of the communication.

5.4. The Committee considers that the author's claims under articles 12, 17, 23 and 24 are sufficiently substantiated for purposes of admissibility, and therefore proceeds to consider them on the merits, in accordance with article 5(2) of the Optional Protocol.

Consideration of the merits

6.1. The Human Rights Committee has considered this 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.

6.2. In terms of the claim under article 12, the Committee recalls its jurisprudence that a passport provides a national with the means practicably to exercise the right to freedom of movement, including the right to leave one's own state, conferred by that article.[3] The confiscation of the passport of the author's wife, also covering her three youngest children, as well as the failure to restore the document to her, accordingly amount to an interference with the right to freedom of movement which must be justified in terms of the permissible limitations set out in article 12(3) concerning national security, public order/*ordre public*, public health or morals or the rights and freedoms of others. The state party has not sought to advance any such justification, nor is any such basis apparent to the Committee on the basis of the material before it. The Committee accordingly concludes that there has been a violation of article 12(2) in respect of the author's wife and three youngest children whom the wife's passport also covered.

6.3. As to the claims under articles 17, 23 and 24, the Committee notes that the state party's action amounted to a definitive, and sole, barrier to the family being reunited in Switzerland. It further notes that the author, as a person granted refugee status under the 1951 Convention on the Status of Refugees, cannot reasonably be expected

[3] *El Ghar v Libyan Arab Jamahiriya*, communication 1107/2002, views adopted on 29 March 2004.

to return to his country of origin. In the absence of justification by the state party, therefore, the Committee concludes that the interference with family life was arbitrary in terms of article 17 with respect to the author, his wife and six children, and that the state party failed to discharge its obligation under article 23 to respect the family unit in respect of each member of the family. On the same basis, and in view of the advantage to a child's development in living with both parents absent persuasive countervailing reasons, the Committee concludes that the state party's action has failed to respect the special status of the children, and finds a violation of the rights of the children up to the age of eighteen years under article 24 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 disclose a violation of article 12(2) of the Covenant in respect of the author's wife and her three youngest children, a violation of articles 17 and 23 in respect of the author, his wife and all children, and a violation of article 24 in respect of the children under the age of eighteen as of September 2000.

8. In accordance with article 2(3) of the Covenant, the state party is under an obligation to ensure that the author, his wife and their children have an effective remedy, including compensation and return of the passport of the author's wife without further delay in order that she and the covered children may depart the state party for purposes of family reunification. The state party is also under an obligation to take effective measures to ensure that similar violations do not recur in future.

9. The Committee recalls that by becoming a state party to the Optional Protocol, the Libyan Arab Jamahiriya has recognised the competence of the Committee to determine whether there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the state party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the Covenant and to ensure an effective and enforceable remedy when a violation has been disclosed. The Committee therefore 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.

SOUTH AFRICA

Prince v South Africa

(2007) AHRLR 40 (HRC 2007)

Communication 1474/2006, *Gareth Anver Prince v South Africa*

Decided at the 91st session, 31 October 2007, CCPR/C/91/D/1474/2006

Whether the failure to exempt Rastafarians from using cannabis for religious purposes violated the ICCPR

Admissibility (consideration by other international body, 6.2; continuing violation, 6.4)
Religion (Rastafarianism, 6.5)
Limitations on rights (proportionality, 7.3, 7.4)
Equality and non-discrimination (discrimination on the grounds of religion, indirect discrimination, 7.5)

1. The author of the communication is Mr Gareth Anver Prince, a South African national born on 6 December 1969. He claims to be the victim of violations by South Africa of his rights under article 18(1); article 26; and article 27 of the International Covenant on Civil and Political Rights. The Covenant and its Optional Protocol entered into force for South Africa respectively on 10 March 1999 and 28 November 2002. The author is represented by counsel, Prof Frans Viljoen.

Facts as presented by the author

2.1. The author is a follower of the Rastafari religion, which originated in Jamaica and later in Ethiopia, as a black consciousness movement seeking to overthrow colonialism, oppression and domination. There are about 12 000 Rastafarians in South Africa. The use of *cannabis sativa* (cannabis) is central to the Rastafari religion. It is used at religious gatherings and in the privacy of one's home where it does not offend others. At religious ceremonies, it is smoked through a chalice (water-pipe) as part of Holy Communion, and burnt as incense. In private, cannabis is also used as incense, to bathe in, for smoking, drinking and eating. Although not all Rastafarians in South Africa belong to formal organisations, there are four Rastafari houses and a Rastafari National Council.

2.2. The author fulfilled all academic requirements for becoming an attorney. Before being allowed to practice, prospective attorneys in South Africa must, in addition to these academic requirements, perform a period of community service, as required by the Attorneys Act.[1] The author applied to the relevant body (the Law Society of Cape of Good Hope) to register his contract of community service. In its determination of this issue, the Law Society must assess whether the candidate is a 'fit and proper person'. A criminal record, or a propensity to commit crime, will jeopardise such a finding.

2.3. Under the Drugs and Drugs Trafficking Act and the Medicines and Related Substances Control Act,[2] it is, among others, an offence to possess or use cannabis. These laws allow for exemptions under specified conditions for patients, medical practitioners, dentists, pharmacists, other professionals, or anyone that has 'otherwise come into possession' of a prohibited substance in a lawful manner.[3]

2.4. When applying to the Law Society, the author disclosed that he had two previous convictions for possessing cannabis, and expressed his intention, in light of his religious dictates, to continue using cannabis. On this basis, his application for registration for community service was refused. He was thus placed in a position where he must choose between his faith and his legal career.

2.5. The author claimed before the South African courts that the failure of the relevant legislation to make provision for an exemption allowing *bona fide* Rastafarians to possess and use cannabis for religious purposes constitutes a violation of his constitutional rights under the South African Bill of Rights.[4] On 23 March 1998, the Cape High Court dismissed the author's application for review of the Law Society's decision.[5] On 25 May 2000, the Supreme Court dismissed his appeal.[6] The Constitutional Court delivered two judgments, on 12 December 2000 and 25 January 2002.[7] In the latter, it decided, by a majority of 5 to 4, that although the Drugs Act did limit the author's constitutional rights, such limitations were reasonable and justifiable

1 Act 53 of 1979.
2 Act 108 of 1996.
3 See eg sec 4(b) (i), (ii), (iii), (iv) and (v) of the Drugs and Drugs Trafficking Act.
4 See the secs of the Constitution referred to in para 4.11 below.
5 *Prince v President of the Law Society, Cape of Good Hope and Others* 1998 8 BCLR 976 (C), decided on 23 March 1998.
6 *Prince v President, Cape Law Society and Others* 2000 3 SA 845 (SCA), decided on 25 May 2000.
7 *Prince v President, Cape Law Society and Others* 2001 2 SA 388 (CC), delivered on 12 December 2000 (*Prince I*) and *Prince v President, Cape Law Society and Others* 2002 2 SA 794 (CC), decided on 25 January 2002 (*Prince II*).

under section 36[8] of the Constitution. The minority found unconstitutional the prohibition on the use and possession of cannabis in religious practices which does not pose an unacceptable risk to society and the individual, and considered that the government should allow an exemption.

2.6. In 2002, the author applied to the African Commission on Human and Peoples' Rights. The issue was whether the failure to exempt *bona fide* Rastafarians from using and possessing cannabis for religious purposes violated the African Charter. In December 2004, the African Commission found no violation of the complainant's rights as alleged [*Prince v South Africa* (2004) AHRLR 105 (ACHPR 2004)].

The complaint

3.1. The author claims a violation of article 18(1) of the Covenant, and refers to General Comment 22, which states that the concept of worship 'extends to ritual and ceremonial acts giving direct expression to belief'. The author is a *bona fide* adherent to Rastafarianism. The use of cannabis is accepted to be an integral part of that religion and fundamental to its practice. The author claims that the state party has a positive obligation to take measures to ensure the *de facto* protection of his right to freedom of religion.

3.2. He argues that his case differs from the case of *Bhinder v Canada,*[9] because the justification of the limitation in the present case is much less concrete, and the failure to exempt Rastafarians is based on pragmatic concerns such as the cost and difficulties to apply and enforce an exemption. The author is fully informed and prepared to accept any risk, if any, to him personally. He submits that the legitimate aim of preventing the harm associated with the use of dangerous dependence-producing substances does not necessitate a blanket ban on the use and possession of cannabis for religious purposes. The limitation is excessive in that it affects all uses of cannabis by Rastafarians, no matter what the form of use, the amount involved, or the circumstances, while the use of cannabis for religious purposes takes many forms. A tailor-made exemption would not open the floodgates of illicit use; and there is no evidence that an exemption would pose substantial health or safety risks to society at

8 Sec 36 of the Constitution: Limitations of rights: '(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose. (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.'

9 Communication 208/1986, views adopted on 9 November 1989.

large. The denial of his right to freedom of religion is greater than the necessary to achieve any legitimate aim.

3.3. The author claims to be the victim of a violation of article 26, as the failure to differentiate the Rastafari religion from other religions constitutes discrimination. He is coerced into a choice between adherence to his religion and respect for the laws of the land.

3.4. The author claims that the failure to explore and find an effective exemption for Rastafari constitutes a violation of article 27. Rastafarianism is essentially collective in nature, as it is a particular way of life, in community with others. This way of life has deep African roots.

3.5. The author contends that his complaint is admissible. His communication is not being examined under another procedure of international investigation or settlement, as the African Commission has already made a finding on the merits. He has exhausted domestic remedies, as his case was examined by the Supreme Court of Appeal and the Constitutional Court.

3.6. The author argues that his claim is admissible *ratione temporis*. Although the judgments of the national courts were issued before the entry into force of the Optional Protocol for the state party in 2002, the alleged violations constitute 'continuous violations' with 'continuing effects', which persist into the period after the entry into force and into the present. The Attorneys Act 53 of 1979 and the Drugs and Drug Trafficking Act 140 of 1992 remaining in force, the legislative framework still presents an obstacle to the author's free expression of his right to religion. He refers to the case of *Lovelace v Canada*[10] and argues that his communication concerns the continuing effect of the Attorney's Act and the Drugs Traffic Act, as a result of which he cannot register for community service with the Law Society.

The state party's submission on admissibility and merits

4.1. On 24 July 2006, the state party commented on the admissibility of the communication. It argues that domestic remedies have not been exhausted, as the author did not, in his applications to the domestic courts, seek to have the prohibition of cannabis declared unconstitutional and invalid, and to have such prohibitions removed from the respective act for the benefit of the whole population, as is the usual way in challenging legislative provisions which are believed to be inconsistent with the Constitution. He only challenged the constitutionality of the laws prohibiting the use of cannabis in as far as they did not make an exception in the favour of a minority of 10 000 people, permitting the use of cannabis for

[10] Communication 24/1977, views adopted on 30 July 1981, para 13.1.

religious purposes. The state party submits that the reason why the prohibition of possession and use of cannabis remains in force is the result of the author's misguided approach in the domestic courts.

4.2. The state party contends that the communication is inadmissible *ratione temporis*. The Optional Protocol entered into force for the state party on 28 November 2002. The facts and applications in domestic courts were completed before the entry into force of the Optional Protocol, with the Constitutional Court delivering its final judgment on 25 January 2002. On the author's argument that the violation has continuous effects because the laws still prohibit the possession and use of cannabis, the state party considers it to be invalid, because the author did not seek to have the prohibition laws declared unconstitutional and invalid. He cannot therefore claim that the fact that these laws still apply amounts to a continuous violation. The state party refers to the Committee's jurisprudence[11] according to which continuous effects can be seen as an affirmation of previous alleged violations. It submits that it has not affirmed the concerned provisions of the relevant laws, as they remain unchanged.

4.3. The state party recalls that the same facts were already examined by the African Commission, which found no violation of the African Charter on Human and Peoples' Rights. The state party suggests that the Committee should broaden its literal interpretation of the concept of 'being examined' to address policy issues such as the phenomenon of 'appeal' from one body to another, as the risk of 'human rights forum shopping'[12] is considerable. It considers that the Committee, in dealing with the present case, has the opportunity to give clear guidance, in an innovative and creative manner, on how it intends to contribute to the maintenance of a credible and respected unified international human rights system.

4.4. On 24 November 2006, the state party commented on the merits. It argues that while its legislation indeed results in a limitation of the right to freedom of religion of Rastafarians, such limitation is reasonable and justifiable in terms of the limitation clause contained in article 18(3). Furthermore, it is proportionate to and necessary for the achievement of the legitimate aims provided for in that article, namely the protection of public safety, order, health, morals or the fundamental rights and freedoms of others. The Cape High Court, the Supreme Court and the Constitutional Court all found that while the legislation the author complained about limited

11 Communication 520/1992, *Könye and Könye v Hungary,* decision on admissibility of 7 April 1994, para 6.4; communication 422/1990, *Aduayoum et al v Togo*, views adopted on 12 July 1996, para 6.2.

12 The state party refers to an article by JS Davidson, 'The procedure and practice of the Human Rights Committee under the first OP to the ICCPR' (1991) 4 *Canterbury Law Review* 337 342, which is annexed to its submissions.

his constitutional rights, such limitation was reasonable and justifiable under section 36 of the state party's Constitution.

4.5. For the state party, the essential question before the Committee is not whether a limitation on the rights of Rastafarians has taken place, but whether such limitation will be encompassed by the limitation clause contained in article 18(3). It emphasises that at the national level, the author did not challenge the constitutionality of the prohibition on the possession and use of cannabis, accepting that it serves a legitimate purpose, but alleged that this prohibition is overbroad and that exemption should be made for the religious use by Rastafarians. In the case before the Cape High Court, it was requested that the possession and use of cannabis for religious purposes by Rastafarians be legalised. On appeal, it was requested that an exemption also be granted for transporting and cultivating cannabis, while the requested exemption became far wider before the Constitutional Court, where importation and transportation to centres of use and distribution to Rastafarians were requested. It follows that the practical relief sought by the author is an exemption to legalise a whole chain of cultivation, import, transport, supply and sale of cannabis to Rastafarians. In practice, the only workable solution would be the creation and implementation of a 'legal' chain of supply of cannabis, as an exception and parallel to the illegal trade in cannabis. The majority in the 2002 Constitutional Court judgment found, after thoroughly considering the limitations clause in section 36 of the Constitution and applicable foreign law, that the relief sought could not be implemented in practice.[13]

4.6. In finding that the 'blanket' ban on the use of cannabis was proportional to the legitimate aim of protecting the public against the harm caused by the use of drugs, the Constitutional Court evaluated the importance of the limitation, the relationship between the limitation and its purpose, and the impact that an exemption for religious reasons would have on the overall purpose of the limitation, against the author's right to freedom of religion. It took into account

[13] 'There is no objective way in which a law enforcement official could distinguish between the use of cannabis for religious purpose and the use of cannabis for recreation purposes. It would be even more difficult, if nor impossible, to distinguish objectively between the possession of cannabis for one or the other of the above purposes' (para 130).
'There would be practical difficulties in enforcing a permit system ... They include the financial and administrative problems associated with setting up and implementing such a system, and the difficulties in policing that would follow if permits were issued sanctioning the possession and use of cannabis for religious purposes' (para 134).
'The use made of cannabis by Rastafari cannot in the circumstances be sanctioned without impairing the state's ability to enforce its legislation in the interests of the public at large and to honour its international obligation to do so. The failure to make provision for an exemption in respect of the possession and use of cannabis by Rastafari is thus reasonable and justifiable under our Constitution' (para 139).

the nature and importance of that right in a democratic society based on human dignity, equality and freedom, the importance of the use of cannabis in the Rastafari religion and the impact of the limitation on the right to practice the religion.

4.7. On counsel's reference to the *Bhinder* case and his contention that allowing a permitted exemption for the benefit of Rastafarians would present little danger to public safety or health, the state party reiterates that implementing such a permit system would present practical difficulties, and that it is impossible to prevent a dangerous substance from escaping from the system and threatening the public at large. Medical evidence on the harmful effects of cannabis was considered and accepted by the Constitutional Court as such.[14]

4.8. The state party invokes the Committee's inadmissibility decision in *MAB, WAT and JAYT v Canada*,[15] where it considered that the use of cannabis for religious purposes cannot be brought within the scope of article 18. The state party concludes that there was no violation of article 18.

4.9. With respect to the author's claim under article 26, the state party recalls that distinctions are justified, provided they are based on reasonable and objective criteria, which in turn depends on the specific circumstances and general situation in the country concerned. It refers to views in *Broeks*,[16] where the Committee held that

> 'the right to equality before the law and to equal protection of the law without any discrimination does not make all differences of treatment discriminatory. A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26'.

4.10. The state party's legislation and the limitation relating to cannabis apply equally to all, Rastafarians and others. The limitation therefore does not violate the right to equal treatment and equality before the law. The author claims the right to see positive measures adopted, at great financial and administrative cost, in favour of Rastafarians to ensure equality for this group with any other religious groups. However, such special treatment in favour of Rastafarians may be interpreted as a form of discrimination against other groups in society who also feel that they have special needs and legitimate claims to be exempted from certain provisions of domestic legislation. The obligations contained in article 26 relate to equality, non-discrimination and equal protection before the law, norms also enshrined in and protected in terms of the state party's Constitution. Equal protection in this context does not include an obligation to make exemptions for certain classes of people.

14 See para 13 of the 2002 judgment.
15 Communication 570/1993, admissibility decision of 8 April 1994.
16 Communication 172/1984, views adopted on 9 April 1987, para 13.

4.11. On the author's claim under article 27, the state party points out that its Constitution contains the same right framed in almost identical language[17]. It is common cause that the Rastafarians form a religious minority group in South African society. When it decided the issue, the Constitutional Court took into account the protection afforded to minority religious groups, like the Rastafarians, in terms of section 15(1),[18] and section 31[19] of the Constitution, and the constitutional protection required by a small, vulnerable and marginalised group like the Rastafarians.[20] The Court concluded that the relief sought by the author was impractical and found that the legislation in question set reasonable and justifiable limitations to the right to freedom of religion, including within its association context provided for in section 31 of the Constitution.

4.12. The state party emphasises that the author did not act on behalf of Rastafarians as a group before domestic courts or the Committee. In addition, he failed to advance facts before the Committee on which to base his view that Rastafarians as a minority group are being singled out for discrimination. If a right to use cannabis during religious ceremonies does not accrue to a member of a minority group because of reasonable and justifiable limitations, such a right cannot be construed in a collective form, as the same limitations will apply.

Author's comments to the state party's observations

5.1. On 31 January 2007, the author commented on the state party's submissions, reaffirming that his communication is admissible. On the state party's argument of inadmissibility *ratione temporis*, he argues that if the violation or its effects continue after the entry into force of the Optional Protocol, then, notwithstanding that it entered into force after the violation itself occurred, a continuing violation should be found and the communication declared

17 Sec 31 of the South African Constitution: '(1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community- (a) to enjoy their culture, practice their religion and use their language; and (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society. (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.'

18 Sec 15(1): 'Everyone has the right to freedom of conscience, religion, thought, belief and opinion.'

19 Sec 31: 'Cultural, religious and linguistic communities: (1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community a. to enjoy their culture, practise their religion and use their language; and b. to form, join and maintain cultural, religious and linguistic associations and other organs of civil society. (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.'

20 See para 122 of the 2002 Constitutional Court decision.

admissible.[21] The Constitutional Court expressed its opinion that the legislation in question in the case is constitutional. This legislation remains in force. It can hardly be expected of the author to 'affirm' the *same* arguments before the *same* courts related to the *same* legislation – in fact, such an attempt would be met with judicial *res judicata* reply, or that it is moot. In any event, the author remains unable to be registered for his contract of community service, required for practice as an attorney, and thus cannot engage in his chosen profession as a result of his religious convictions.

5.2. On the issue of exhaustion of domestic remedies, the author acknowledges that his case before the South African courts was not to contest the constitutionality of the general prohibition against the possession and use of cannabis, but to contest the constitutionality of the relevant legislation only in so far as it does not provide for a circumscribed exemption allowing a particular group, on established religious grounds, to possess and use cannabis. Under South African law, the complainant is entitled to contest the constitutionality of legislation for being excessive and is not required to contest the constitutional validity of a 'general provision' *in toto*, as the state party argues. In fact, the Constitutional Court itself characterised the author's constitutional complaint as one contesting that the 'impugned provisions are overboard',[22] and dealt with it on these terms.

5.3. On the merits, the author accepts that the right to freedom of religion may reasonably and justifiably be limited. He does not argue that article 18(3) of the Covenant is not applicable to this case. While the state party emphasises the 'thorough consideration' of the relevant factors by the Constitutional Court, the author points out that the Court's finding was narrow, with the Court split 5-4.[23] He contends that the government did not properly consider all the possible forms that an appropriate statutory amendment and administrative infrastructure allowing for a circumscribed exemption could take. Ngcobo J, for the Court minority, noted that the state's representatives did not suggest 'that it would be impossible to address these problems by appropriate legislation and administrative infrastructure'. There is no need to raise the spectre of a 'whole

[21] See communication 422/1990, *Aduayom et al v Togo;* and communication 42/1997, *Lovelace v Canada,* para 13.1: 'The Committee considers that the essence of the present communication concerns the continuing effect of the Indian Act, in denying Sandra Lovelace legal status as an Indian ... This fact persists after the entry into force of the Covenant, and its effects have to examined, without regard to their original cause.'

[22] *Prince v President, Cape Law Society and Others* 2002 2 SA 794 (CC), decided on 25 January 2002, Constitutional Court judgment, para 31.

[23] The majority judgment is by Chaskalson CJ; with Ackermann J, Kriegler J, Goldstone J and Yacoob J concurring. The minority is that of Ncobo J; with Mokgoro J, Sachs J and Madlanga AJ concurring. Only 9 of the 11 Constitutional Court judges participated in this case.

chain of cultivation, import, transport, supply and sale' of cannabis, as all that the complainant requests is that his religious use of cannabis be accommodated within the legislative and administrative scheme of existing legislation. The government did not engage in a consultative process to establish how the author's rights may be accommodated within a workable scheme that does not pose the risks outlined in evidence.

5.4. The author refers to the Committee's General Comment 22 on article 18, according to which limitations imposed on the right to practise or manifest one's religion must be established by law and must not be applied in a manner that would vitiate the rights guaranteed in article 18. He argues that the laws in question[24] are applied in a way that negates the author's right to practice and manifest his religion in as much as the freedom to use cannabis for religious purposes is denied to him.

5.5. The author submits that if exceptions to the prohibition of the use of cannabis could be made for medical and professional purposes and effectively enforced by the state party, exceptions to the prohibition of the use of cannabis could also be made and effectively enforced on religious grounds with no additional burden on the state party. Its failure and unwillingness to exempt the religious use of cannabis from the prohibition of the law negates the author's freedom to manifest his religion guaranteed by article 18, and cannot be not justified under article 18(3).

5.6. With respect to article 26, the author reiterates that the current legal position constitutes a *de facto* violation of his right to equality, and the government has a duty to correct that situation. He argues that the law outlawing the possession and use of cannabis applies to 'everyone', and does not single out Rastafarians by name, but in its effect it discriminates against them, because it affects *them* and their religion, not everyone else and their religion.[25]

5.7. The author argues that it is for the Committee to decide if his rights were reasonably accommodated. If not, a workable exemption clause has to be found — not by the Committee, but by the state party's executive. In determining the most workable solution, Parliament will have regard to factors such as financial and administrative cost. These considerations may affect the course it chooses, but cannot justify a violation of the Covenant.

5.8. The author contends that as a member of a religious minority, he can invoke article 27, which requires that someone invoking this provision must be a 'person belonging' to such a minority. Although

[24] The Drugs and Drug Trafficking Act 140 of 1992 and the Medicines and Related Substances Act 101 of 1965.

[25] The author refers to communication 666/1995, *Foin v France*, views adopted on 3 November 1999, paras 8.3 — 8.8.

the author may not have acted explicitly 'on behalf of' all Rastafarians, both the majority and minority judgments of the Constitutional Court indicate that the author is a member of the Rastafarian community, and that the exercise of his religion has strong communal elements.

5.9. Finally, the author submits that the onus is on the state party to prove that the interest of the state outweighs his own. Its mere assertions that a permit system in the author's favour would be burdensome to enforce is no proof, all the more so since there are already exceptions to the general prohibition of use of cannabis under the state party's laws. The restriction on the practice of the Rastafari religion occasioned by the state party's legislation is not reasonable, justifiable or proportionate to the aim of protecting the public in the state party.

Issues and proceedings before the Committee

Consideration of admissibility

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

6.2. The Committee notes the state party's contention that a similar claim filed by the author in the African Commission on Human and Peoples' Rights was dismissed on the merits in December 2004. However, article 5(2)(a) of the Optional Protocol does not constitute an obstacle to the admissibility of the present communication, since the matter is no longer pending before another procedure of international investigation or settlement, and South Africa has not entered a reservation to article 5(2)(a) of the Optional Protocol. The clear wording of the provisions of article 5(2)(a) militates against the state party's interpretation in paragraph 4.3 above.

6.3. As to the state party's argument that the author has failed to exhaust domestic remedies because he has not brought a general challenge of the law before national courts, the Committee notes that the author brought the claim that Rastafarians should be granted a workable exemption from the general prohibition of the possession and use of cannabis up to the Constitutional Court, the highest court in the state party. As this is precisely the claim argued before the Committee, it concludes that the author has exhausted domestic remedies for the purpose of article 5(2)(b) of the Optional Protocol.

6.4. The state party has challenged the admissibility *ratione temporis* of the communication, because the facts and applications

in domestic courts were completed before the entry into force of the Optional Protocol on 28 November 2002, and because it has not affirmed the relevant provisions in the legislation in question. The Committee recalls that it is precluded from examining alleged violations of the Covenant which occurred before the entry into force of the Optional Protocol for the state party, unless these violations continue after that date or continue to have effects which in themselves constitute a violation of the Covenant.[26] While the author's complaint was finally decided by the domestic courts before the entry into force of the Optional Protocol, the Committee notes that the author's claims relate to the application of the Drugs and Drug Trafficking Act 140 of 1992 and the Attorneys Act 53 of 1979, which remain in force. The Committee considers that the issue of whether the effects of the challenged legislation, which continue after the entry into force of the Optional Protocol, constitute a violation is an issue closely interwoven with the merits of the case. It is therefore more appropriately examined at the same time as the substance of the author's claims under articles 18, 26 and 27.

6.5. Regarding the state party's reference to the Committee's inadmissibility decision in *MAB, WAT and JAYT v Canada*,[27] the Committee considers that the factual and legal position in the present case can and should be distinguished from that in the Canadian case which, it understood, concerned the activities of a religious organisation whose belief consisted primarily or exclusively in the worship and distribution of a narcotic drug. Rastafarianism as a religion within the meaning of article 18 is not an issue in the present case. The Committee concluded that such a belief could not be brought within the scope of article 18 of the Covenant.

6.6. For the above reasons, the Committee concludes that the communication is admissible.

Consideration of merits

7.1. 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.

7.2. The author has claimed a violation of his right to freedom of religion, because the impugned law does not make an exemption to allow him to use cannabis for religious purposes. The Committee recalls that the freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts and that the concept of worship extends to ritual and ceremonial acts

[26] See communication 24/1977, *Lovelace v Canada*, views adopted on 30 July 1981, para 7.3; communication 1367/2005, *Anderson v Australia*, decision on admissibility of 31 October 2006, para 7.3; and communication 1424/2005, *Anton v Algeria*, decision on admissibility of 1 November 2006, para 8.3.

[27] See para 4.8 above.

giving expression to belief, as well as various acts integral to such acts.[28] The Committee notes that the material before it is to the effect that the use of cannabis is inherent to the manifestation of the Rastafari religion. In this regard, it recalls that the freedom to manifest one's religion or beliefs is not absolute and may be subject to limitations, which are prescribed by law and are necessary to protect public safety, order, health, or morals, or the fundamental rights and freedoms of others.

7.3. The Committee observes that the prohibition of the possession and use of cannabis, which constitutes the limitation on the author's freedom to manifest his religion, is prescribed by the law (the Drugs and Drug Trafficking Act 140 of 1992). It further notes the state party's conclusion that the law in question was designed to protect public safety, order, health, morals or the fundamental rights and freedoms of others, based on the harmful effects of cannabis, and that an exemption allowing a system of importation, transportation and distribution to Rastafarians may constitute a threat to the public at large, were any of the cannabis enter into general circulation. Under these circumstances the Committee cannot conclude that the prohibition of the possession and use of drugs, without any exemption for specific religious groups, is not proportionate and necessary to achieve this purpose. The Committee finds that the failure of the state party to grant Rastafarians an exemption to its general prohibition of possession and use of cannabis is, in the circumstances of the present case, justified under article 18(3) and accordingly finds that the facts of the case do not disclose a violation of article 18(1).

7.4. On the author's claim that the failure to provide an exemption for Rastafarians violates his rights under article 27, the Committee notes that it is undisputed that the author is a member of a religious minority and that the use of cannabis is an essential part of the practice of his religion. The state party's legislation therefore constitutes interference with the author's right, as a member of a religious minority, to practice his own religion, in community with the other members of his group. However, the Committee recalls that not every interference can be regarded as a denial of rights within the meaning of article 27.[29] Certain limitations on the right to practice one's religion through the use of drugs are compatible with the exercise of the right under article 27 of the Covenant. The Committee cannot conclude that a general prohibition of possession and use of cannabis constitutes an unreasonable justification for the interference with the author's rights under this article and concludes that the facts do not disclose a violation of article 27.

---

28 See communication 721/1996, *Boodoo v Trinidad and Tobago*, views adopted on 2 April 2002, para 6.6.

29 See communication 24/1977, *Lovelace v Canada*, views adopted on 30 July 1981, para 15.

7.5. The author argues that he is the victim of a *de facto* discrimination because unlike others, he has to choose between adherence to his religion and respect for the laws of the land. The Committee recalls that a violation of article 26 may result from the discriminatory effect of a rule or measure that is neutral at face value or without intent to discriminate. However, such indirect discrimination can only be said to be based on the grounds set out in article 26 of the Covenant if the detrimental effects of a rule or decision exclusively or disproportionably affect persons having a particular race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, rules or decisions with such an impact do not amount to discrimination if they are based on objective and reasonable grounds.[30] In the circumstances of the present case, the Committee notes that the prohibition of the possession and use of cannabis affects all individuals equally, including members of other religious movements who may also believe in the beneficial nature of drugs. Accordingly, it considers that the prohibition is based on objective and reasonable grounds. It concludes that the failure of the state party to provide an exemption for Rastafarians does not constitute differential treatment contrary to article 26.

8. 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 do not reveal a breach of any articles of the Covenant.

[30] See the Committee's General Comment 18 on non-discrimination and communication 998/2001, *Althammer et al v Austria*, views adopted on 8 August 2003, para 10.2.

TUNISIA

Ben Salem v Tunisia

(2007) AHRLR 54 (CAT 2007)

Communication 269/2005, *Ali Ben Salem v Tunisia*

Decided at the 39th session, 7 November 2007, CAT/C/39/D/269/2005

Lack of investigation into allegations of torture of human rights defender

Admissibility (exhaustion of local remedies, remedies must not be unduly prolonged, 8.5, 16.2)
Torture (16.4)
Evidence (failure of state to respond to allegations, 16.4)
Remedies (prompt and impartial investigation, 16.7, 16.8)

1. The complainant is Mr Ali Ben Salem, a 73-year-old Tunisian national. He alleges he was the victim of violations by Tunisia of article 2(1), read in conjunction with article 1; article 16(1); and articles 11, 12, 13 and 14, read separately or in conjunction with article 16(1) of the Convention. He is represented by counsel.

Factual background as presented by the complainant

2.1. The complainant has a long history of human rights activism in Tunisia, where, over the past 24 years, he has helped set up and run human rights monitoring organisations. In 1998, he co-founded the National Council for Fundamental Freedoms in Tunisia (CNLT), which the Tunisian Government refused to register as a legal non-governmental organisation (NGO) and kept under constant surveillance. In 2003, he co-founded the Tunisian Association against Torture (ATLT). He and his colleagues have been subjected to harassment, threats and violence by the Tunisian government.

2.2. In March 2000, CNLT published a report setting out in detail all the systematic human rights violations committed by the Tunisian government, including acts of torture. On 3 April 2000, Mr Ben Brik, a journalist and friend of the complainant, began a hunger strike in protest against the withdrawal by the Tunisian authorities of his passport, constant police harassment and a boycott of his work by the Tunisian media. On 26 April 2000 the complainant went to visit Mr Ben

Brik and noticed a large number of people around the house. Among them he recognised several plain-clothes policemen, some of whom had been involved in the surveillance and numerous closures of CNLT offices. These policemen prevented foreign journalists from approaching Mr Ben Brik's house. The complainant tried to flee, but was struck on the back of the neck, and partially lost consciousness. Other people were also beaten and arrested by the police.

2.3. Along with the others, the complainant was brought to El Manar 1 police station, where he was hit many times on the back of the head and neck and was kicked by several officers. He was subsequently dragged 15 metres along the courtyard face down and up a flight of stairs leading to the police station. His clothes were torn and he was left with abrasions on his lower body. He continued to be beaten, in particular by one policeman who he later learned was Mr Abdel Baqui Ben Ali. Another officer sprayed tear gas in his face, which burned his eyes and choked him. A policeman banged his head against a wall, leaving him unconscious for an undetermined period. When he came to, he found himself in a puddle of water on the floor of the main hall of the police station. He asked to be taken to the toilet, as he felt prostate pain, a condition which he had suffered from for several years. When the policemen refused, he was obliged to drag himself along the floor to the toilets.

2.4. A little later, he was told to go to an office a few metres further on. He was once again obliged to drag himself along the floor. Three police officers tried to force him to sit on a chair. He was then hit on the back of the neck and briefly lost consciousness. When he came to, he realised that he was being thrown in the back of a car, then fainted from pain. He was dumped at a construction site. He was discovered there in the late afternoon by three workers who found him a taxi to take him to hospital. At the hospital, medical tests confirmed that he had severe injuries to the spine, head injuries and bruises. Despite the doctors' concern, for fear of the police he decided as early as the next day to leave hospital and return to his home in Bizerte. Ever since he has suffered from serious back problems and has had difficulty standing up, walking and even carrying small objects. Doctors have advised back surgery. He also suffers from shoulder injuries. Because he cannot afford surgery, he has to take painkillers.

2.5. On 20 June 2000 the complainant lodged a complaint with the office of the Public Prosecutor describing the ill-treatment to which he had been subjected by policemen at El Manar 1 police station, requesting the Public Prosecutor to open a criminal investigation into the incident and implicating the Ministers of the Interior and of National Security. The Public Prosecutor's office would not accept the complaint, on the grounds that it was not the two Ministers themselves who had mistreated the complainant. On 22 August 2000

the complainant mailed his complaint back to the Public Prosecutor's office. On 4 September 2000 he delivered it to the office in person. He received no reply. No investigation has been opened since.

2.6. The applicant has been subjected to nearly constant police surveillance since 26 April 2000. Plain-clothes policemen are nearly always posted in front of his home. His telephone line is often cut, and he suspects that the police have tapped it. He was again assaulted by police officers on 8 June 2004 when he tried to register the organisation that he had co-founded, ATLT.

The complaint

3.1. The complainant alleges a violation of article 2, read in conjunction with article 1, of the Convention, on the grounds that the state party not only failed in its obligation to take effective measures to prevent acts of torture, but also used its own police forces to subject him to such acts. The state party intentionally inflicted on the complainant treatment tantamount to torture with the aim of punishing him for his human rights activities and intimidating him into halting such activities. He notes that the seriousness of the ill-treatment is comparable to that of other cases where the Committee has found that the ill-treatment constituted torture under article 1.[1] Furthermore, the gravity of the ill-treatment must be assessed taking into account the victim's age, his state of health and the resulting permanent physical and mental effects of the ill-treatment. He points out that at the time of the incidents he was 67 years old and suffered from prostate problems.

3.2. The complainant considers that the state party violated article 11, on the grounds that the authorities not only failed to exercise their supervisory powers to prevent torture, but actually resorted to torture themselves. The state party thus clearly failed to exercise a systematic review of rules, instructions, methods and practices with a view to preventing any cases of torture.

3.3. The complainant alleges that he has been a victim of a violation of articles 12 and 13 taken together, on the grounds that the state party did not carry out an investigation into the acts of torture committed against him, despite abundant evidence that public officials had perpetrated such acts. He filed complaints, and several international organisations made official statements mentioning his case and describing the ill-treatment inflicted by the Tunisian police. He further notes that according to the Committee's case law, a mere

[1] See communication 207/2002, *Dimitrijevic v Serbia and Montenegro*, decision adopted on 24 November 2004, paras 2.1, 2.2 and 5.3.

allegation of torture by the victim is sufficient to require an investigation by the authorities.[2]

3.4. With respect to the alleged violation of article 13, the complainant points out that the state party has not discharged its duty to protect him against all ill-treatment or intimidation as a consequence of his complaint. On the contrary, he considers that the state party has exposed him to intimidation by its own police force. He also points out that since the events in question he has been under nearly constant surveillance by the Tunisian police.

3.5. With respect to the alleged violation of article 14, the complainant considers that the state party has ignored his right to file a complaint, and has thus deprived him of his right to obtain compensation and the means for his rehabilitation. Even if civil suits may theoretically afford adequate reparation for victims of torture, they are either unavailable or inadequate. Under article 7 of the Tunisian Code of Criminal Procedure, when a complainant chooses to bring both civil and criminal actions, judgment cannot be handed down in the civil suit until a definitive decision has been reached on the criminal charges. Since criminal proceedings were never begun in this case, the state party has denied the complainant the opportunity to claim civil damages. If the complainant brings a civil suit without any criminal proceedings being initiated, he must renounce any future criminal charges. Thus, even if he won his case, the limited compensation that resulted would be neither fair nor appropriate.[3]

3.6. With respect to the alleged violation of article 16, the complainant argues that while the ill-treatment he suffered may not qualify as torture, it does constitute cruel, inhuman or degrading treatment.

3.7. On the exhaustion of domestic remedies, the complainant points out that he has unsuccessfully tried all the remedies available under Tunisian law. He has tried three times to file a complaint with the Public Prosecutor's office (see paragraph 2.5 above). He has received no response to his complaints, although they were submitted in 2000. He notes the Committee's finding that allegations of torture are of such gravity that, if there is reasonable ground to believe that such an act has been committed, the state party has the obligation to proceed automatically to a prompt and impartial investigation.[4] In such cases, the victim needs only bring the matter to the attention of the authorities for the state to be under such an

2 See communication 59/1996, *Blanco Abad v Spain*, decision adopted on 14 May 1998, para 8.6.

3 See communication 161/2000, *Hajrizi Dzemajl et al v Serbia and Montenegro*, decision adopted on 21 November 2002, para 9.6.

4 See communication 187/2001, *Thabti v Tunisia*, decision adopted on 14 November 2003, para 10.4.

obligation.[5] In the present case, not only did the complainant report the matter, but international organisations have also publicly decried the brutality to which he was subjected.

3.8. In the complainant's opinion, five years of inaction by the Public Prosecutor after a criminal complaint is submitted is an unreasonable and unjustifiable amount of time. He points out that the Committee has regarded a period of several months between the time the competent authority is informed of alleged torture and the time a proper investigation begins as excessive.[6] There is no effective remedy available to torture victims in Tunisia, because other appeal procedures are in practice flawed. A complainant can bring a private suit if the Public Prosecutor does not wish to initiate proceedings, but by so doing he forfeits the opportunity subsequently to seek criminal damages. The Committee has considered failure to bring proceedings to be an 'insurmountable obstacle', since it made it very unlikely that the victim would receive compensation.[7] He notes that prosecutors do not investigate allegations of torture and abuse, and that judges regularly dismiss such complaints without investigating them. Thus, while appeal procedures exist in theory, in practice they are unsatisfactory.[8]

3.9. The complainant requests the Committee to recommend to the state party that it take steps to investigate fully the circumstances of the torture he underwent, communicate the information to him and, based on the findings of the investigation, take action, if warranted, to bring the perpetrators to justice. He also requests that the state party take whatever steps are necessary to grant him full and suitable compensation for the injury he has suffered.

State party's observations on admissibility

4.1. The state party forwarded its observations on the admissibility of the complaint on 21 October 2005. It objects that the communication is inadmissible because the complainant has neither used nor exhausted the domestic remedies available, which, contrary to his assertions, are effective. The state party points out that the complainant did not follow up on his complaint. On 4 September 2000, the very day that the complaint was filed with the lower court in Tunis, the Deputy Public Prosecutor invited the complainant, in writing, to produce a medical certificate attesting to the alleged bodily harm cited in his complaint; the complainant did not submit

5 See communication 6/1990, *Parot v Spain*, decision adopted on 26 April 1994, para 10.4.

6 See communication 59/1996, *Blanco Abad v Spain*, decision adopted on 14 May 1998, para 8.5.

7 See communication 207/2002, *Dimitrijevic v Serbia and Montenegro*, decision adopted on 24 November 2004, para 5.4.

8 See European Court of Human Rights, *Aksoy v Turkey*, preliminary objections, 18 December 1996, Reports of Judgments and Decisions 1996-IV, para 53.

such a certificate. Even so, the Public Prosecutor asked the chief of the security service for the Tunis district to proceed with the necessary investigation of the related facts and report back to him. On 17 April 2001, the chief of the security service for the Tunis district stressed that the facts as related by the complainant had not been established but investigations were still under way. On the same dates and in the same places, on the other hand, the police had stopped and arrested people at an unauthorised gathering on the public highway. On the basis of that information, the Public Prosecutor assigned a deputy to question the persons cited in the complaint - the three policemen and the complainant. Questioned on 12 July 2001, 13 November 2001 and 11 July 2002 respectively, the three defendants all denied the facts as related by the complainant. One said he could not have been at the scene of the alleged incident because he was assigned to a different district. The other two had been at the scene of the unauthorised gathering but had been taken to hospital after being assaulted by a demonstrator. Faced with the complainant's failure to respond, the Tunis prosecutor's office decided on 29 May 2003 to bring the alleged victim face-to-face with the three police officers. It assigned the office of the chief of the security service for the Tunis district to summon the complainant and ask him for contact details of the witnesses he cited in his complaint. That request was not followed up because the complainant was not at the address given in the initial complaint. The Deputy Public Prosecutor therefore decided on 12 June 2003 to file the case without further action, for lack of evidence.

4.2. The state party points out that the allegations made by the complainant relate to acts that qualify as crimes under Tunisian law, action on which is time-barred only after 10 years. The complainant can, therefore, still lodge an appeal. The state party stresses that the complainant has offered no serious reason for his failure to take action despite the legal and practical opportunities open to him to bring his case before the national courts. He can contest the Public Prosecutor's decision to file the case without further action, having the inquiry brought before an examining magistrate, or he can summon the defendants directly before the Criminal Division of the High Court under article 36 of the Code of Criminal Procedure. He can combine a civil application for compensation with the criminal proceedings, or await a conviction, then bring a separate civil suit for damages before the civil courts alone. The complainant can also file an administrative appeal, since public officials who commit serious misconduct render the state liable along with themselves. An appeal of this kind is still possible, since the limitation period for compensation appeals is 15 years. The state party asserts that domestic remedies are effective but the complainant has not made intelligent use of them. It cites numerous examples to show that

appeals to the Tunisian justice system in similar cases have been not only possible, but effective.

4.3. Because of the complainant's political motivations and the slanderous content of the communication, the state party considers that he has abused the right to submit communications under article 22(2) of the Convention. It points out that the complainant is a founder member of two groups that are not legally recognised in Tunisia, CNLT and ATLT, which continue to operate outside the law and are constantly adopting disparaging positions aimed at discrediting the country's institutions. It notes that the complainant has levelled serious defamatory accusations against the Tunisian judicial authorities that are in actual fact not supported by any evidence.

Complainant's comments on the state party's observations

5.1. On 21 November 2005 the complainant reaffirmed that he had made use of the domestic remedies provided under Tunisian law, despite the fact that they were ineffective. He had done more than should be expected to have the incidents investigated and judged at the national level, since he had taken all the steps that should have led to a serious inquiry. The obligation to undertake an investigation lay with the state even in the absence of any formal procedural action on the part of the victim. In any case, he had gone in person to the offices of the competent authorities to submit his complaint after trying to complain twice before. No notification, summons or instruction had been sent to him, and no information on the status of his case had been communicated to him. He therefore considered that he had not been remiss as far as following up on his complaint was concerned. The state party bore sole responsibility for conducting the inquiry. Even if the complainant had not shown due diligence, the state party would be under the same obligation. The Committee had stated that a lack of action on the part of the victim could not excuse failings by the state party in the investigation of accusations of torture.[9]

5.2. The complainant considers that his complaint was unproductive since he had never been informed of any follow-up to it. He notes that none of the records, letters and other communications concerning the investigation which the state party mentions have been produced by the state party in its response to his communication; and in any event, they cannot be considered to amount to a full, impartial investigation as required by article 12 of the Convention. As for the fact that he did not receive the summons issued in June 2003 because he was not at home, he argues that absence from his home on one occasion is not a valid reason to

[9] See communication 59/1996, *Blanco Abad v Spain*, decision adopted on 14 May 1998, para 8.7.

exclude him entirely from the proceedings. As for medical certificates, even if the Public Prosecutor in September 2000 did issue a request — which was never received — asking him to present such documents, no further attempt to obtain them was made thereafter. He notes that the chief of the security service for the Tunis district reached the provisional conclusion in his message of 17 April 2001, seven months after the inquiry supposedly started, that the facts as related had not been established, and did so without hearing any witnesses, the complainant or the defendants, or seeing any medical certificates. Of the three defendants, the first was questioned more than a year after the incident and the last, more than two years after it although the criminal investigation service could easily get in touch with them all. The complainant further notes that the state party reports, without giving further details, that the three defendants denied the facts, and that there is no indication that their statements were subsequently checked. He considers that the authorities have not conducted a prompt, serious, exhaustive and impartial investigation.

5.3. The complainant considers that the other domestic remedies mentioned by the state party are equally ineffective, and that he therefore does not need to pursue them to satisfy article 22(5)(b) of the Convention. With regard to seeking remedy through criminal proceedings, he mentions that he has run up against several obstacles as already described, including the absence of a decision by the Public Prosecutor not to bring a prosecution. Furthermore, if an investigation begun by institution of a civil suit results in a dismissal of proceedings, the complainant may be held civilly and criminally liable, and this deters action. Regarding a possible civil remedy, he points out that under article 7 of the Code of Criminal Procedure, civil suits are dependent and contingent upon the criminal proceedings; yet in practice, criminal proceedings are not an available option. As regards an administrative appeal, he says that a favourable outcome is no more likely in the administrative tribunal than it would be in the criminal courts, and the outcome of his attempt to bring criminal charges is a good indicator of how administrative litigation would probably end. Furthermore, he considers that by their very nature, neither civil nor administrative proceedings can guarantee full and appropriate reparation in a case of torture: only a criminal remedy for such a violation of the fundamental rights of the person is appropriate.

5.4. As regards the argument that his communication constitutes an abuse of the right to submit communications to the Committee, the complainant states that he has merely exercised his right to an effective remedy, that he has no political motivations and has made no defamatory statements against the state party. He notes that the Committee has found that a complainant's political commitment does

not impede consideration of his complaint.[10]

Additional observations by the parties

6.1. On 26 April 2006 the state party reiterated that the complainant had, since the alleged assault, been blatantly negligent, not least insofar as it had taken over four months for him to file his complaint, he had not enclosed a medical certificate, and he had not given sufficient details concerning the policemen he accused and the witnesses he cited. Besides those major omissions, the complainant had been remiss in following up on the investigation, since at no time after submitting his complaint had he taken the trouble to enquire about the outcome or follow it up. His attitude indicated bad faith and a deliberate intention to make the appeal procedure appear ineffective. The Public Prosecutor, on the other hand, had shown exceptional diligence, considering that complaints not supported by strong evidence are generally filed with no further action. In this case, the Public Prosecutor had examined the complaint the very day it had been submitted; he had noted the absence of a medical certificate and had opted to give the complaint a chance by asking the complainant to supply one. Despite the paucity of evidence, he had on his own initiative undertaken an investigation into the facts as related by the complainant. Despite this diligence, the absence of the complainant from his home, observed on numerous occasions, had seriously hampered the collection of reliable information.

6.2. Regarding the absence of information on the status of the case, the state party explains that the Code of Criminal Procedure calls for no special procedures to notify or inform the complainant when a complaint is filed, and that it is customary and logical for the complainant himself to follow the case. As for the argument that the complainant may be held criminally and civilly liable in the event that proceedings are dismissed in an application for civil indemnities, the state party explains that such a risk exists only if slanderous accusations have been made. On the matter of evidence, it emphasises that its comments are based entirely on official documents in the case file.

7. On 10 May 2006 the complainant again asserted that he had been diligent and had persevered in his attempts to file a complaint, and the ineffectiveness of the legal steps he had taken was in no way attributable to his conduct. He added that he did not actually have any alternative legal course affording reasonable prospects of satisfaction.

[10] See for example communication 187/2001, *Thabti v Tunisia*, decision adopted on 14 November 2003, para 7.3.

Decision of the Committee on admissibility

8.1. The Committee considered the question of the admissibility of the complaint at its thirty-seventh session and, in a decision dated 8 November 2006, pronounced it admissible.

8.2. The Committee has ascertained, as it is required to do under article 22(5)(a) of the Convention, that the same matter has not been, and is not being, examined under another procedure of international investigation or settlement.

8.3. The state party had requested the Committee to declare the complaint inadmissible on the grounds that the complainant had abused the right to submit such a communication and had not exhausted all available domestic remedies. The complainant for his part contested the arguments put forward by the state party, asserting not only that his submission to the Committee was not abusive, but also that his approaches to the Tunisian authorities stood no chance of success.

8.4. On the question of abuse raised by the state party, the Committee pointed out that in order for there to be abuse of the right to raise a matter before the Committee under article 22 of the Convention, one of the following conditions must be met: the submission of a matter to the Committee must amount to malice or a display of bad faith or intent at least to mislead, or be frivolous; or the acts or omissions referred to must have nothing to do with the Convention. In the present case, however, it had been ascertained that the complainant had reported being tortured and/or ill-treated by policemen in the street or at a police station, and had accused the state party of violating provisions of the Convention.

8.5. Regarding the contention that the complaint should not be entertained owing to the failure to exhaust domestic remedies, while taking into consideration the state party's description of its legal and court system, the Committee noted that the incident in question had taken place on 26 April 2000 at El Manar 1 police station; that the only investigations had been conducted by the chief of the security service of the Tunis district and by the Public Prosecutor, who had eventually filed the complaint with no further action; that by the date the complaint was submitted to the Committee against Torture, 6 July 2005 (over five years after the incident), no substantive decision had been reached; and that that was an abnormally long delay before dealing with extremely serious acts which qualify as crimes attracting severe penalties under Tunisian law. In the light of the above, the Committee considered that the requirements of article 22(5) of the Convention had been met.

8.6. The Committee against Torture therefore decided that the communication was admissible in respect of articles 2(1), read in

conjunction with 1; 16(1); 11, 12, 13 and 14, read separately or in conjunction with 16(1).

State party's observations

9.1. On 2 March 2007 the state party repeated that no provision of the Convention had been violated and expressed surprise that the Committee should have found the complaint admissible. It points out that a complaint to the Committee should not allow the complainant to evade the consequences of his own negligence and his failure to exhaust available domestic remedies.

9.2. The Committee had found that no substantive decision had been reached more than five years after the complainant had complained to the authorities, but the state party stresses that it was several serious omissions on the part of the complainant that had led the Public Prosecutor to file the case: failure to attach a medical certificate or provide sufficient details about the policemen accused and the witnesses cited, and failure to follow up on his complaint. The absence of convincing evidence and details of the full names and addresses of witnesses, in addition to the accused's denial of the facts as related by the complainant, made it impossible to take a decision on the substance of the complaint.

9.3. The state party believes it has explained the available remedies that are still open to the complainant. Since criminal proceedings are not yet time-barred, the complainant can still bring judicial proceedings. The state party is emphatic that there is no question that domestic remedies are effective. As it has indicated in earlier submissions, both disciplinary and judicial sanctions have been imposed on officials where liability has been established. In this case, the Committee could have recommended that the complainant should initiate proceedings and exhaust domestic remedies in accordance with the Convention. The state party therefore requests that the Committee review its position in light of these considerations. The state party submits no observations on the merits.

Further comments by the parties

10. On 28 March 2007, the complainant pointed out that the state party was merely repeating the comments it has already made on admissibility and had put forward no observations on the merits.

11. On 12 April 2007, the state party again regretted the Committee's attitude in finding the complaint admissible despite all the state party's clarifications. It reported that further steps had been taken in line with rule 111 of the Committee's Rules of Procedure. In accordance with article 23 of the Code of Criminal Procedure, the prosecutor at the Tunis Court of Appeal had asked the

Public Prosecutor at the lower court in Tunis to provide information on the facts of the complaint. A preliminary inquiry had thus been opened against such persons as might be indicated by the inquiry, to be carried out by the judge in charge of the 10th investigating office of the lower court in Tunis. The case had been registered with the investigating judge as no 8696/10.[11] Pending the outcome of the judicial investigation and in light of the measures taken by the authorities, the state party invited the Committee to review its decision on admissibility.

12.1. On 20 April 2007, the complainant noted that the state party's observations were now irrelevant since a decision on admissibility had already been taken. The state party was simply repeating the arguments it had previously put forward. However, the complainant noted that concerning several of his allegations the state party had provided information that was not correct. He had submitted his first complaint to the Tunisian authorities in June 2000. Instead of facilitating his access to domestic remedies, the state party had continued to harass and intimidate him in 2005 and 2006, including by placing him under constant close surveillance. He had been placed under house arrest on several occasions. On 3 June 2006 he had been placed under temporary arrest and barred from leaving the country.

12.2. Given the state party's persistent refusal to comment on the merits of the complaint, the complainant requested the Committee to base its decision on the facts as he had described them. He recalled that the Human Rights Committee and the Committee against Torture had consistently maintained that due weight must be given to a complainant's allegations if the state party fails to provide any contradictory evidence or explanation. In the present case, the state party had not expressed any view on the merits. The complainant, however, had correctly proceeded to substantiate his allegations with a number of documents, including copies of his medical records, his complaint to the Tunisian judicial authorities, witness statements and several pieces of additional documentation.

12.3. The complainant asserted that the state party had not been able to demonstrate that remedies were effectively available to victims in Tunisia. It had merely described the domestic remedies available to victims in theory. The judicial system in Tunisia was not independent and the courts generally endorsed the government's decisions. Under the circumstances the burden of proof with regard

[11] According to the registration certificate enclosed, which has been translated into French: 'The registrar responsible for the 10th investigating office of the court of first instance in Tunis hereby certifies that the case registered as no 8696/10, concerning the investigation of such persons as may be indicated by the investigation, in accordance with article 31 of the Code of Criminal Procedure, for the purposes of determining the circumstances of the arrest of Mr Ali Ben Salem on 26 April 2000, at the El Manar 1 police station, Tunis, and the alleged events in relation thereto, is still under investigation.'

to the effectiveness of remedies rested on the state party. In the present case, the state party had not met this burden of proof because it had merely described the availability of remedies in theory without contradicting any of the evidence provided by the complainant to show that such remedies were not available in practice.

13.1. On 15 May 2007, the state party asserted that the complainant was accusing the Tunisian judiciary of hidden intentions. As far as the date of submission of the complaint was concerned, the state party argued that the receipt produced by the complainant in no way proved that he had actually sent the complaint, since the receipt made no mention of the nature or purpose of the letter sent. The state party considered that the complainant was again indulging in slanderous allegations against the Tunisian judiciary. It recalled that criminal proceedings had been instituted by the Public Prosecutor's office. More than 100 law enforcement officers had been brought before the correctional and criminal courts since 2000 for violations committed while on duty. There was therefore no doubt about the effectiveness of domestic remedies.

13.2. In the state party's view, the complainant was resorting to manipulation in order to sabotage the judicial proceedings and disrupt the proper course of domestic remedies. Having undermined the efforts of the Public Prosecutor with the lower court in Tunis following submission of his complaint in September 2000, and those of the Deputy Prosecutor appointed to conduct the preliminary investigation into the allegations, the complainant was now adopting an attitude of non-cooperation. The complainant had been summoned to appear before the investigating magistrate on 30 April 2007 but had once again refused to make a statement on the grounds that his lawyer had not been permitted to attend, even though the examining magistrate had explained that his status as complainant did not require the assistance of a lawyer and that the latter did not need to be heard for the purposes of the inquiry. The examining magistrate therefore went ahead with other measures, including calling other people cited by the complainant. The case was continuing. Consequently, the state party considered that it was still within its rights to request the Committee to review its decision on admissibility pending the outcome of the ongoing judicial inquiry.

14. On 13 September 2007, the complainant again stated that the state party was merely reiterating earlier observations. He repeated that the state party bore sole responsibility for the lack of progress in the domestic proceedings. He recalled that the state party had even denied him legal assistance when he had been called before the examining magistrate, a point, moreover, that was not contested by the state party. Denial of access to a lawyer was a violation of Tunisian law.

15. On 25 October 2007, the state party again requested that the Committee postpone its decision on the merits until the investigation had been completed and all domestic remedies exhausted. It recalled that, contrary to the complainant's assertions, the judicial authority had shown due diligence by ordering:

- That a preliminary investigation be opened on the basis of a complaint that was not supported by any evidence;
- That the investigation be conducted personally by a member of the Prosecutor's Office without the assistance of the criminal investigation service;
- That, despite the decision by the Prosecutor's Office to file the case, a judicial investigation had been opened even though it might never lead to any result owing to the complainant's attitude of non-cooperation.

On the last point, the state party recalled that under Tunisian law a witness was not entitled to legal assistance and that the complainant would not have qualified as an 'assisted witness' on account of his status as a possible victim. The examining magistrate in charge of the case had summoned the complainant to appear at a hearing scheduled for 16 October 2007, but the latter had failed to appear.

Consideration of the merits

16.1. The Committee has considered the communication in the light of all information made available to it by the parties concerned, in accordance with article 22(4) of the Convention.

16.2. The Committee takes note of the state party's comments of 2 March, 12 April and 15 May 2007 challenging the admissibility of the complaint. While taking note of the state party's request of 25 October 2007 for a postponement, it finds that the points raised by the state party are not such as to require the Committee to review its decision on admissibility, owing in particular to the lack of any convincing new or additional information from the state party concerning the failure to reach any decision on the complaint after more than seven years of *lis alibi pendens*, which in the Committee's opinion justifies the view that the exhaustion of domestic remedies was unreasonably prolonged (see paragraph 8.5 above). The Committee therefore sees no reason to reverse its decision on admissibility.

16.3. The Committee therefore proceeds to a consideration on the merits and notes that the complainant alleges violations by the state party of article 2(1) read in conjunction with article 1; article 16(1); and articles 11, 12, 13 and 14, read separately or in conjunction with article 16(1) of the Convention.

16.4. The complainant has alleged a violation of article 2(1) of the Convention, on the grounds that the state party failed in its duty to prevent and punish acts of torture. These provisions are applicable insofar as the acts to which the complainant was subjected are

considered acts of torture within the meaning of article 1 of the Convention. In this respect, the Committee takes note of the complaint submitted and the supporting medical certificates, describing the physical injuries inflicted on the complainant, which can be characterised as severe pain and suffering inflicted deliberately by officials with a view to punishing him for acts he had allegedly committed and to intimidating him. The Committee also notes that the state party does not dispute the facts as presented by the complainant. In the circumstances, the Committee concludes that the complainant's allegations must be duly taken into account and that the facts, as presented by the complainant, constitute torture within the meaning of article 1 of the Convention.

16.5. In light of the above finding of a violation of article 1 of the Convention, the Committee need not consider whether there was a violation of article 16(1) as the treatment suffered by the complainant in breach of article 1 is more serious and is covered by the violation of article 16 of the Convention.

16.6. Regarding articles 2 and 11, the Committee considers that the documents communicated to it furnish no proof that the state party has failed to discharge its obligations under these provisions of the Convention.

16.7. As to the allegations concerning the violation of articles 12 and 13 of the Convention, the Committee notes that according to the complainant the Public Prosecutor failed to inform him whether an inquiry was under way or had been carried out in the three years following submission of his complaint in 2000. The Committee further notes that the state party accepts that the Deputy Public Prosecutor filed the case without further action in 2003, for lack of evidence. The state party has, however, informed the Committee that the competent authorities have reopened the case (see paragraph 11 above). The state party has also indicated that the investigation is continuing, more than seven years after the alleged incidents, yet has given no details concerning the inquiry or any indication of when a decision might be expected. The Committee considers that such a delay before an investigation is initiated into allegations of torture is unreasonably long and does not meet the requirements of article 12 of the Convention,[12] which requires the state party to proceed to a prompt and impartial investigation whenever there is reasonable ground to believe that an act of torture has been committed. Nor has the state party fulfilled its obligation under article 13 of the Convention to ensure that the complainant has the right to complain to, and to have his case promptly and impartially investigated by, its competent authorities.

[12] See communication 8/1991, *Halimi-Nedzibi v Austria*, views of 18 November 1993, para 13.5.

16.8. With regard to the alleged violation of article 14 of the Convention, the Committee notes the complainant's allegations that the state party has deprived him of any form of redress by failing to act on his complaint and by not immediately launching a public investigation. The Committee recalls that article 14 of the Convention recognises not only the right to fair and adequate compensation, but also requires states parties to ensure that the victim of an act of torture obtains redress. The Committee considers that redress should cover all the harm suffered by the victim, including restitution, compensation, rehabilitation of the victim and measures to guarantee that there is no recurrence of the violations, while always bearing in mind the circumstances of each case. Given the length of time that has elapsed since the complainant attempted to initiate proceedings at the domestic level, and given the absence of any indication from the state party concerning the completion of the current investigation, the Committee concludes that the state party is also in breach of its obligations under article 14 of the Convention.

17. The Committee against Torture, acting under article 22(7) of the Convention, is of the view that the facts before it disclose a violation of articles 1, 12, 13 and 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

18. Pursuant to rule 112(5) of its Rules of Procedure, the Committee urges the state party to conclude the investigation into the incidents in question, with a view to bringing those responsible for the complainant's treatment to justice, and to inform it, within 90 days of this decision being transmitted, of any measures taken in conformity with the Committee's views, including the grant of compensation to the complainant.

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

ERITREA

Article 19 v Eritrea

(2007) AHRLR 73 (ACHPR 2007)

Communication 275/2003, *Article 19 v The State of Eritrea*

Decided at the 41st ordinary session, May 2007, 22nd Activity Report

Incommunicado detention of 18 journalists since 2001

Admissibility (exhaustion of local remedies, remedies must be available, effective and sufficient, 45-47, 51, 64, 67, 69, 72-76; administrative remedies, 70; ample notice, 77, *incommunicado* detention, 76, 81; *actio popularis*, 65
Derogation (not possible under Charter, 87, 98, 99)

Summary of facts

1. On 14 April 2003, the Secretariat of the African Commission received a communication brought by Article 19 against the state of Eritrea, a state party to the African Charter.

2. Article 19 states that it is concerned especially about the continued detention *incommunicado* without trial of at least 18 journalists in Eritrea since September 2001.

3. The 18 journalists who are reportedly detained *incommunicado* are:

- Zemenfes Haile, founder and manager of the private weekly *Tsigenay*;
- Ghebrehiwet Keleta, a news writer for *Tsigenay*;
- Selamyinghes Beyene, reporter for the weekly *Meqaleh*;
- Binyam Haile of Haddas Eritrea;
- Yosef Mohamed Ali, chief editor of *Tsigenay*;
- Seyoum Tsehaye, free-lance editor and photographer and former Director of Eritrean State Television (ETV);
- Temesgen Gebreyesus, reporter for *Keste Debena*;
- Mattewos Habteab, editor of *Meqaleh*;
- Dawit Habtemicheal, assistant chief editor, *Meqaleh*;
- Medhanie Haile, assistant chief editor, *Keste Debena*;
- Fessahye Yohannes (or Joshua) editor-in-chief of *Setit*;
- Said Abdulkadir, chief editor of *Admas*;
- Amanuel Asrat, chief editor of *Zemen*;

- Dawit Isaac, contributor to *Setit*;
- Hamid Mohammed Said, ETV;
- Saleh Aljezeeri, Eritrean state radio; and
- Simret Seyoum, a writer and general manager for *Setit*.

4. The complainant alleges that in August 2001, a dozen senior officials and other members of the ruling elite, known as the G15, signed a public letter criticising President Isaias Afewerki's rule. This letter allegedly generated a political crisis which involved defections, resignations, the dismissal of top officials, the imprisonment of government critics and journalists and the cancellation of the general elections that had been planned for December 2001.

5. The complainant further alleges that on 18 and 19 September 2001, 11 former Eritrean government officials including the former Vice President Mahmoud Sherifo and the former Foreign Minister Petros Solomon were arrested in Asmara.

6. Furthermore, on 18 September 2001, the Eritrean government banned the entire private press comprising of the following newspapers: *Meqaleh, Setit, Tiganay, Zemen, Wintana, Admas, Keste Debena* and *Mana*. Subsequently, many journalists were arrested and detained, including the 18 journalists who are now being held *incommunicado*. The reasons given by the government for these actions ranged from threatening national security to failure to observe licensing requirements.

7. The complainant asserts that *Hadas Eritrea*, a government-owned daily newspaper, is the only publication allowed in the country.

8. The complainant states that on 4 October 2002, they sent appeal letters to the President of Eritrea and to the Chairman of the African Commission urging them to ensure the unconditional release or a fair trial of the detainees. On 12 November 2002, the complainant sent a letter to the government requesting information on the detainees and permission to visit the country and the detainees. Article 19 alleges that all requests sent to the government have been ignored.

Complaint

9. Article 19 alleges a violation of the following articles of the African Charter: Articles 1, 3, 5, 6, 7, 9, 13, 18 and 26 of the African Charter.

Procedure

10. By letter dated 21 April 2003, the Secretariat of the African Commission acknowledged receipt of the communication and informed the complainant that the matter had been scheduled for consideration at the 33rd ordinary session of the African Commission.

11. At its 33rd ordinary session held from 15 to 29 May 2003, in Niamey, Niger, the African Commission considered the communication and decided to be seized of the matter.

12. On 10 June 2003, the Secretariat wrote informing the parties to the communication that the African Commission had been seized with the matter and requested them to forward their submissions on admissibility within 3 months.

13. On 27 August 2003, the Secretariat received a *note verbale* from the respondent state requesting the African Commission to advise Article 19 to exhaust all domestic remedies.

14. On 10 September 2003, Article 19 forwarded by fax its submissions on admissibility.

15. On 15 September 2003, the Secretariat of the African Commission acknowledged receipt of the *note verbale* from the respondent state and the submissions from the complainant. The Secretariat of the African Commission additionally advised the respondent state to forward its arguments supporting its assertion that the complainant had not exhausted domestic remedies. Article 19 was also reminded to forward a copy of the Decree banning the entire private press.

16. At its 34th ordinary session held from 6 to 20 November 2003 in Banjul, The Gambia, the African Commission examined the communication and decided to defer further consideration on admissibility of the matter to its 35th ordinary session.

17. On 4 December 2003, the Secretariat of the African Commission wrote to inform the parties of the African Commission's decision. The respondent state was furnished with another copy of the complainant's written submissions on admissibility and further reminded it to forward its written submissions on admissibility within two months.

18. On 23 February 2004, the Secretariat of the African Commission received submissions on admissibility from the respondent state. The Secretariat acknowledged receipt of the said submissions and transmitted a copy of the same to the complainants on 3 March 2004.

19. On 17 March 2004, the Secretariat received submissions from the complainant in response to the submissions from the state of Eritrea. The Secretariat of the African Commission acknowledged receipt of the said submissions and transmitted a copy of the same to the respondent state on 18 March 2004.

20. At its 35th ordinary session held from 21 May to 4 June 2004, in Banjul, The Gambia, the African Commission examined the communication and decided to defer further consideration on admissibility of the matter to its 36th ordinary session pending receipt of information from the complainant on concrete steps taken

to access domestic remedies in Eritrea. The parties to the communication were informed accordingly

21. By *note verbale* and letter dated 15 June 2004 the respondent state and the complainant were respectively informed of the Commission's decision.

22. By letter dated 15 September 2004, the Secretariat of the African Commission reminded the complainant to send the information requested by the African Commission during the 35th ordinary session.

23. At its 36th ordinary session held in Dakar, Senegal from 23 November to 7 December 2004, the African Commission considered the communication and declared it admissible.

24. By *note verbale* of 13 December 2004 and by letter of the same date, the Secretariat of the African Commission notified the parties of the African Commission's decision and requested them to submit their arguments on the merits within three months of the notification.

25. By *note verbale* dated 27 January 2005, the state of Eritrea wrote to the Secretariat of the African Commission requesting the African Commission to dismiss the communication on the grounds that: one of the subjects of the communication had already been dealt with in another communication (communication 250/2002) and therefore would constitute a case of double jeopardy, and that the complainant had appeared before the African Commission only once despite repeated requests to 'face and question the accuser — a legal right which was denied them' by the African Commission.

26. By *note verbale* dated 23 February 2005, the Secretariat of the African Commission acknowledged receipt of the respondent state's *note verbale* and informed the respondent state that its request would be put before the African Commission for consideration during the 37th ordinary session.

27. By letter dated 24 February 2005, the Secretariat of the African Commission informed the complainant that the respondent state had requested the African Commission to reconsider its decision on the communication and declare the latter inadmissible.

28. By letter dated 30 March 2005, the complainant acknowledged receipt of the Secretariat's letter of 24 February 2005. The complainant indicated that they were of the belief that the African Commission had thoroughly examined the communication before arriving at the decision on admissibility and therefore urged the African Commission to consider the communication on its merits.

29. By letter dated 5 April 2005, the Secretariat of the African Commission acknowledged receipt of the complainant's letter of 30 March 2005 and requested it to submit its arguments on the merits or

confirm whether the arguments contained in its complaint were sufficient.

30. By letter dated 13 April 2005, the complainant acknowledged receipt of the Secretariat's letter of 5 April 2005 and indicated that in their earlier submissions they had addressed themselves on the merits of the communication but further indicated that they were available to make oral submissions on the same.

31. By letter dated 13 April 2005, the Secretariat acknowledged receipt of the complainant's letter and informed them that the communication had been scheduled for consideration at the 37th ordinary session of the African Commission.

32. At its 37th ordinary session held in Banjul, The Gambia, the African Commission deferred further consideration of the communication due to the absence of the rapporteur of the communication.

33. By *note verbale* and a letter dated 10 June 2005, the respondent state and the complainant were respectively notified of the African Commission's decision.

34. At its 38th ordinary session held from 21 November to 5 December 2005, in Banjul, The Gambia, the African Commission considered the respondent state's request that the communication be dismissed but decided to confirm its decision on admissibility.

35. By *note verbale* and a letter dated 15 December 2005, the respondent state and the complainant were respectively notified of the African Commission's decision and requested the parties to submit their arguments on the merits of the communication.

36. On 6 March 2006, the Secretariat of the African Commission wrote to the parties reminding them to submit their arguments on the merits before the end of March 2006.

37. By electronic mail dated 3 May 2006, the complainant re-submitted its arguments on the merits of the communication, which was immediately communicated to the respondent state for its comments.

38. By *note verbale* dated 19 May 2006, the respondent state submitted its arguments on the merits of the communication.

39. At its 39th ordinary session held from 11 to 25 May 2006, the African Commission decided to defer consideration of the merits to the 40th ordinary session, in order to allow the Secretariat to consider the parties' arguments and draft an opinion on the merits.

40. By *note verbale* and letter dated 31 May 2006, the respondent state and the complainant were respectively notified of the African Commission's decision.

41. By letter dated 17 October 2006 and *note verbale* dated 18 October 2006, the complainant and the respondent state respectively were reminded that the African Commission would consider the merits of the communication at its 40th ordinary session.

42. By *note verbale* and letter dated 10 February 2007, the respondent state and the complainant were respectively notified that the African Commission had deferred the communication, as it was unable to consider the said communication at its 40th ordinary session because of lack of time. Both the complainant and the respondent state were informed that the communication would be considered at the 41st ordinary session of the African Commission.

The law

Admissibility

43. 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.[1] 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.[2]

44. The parties to the present communication seem to agree that six of the conditions set out in article 56 have been met. They are however in dispute over the application of one of the conditions — article 56(5), which provides that communications relating to human and peoples' rights referred to in article 55 received by the African Commission shall be considered if they 'are sent after the exhaustion of local remedies, if any, unless it is obvious that this procedure is unduly prolonged'.

45. The exhaustion of local remedies rule is a principle under international law of permitting states to solve their internal problems in accordance with their own constitutional procedures before accepted international mechanisms can be invoked. The particular state is thus enabled to have an opportunity to redress the wrong that has occurred there within its own legal order. It is a well established rule of customary international law that before international proceedings are instituted, the various remedies provided by the state should have been exhausted.

46. The African Commission has held in previous communications that for local remedies to be exhausted, they must be available, effective and sufficient. In communication 147/95 and 149/96, the

1 See art 56 of the African Charter on Human and Peoples' Rights.
2 See African Commission, information sheet 3, communication procedure.

African Commission held that a remedy is considered *available* if the complainant can pursue it without impediment, it is deemed *effective* if it offers a prospect of success, and it is found *sufficient* if it is capable of redressing the complaint.[3]

47. In terms of article 56(5) therefore, the law on exhaustion of domestic remedies presupposes: (i) the existence of domestic procedures for dealing with the claim; (ii) the justiciability or otherwise, domestically, of the subject-matter of the complaint; (iii) the existence under the municipal legal order of provisions for redress of the type of wrong being complained of; and (iv) available effective local remedies, that is, remedies sufficient or capable of redressing the wrong complained of.

48. The second part of article 56(5) which is the subject of contention between the parties provides that a communication shall be considered if they are sent after the exhaustion of local remedies, 'if any, unless it is obvious that this procedure is unduly prolonged'. It follows therefore that the local remedies rule is not rigid. It does not apply if:

- local remedies are nonexistent;
- local remedies are unduly and unreasonably prolonged;
- recourse to local remedies is made impossible;
- from the face of the complaint there is no justice or there are no local remedies to exhaust, for example, where the judiciary is under the control of the executive organ responsible for the illegal act; and
- the wrong is due to an executive act of the government as such, which is clearly not subject to the jurisdiction of the municipal courts.

Issues before the African Commission

49. The parties to the present case are in dispute over the question of the exhaustion of domestic remedies in Eritrea and it is therefore for the African Commission to make a determination on the matter.

50. On the one hand, the state argues that the stipulated requirement in article 56(5) has not been fulfilled by the complainant and that none of the abovementioned exceptions should therefore apply. On the other hand, the complainant alleges that the exception rule in article 56(5) should apply.

51. Whenever a state alleges the failure by the complainant to exhaust domestic remedies, it has the burden of showing that the remedies that have not been exhausted are available, effective and sufficient to cure the violation alleged, ie that the function of those remedies within the domestic legal system is suitable to address an

[3] Communication 147/95 and 149/96, *Jawara v The Gambia* [(2000) AHRLR 107 (ACHPR 2000)].

infringement of a legal right and are effective.[4] When a state does this, the burden of responsibility then shifts to the complainant who must demonstrate that the remedies in question were exhausted or that the exception provided for in article 56(5) of the African Charter is applicable.

Submissions by the complainant

52. The complainant in the present communication argues that domestic remedies are not available and notes that the fact that the victims have been held for over three years (since September 2001) *incommunicado* 'is a manifestation of the fact that the administration of justice in Eritrea is extremely abnormal'.

53. The complainant further points to the fact that section 17 of the Eritrean Constitution provides safeguards against the arbitrary arrest and detention of persons, and the government of Eritrea has failed to abide by these safeguards.[5] The complainant claims that the 'deliberate failure of the government to abide by its own constitutional obligation shows that it is hopeless and impractical or unreasonable for the detainees to seize the domestic courts by way of *habeas corpus*'.

54. The complainant further argues that the executive branch of government in Eritrea interferes in the affairs of the judiciary thus rendering the latter's independence and effectiveness suspect. They cite the removal of the Chief Justice by the President of the Republic when the former allegedly requested the executive not to interfere in the judiciary. The complainant noted that 'if the Chief Justice could be removed from office for merely asking the executive branch of government not to interfere with the independence of the judiciary, what will happen to any judge who dares to order the release of the detainees marked out as "traitors" and "state enemies" by the highest authority, the President?'

55. The complainant notes further that the human rights violations complained of are serious and massive and in terms of the

4 Inter-American Court of Human Rights, case of *Velásquez Rodríguez*, judgment of 29 July 1988, para 63.

5 See art 17(1) No person may be arrested or detained save pursuant to due process of law ... (3) Every person arrested or detained shall be informed of the grounds for his arrest or detention and the rights he has in connection with his arrest or detention in a language he understands. (4) Every person who is arrested and detained in custody shall be brought before the court within 48 hours of his arrest, and if this is not reasonably possible, as soon as possible thereafter, and no such person shall be detained in custody beyond such period without the authority of the court. (5) Every person shall have the right to petition the court for a writ of *habeas corpus*. Where the arresting officer fails to bring him before the court of law and provide the reason for their arrest, the court shall accept the petition and order the release of the prisoner.

jurisprudence of the African Commission, such violations do not necessitate the exhaustion of local remedies.

56. The complainant concludes by stating that in fact, they had sent a writ of *habeas corpus* to the Minister of Justice requesting that the victims be brought to court but received no response from the Minister, and that they had requested to visit the victims but were not granted permission by the responding state.

Submissions by the state

57. The respondent state in its submission maintains that the Eritrean judiciary is independent and that the complainant should have exhausted local remedies either directly or through local legal representatives. The respondent state submits that it informed the complainant that they should take the initiative to approach the courts directly in order to seek justice for the detainees but no such efforts were made by the complainant.

58. The respondent state further submits that the claims by the complainant that there is an 'information black out' and that the Eritrean judiciary lacks independence are unfounded as they are not substantiated by concrete examples indicating that there has been interference in the actual work of the judges and in the dispensation of justice in the country. With respect to the dismissal of the Chief Justice, the respondent state argues that in Eritrea the President appoints the Chief Justice and therefore has the power to dismiss him.[6]

59. Article 52 of the Eritrean Constitution provides for the removal and suspension of judges. Sub-article 1 provides that a judge may be removed from office before the expiry of his tenure of office by the President 'only, acting on the recommendation of the Judicial Service Commission', pursuant to the provisions of sub-article 2 of this article 'for physical or mental incapacity, violation of the law or judicial code of ethics'. Sub-article 2 provides that the Judicial Service Commission 'shall investigate whether or not a judge should be removed from office on grounds of those enumerated in sub-article 1' of this article. In case the Judicial Service Commission decides that a judge should be removed from office, it shall present its recommendation to the President. And sub-article 3 provides that the President may, on the recommendation of the Judicial Service Commission, suspend from office a judge who is under investigation. The state did not indicate whether these procedural safeguards had been followed but simply intimated that the Chief Justice is appointed by the President and can be dismissed by the President.

60. In his oral submission during the 35th ordinary session, the representative of the respondent state reiterated that the allegations

6 Art 52(1) of the Eritrean Constitution.

made by the complainant were false and unfounded as they had been made without any serious attempts by the complainants to ascertain the facts before bringing the matter before the African Commission. Furthermore, the complainants had not submitted themselves to the courts in Eritrea and as such it is the responsibility of the complainant to find ways and means of utilising the domestic courts prior to bringing the matter before the African Commission. He reminded the African Commission that all conditions of article 56 must be met in order for a matter to be admitted and if any one of the conditions is not met, the communication must be declared inadmissible.

61. The representative of the respondent state informed the African Commission that the incarcerated journalists had been arrested by the police and were being held by executive authorities. However, following investigation, an administrative decision was reached to release two of the journalists and that the decision with respect to the remaining incarcerated journalists would be forthcoming.

62. He conceded that the detainees on whose behalf this communication is brought have not been brought before a court of law because of the nature of the criminal justice system in Eritrea. He stated that the criminal justice system in Eritrea does not have the institutional capacity to handle cases expeditiously and as such there is a huge backlog of cases in all the courts in the country.

63. The respondent state further stated that contrary to the claims by the complainant that they were not able to visit Eritrea in order to assist the victims, everyone who was involved in the matter relating to the detained journalists and the political detainees was invited to Eritrea including the complainant who chose not to visit the country.

Decision of the African Commission on admissibility

64. To determine the question of admissibility of this communication, the African Commission will have to answer, among others, the following questions:

- Who is required under the African Charter to exhaust local remedies — the author of the communication or the victim of the alleged human rights violations?;
- Does the removal of a Chief Justice render domestic remedies unavailable and insufficient?;
- Does the fact that a state has failed to abide by its own laws render domestic remedies 'hopeless, impractical and unreasonable'?;
- Does the communication reveal massive and serious violations of human and peoples' rights?; and
- Does the continuous *incommunicado* detention of the victims render domestic remedies unavailable, ineffective and inefficient?

65. As regards who is required to exhaust local remedies, the African Charter is clear. It indicates in article 56(1) that the authors of the communication must indicate their identity even if they claim

anonymity. This presupposes that domestic remedies are to be exhausted but by the authors. In the consideration of communications, the African Commission has adopted an *actio popularis* approach where the author of a communication need not know or have any relationship with the victim. This is to enable poor victims of human rights violations on the continent to receive assistance from NGOs and individuals far removed from their locality. All the author needs to do is to comply with the requirements of article 56. The African Commission has thus allowed many communications from authors acting on behalf of victims of human rights violations. Thus, having decided to act on behalf of the victims, it is incumbent on the author of a communication to take concrete steps to comply with the provisions of article 56 or to show cause why it is impracticable to do so.

66. As regards the removal of the Chief Justice, the complainant fails to demonstrate sufficiently how this removal prevented them from approaching the domestic remedies or how it rendered such domestic remedies unavailable, ineffective, 'hopeless, impractical and unreasonable'. The independence of the judiciary is a crucial element of the rule of law. Article 1 of the UN Basic Principles on the Independence of the Judiciary[7] states that

> The independence of the judiciary shall be guaranteed by the state and enshrined in the constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of judiciary.

Article 11 of the same Principles states that '[t]he term of office of judges, their independence, security ... shall be adequately secured by law'. Article 18 provides that '[j]udges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties'. Article 30 of the International Bar Association (IBA)'s Minimum Standards of Judicial Independence[8] also guarantees that:

> A judge shall not be subject to removal unless, by reason of a criminal act or through gross or repeated neglect or physical or mental incapacity, he has shown himself manifestly unfit to hold the position of judge.

and article 1(b) states that '[p]ersonal independence means that the terms and conditions of judicial service are adequately secured so as to ensure that individual judges are not subject to executive control'. Article 52(1) of the Eritrean Constitution provides an almost similar provision.

67. The issue however is, does the removal of a Chief Justice in a manner inconsistent with international standards render the judiciary

7 Adopted by the seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

8 IBA Minimum Standards of Judicial Independence (adopted 1982).

in a state unavailable and ineffective? The complainant was simply casting doubts about the effectiveness of the domestic remedies. The African Commission is of the view that it is incumbent on the 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 aspersion on the ability of the domestic remedies of the state due to isolated incidences. In this regard, the African Commission would like to refer to the decision of the Human Rights Committee in *A v Australia*[9] in which the Committee held that 'mere doubts about the effectiveness of local remedies or the prospect of financial costs involved did not absolve an author from pursuing such remedies'.[10] The African Commission can therefore not declare the communication admissible based on this argument.

68. As regards the complainant's argument that the government has failed to abide by its own constitutional obligations as provided for in article 17 of the Eritrean Constitution, the African Commission is of the view that the whole essence why human rights violations occur is because governments fail to abide by their domestic as well as international obligations. When this happens, individuals whose rights have been, are being or are likely to be violated seize the local courts to invoke their rights in order to compel governments to abide by these obligations. The Eritrean Constitution provides ample safeguards against persons who are arrested and detained without charge or trial. Apart from sub-articles 1, 3, and 4 of article 17, sub-article 5 of the same article is very instructive. It provides that

> Every person shall have the right to petition the court for a writ of *habeas corpus*. Where the arresting officer fails to bring him before the court of law and provide the reason for their arrest, the court shall accept the petition and order the release of the prisoner.

69. In the instant case therefore, the complainant could, at the very least, have seized the local courts by way of a writ of *habeas corpus* to draw the court's attention to the constitutional provision they claim the government has breached. Lawyers often seek the release of detainees by filing a petition for a writ of *habeas corpus*. A writ of *habeas corpus* is a judicial mandate to an arresting officer ordering that an inmate be brought to the court so it can be determined whether or not that person is imprisoned lawfully and whether or not he should be released from custody. A *habeas corpus* petition is a petition filed with a court by a person who objects to his own or another's detention or imprisonment. The writ of *habeas corpus* has been described as 'the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state

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

10 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).

action'.[11] It serves as an important check on the manner in which the courts pay respect to constitutional rights.

70. The complainant in their submissions does acknowledge that they did send a writ of *habeas corpus* to the Minister of Justice. The African Commission is of the view that even though it expected the Minister to advise the complainant on the proper procedure to follow, the failure to do so does not constitute a breach of the law. The Ministry of Justice is the same arm of government that has failed to 'abide by its own constitutional obligations ...' and it is only the courts that can order it to do so. By sending the writ to the Minister of Justice, the complainant cannot claim they were attempting the exhaustion of domestic remedies as article 56(5) requires the exhaustion of legal remedies and not administrative remedies.

71. As regards the argument that the communication reveals serious and massive violations of human rights, the African Commission would like to reiterate its earlier decisions in communication 16/88,[12] 25/89, 47/90, 56/91, 100/93,[13] 27/89, 46/91, 49/91, 99/93[14] that it cannot hold the requirement of exhaustion of local remedies to apply literally in cases where it is impractical or undesirable for the complainant to seize the domestic courts in respect of each individual complaint. This is the case where there are a large number of victims. Due to the seriousness of the human rights situation and the large number of people involved, such remedies as

---

11 *Harris v Nelson*, 394 US 286, 290-91 (1969).

12 *Comité Culturel pour la Démocratie au Bénin v Benin* [(2000) AHRLR 23 (ACHPR 1995)]. Communication 16/88 concerns the arrest of students, workers and pupils and their detention without trial (some for several months), during which they were tortured and maltreated.

13 *Free Legal Assistance Group and Others v Zaire* [(2000) AHRLR 74 (ACHPR 1995)]. Communication 25/89 alleges the torture of 15 persons by a military unit, on or about 19 January 1989, in Kinsuka near the Zaire River. On 19 April 1989 when several people protested their treatment, they were detained and held indefinitely. Communication 47/90 alleges arbitrary arrests, arbitrary detentions, torture, extra-judicial executions, unfair trials, severe restrictions placed on the right to association and peaceful assembly, and suppression of the freedom of the Press. Communication 56/91 alleges the persecution of Jehovah's Witnesses, including arbitrary arrests, appropriation of church property, and exclusion from access to education. Communication 100/93 makes allegations of torture, executions, arrests, detention, unfair trials, restrictions on freedom of association and freedom of the press. It also alleges that public finances were mismanaged; that the failure of the government to provide basic services was degrading; that there was a shortage of medicines; that the universities and secondary schools had been closed for two years; that freedom of movement was violated; and that ethnic hatred was incited by the official media.

14 *Organisation Mondiale Contre la Torture and Others v Rwanda* [(2000) AHRLR 282 (ACHPR 1996)]. The communications allege the expulsion of Burundi nationals who had been refugees without the opportunity to defend themselves at trial; arbitrary arrests and summary executions; the detention of thousands of people by the armed forces on the basis of ethnic origin; the destruction of Tutsi villages and massacre of Tutsis.

might theoretically exist in the domestic courts are as a practical matter unavailable.

72. However, as regards the continuous *incommunicado* detention of the detainees, the African Commission would like to note the state party's acknowledgement that the victims are still being held in detention because of the poor state of the criminal justice system in the country. With respect to this argument by the state party, the African Commission notes that whenever there is a crime that can be investigated and prosecuted by the state on its own initiative, the state has the obligation to move the criminal process forward to its ultimate conclusion. In such cases, one cannot demand that the complainants, or the victims or their family members assume the task of exhausting domestic remedies when it is up to the state to investigate the facts and bring the accused persons to court in accordance with both domestic and international fair trial standards.

73. The African Commission would also like to note that the state party has made a general refutation of the claims alleged and has insisted that domestic remedies do exist and that the complainant did not attempt to exhaust them. The African Commission notes, however, that the state party has merely listed *in abstracto* the existence of remedies without relating them to the circumstances of the case, and without showing how they might provide effective redress in the circumstances of the case.[15]

74. In the instant communication, therefore, the fact that the complainant has not sufficiently demonstrated that they have exhausted domestic remedies does not mean such remedies are available, effective and sufficient. The African Commission can infer from the circumstances surrounding the case and determine whether such remedies are in fact available, and if they are, whether they are effective and sufficient.

75. The invocation of the exception to the rule requiring that remedies under domestic law should be exhausted provided for in article 56(5) must invariably be linked to the determination of possible violations of certain rights enshrined in the African Charter, such as the right to a fair trial enshrined under article 7 of the African Charter.[16] The exception to the rule on the exhaustion of domestic remedies would therefore apply where the domestic situation of the state does not afford due process of law for the protection of the right or rights that have allegedly been violated. In the present communication, this seems to be the case.

---

15 *Albert Womah Mukong v Cameroon,* communication 458/1991, UN Doc CCPR/C/51/D/458/1991 of 10 August 1994.

16 Inter-American Court of Human Rights, case of *Velásquez Rodríguez* para 91. See in this connection also *Judicial Guarantees during States of Emergency* (articles 27.2, 25 and 8 of the American Convention on Human Rights), advisory opinion OC–/87 of October 6, 1987. Series A N° 9, para 24.

76. Holding the victims *incommunicado* for over three years demonstrates a *prima facie* violation of due process of the law and in particular, article 7 of the African Charter. By not taking any action to remedy the situation more than twelve months after the African Commission had been seized of the communication goes to demonstrate that the state has equally failed to demonstrate that domestic remedies are available and effective.

77. Another rationale for the exhaustion requirement is that a government should have notice of a human rights violation in order to have the opportunity to remedy such violation, before being called to account by an international tribunal. The African Commission is of the view that the state has had ample time and notice of the alleged violation to at least charge the detainees and grant them access to legal representation. However, if it is shown that the state has had ample notice and time within which to remedy the situation, even if not within the context of the domestic remedies of the state, as is the case with the present communication, the state may still be said to have been properly informed and is expected to have taken appropriate steps to remedy the violation alleged. The fact that the state of Eritrea has not taken any action means that domestic remedies are either not available or if they are, not effective or sufficient to redress the violations alleged.

78. The African Commission would like in this regard to refer to its decision in communication 18/88[17] which concerned the detention and torture of the complainant for more than seven years without charge or trial, the denial of food for long periods, the blocking of his bank account, and the use of his money without his permission. The African Commission held that in such circumstances it is clear that the state has had ample notice of the violations and should have taken steps to remedy them. The African Commission would also like to restate the position taken in communication 250/2002.[18] In that communication, the African Commission was of the view that the situation as presented by the respondent state does not afford due process of law for protection of the rights that have been alleged to be violated; the detainees have been denied access to the remedies under domestic law and have thus been prevented from exhausting them. Furthermore, there has been unwarranted delay in bringing these detainees to justice.

79. The situation as presented by the respondent state does not afford due process of law for protection of the rights that have been alleged to be violated; the detainees have been denied access to the remedies under domestic law and have thus been prevented from

[17] *El Hadj Boubacar Diawara v Benin*, July 1988 [*Comité Culturel pour la Démocratie au Bénin v Benin* (2000) AHRLR 23 (ACHPR 1995)].

[18] *Zegveld and Another v Eritrea* [(2003) AHRLR 84 (ACHPR 2003)].

exhausting them. Furthermore, there has been unwarranted delay in bringing these detainees to justice.

80. In the *Albert Mukong* case, the Human Rights Committee held that a state party to the Covenant, regardless of its level of development, must meet certain minimum standards regarding conditions of detention.[19] This reasoning of the Human Rights Committee can also include the fact that a state party to the African Charter regardless of its level of development must meet certain minimum standards regarding fair trial or due process conditions. The Committee concluded that 'the legitimate objective of safeguarding and indeed strengthening national unity under difficult political circumstances cannot be achieved by attempting to muzzle ... democratic tenets and human rights'.[20]

81. The continuous *incommunicado* detention of the victims without charge bars them from any legal representation and makes it difficult for the complainant or any person interested in assisting them from attempting whatever domestic remedies might be available. To leave the detainees to languish in detention forever because of the inadequacy of the state's criminal justice system or because there is no one to access the domestic courts on their behalf would be grossly unjust, if not unfair.

82. In the absence of any concrete steps on the part of the state to bring the victims to court, or to allow them access to their legal representatives three years after their arrest and detention, and more than one year after being seized of the matter, the African Commission is persuaded to conclude that domestic remedies, even if available, are not effective and/or sufficient.

For this reason, the African Commission declares the communication admissible.

Decision of the African Commission on request by the respondent state to dismiss the communication

83. The present communication was declared admissible at the 36th ordinary session of the African Commission held in Dakar, Senegal from 23 November to 7 December 2004. In response to the African Commission's request for written submissions on the merits, the respondent state in a *note verbale* dated 27 January 2005 wrote requesting the African Commission to dismiss the communication. The respondent state's grounds for such dismissal were that:

- One of the 18 journalists in this matter had been the subject of another communication — communication 250/2002, *Zegveld and Another v Eritrea*, which the African Commission had already disposed of. The respondent state therefore argued that dealing with that person in this matter constitutes double jeopardy.

19 Communication 458/1991 para 9.3.
20 *Mukong* para 9.7 *supra*.

- The complainant had appeared before the African Commission only once despite repeated requests to 'face and question the accuser – a legal right which was denied them' by the African Commission.

84. In dealing with the respondent state's request that the communication be dismissed the African Commission noted that rule 118(2) of the African Commission's Rules of Procedure stipulate that: 'If the Commission has declared a communication inadmissible under the Charter, it may reconsider this decision at a later date if it receives a request for reconsideration'.

85. No provision is made therein for the African Commission to dismiss a matter after having declared it admissible. In any case, the victims who are the subject of this communication are still being held in *incommunicado* detention by the respondent state and are accordingly unable to access domestic remedies whether on their own or through legal representatives. It is for these reasons that the African Commission has decided not to dismiss the communication and will therefore consider it on the merits.

Decision on the merits

86. The African Commission will not deal with any issue already decided upon in communication 250/2002.

87. Eritrea submits that the acts alleged were undertaken 'against a backdrop of war when the very existence of the nation was threatened' and that, as a result, the government was 'duty bound to take necessary precautionary measures (and even suspend certain rights).' However, unlike other human rights instruments,[21] and as emphasised in communication 74/92,[22] the African Charter does not allow states parties to derogate from it in times of war or other emergency. The existence of war, international or civil, or other emergency situation within the territory of a state party cannot therefore be used to justify violation of any of the rights set out in the Charter, and Eritrea's actions must be judged according to the Charter norms, regardless of any turmoil within the state at the time.

88. The complainant alleges, and Eritrea does not deny, that 11 political dissidents and 18 journalists have been detained, *incommunicado* and without trial, since September 2001. It is also alleged by the complainant, and admitted by the respondent state, that private newspapers were banned from September 2001.

---

21 For example, the International Covenant on Civil and Political Rights and the European Convention on Human Rights.

22 *Commission Nationale des Droits de l'Homme et des Libertés v Chad* [(2000) AHRLR 66 (ACHPR 1995)], para 21: 'The African Charter, unlike other human rights instruments, does not allow for states parties to derogate from their treaty obligations during emergency situations. Thus, even a civil war in Chad cannot be used as an excuse by the state violating or permitting violations of rights in the African Charter.'

Although Eritrea maintains that this ban was temporary, it is not clear from the information available whether or when the ban was lifted.

89. The basic facts are not therefore in dispute. However, the versions of the parties vary as regards the motivation for the detention of the individuals concerned and the ban on the press. According to the complainant the arrests were due to the detainees having expressed their opinions and spoken out against the government; the respondent state on the other hand claims that the 11 political opponents were arrested for breaching articles 259 (attacks on the independence of the state), 260 (impairment of the defence powers of the state) and 261 (high treason) of the Transitional Penal Code of Eritrea. As regards the ban on the press and the detention of the 18 journalists, the respondent state claims that these occurred because, 'the stated newspapers and the leading editors were recruited into the illegal network organised for the purpose of ousting the government through illegal and unconstitutional means'.

90. Eritrea's argument, then, is that its actions were justified by the circumstances prevailing within its territory during the relevant period, and permissible under its domestic law. Reference is made to articles 6 and 9 of the African Charter, the relevant sections of which provide respectively that:

> No-one may be deprived of his freedom *except for reasons and conditions previously laid down by law*; and
>
> Every individual shall have the right to express and disseminate his opinions *within the law*. (Emphasis added)

91. Such provisions of the Charter are sometimes referred to as 'claw-back clauses', because if 'law' is interpreted to mean any domestic law regardless of its effect, states parties to the Charter would be able to negate the rights conferred upon individuals by the Charter.

92. However, the Commission's jurisprudence has interpreted the so called claw-back clauses as constituting a reference to international law, meaning that only restrictions on rights which are consistent with the Charter and with states parties' international obligations should be enacted by the relevant national authorities.[23] The lawfulness of Eritrea's actions must therefore be considered against the Charter and other norms of international law, rather than by reference to its own domestic laws alone.[24]

93. The arrest and detention of the journalists and political opponents is claimed by the complainant to breach articles 6 and 7 of the Charter. Article 6 provides that 'no-one may be arbitrarily

[23] See for example communication 101/93, *Civil Liberties Organisation (in respect of the Bar Association) v Nigeria* [(2000) AHRLR 186 (ACHPR 1995)], para 16, and communication 212/98, *Amnesty International v Zambia*, para 50.

[24] See communications 147/95 and 149/96, *Jawara v The Gambia*, paras 57-59.

arrested or detained'. The concept of arbitrary detention is one which both the Commission and other international human rights bodies have previously expounded upon. In the *Albert Mukong* case,[25] the United Nations Human Rights Committee stated 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 due process of law ... remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances ... remand in custody must further be necessary in all the circumstances.

From this case it can be inferred that an arrest or detention may be legal according to the letter of domestic law, but arbitrary and therefore illegal by reason of its inappropriate, unjust or unpredictable nature.

94. The Eritrean detainees have not been charged, or brought to trial. This in itself constitutes arbitrariness, as the Commission has previously stated. In communication 102/93,[26] the Commission held that, '[w]here individuals have been detained without charges being brought ... this constitutes an arbitrary deprivation of their liberty and thus violates article 6'.

95. Furthermore, the length of time for which the detainees have been kept in custody must be considered. Both parties agreed that the arrests occurred in September 2001. The journalists and political opponents have therefore been detained, without charge or trial, for a period of over five years.

96. Article 7(1)(d) of the Charter provides that all individuals shall have 'the right to be tried within a reasonable time by an impartial court or tribunal'. The Commission has expanded upon this provision in its Resolution on the Right to Recourse and Fair Trial, which states that:[27]

> Persons arrested or detained shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or be released.

97. The question of what is reasonable cannot be expressed in terms of a blanket time limit which will apply in all cases, but rather must depend on the circumstances. This approach has also been espoused by the European Court of Human Rights, which has held that the reasonableness of the length of proceedings is to be assessed in accordance with all the circumstances of a case. The European Court will look in particular at the complexity of the case, and the conduct of the applicant and of the relevant authorities.[28]

---

25 Human Rights Committee, communication 458/1991 *Albert Mukong v Cameroon*, 10 August 1994, para 9.8.

26 *Constitutional Rights Project and Another v Nigeria* [(2000) AHRLR 191 (ACPHR 1998)], para 55.

27 ACHPR /Res.4(XI)92: Resolution on the Right to Recourse and Fair Trial (1992), para 2(c).

28 *Buchholz v Germany*, 7759/77 [1981] ECHR 2 (6 May 1981).

98. Eritrea contends that the delay in bringing these particular detainees to trial is due to the complexity and gravity of the offences committed, and to the 'precarious war situation' existing within the state. However, as already stated, it must be borne in mind that states parties cannot derogate from the Charter in times of war or any other emergency situation. Even if it is assumed that the restriction placed by the Charter on the ability to derogate goes against international principles, there are certain rights such as the right to life, the right to a fair trial, and the right to freedom from torture and cruel, inhuman and degrading treatment, that cannot be derogated from for any reason, in whatever circumstances.

99. The existence of war in Eritrea cannot therefore be used to justify excessive delay in bringing the detainees to trial. Furthermore, a backlog of cases awaiting trial cannot excuse unreasonable delays, as the European Court of Human Rights has held.[29] Further, in the case of *Albert Mukong*, referred to above, the Human Rights Committee stated that states parties to the ICCPR must observe certain minimum standards as regards the condition of detention, regardless of their state of development. The Commission considers that the same principle applies to the length of detention before trial, and that states parties to the Charter cannot rely on the political situation existing within their territory or a large number of cases pending before the courts to justify excessive delay.

100. Moreover, the detainees are being held *incommunicado*, and have never been brought before a judge to face charges. In these circumstances, the Commission finds that Eritrea has breached the requirement of trial within a reasonable time set out in article 7(1)(d). This is consonant with its previous decisions, such as communication 102/93, in which three years detention was found to be unacceptable, and communication 103/93,[30] in which the Commission stated that seven years detention without trial, 'clearly violates the "reasonable time" standard stipulated in the Charter'.

101. The fact that the detainees are being held *incommunicado* also merits further consideration in terms of international human rights law. The United Nations Human Rights Committee has directed[31] that states should make provisions against *incommunicado* detention, which can amount to a violation of article 7 (torture and cruel treatment and punishment) of the International Covenant of Civil and Political Rights, to which Eritrea has acceded. Furthermore, the Commission itself has stated that

> holding an individual without permitting him or her to have contact with his or her family, and refusing to inform the family if and where the

29 *Union Alimentaria Sanders SA* [*v Spain*], 7 July 1989, Series A Number 157.
30 *Abubakar v Ghana* [(2000) AHRLR 124 (ACHPR 1996)] para 12.
31 General Comment 20, 44th Session, 1992.

individual is being held, is inhuman treatment of both the detainee and the family concerned.[32]

102. Eritrea has not denied the complainant's contention that the detainees are being held *incommunicado*, with no access to legal representation or contact with their families, and as the Commission has enunciated in many of its previous decisions, where allegations are not disputed by the state involved, the Commission may take the facts as provided by the complainant as a given.[33] Nor does the political situation described by Eritrea excuse its actions, as article 5 permits no restrictions or limitations on the right to be free from torture and cruel, inhuman or degrading punishment or treatment. The Commission thus finds that Eritrea has violated article 5, by holding the journalists and political dissidents *incommunicado* without allowing them access to their families.

103. In keeping with its earlier decisions on similar cases,[34] the Commission also finds that such treatment amounts to a breach of article 18, as it constitutes violation of the rights of both the detainees and their families to protection of family life. Finally, the Commission holds that there has been a violation of article 7(1)(c), since the detainees have been allowed no access to legal representation, contrary to the right to be defended by counsel which is protected by that provision of the Charter.

104. The Commission turns its attention now to the question of whether there has been a violation of the detainees' rights to express and disseminate their opinions, as alleged by the complainant. The events which give rise to this allegation are the ban by the Eritrean government of the private press, and the arrest and detention of the 18 journalists. The respondent state argues that these actions were justified by the activities of the journalists and the newspapers in question, which it considered were aimed at overthrowing the government. Further, the Eritrean government claims that its actions did not constitute a breach of the Charter, as article 9 only protects the expression and dissemination of opinions within the law.

105. As explained above, permitting states parties to construe Charter provisions so that they could be limited or even negated by domestic laws would render the Charter meaningless. Any law enacted by the Eritrean government which permits a wholesale ban on the press and the imprisonment of those whose views contradict those of the government's is contrary to both the spirit and the purpose of article 9. The Commission reiterates its own statement in

---

32 Communications 48/90, 50/91, 52/91 and 89/93, *Amnesty International and Others v Sudan* [(2000) AHRLR 297 (ACHPR 1999) para 54].

33 Communication 74/92, *Commission Nationale des Droits de l'Homme et des Libertés v Chad*.

34 See for example communications 143/95 and 150/96, *Constitutional Rights Project and Another v Nigeria* [(2000) AHRLR 235 (ACHPR 1999)].

communications 105/93, 128/94, 130/94 and 152/96.[35] According to article 9(2) of the Charter, dissemination of opinions may be restricted by law. This does not mean that national law can set aside the right to express and disseminate one's opinions; this would make the protection of the right to express one's opinions ineffective. To allow national law to have precedence over the international law of the Charter would defeat the purpose of the rights and freedoms enshrined in the Charter. International human rights standards must always prevail over contradictory national law. Any limitation on the rights of the Charter must be in conformity with the provisions of the Charter.

106. By applying norms of international human rights law, the Commission has previously found, and finds in this case, that the imprisonment of journalists 'deprives not only the journalists of their rights to freely express and disseminate their opinions, but also the public, of the right to information. This action is a breach of the provisions of article 9 of the Charter'.[36]

107. Moreover, banning the entire private press on the grounds that it constitutes a threat to the incumbent government is a violation of the right to freedom of expression, and is the type of action that article 9 is intended to proscribe. A free press is one of the tenets of a democratic society, and a valuable check on potential excesses by government.

108. No political situation justifies the wholesale violation of human rights; indeed general restrictions on rights such as the right to free expression and to freedom from arbitrary arrest and detention serve only to undermine public confidence in the rule of law and will often increase, rather than prevent, agitation within a state. The Commission draws on the findings of the UN Human Rights Committee:

> The legitimate objective of safeguarding and indeed strengthening national unity under difficult political circumstances cannot be achieved by attempting to muzzle advocacy of multi-party democracy, democratic tenets and human rights.[37]

For the reasons given above the Commission:

- Holds a violation of articles 1, 5, 6, 7(1), 9 and 18 by the state of Eritrea;
- Urges the government of Eritrea to release or to bring to a speedy and fair trial the 18 journalists detained since September 2001, and to lift the ban on the press;
- Recommends that the detainees be granted immediate access to their families and legal representatives; and

35 *Media Rights Agenda and Others v Nigeria* [(2000) AHRLR 200 (ACHPR 1998)].
36 Communication 147/95 and 149/96, *Jawara v The Gambia* [(2000) AHRLR 107 (ACHPR 2000)].
37 Mukong para 9.7.

- Recommends that the government of Eritrea takes appropriate measures to ensure payment of compensation to the detainees.

ZIMBABWE

Chinhamo v Zimbabwe

(2007) AHRLR 96 (ACHPR 2007)

Communication 307/2005, *Mr Obert Chinhamo v Zimbabwe*

Decided at the 42nd ordinary session, November 2007, 23rd Activity Report

Refugee status does not prevent exhaustion of local remedies

Locus standi (40)
Admissibility (compatibility, 40, 48; exhaustion of local remedies, 52-54, 62; refugee, 63, 64, 72-76, 79, 82; failure of state to enforce judgments, 84-86; submission of communication within reasonable time, 89)
Evidence (uncorroborated suspicions, 74-76)

Summary of the facts

1. The African Commission on Human and Peoples' Rights (the African Commission) received a complaint/communication on 26 September 2005, from Mr Obert Chinhamo, (also referred herein as the complainant) an employee of Amnesty International, Zimbabwe section and an active human rights defender. The complaint is submitted in accordance with the provisions of article 55 of the African Charter on Human and Peoples' Rights (the African Charter).

2. The complaint is submitted against the Republic of Zimbabwe, (also referred herein as the respondent state), a state party to the African Charter.[1] The complainant alleges among others that, through the acts of the agents of the respondent state his rights protected under the African Charter have been violated. Mr Chinhamo lists a number of separate incidents to justify his allegations.

3. The complainant alleges that on 28 August 2004, while investigating and documenting human rights abuses at Porta Farm, he was allegedly surrounded by more than ten uniformed police officers that assaulted him, poked his face with batons, shouted abusive language and accused him of working for a foreign organisation which works against the respondent state. The complainant was then arrested, forcibly removed from the premises, detained at Norton

1 Zimbabwe ratified the African Charter on 30 May 1986.

police station, threatened and banned from returning to Porta Farm and other farms. Upon his release several hours later, the complainant declares that he was neither charged nor furnished with reasons for his arrest.

4. The complainant alleges further that he and two others were again arrested on 2 September 2004 while visiting Porta Farm and believes that this arrest was perpetrated in order to prevent them from documenting the human rights abuses occurring there. They were given no explanation for the arrest by the arresting officer but the complainant was later charged with incitement of public violence and released on one hundred thousand (100 000) Zimbabwean dollars bail. On 21 February 2005, the case was withdrawn for lack of evidence.

5. The complainant also alleges that provisions of the Public Order and Security Act were used, in contravention of the African Charter, to deny him access to Porta Farm, prevent the documentation of human rights abuses there and of holding meetings with residents, and to justify his arrest, detention and the threaten him against publishing reports and press releases about the human rights abuses discovered.

6. The complainant informs the Commission that in September 2004, all files were deleted from his laptop, while a number of Amnesty International-Zimbabwe section reports disappeared from his office. The complainant believes that there is a reasonable probability the respondent state, through its agents, invaded his right to privacy.

7. Prior to the withdrawal of the case against him, the complainant alleges that court remands were abused in order to deny him the right to be tried within a reasonable time limit, psychologically torture him and deplete his resources. He argues that members of the Central Intelligence Organisation (CIO) took pictures of him on several occasions, thereby intimidating him.

8. In addition, the complainant notes that the conditions in which he was detained caused him to suffer torture. These conditions, according to the complainant, include being locked up in an extremely small, unhygienic cell, infested with parasites where he was denied blankets, denied permission to visit the toilet or to bath. According to him, all of these caused him to develop a cold, breathing problems and a cough which lasted for about six months.

9. The complainant further alleges that after his release on bail, he was tracked by security agents and received several threats, including death threats against himself and his brother, which caused him to fear for his life and the safety of his family. Due to this fear, he fled the country in January 2005 — forcing him to abandon his studies and his job — and is currently residing in the Republic of South

Africa as an asylum seeker. He added that the respondent state continues to refuse to issue passports to his family members so that they can join him in South Africa.

The complaint

10. The complainant alleges that articles 5, 6, 7, 8, 9, 11, 12, 16, 17 and 18 of the African Charter on Human and Peoples' Rights have been violated.

The procedure

11. By letter ACHPR/LPROT/COMM/ZIM/307/2005/ARM of 4 October 2005, the Secretariat of the African Commission acknowledged receipt of the communication and informed the complainant that the matter would be considered for seizure at the 38th ordinary session of the African Commission, scheduled from 21 November – 5 December 2005, in Banjul, Gambia.

12. During the 38th ordinary session held from 21 November - 5 December 2005, the African Commission considered the communication and decided to be seized thereof.

13. On 15 December 2005, the Secretariat of the African Commission informed the parties accordingly, and requested the respondent state to submit its arguments on the admissibility of the communication. The Secretariat of the African commission forwarded a copy of the complaint to the respondent state.

14. On 13 March 2006, a reminder was sent to the respondent state requesting it to submit its arguments on the admissibility of the communication.

15. On 10 April 2006, the Secretariat received the complainants' submissions on admissibility.

16. During the 39th ordinary session held from 11 - 25 May 2006, the African Commission decided to defer consideration of the communication on admissibility to its 40th ordinary session scheduled to take place from 15 - 29 November 2006, pending the respondent state's submission on admissibility.

17. By letter of 14 July 2006, the Secretariat of the African Commission informed the parties of the Commission's decision.

18. During the 40th ordinary session held from 15 - 29 November 2006, the African Commission decided to defer consideration of the Communication on admissibility to the 41st ordinary session.

19. On 24 November 2006, the Secretariat received the respondent state's submission on admissibility.

20. By letter dated 11 December 2006, both parties were informed of the Commission's intention to consider the communication on admissibility during its 41st ordinary session.

21. On 3 May 2007, the Secretariat received additional submissions on admissibility from the complainant in response to the respondent state's submission on admissibility.

22. During the 41st ordinary session of the African Commission held from 16 – 30 May 2007, the African Commission decided to further defer to its 42nd ordinary session a decision on admissibility to enable the Secretariat prepare a draft decision.

Summary of parties' submissions on admissibility

Summary of complainant's submission on admissibility

23. The complainant submits that he has *locus standi* before the Commission as the communication is brought by himself, a citizen of Zimbabwe. Regarding compatibility, the complainant submits that the communication raises *prima facie* violations of the Charter, committed by the respondent state.

24. He submits further that in accordance with article 56(4), the evidence he has submitted reveal that the communication is not based exclusively on news disseminated by the mass media, adding that it is based on first hand evidence from him, including reports by reputable human rights organizations.

25. On the requirement of exhaustion of local remedies in accordance with article 56(5), the complainant states that the remedy in his particular circumstance is not available because he cannot make use of local remedies, that he was forced to flee Zimbabwe for fear of his life after surviving torturous experiences in the hands of the respondent state due to his activities as a human rights defender. The complainant submits that the onus is on the respondent state to demonstrate that remedies are available; citing the Commission's decisions on communications 71/92[2] and 146/96.[3]

26. The complainant draws the African Commission's attention to its decision on *Rights International v Nigeria*[4] where the Commission held that a complainant's inability to pursue local remedies following his flight for fear of his life to Benin, and was subsequently granted asylum, was sufficient to establish a standard for constructive exhaustion of local remedies. He concludes by noting that considering the fact that he was no longer in the respondent state's territory where remedies could be sought, and the fact that he fled the

2 *Rencontre Africaine pour la Défense des Droits de l'Homme v Zambia* [(2000) AHRLR 321 (ACHPR 1996)].
3 *Jawara v The Gambia* [(2000) AHRLR 107 (ACHPR 2000)].
4 Communication 215/1998, [(2000) AHRLR 254 (ACHPR 1999)]

country against his will due to threat to his life, remedies could not be pursued without impediments.

27. The complainant also challenges the effectiveness of the remedies, noting that remedies are effective only where they offer a prospect of success. He claims the respondent state treats court rulings that go against it with indifference and disfavour, and says he does not expect that in his case, any decision of the court would be adhered to. He says there was a tendency in the respondent state to ignore court rulings that went against it and adds that the Zimbabwe Lawyers for Human Rights has documented at least 12 instances where the state has ignored court rulings since 2000. He cites the ruling of the High court in the *Commercial Farmers Union* case and the *Mark Chavunduka and Ray Choto* case where the duo were allegedly abducted and tortured by the army. He concludes that given the prevailing circumstances in the respondent state, the nature of his complaint, and the respondent state's well publicized practice of non-enforcement of court decisions, his case has no prospect of success if local remedies were pursued, and according to him, not worth pursuing.

28. The complainant submits further that the communication has been submitted within a reasonable time as required by article 56(6) and concludes that the communication has not been settled by any other international body.

Summary of respondent state's submission on admissibility

29. The respondent state briefly restates the facts of the communication and indicates that the facts as submitted by the complainant 'have a number of gaps'. The state submits that the complainant makes general allegations without substantiating, citing for example, the complainant's allegation that he was assaulted, abused and was denied access to the toilet when remanded. The state wonders why the complainant did not bring all these alleged degrading treatment to the attention of the Magistrate when he was brought before the latter. The state also questions why the complainant or his lawyer did not raise the alleged threats to the complainant's life before the Magistrate when he made four appearances before the latter. The state concluded that the complainant has failed to substantiate his alleged fear and threats to his life and is of the opinion that the complainant left the country on his own volition and not as a result of any fear occasioned by any of its agents.

30. On the question of admissibility, the state submits that the communication should be declared inadmissible because, according to the state, it is not in conformity with article 56(2), (5) and (6) of the Charter.

31. The state submits further that the communication is incompatible because it makes a general allegation of human rights violations and does not substantiate the violations, adding that the facts do not show a *prima facie* violation of the provisions of the Charter, noting that 'basically the facts and issues in dispute do not fall within the *rationae materae* and *rationae personae* of the jurisdiction of the Commission'.

32. On the exhaustion of local remedies under article 56(5), the state submits that local remedies are available to the complainant, citing section 24 of its Constitution which provides the course of action to be taken where there are allegations of human rights violations. The state adds that there is no evidence to prove that the complainant pursued local remedies. The state further indicates that in terms of Zimbabwean law, where one is engaged in acts that violate the rights of another person, that other person can obtain an interdict from the court restraining the violator from such act.

33. On the effectiveness of local remedies, the state submits that the Constitution provides for the independence of the judiciary in the exercise of its mandate in conformity with both the UN Principles on an Independent Judiciary, and the African Commission's Guidelines on the right to a fair trial.

34. The state dismisses the complainant's argument that his case is similar to those brought by Sir Dawda Jawara against the Republic of The Gambia, and Rights International (on behalf of Charles Baridorn Wiwa) against the Federal Republic of Nigeria, adding that in the latter cases, there was proof of real threat to life. The state goes further to indicate instances where the government has implemented court decisions that went against it, adding that even in the present case involving the complainant, the government respected the Court's decision.

35. The state further indicates that in terms of Zimbabwe law, it is not a legal requirement for a complainant to be physically present in the country in order to access local remedies, adding that, both the High Court Act (Chapter 7:06) and the Supreme Court Act (Chapter 7:05) permit any person to make an application to either court through his/her lawyer. The state adds that in the *Ray Choto and Mark Chavhunduka* case, the victims were tortured by state agents and they applied for compensation while they were both in the United Kingdom, and succeeded in their claim. The state concludes that the complainant is not barred from pursuing remedies in a similar manner.

36. The state also argues that the Communication does not comply with article 56(6) of the Charter which provides that a communication should be lodged within a reasonable time after exhaustion of local remedies, but where complainant realises that local remedies shall

be unduly prolonged he/she must submit the complaint to the Commission immediately. According to the state, although the Charter does not specify what constitutes a reasonable time, the Commission should get inspiration from the other jurisdictions, including the Inter-American Commission which has fixed six months as reasonable time, adding that even the draft protocol merging the African Court of Justice and the African Court on Human and Peoples' Rights provides for a six months period.

37. The state concludes its submissions by noting that 'no cogent reasons have been given for the failure to pursue local remedies or remedies before the Commission within a reasonable time' and as such the communication should be declared inadmissible.

The law on admissibility

Competence of the African Commission

38. In the present communication, the respondent state raises a preliminary question regarding the competence of the African Commission to deal with this communication. The state avers that: 'basically the facts and issues in dispute do not fall within the *rationae materiae* and *rationae personae* of the jurisdiction of the Commission'. This statement questions the competence of the African Commission to deal with this communication. The Commission will thus first deals with the preliminary issue of its competence raised by the respondent state.

39. Black's Law Dictionary defines *rationae materae* as 'by reason of the matter involved; in consequence of, or from the nature of, the subject-matter'. While *rationae personae* is defined as 'by reason of the person concerned; from the character of the person'.

40. Given the nature of the allegations contained in the communication, notably, allegations of violation of personal integrity or security, intimidation and torture, the Commission is of the view that the communication raises material elements which may constitute human rights violations, and as such it has competence *rationae materiae* to entertain the matter, because the communication alleges violations to human rights guaranteed and protected in the Charter. With regards to the Commission's competence *rationae personae*, the Communication indicates the name of the author, an individual, whose rights under the African Charter, the respondent state is committed to respecting and protecting. With regard to the state, the Commission notes that Zimbabwe, the respondent state in this case, has been a state party to the African Charter since 1986. Therefore, both the complainant and the respondent state have *locus standi* before the Commission, and the Commission thus has competence *rationae personae* to examine the Communication before it.

41. Having decided that it has competence *rationae materiae* and *rationae personae*, the Commission will now proceed to pronounce on the admissibility requirements and the contentious areas between the parties.

The African Commission's decision on admissibility

42. The admissibility of communications before the African Commission is governed by the requirements of article 56 of the African Charter. This article provides seven requirements which must all be met before the African Commission can declare a communication admissible. If one of these conditions/requirements is not met, the African Commission will declare the communication inadmissible, unless the complainant provides justifications why any of the requirements could not be met.

43. In the present communication, the complainant avers that his complaint meets the requirements under article 56 sub-sections 1 - 4, 6 and 7. He indicates that he did not attempt to comply with the requirement under article 56(5) dealing with the exhaustion of local remedies, because of the nature of his case and the circumstances under which he left the respondent state, and since he is presently living in South Africa, the exception rule should be invoked. He states that his inability to exhaust local remedies was due to the fact that he had to flee to South Africa for fear for his life.

44. The state on the other hand argues that the complainant has not complied with the provisions of article 56 sub-sections 2, 5 and 6 of the Charter, and urges the Commission to declare the communication inadmissible based on the non-fulfilment of these requirements.

45. The admissibility requirements under article 56 of the Charter are meant to ensure that a communication is properly brought before the Commission, and seek to sieve frivolous and vexatious communications before they reach the merits stage. As indicated earlier, for a communication to be declared admissible, it must meet all the requirements under article 56. Therefore, if a party contends that another party has not complied with any of the requirements, the Commission must pronounce itself on the contentious issues between the parties. This however does not mean that other requirements of article 56 which are not contested by the parties will not be examined by the Commission.

46. Article 56(1) of the African Charter provides that communications will be admitted if they indicate their authors, even if they request anonymity. In the present case the author of this communication is identified as Mr Obert Chinhamo, he has also not requested that his identity be hidden. The respondent state has also

been clearly identified as the Republic of Zimbabwe. Therefore the provision of article 56(1) has been adequately complied with.

47. Article 56(2) of the African Charter provides that a communication must be compatible with the Charter of the OAU or with the African Charter on Human and Peoples' Rights. In the present communication, the respondent state argues that the communication does not comply with this requirement, that is, the communication is not compatible with the provisions of the Constitutive Act of the African Union or the African Charter itself. The state asserts in this regard that, for a complaint to be compatible with the Charter or the Constitutive Act, it must prove a *prima facie* violation of the Charter.

48. Compatibility according to Black's Law Dictionary denotes 'in compliance with' and 'in conformity with' or 'not contrary to' or 'against'. In this communication, the complainant alleges, among others, violations of his right to personal integrity and being subjected to intimidation, harassment and psychological torture, arbitrary detention, violation of freedom of movement and loss of resources occasioned by the actions of the respondent state. These allegations do raise a *prima facie* violation of human rights, in particular, the right to the security of the person or personal integrity and freedom from torture guaranteed in the Charter. Complainants submitting communications to the Commission need not specify which articles of the Charter have been violated, or even which right is being invoked, so long as they have raised the substance of the issue in question. Based on the above, the African Commission is satisfied that in the present Communication, the requirement of article 56(2) of the African Charter has been sufficiently complied with.

49. Article 56(3) of the Charter provides that communications will be admitted if they are not written in disparaging or insulting language directed against the state concerned and its institutions or to the Organisation of African Unity (African Union). In the present case, the communication sent by the complainant does not, in the view of this Commission, contain any disparaging or insulting language, and as a result of this, the requirement of article 56(3) has been fulfilled.

50. Article 56(4) of the Charter provides that the Communication must not be based exclusively on news disseminated through the mass media. This Communication was submitted by the complainant himself and is his account of his personal experience with the law enforcement agents of the respondent state. For this reason he has fulfilled the provision of this sub-article of article 56.

51. Article 56(5) provides that communications to be considered by the African Commission must be sent after local remedies have been

exhausted. The respondent state contends that the complainant has not complied with this requirement. The state argues that there are sufficient and effective local remedies available to the complainant in the state, and the complainant has not sought these remedies before bringing the present communication before the Commission. On the other hand, the complainant argues that since he had to flee the country due to fear for his life, he could not come back to the country to pursue these local remedies.

52. The rationale for the exhaustion of local remedies is to ensure that before proceedings are brought before an international body, the state concerned must have the opportunity to remedy the matter through its own local system. This prevents the international tribunal from acting as a court of first instance rather than as a body of last resort.[5]

53. Three major criteria could be deduced from the practice of the Commission in determining compliance with this requirement, that is: the remedy must be available, effective and sufficient.

54. In *Jawara v The Gambia*, the Commission stated that '[a] remedy is considered available if the petitioner can pursue it without impediment; it is deemed effective if it offers a prospect of success, and it is found sufficient if it is capable of redressing the complaint'. In the *Jawara* communication, which both parties have cited, the Commission held that:

> The existence of a remedy must be sufficiently certain, not only in theory but also in practice, failing which, it will lack the requisite accessibility and effectiveness. Therefore, if the applicant cannot turn to the judiciary of his country because of fear for his life (or even those of his relatives), local remedies would be considered to be unavailable to him.

55. The complainant in the present communication claims that he left his country out of fear for his life due to intimidation, harassment and torture. He said due to the nature of his work, the agents of the respondent state started tracking him with a view to harming and/or killing him. He has also described how he was treated while in detention, noting that he was denied food, he was not attended to when he complained of headache, he was refused visit to the toilet, that the conditions in the holding cells were bad — smelling, small, toilets could not flush, toilets were overflowing with urine and other human waste, the cells were infested with parasites such as mosquitoes which sucked complainant's blood for the duration of his stay and made sleep impossible for the complainant, the cell had a bad stench and was very cold, resulting in the complainant contracting breathing problems and a cough which lasted for six

[5] See communications 25/89 [*Free Legal Assistance Group and Others v Zaire* (2000) AHRLR 74 (ACHPR 1995)], 74/92 [*Commission Nationale des Droits de l'Homme et des Libertés v Chad* (2000) AHRLR 66 (ACHPR 1995) and 83/92 [*Degli and Others v Togo* (2000) AHRLR 317 (ACHPR 1995).

months, complainant was refused a blanket during the night and further refused permission to take his bath. According to the complainant, all these constituted torture and inhuman and degrading treatment.

56. The complainant alleged further that the respondent state used court remands to deny him of a trial within a reasonable time, thus psychologically torturing him and depleting his resources. According to the complainant, the matter was remanded at least five times — from 20 September 2004 – 21 February 2005 (within a period of six months), and he noted that these remands were calculated to harass and psychologically torture him. He said most of the time, the Central Intelligence Organization would come and take pictures of him, thus, intimidating him.

57. Complainant added that when he continued publishing the respondent's human rights abuses in Porta Farm, the respondent state sent its security agents to trail him and on various occasions, attempts were made to harm him. According to the complainant, on 12 September 2004, 'a man suspected to be a CIO official driving a white Mercedes went to the complainant's family and left threatening messages of death to complainant's brother'. The message from the CIO official, according to the complainant was that the complainant was an enemy of the state and will be killed. Complainant was forced to call his brother to stay with him for security reasons. In another incident, the same man, this time accompanied by three others, paid a second visit and issued similar threats to the complainant.

58. He indicated that on 30 September 2004, he was stopped by men driving a blue Mercedes Benz who again threatened him. He said because this later incident took place near his house, it was enough reason for him to be afraid for his life. He added that in August 2004, on several occasions he received numerous telephone calls where some of the callers threatened him with death and one caller said: 'We are monitoring you. We will get you. You are dead already'. He said he informed the board of Amnesty International-Zimbabwe, the Zimbabwe Lawyers for Human Rights and his lawyer about the threatening calls. He added that vehicles with people acting strangely were observed parking around his residence and work place during what he termed odd hours, until he decided to go into hiding and subsequently fled to South Africa. He says he suspects the respondent state wanted to abduct and kill him, adding that there are many cases in which people have been abducted and never seen again.

59. Other incidences which, according to complainant, gave him reason to believe his life was threatened, include the fact that in January 2005 the respondent state refused to issue passports to his family, even though he applied since November 2004. Because of this he was forced to leave his family behind who still reside in Zimbabwe.

As at the time of submission of this communication, they had not been given passports. He also indicated that he was forced to abandon his studies with the Institute of Personnel Management of Zimbabwe (IPMZ) and at the Zimbabwe Open University. He said, in October 2004, his daughter had to abandon school when the whole family went into hiding. He said at the end of September 2004, he received a great shock when he found all files in his laptop deleted, and suspected the disappearance of the files was linked to respondent's agents.

60. He concluded that 'by reason of the arbitrary arrests and detentions, torture, inhuman and degrading treatment, delays in charging and trying him, surveillance by the respondent's agents and others cited in the afore-mentioned incidents, the complainant submits that the respondent flagrantly violated his rights and freedoms and those of his family ...'.

61. From the above submissions of the complainant, the latter seeks to demonstrate that through the actions of the respondent state and its agents, a situation was created which made him to believe that the respondent was out to harm and/or kill him. He thus became concerned about his safety and that of his family. Due to the fear for his life, he claims, he went into hiding and eventually fled into a neighbouring country, South Africa, from where he submitted this communication.

62. In a complaint of this nature, the burden of proving torture and the reasons why local remedies could not be exhausted rests with the complainant. The complainant has the responsibility of proving that he was tortured and describing the nature of the torture or the treatment he underwent, and the extent to which each act of torture, intimidation or harassment alleged, instilled fear in the complainant to cause him to be concerned for his life and those of his dependants, to the extent that he could not attempt local remedies but preferred to flee the country. It is not enough for the complainant to claim he was tortured or harassed without relating each particular act to the element of fear. If the complainant discharges this burden, the burden will then shift to the respondent state to show the remedies available, and how in the particular circumstance of the complainant's case, the remedies are effective and sufficient.

63. To support his case, the complainant cited the African Commission's decisions in the *Jawara* case, the cases of *Abubakar v Ghana*[6] and *Rights International v Nigeria* in which he said the Commission found that the complainants in these cases could not be expected to pursue domestic remedies in their country due to the fact that they had fled their country for fear of their lives.

6 Communication 103/1993 [(2000) AHRLR 124 (ACHPR 1996)].

64. Having studied the complainant's submissions, and comparing it with the above cases cited in support of his claim, the Commission is of the opinion that the facts of the above cases are not similar to his case. In the *Jawara* case, for example, the complainant was a former head of state who had been overthrown in a military coup. The complainant in this case alleged that after the coup, there was 'blatant abuse of power by ... the military junta'. The military government was alleged to have initiated a reign of terror, intimidation and arbitrary detention. The complainant further alleged the abolition of the Bill of Rights as contained in the 1970 Gambia Constitution by Military Decree no 30/31, ousting the competence of the courts to examine or question the validity of any such Decree. The communication alleged the banning of political parties and of Ministers of the former civilian government from taking part in any political activity. The communication further alleged restrictions on freedom of expression, movement and religion. These restrictions were manifested, according to the complainant, by the arrest and detention of people without charge, kidnappings, torture and the burning of a mosque.

65. In the *Jawara* case, the Commission concluded that:

> The complainant in this case had been overthrown by the military, he was tried *in absentia*, former ministers and members of parliament of his government have been detained and there was terror and fear for lives in the country ...
>
> There is no doubt that there was a generalised fear perpetrated by the regime as alleged by the complainant. This created an atmosphere not only in the mind of the author but also in the minds of right-thinking people that returning to his country at that material moment, for whatever reason, would be risky to his life. Under such circumstances, domestic remedies cannot be said to have been available to the complainant.

The Commission finally noted that '[i]t would be an affront to common sense and logic to require the complainant to return to his country to exhaust local remedies.'

66. In the *Abubakar* case, it should be recalled that Mr Alhassan Abubakar was a Ghanaian citizen detained for allegedly co-operating with political dissidents. He was detained without charge or trial for over seven years until his escape from a prison hospital on 19 February 1992 to Côte d'Ivoire. After his escape, his sister and wife, who had been visiting him in Côte d'Ivoire, were arrested and held for two weeks in an attempt to get information on the complainant's whereabouts. The complainant's brother informed him that the police have been given false information about his return, and have on several occasions surrounded his house, searched it, and subsequently searched for him in his mother's village.

67. In the early part of 1993 the United Nations High Commissioner for Refugees (UNHCR) in Côte d'Ivoire informed the complainant that they had received a report on him from Ghana assuring that he was

free to return without risk of being prosecuted for fleeing from prison. The report further stated that all those detained for political reasons had been released. Complainant on the other hand maintained that there is a law in Ghana which subjects escapees to penalties from six months to two years imprisonment, regardless of whether the detention from which they escaped was lawful or not. On the basis of the above, the Commission held that 'considering the nature of the complaint it would not be logical to ask the complainant to go back to Ghana in order to seek a remedy from national legal authorities. Accordingly, the Commission does not consider that local remedies are available for the complainant'.

68. In *Rights International v Nigeria*, the victim, a certain Mr Charles Baridorn Wiwa, a Nigerian student in Chicago, was arrested and tortured at a Nigerian Military Detention Camp in Gokana. It was alleged that Mr Wiwa was arrested on 3 January 1996 by unknown armed soldiers in the presence of his mother and other members of his family, and remained in the said military detention camp from 3 - 9 January 1996. While in detention, Mr Wiwa was horsewhipped and placed in a cell with forty-five other detainees. When he was identified as a relative of Mr Ken Saro-Wiwa he was subjected to various forms of torture. Enclosed in the communication was medical evidence of Mr Wiwa's physical torture. After five days in the detention camp in Gokana, Mr Wiwa was transferred to the State Intelligence Bureau (SIB) in Port Harcourt. Mr Wiwa was held from 9 -11 January 1996, without access to a legal counsel or relatives, except for a five minutes discussion with his grandfather. On 11 January 1996, Mr Wiwa and 21 other Ogonis were brought before the Magistrates' Court 2 in Port-Harcourt, charged with unlawful assembly in violation of section 70 of the Criminal Code Laws of Eastern Nigeria 1963. Mr Wiwa was granted bail, but while out on bail some unknown people believed to be government agents abducted him and threatened his life by forcing him into a car in Port Harcourt. On the advice of human rights lawyers, Mr Wiwa fled Nigeria on 18 March 1996 to Cotonou, Republic of Benin, where the UN High Commissioner for Refugees declared him a refugee. On September 17 1996, the US government granted him refugee status and he has been residing in the United States since then.

69. In this case, the African Commission declared the communication admissible on grounds that there was a lack of available and effective domestic remedies for human rights violations in Nigeria under the military regime. It went further to assert that

> the standard for constructive exhaustion of domestic remedies [is] satisfied where there is no adequate or effective remedy available to the individual. In this particular case, the Commission found that Mr Wiwa was unable to pursue any domestic remedy following his flight for fear of his life to the Republic of Benin and the subsequent granting of refugee status to him by the United States of America.

70. The communication under consideration must also be distinguished from *Gabriel Shumba v Republic of Zimbabwe*.[7] In the *Shumba* case, the complainant, Mr Gabriel Shumba, alleged that, he, in the presence of three others, namely Bishop Shumba, Taurai Magayi and Charles Mutama was taking instructions from one of his clients, a Mr John Sikhala in a matter involving alleged political harassment by members of the Zimbabwe Republic Police (ZRP). Mr John Sikhala is a Member of Parliament for the Movement for Democratic Change (MDC), which is the opposition party in Zimbabwe. At about 11.00 pm riot police accompanied by plain-clothes policemen and personnel identified to be from the Central Intelligence Organization stormed the room and arrested everyone present. During the arrest, the complainant's law practicing certificate, diary, files, documents and cell phone were confiscated and he was slapped and kicked several times by, among others, the Officer in Charge of Saint Mary's police station.

71. Mr Shumba and the others were taken to Saint Mary's police station where he was detained without charge and denied access to legal representation. He was also denied food and water. The complainant claims that on the next day following his arrest, he was removed from the cell, a hood was placed over his head and he was driven to an unknown location where he was led down what seemed like a tunnel, to a room underground. The hood was removed, he was stripped naked and his hands and feet were bound in a foetal position and a plank was thrust between his legs and arms. While in this position, the complainant was questioned and threatened with death by about 15 interrogators. The complainant further alleged that he was also electrocuted intermittently for eight hours and a chemical substance was applied to his body. He lost control of his bodily functions, vomited blood and he was forced to drink his vomit. The complainant submitted a certified copy of a medical report describing the injuries found on his body. Following his interrogation at around 7pm of the same day, the complainant was unbound and forced to write several statements implicating him and several senior MDC members in subversive activities. At around 7.30 pm he was taken to Harare Police Station and booked into a cell. On the third day of his arrest, his lawyers who had obtained a High Court injunction ordering his release to court were allowed to access him. The complainant was subsequently charged under section 5 of the Public Order and Security Act that relates to organising, planning or conspiring to overthrow the government through unconstitutional means. He then fled Zimbabwe for fear of his life.

72. In the four cases cited above, there is one thing in common — the clear establishment of the element of fear perpetrated by identified state institutions, fear which in the *Jawara* case, the

7 Communication 288/2004.

Commission observed that 'it would be reversing the clock of justice to request the complainant to attempt local remedies'. In the *Abubakar* case, the complainant's sister and wife were arrested to force the complainant to return, his house was regularly surrounded and searched, and his mother's village was visited by state agents looking for him. In the *Shumba* case, the state never refuted the allegations of torture or the authenticity of the medical reports, but simply argued that complainant could have seized the local courts for redress.

73. In the case under consideration, the complainant, Mr Obert Chinhamo, has presented a picture of the conditions of detention, which without prejudice to the merits of the communication, can be termed inhuman and degrading. He also pointed out instances of alleged intimidation and harassment by state agents.

74. Every reasonable person would be concerned and afraid for their life if they had state security agents prying into their everyday activities. Complainant had every reason to be concerned for his safety and that of his family. However, it should be noted that complainant did not identify any of the men tracking him to be state agents. According to his submissions, the people harassing him were anonymous, unknown or suspected IO officials, and in some cases, he simply observed some strange men around his home and his place of work. In none of the instances of alleged harassment or intimidation mentioned by the complainant did he identify his alleged persecutors as agents of the respondent state. He based his fear on suspicion, which was not corroborated.

75. Of particular importance here is to note that in spite all the threats, harassment, intimidations, threatening phone calls and alleged tracking by respondent states' agents, complainant chooses not to report the matter to the police. From his submissions, he was harassed and intimidated for over six months, that is, from August 2004 when he claims he was first arrested, to January 2005, when he left the country. In his submissions, he did not indicate why he could not submit the matter to the police for investigation but preferred reporting to his employers and his lawyers. In the opinion of the Commission, the complainant has not substantiated his allegations with facts. Even if, for example, the detention of the complainant amounted to psychological torture, it could not have been life-threatening to cause the complainant flee for his life. Apart from the alleged inhumane conditions under which he was held, there is no indication of physical abuse like in the *Shumba* and *Wiwa* cases. Torture could not have been the cause for the complainant's fleeing the country because the alleged inhumane and degrading or torturous treatment occurred in August/September 2004, and the complainant remained in the country until January 2005, and even made court appearances on at least four occasions to answer charges brought

against him. The alleged intimidation and threat to the complainant's life occurred between August and October 2004. This means that by the time the complainant left for South Africa in January 2005, the alleged threats and intimidation had ceased. There is therefore no evidence to prove that his leaving the respondent state was as a result of fear for his life occasioned by threats and intimidation, or that even if he was threatened and intimidated, this could be attributed to the respondent state.

76. The complainant has simply made general allegations and has not corroborated his allegations with documentary evidence or testimonies of others. He has not shown, like in the other cases mentioned above, the danger he found himself in that necessitated his fleeing the country. Without concrete evidence to support the allegations made by the complainant, the Commission cannot hold the respondent state responsible for whatever harassment, intimidation and threats that the complainant alleges he suffered, that made him flee the country for his life. This is even so because complainant never bothered to report these incidences to the police or raise them with the Magistrate when he appeared four times in the respondent court. If the intimidation and threats were not brought to the attention of the state for investigation, and if the state was not in a position to know about them, it would be inappropriate to hold the state responsible.

77. Having said that, the question is, could the complainant still have exhausted local remedies or better still, is he required to exhaust local remedies, even outside the respondent state?

78. The first test that a local remedy must pass is that it must be available to be exhausted. The word 'available' means 'readily obtainable; accessible';[8] 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]

79. According to this Commission, a remedy is considered to be available if the petitioner can pursue it without impediments or if he can make use of it in the circumstances of his case.[10] Were there remedies available to the complainant even from outside the respondent state?

80. The state indicates that in terms of its laws, a complainant need not be physically present in the country in order to access local remedies, adding that both the High Court Act and the Supreme Court Act permit any person to make an application to either court through his/her lawyer. In support of this, the state cites the *Ray Choto and Mark Chavhunduka* case where the victims were tortured by state

8 *Webster's encyclopedic unabridged dictionary of the English language* (1989) 102.
9 *Longman synonym dictionary* (1986) 82.
10 *Jawara v The Gambia* [(2000) AHRLR 107 (ACHPR 2000)].

agents, and they applied for compensation while they were both in the United Kingdom and succeeded in their claim. The state concluded that the complainant is not barred from pursuing remedies in a similar manner.

81. The complainant does not dispute the availability of local remedies in the respondent state, but argues that in his particular case, having fled the country for fear of his life, and now out of the country, local remedies are not available to him.

82. This Commission holds the view that having failed to establish that he left the country involuntarily due to the acts of the respondent state, and in view of the fact that under Zimbabwe law, one need not be physically in the country to access local remedies; the complainant cannot claim that local remedies are not available to him.

83. The complainant argues that even if local remedies were available, they were not effective because the state has the tendency of ignoring court rulings taken against it, citing among others the High Court decision in the Commercial Farmers Union case and the *Ray Choto and Mark Chavhunduka* case, and added that the Zimbabwe Lawyers for Human Rights has documented at least 12 instances where the state has ignored court rulings since 2000.

84. It is not enough for a complainant to simply conclude that because the state failed to comply with a court decision in one instance, it will do the same in their own case. Each case must be treated on its own merits. Generally, this Commission requires complainants to set out in their submissions the steps taken to exhaust domestic remedies. They must provide some *prima facie* evidence of an attempt to exhaust local remedies. This position is supported by other human rights bodies around the globe. The UN Human Rights Committee, for example, has stated that the mere fact that a domestic remedy is inconvenient or unattractive, or does not produce a result favourable to the petitioner does not, in it, demonstrate the lack or exhaustion of all effective remedies.[11] In the Committee's decision in *A v Australia*,[12] it was held that 'mere doubts about the effectiveness of local remedies or prospect of financial costs involved did not absolve the author from pursuing such remedies'.[13]

85. The European Court of Human Rights on its part has held that even if the applicants have reason to believe that available domestic remedies and possible appeals will be ineffective, they should seek

[11] *TK v France*, communication 220/1987, *MK v France*, communication 222/1988, *JG v The Netherlands*, 306/1988.

[12] Communication 560/1993, UN Doc CCPR/C/59/D/560/1993 (1997).

[13] 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).

those remedies since 'it is generally incumbent on an aggrieved individual to allow the domestic courts the opportunity to develop existing rights by way of interpretation'.[14] In *Article 19 v Eritrea,*[15] the Commission held that

> it is incumbent on the 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 aspersion on the ability of the domestic remedies of the state due to isolated incidences.

86. From the above analysis, this Commission is of the view that the complainant ignored to utilise the domestic remedies available to him in the respondent state, which had he attempted, might have yielded some satisfactory resolution of the complaint.

87. The third issue of contention between the complainant and the respondent state is the requirement under article 56(6) of the Charter which provides that:

> Communications ... received by the Commission, shall be considered if they are submitted within a reasonable period from the time local remedies are exhausted, or from the date the Commission is seized of the matter.

88. The present communication was received at the Secretariat of the Commission on 26 September 2005. It was considered on seizure by the Commission in November 2005, that is, ten months after the complainant allegedly fled from the country. The complainant left the country on 12 January 2005.

89. The Commission notes that the complainant is not residing in the respondent state and needed time to settle in the new destination, before bringing his complaint to the Commission. Even if the Commission were to adopt the practice of other regional bodies to consider six months as the reasonable period to submit complaints, given the circumstance in which the complainant finds himself, that is, in another country, it would be prudent, for the sake of fairness and justice, to consider a ten months period as reasonable. The Commission thus does not consider the Communication to have been submitted contrary to sub-section 6 of article 56 of the Charter.

90. Lastly, article 56(7) provides that the communication must not deal with cases which have been settled by the states, in accordance with the principles of the United Nations, or the Charter of the OAU or the African Charter. In the present case, this case has not been settled by any of these international bodies and as a result of this, the requirement of article 56(7) has been fulfilled by the complainant. The African Commission finds that the complainant in this communication, that is, communication 307/05, *Obert Chinhamo v the Republic of Zimbabw*e, has not fulfilled the requirement under

[14] Philip Leach, *Taking a case to the European Court of Human Rights* (2001) 79 (quoting *Earl Spencer and Countess Spencer v United Kingdom*, app nos 28851/95, 28852/95 (European Commission on Human Rights, 1998).

[15] Communication 275/2003 [(2007) AHRLR 73 (ACHPR 2007)].

article 56(5) of the African Charter, and therefore declares the communication inadmissible.

SUB-REGIONAL COURTS

EAST AFRICAN COURT OF JUSTICE

Katabazi and Others v Secretary-General of the East African Community and Another

(2007) AHRLR 119 (EAC 2007)

James Katamazi and 21 Others v Secretary-General of the East African Community and the Attorney-General of the Republic of Uganda

East African Court of Justice at Arusha, reference 1 of 2007, 1 November 2007
Judges: Keiwua, Mulenga, Ramadhani, Arach-Amoko, Nsekela

Whether the invasion of a Ugandan High Court by armed government agents, the re-arrest of the complainants granted bail by the High Court and their incarceration in prison constitute infringement of the EAC Treaty

Jurisdiction (*res judicata*, 30-32; human rights, 33-39)
Rule of law (separation of powers, 45, 53, 54)
Fair trial (independence of courts, 47-54)
Remedies (responsibility of EAC Secretary-General, 59-62)

[**1.**] This is a reference by sixteen persons against the Secretary-General of the East African Community as the 1st respondent and the Attorney-General of Uganda as the 2nd respondent.

[**2.**] The story of the claimants is that: during the last quarter of 2004 they were charged with treason and misprision of treason and consequently they were remanded in custody. However, on 16 November 2006, the High Court granted bail to fourteen of them. Immediately thereafter the High Court was surrounded by security personnel who interfered with the preparation of bail documents and the fourteen were re-arrested and taken back to jail.

[**3.**] On 24 November 2006 all the claimants were taken before a military General Court Martial and were charged with offences of unlawful possession of firearms and terrorism. Both offences were based on the same facts as the previous charges for which they had been granted bail by the High Court. All claimants were again remanded in prison by the General Court Martial.

[**4.**] The Uganda Law Society went to the Constitutional Court of Uganda, challenging the interference in the court process by the security personnel and also the constitutionality of conducting prosecutions simultaneously in civilian and military courts. The Constitutional Court ruled that the interference was unconstitutional.

[**5.**] Despite that decision of the Constitutional Court the complainants were not released from detention and hence this reference with the following complaint:

> The claimants aver that the rule of law requires that public affairs are conducted in accordance with the law and decisions of the court are respected, upheld and enforced by all agencies of the government and citizens and that the actions of a partner state of Uganda, its agencies and the second respondent have in blatant violation of the rule of law and contrary to the treaty continued with infringement of the Treaty to date.

The claimants have sought the following orders:

> (a) That the act of surrounding the High Court by armed men to prevent enforcement of the Court's decision is an infringement of articles 7(2), 8(1)(c) and 6 of the Treaty for the Establishment of the East African Community (the Treaty).
>
> (b) That the surrounding of the High Court by armed men from the armed forces of Uganda is in itself an infringement of the fundamental principles of the Community in particular with regard to peaceful settlement of disputes.
>
> (c) The refusal by the second respondent to respect and enforce the decision of the High Court and the Constitutional Court is an infringement of articles 7(2), 8(1)(c) and 6 of the Treaty.
>
> (d) The continual arraignment of the applicants who are civilians before a military court is an infringement of articles 6, 7, and 8 of the Treaty for Establishment of the East African Community.
>
> (e) The inaction and the loud silence by the first respondent is an infringement of article 29 of the Treaty.
>
> (f) Costs for the reference.

[**6.**] The 1st respondent in his response at the outset sought the Court to dismiss the reference on two grounds: One, that there was no cause of action disclosed against him, and two, that the affidavits in support of the reference were all incurably defective. In the alternative, the 1st respondent argued that:

> The allegations which form the basis of the application have at no time been brought to the knowledge of the 1st respondent and the claimants are, therefore, put to strict proof.

[**7.**] The 2nd respondent, on the other hand, virtually conceded the facts as pleaded by the claimants. After admitting that the claimants were charged with treason and misprision of treason, the 2nd respondent stated in his response:

> (a) That on 16 November 2005 the security agencies of the government of Uganda received intelligence information that upon release on bail, the claimants were to be rescued to escape the course of justice and to go to armed rebellion.
>
> (b) That the security agencies decided to deploy security at the High Court for purely security reasons and to ensure that the claimants are

re-arrested and taken before the General Court Martial to answer charges of terrorism and unlawful possession of firearms.

(c) That on 17 November 2005, all the claimants were charged in the General Court Martial with terrorism and unlawful possession of firearms which are service offences according to the Uganda People's Defence Forces Act 7 of 2005.

Thus, in effect, the 2nd respondent is affirming that the acts did take place but contends that they did not breach the rule of law.

[**8.**] The claimants were represented by Mr Daniel Ogalo, learned counsel, while the 1st respondent had the services of Mr Colman Ngalo, learned advocate, and Mr Wilbert Kaahwa, learned counsel to the Community. The 2nd respondent was represented for by Mr Henry Oluka, learned Senior State Attorney of Uganda assisted by Mr George Kalemera and Ms Caroline Bonabana, learned State Attorneys of Uganda.

[**9.**] When the matter came up for the Scheduling Conference under rule 52 of the East African Court of Justice Rules of Procedure (the Rules), Mr Ngalo raised a preliminary objection that there is no cause of action established against the 1st respondent. The pleadings of the claimants do not disclose that at any stage, the Secretary-General was informed by the applicants or by anybody at all that the applicants had been incarcerated or confined or that their rights were being denied.

[**10.**] Mr Ogalo responded by submitting that under article 71(1)(d) of the Treaty one of the functions of the Secretariat, of which the 1st respondent is head, is:

> the undertaking either on its own initiative or otherwise, of such investigations, collection of information, or verification of matters relating to any matter affecting the Community that appears to it to merit examination.

[**11.**] Mr Ogalo contended that it is not necessary that the 1st respondent must be told by any person 'because he can, on his own, initiate investigations'.

[**12.**] The Court dismissed the preliminary objection but we reserved our reasons for doing so and we now proceed to give them. At the time of hearing the preliminary objection the Court had not reached the stage of a Scheduling Conference under rule 52. It is at that Conference that points of agreement and disagreement are sorted out. It was our considered opinion that the matter raised could appropriately be classified at the Scheduling Conference as a point of disagreement.

[**13.**] But apart from that, the matter raised by Mr Ngalo was not one which could be dealt with as a preliminary objection because it was not a point of law but one involving facts. As Law, JA of the East African Court of Appeal observed in *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696 700:

> So far as I am aware, preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

Then at 701 Sir Charles Newbold, P added:

> A preliminary objection is in the nature of what used to be a demurrer. *It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained* or if what is sought is the exercise of judicial discretion (emphasis added).

The Court of Appeal of Tanzania in Civil Reference 32 of 2005, *Etiennes Hotel v National Housing Corporation* dealt with a similar issue and, after citing *Mukisa Biscuits* with approval, held:

> Here facts have to be ascertained in all the remaining six grounds of the so called preliminary objection and that is why the Respondent has filed two affidavits which have been objected to by the applicant.
>
> We are of the decided view that grounds of preliminary objection advanced cannot be disposed off without ascertaining facts. These are not then matters for preliminary objection. So, we dismiss the motion for preliminary objection with costs.

[**14.**] Whether or not the 1st respondent had knowledge of what was happening to the complainants in Uganda can never ever be a point of law but one of fact to be proved by evidence and, therefore, it could not be a matter for a preliminary objection and hence dismissal.

[**15.**] We may as well point out here, for the sake of completeness, that Mr Ngalo also challenged the legality of the affidavits filed in support of the reference. However, in the course of answering questions from the bench he abandoned his objection in the following terms: 'Your Lordships, I am not going to pursue this point. I concede that these affidavits are sufficient for the purposes of this application.'

[**16.**] Two issues were agreed upon at the Scheduling Conference which were:

> (1) Whether the invasion of the High Court premises by armed agents of the second respondent, the re-arrest of the complainants granted bail by the High Court and their incarceration in prison constitute infringement of the Treaty for the Establishment of the East African Community.
>
> (2) Whether the first respondent can on his own initiative investigate matters falling under the ambit of the provisions of the Treaty.

[**17.**] As for the first issue, Mr Ogalo submitted that the Court was called on to interpret articles 6, 7, 8, 29 and 71 of the Treaty and implored the Court to do so by looking at 'the ordinary meaning of the words used in those provisions, the objectives of the Treaty and the purposes of those articles'.

[**18.**] His main plank of argument was that the acts complained of violated one of the fundamental principles of the Community as

spelled out in article 6(d), that is, rule of law. As to the import of that doctrine he referred us to *The Republic v Gachoka and Another*, [1999] 1 EA 254; *Bennett v Horseferry Road Magistrates' Court and Another* [1993] 2 All ER 474; and a passage in Kanyeihamba's *Commentaries on Law, Politics and Governance* (Renaissance Media Ltd, 2006) 14.

[**19.**] The learned advocate pointed out that the first complaint is the act of surrounding the High Court of Uganda by armed men so as to prevent the enforcement of the decision of the Court. The second act was the re-arrest and the incarceration of the complainants.

[**20.**] Mr Ogalo pointed out that the acts complained of constituted contempt of court and also interference with the independence of the judiciary. He concluded that both contempt of court and the violation of the independence of the judiciary contravene the principle of the rule of law.

[**21.**] As for the second issue Mr Ogalo was very brief. He submitted that the 1st respondent is empowered by article 71(1)(d), on his own initiative, to conduct investigation, collect information or verify facts relating to any matter affecting the Community that appears to him to merit examination. The stand taken by Mr Ogalo was that if the 1st respondent properly exercised his powers under the Treaty, he should have known the matters happening in Uganda as a partner state and take appropriate actions.

He therefore asked the Court to find both issues in favour of the complainants.

[**22.**] In reply Mr Ngalo pointed out that what concerned the 1st respondent was the second issue. The learned counsel submitted that the complainants are alleging that the 1st respondent ought to have reacted to what the 2nd respondent was doing in Uganda. However, he contended, there is no evidence that the 1st respondent was aware of those activities. He pointed out that article 29 starts by providing 'Where the Secretary-General considers that a partner state has failed ... ' and he argued that for the Secretary-General to 'consider' he has to be aware but the complainants have failed to establish that awareness.

[**23.**] As for article 71 Mr Ngalo submitted that it provides for the functions of the Secretariat as an institution of the Community and not as to what happens in the partner states.

[**24.**] For the 2nd respondent Mr Oluka dealt with the surrounding of the High Court, the re-arrest and the continued incarceration of the complainants. The learned Senior State Attorney pointed out that all the three matters were fully canvassed and decided upon by the Constitutional Court of Uganda. Therefore, he submitted that this Court is prohibited by the doctrine of *res judicata* from dealing with those issues again.

[**25.**] Mr Oluka conceded that though the facts in this reference and those which were in the petition before the Constitutional Court of Uganda are substantially the same, the parties are different. In the Constitutional Petition 18 of 2005, the parties were the Uganda Law Society and the Attorney-General of Uganda while in this reference the parties are James Katabazi and 21 others, on the one hand, and the Secretary-General of the Community and the Attorney-General of Uganda, on the other hand. Nevertheless, Mr Oluka stuck to his guns that the doctrine of *res judicata* applies to this reference.

[**26.**] He also submitted that under article 27(1) this Court does not have jurisdiction to deal with matters of human rights until jurisdiction is vested under article 27(2). He, therefore, asked the Court to dismiss the reference with costs.

[**27.**] There are three issues which we think we ought to dispose of at the outset: First, whether or not article 71 is relevant in this application. Second, whether or not the doctrine of *res judicata* applies to this reference. Last, is the issue of the jurisdiction of this Court to deal with human rights?

[**28.**] It is the argument of Mr Ogalo that article 71(1)(d) imposes on the 1st respondent the duty to collect information or verify facts relating to any matter affecting the Community that appears to him to merit examination. Mr Ngalo, on the other hand, contends that article 71(1)(d) sets out the functions of the Secretariat as an institution of the Community and not as to what happens in the partner states.

Article 71(1)(d) provides as follows:

> The Secretariat shall be responsible for the undertaking either on its own initiative or otherwise, of such investigations, collection of information, or verification of matters *relating to any matter affecting the Community* that appears to it to merit examination (emphasis added).

[**29.**] Mr Ngalo wanted to confine the functions of the Secretariat under article 71(1)(d) to internal matters of the Secretariat as an organ, which he erroneously referred to as an institution, divorced from the duties imposed on the Secretary-General under article 29. It is, therefore, our considered opinion that article 71(1)(d) applies to this reference.

[**30.**] Are we barred from adjudicating on this reference because of the doctrine of *res judicata?* The doctrine is uniformly defined in the Civil Procedure Acts of Kenya, Uganda and Tanzania as follows:

> No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

[**31.**] Three situations appear to us to be essential for the doctrine to apply: One, the matter must be 'directly and substantially' in issue in the two suits. Two, parties must be the same or parties under whom any of them claim litigating under the same title. Lastly, the matter was finally decided in the previous suit. All the three situations must be available for the doctrine of *res judicata* to operate. In the present case one thing is certain: the parties are not the same and cannot be said to litigate under the same title. Mr Oluka himself has properly conceded that.

[**32.**] Secondly, while in the Constitutional Court of Uganda the issue was whether the acts complained of contravene the Constitution of Uganda, in the instant reference the issue is whether the acts complained of are a violation of the rule of law and, therefore, an infringement of the Treaty. Therefore, the doctrine does not apply in this reference.

[**33.**] Does this Court have jurisdiction to deal with human rights issues? The quick answer is no it does not. Jurisdiction of this Court is provided by article 27 in the following terms:

> (1) The Court shall initially have jurisdiction over the interpretation and application of this Treaty.
>
> (2) The Court shall have such other original, appellate, human rights and other jurisdiction as will be determined by the Council at a suitable subsequent date. To this end, the partner states shall conclude a Protocol to operationalise the extended jurisdiction.

[**34.**] It very clear that jurisdiction with respect to human rights requires a determination of the Council and a conclusion of a Protocol to that effect. Both of those steps have not been taken. It follows, therefore, that this Court may not adjudicate on disputes concerning violation of human rights *per se*.

[**35.**] However, let us reflect a little bit. The objectives of the Community are set out in article 5(1) as follows:

> The objectives of the Community *shall be to develop policies and programmes aimed at widening and deepening co-operation among the partner states in* political, economic, social and cultural fields, research and technology, defence, security and *legal and judicial affairs*, for their mutual benefit (emphasis added).

Sub-articles (2) and (3) give details of pursuing and ensuring the attainment of the objectives as enshrined in sub-article (1) and of particular concern here is the 'legal and judicial affairs' objective.

[**36.**] Then article 6 sets out the fundamental principles of the Community which governs the achievement of the objectives of the Community, of course as provided in article 5(1). Of particular interest here is paragraph (d) which talks of the rule of law and the promotion and the protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights.

[**37.**] Article 7 spells out the operational principles of the Community which govern the practical achievement of the objectives of the Community in sub-article (1) and seals that with the undertaking by the partner states in no uncertain terms of sub-article (2):

> The partner states undertake to abide by the principles of good governance, including adherence to the principles of democracy, *the rule of law*, social justice *and the maintenance of universally accepted standards of human rights* (emphasis added).

[**38.**] Finally, under article 8(1)(c) the partner states undertake, among other things, to: 'Abstain from any measures likely to jeopardise the achievement of those objectives or the implementation of the provisions of this Treaty.'

[**39.**] While the Court will not assume jurisdiction to adjudicate on human rights disputes, it will not abdicate from exercising its jurisdiction of interpretation under article 27(1) merely because the reference includes allegation of human rights violation.

[**40.**] Now, we go back to the substance of this reference. As we have already observed in this judgment, the 2nd respondent has conceded the facts which are the subject matter of this reference and, so, they are not in dispute. He has only offered some explanation that the surrounding of the Court, the re-arrest, and therefore, the non-observance of the grant of bail, and the re-incarceration of the complainants were all done in good faith to ensure that the complainants do not jump bail and go to perpetuate insurgency.

[**41.**] Mr Ogalo invited us to find that explanation unjustified because it was not supported by evidence. We agree with him and we would go further and observe that 'the end does not justify the means'.

[**42.**] The complainants invite us to interpret articles 6(d), 7(2) and 8(1)(c) of the Treaty so as to determine their contention that those acts, for which they hold the 2nd respondent responsible, contravened the doctrine of the rule of law which is enshrined in those articles.

[**43.**] The relevant provision of article 6(d) provides as follows:

> The fundamental principles that shall govern the achievement of the objectives of the Community by the partner states shall include good governance including adherence to the principles of democracy, *the rule of law*, accountability, transparency, social justice, equal opportunities, gender equality, as well as the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights (emphasis added).

The starting point is what does rule of law entail? From Wikipedia, the *Free Encyclopaedia*:

> The rule of law, in its most basic form, is the principle that no one is above the law. *The rule* follows logically from the idea that truth, and therefore law, *is based upon fundamental principles* which can be discovered, but *which cannot be created through an act of will* (emphasis added).

The *Free Encyclopaedia* goes further to amplify:

> Perhaps the most important application of the rule of law is the principle that governmental authority is legitimately exercised only in accordance with written, publicly disclosed laws adopted and enforced in accordance with established procedural steps that are referred to as due process. The principle is intended to be a safeguard against arbitrary governance, whether by a totalitarian leader or by mob rule. Thus, the rule of law is hostile both to dictatorship and to anarchy.

[**44.**] Here at home in East Africa Justice George Kanyeihamba in Kanyeihamba's *Commentaries on Law, Politics and Governance* at page 14 reiterates that essence in the following words:

> The rule of law is not a rule in the sense that it binds anyone. It is merely a collection of ideas and principles propagated in the so-called free societies to guide lawmakers, administrators, judges and law enforcement agencies. *The overriding consideration in the theory of the rule of law is the idea that both the rulers and the governed are equally subject to the same law of the land* (emphasis added).

[**45.**] It is palpably clear to us, and we have no flicker of doubt in our minds, that the principle of 'the rule of law' contained in article 6(d) of the Treaty encapsulates the import propounded above. But how have the courts dealt with it? In *The Republic v Gachoka and Another*, Court of Appeal of Kenya reiterated the notion that the rule of law entails the concept of division of power and its strict observance. In *Bennett v Horseferry Road Magistrates' Court and Another*, the House of Lords took the position that the role of the courts is to maintain the rule of law and to take steps to do so. In that appeal the appellant, a New Zealander, while living in Britain obtained a helicopter by false pretences and then fled the country. He was later found in South Africa but as there was no extradition treaty between Britain and South Africa, the police authorities of the two countries conspired to kidnap the appellant and took him back to Britain. His defence to a charge before a divisional court was that he was not properly before the court because he was abducted contrary to the laws of the two countries. That defence was dismissed by the divisional court. However, on appeal to the House of Lords Lord Griffiths remarked at page 108:

> If the Court is to have the power to interfere with the prosecution in the present circumstances it must be because the judiciary accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law.

His Lordship went on: 'It is to my mind unthinkable that in such circumstances the court should declare itself to be powerless and stand idly by.' He then referred to the words of Lord Devlin in *Connelly v DPP* [1964] 2 All ER 401 at 442: 'The courts cannot contemplate for a moment the transference to the executive of the responsibility for seeing that the process of law is not abused.' The appeal was allowed and the appellant was let scot-free.

[**46.**] Have the facts complained of in this reference breached the sacred principle of rule of law as expounded above?

[**47.**] Let us briefly reiterate the facts even at the risk of repeating ourselves: The complainants were granted bail by the High Court of Uganda but some armed security agents of Uganda surrounded the High Court premises pre-empting the execution of the bail, re-arrested the complainants, re-incarcerated them and re-charged them before a Court Martial. The complainants were not released even after the Constitutional Court of Uganda ordered so.

[**48.**] Mr Ogalo left no stone unturned to persuade us to find that what the soldiers did breach the rule of law. He referred us to similar facts in the case of *Constitutional Rights Project and Another v Nigeria* [(2000) AHRLR 235 (ACHPR 1999)]. In that matter Chief Abiola, among others, was detained and the federal government of Nigeria refused to honour the bail granted to him by court. In the said communication the African Commission on Human and Peoples' Rights had this to say in paragraph 30:

> The fact that the government refuses to release Chief Abiola despite the order of his release on bail made by the Court of Appeal is a violation of article 26 which obliges states parties to ensure the independence of the judiciary. *Failing to recognise a grant of bail by the Court of Appeal militates against the independence of the judiciary* (emphasis added).

[**49.**] The facts in that communication are on all fours with the present reference and we find that the independence of the judiciary, a cornerstone of the principle of the rule of law, has been violated.

[**50.**] The African Commission went further to observe in paragraph 33 that:

> The government attempts to justify Decree no 14 with the necessity for state security. While the Commission is sympathetic to all genuine attempts to maintain public peace, it must note that too often extreme measures to curtail rights simply create greater unrest. It is dangerous for the protection of human rights for the executive branch of government to operate without such checks as the judiciary can usefully perform.

[**51.**] That is exactly what the government of Uganda through the Attorney-General, the 2nd respondent, attempted to do, to justify the actions of the Uganda Peoples' Defence Forces:

> (a) That on 16 November, 2005, the security agencies of the government of Uganda received intelligence information that upon release on bail, the claimants were to be rescued to escape the course of justice and to go to armed rebellion.
>
> (b) That the security agencies decided to deploy security at the High Court for purely security reasons and to ensure that the claimants are re-arrested and taken before the General Court Martial to answer charges of terrorism and unlawful possession of firearms.

[**52.**] We on our part are alarmed by the line of defence offered on behalf of the government of Uganda which if endorsed by this Court would lead to an unacceptable and dangerous precedent, which would undermine the rule of law.

[**53.**] Much as the exclusive responsibility of the executive arm of government to ensure the security of the state must be respected and upheld, the role of the judiciary to provide a check on the exercise of the responsibility in order to protect the rule of law cannot be gainsaid. Hence the adjudication by the Constitutional Court of Uganda referred to earlier in this judgment. In the context of the East African Community, the same concept is embodied in article 23 which provides: 'The Court shall be a judicial body which shall ensure the adherence to law in the interpretation and application and compliance with this Treaty.'

[**54.**] We, therefore, hold that the intervention by the armed security agents of Uganda to prevent the execution of a lawful court order violated the principle of the rule of law and consequently contravened the Treaty. Abiding by the court decision is the cornerstone of the independence of the judiciary which is one of the principles of the observation of the rule of law.

[**55.**] The second issue is rather nebulous and we reproduce it for better comprehension: 'Whether the first respondent can on his own initiative, investigate matters falling under the ambit of the provisions of the Treaty.'

Article 29(1) of the Treaty provides as follows:

> Where the Secretary General considers that a partner state has failed to fulfil an obligation under this Treaty or has infringed a provision of this Treaty, the Secretary General shall submit his or her findings to the partner state concerned for that partner state to submit its observations on the findings.

[**56.**] The Secretary-General is required to 'submit his or her findings to the partner state concerned'. It is obvious to us that before the Secretary-General is required to do so, she or he must have done some investigation. From the unambiguous words of that sub-article there is nothing prohibiting the Secretary-General from conducting an investigation on his/her own initiative. Therefore, the glaring answer to the second issue is: Yes the Secretary-General can on his own initiative investigate such matters.

[**57.**] But the real issue here is not whether he can but whether the Secretary-General, that is, the 1st respondent, should have done so. It was in this regard that there was heated debate in the preliminary objection on whether or not the Secretary-General must have intelligence of some activity happening in a partner state before he undertakes an investigation.

[**58.**] We dismissed the preliminary objection for the reason that the issue was not a point of law but one of fact requiring evidence. That evidence of whether or not the 1st respondent had knowledge, however, was never produced by the complainants in the course of the hearing. This, therefore, is the appropriate juncture to determine

whether or not knowledge is an essential prerequisite for an investigation by the 1st respondent.

[**59.**] We are of the decided opinion that without knowledge the Secretary-General could not be expected to conduct any investigation and come up with a report under article 29(1).

[**60.**] We may as well add that it is immaterial how that information comes to the attention of the Secretary-General. As far as we are concerned it would have sufficed if the complainants had shown that the events in Uganda concerning the complainants were so notorious that the 1st respondent could not but be aware of them. But that was not the case for the complainants.

[**61.**] In almost all jurisdictions courts have the power to take judicial notice of certain matters. We are not prepared to say that what is complained of here is one such matter. However, the powers that the Secretary-General has under article 29 are so encompassing and are pertinent to the advancement of the spirit of the re-institution of the Community and we dare observe that the Secretary-General ought to be more vigilant than what his response has portrayed him to be.

[**62.**] In any case, it is our considered opinion that even if the 1st respondent is taken to have been ignorant of these events, the moment this application was filed and a copy was served on him, he then became aware, and if he was mindful of the delicate responsibilities he has under article 29, he should have taken the necessary actions under that article. That is all that the complainants expected of him: to register with the Uganda government that what happened is detestable in the East African Community.

[**63.**] In the result we hold that the reference succeeds in part and the claimants are to have their costs as against the 2nd respondent.

ECOWAS COMMUNITY COURT OF JUSTICE

Essien v The Republic of The Gambia and Another

(2007) AHRLR 131 (ECOWAS 2007)

Professor Etim Moses Essien v The Republic of The Gambia and University of The Gambia

Community Court of Justice of the Economic Community of West African States (ECOWAS), suit ECW/CCJ/APP/05/05, 14 March 2007
Judges: Donli, Sanogo, Benin, Nana, Tall

Preliminary objection in labour dispute dealing with the jurisdiction of the ECOWAS Community Court of Justice

Jurisdiction (human rights, 9; labour dispute, 10, 11, 27, 28; necessary party, effect of non-joinder, 15,16, 19)
Interpretation (relevance of international case law, 17)
Admissibility (exhaustion of local remedies, applicability of the African Charter, 23, 27, 28)

Ruling

1. The plaintiff, Professor Etim Moses Essien, instituted the substantive action against the defendants to wit the Republic of The Gambia and the University of The Gambia, wherein the following reliefs are sought *inter alia*:

> (a) A declaration that the action and conduct of the Republic of The Gambia and University of The Gambia by engaging the applicant to render expert technical services to them from 5 February, 2004 to 26 January 2005 (a period of one year) without an equal pay for the said services amounted to economic exploitation of the applicant and a breach of his right to equal pay for equal work.
>
> (b) A declaration that the action and conduct of the Republic of The Gambia and University of The Gambia as aforesaid violated articles 5 and 15 of the African Charter on Human and Peoples' Rights and article 23 of the Universal Declaration of Human Rights, 1948 both of which the Republic of The Gambia signed and acceded to respectively.

2. Within the proceedings by the plaintiff, the defendants brought an application for preliminary objection seeking three reliefs in the main as follows:

(1) That the plaintiff failed to join the Commonwealth Secretariat which is necessary party to the claim and who were the architects of the employment relationship between the plaintiff and the defendants which is the main issue of the action.

(2) The applicant in bringing this matter before this Court has failed to exhaust the local remedies available under articles 50 and 68 of the African Charter on Human and Peoples' Rights which is the international norm under which this action is brought before this Court.

(3) That the applicant's claim for violation of his fundamental rights based upon facts showing unresolved/unrenewed contract of service, counter offers and claims based on *quantum* merit is incompetent before the court.

3. The defendants further distilled from the above relief the following issues:

(1) Whether the non-joinder of the Commonwealth Secretariat as a party to the suit did not affect its competence and consequently the jurisdiction of the Court to adjudicate thereon.

(2) Whether the applicant's claim is competent before the court having failed to exhaust local remedies available to him as stipulated by article 56(5) of the African Charter in view of his claim being based on articles 60 and 66 thereof.

(3) Whether the applicant's claim for violation of his fundamental rights based upon facts showing unresolved/unrenewed contract of service, counter offers and claims based on *quantum* merit is competent before the court.

(4) Whether in the circumstances of paragraphs 1 to 3 above the Court can properly exercise jurisdiction on applicant's suit as constituted.

With these reliefs and issues, learned counsel to the parties put in their written addresses and adopted same for the consideration of this preliminary objection.

The legal arguments by the parties

4. Learned counsel for the defendants made his submission on three main issues upon which the preliminary objection should be resolved in their favour. He submitted on issue one that the basis of the plaintiffs claim was the contract of service granted him by the Commonwealth Secretariat and it was essential for an action based on such contract to join the Commonwealth Secretariat as a necessary party and where the plaintiff failed to join such a necessary party, the action should fail as the Court is divested of its jurisdiction to adjudicate on the matter. In furtherance of the above justification, counsel reiterated the fact that the contract with Commonwealth Secretariat had a clause for arbitration which had not been pursued when the dispute arose before the plaintiff accessed this Court. Another point counsel canvassed related to the violation of the doctrine of *audi alteram partem* and that the said violation rendered the suit incompetent and relied on the case of *Olajide Afolabi v Federal Republic of Nigeria*, 2004 ECW/CCJ/04 at pages 65-66 wherein this Court stated thus:

It is a well established principle of law that a court is competent when it is properly constituted as regards numbers and qualifications of the members of the bench, and no member is disqualified for one reason or

another; and the subject matter of the case is within its jurisdiction and there is no feature in the case which prevents the court from exercising its jurisdiction and the case comes before the court initiated by due process of law and upon fulfilment of any condition precedent to the exercise of jurisdiction.

5. In reply, learned counsel to the plaintiff made submissions on several issues on these terms. On the first issue, he contended that the non-joinder of the Commonwealth Secretariat as a party did not violate the doctrine of *audi alteram partem* and consequently, same cannot render the suit improperly filed as to affect the jurisdiction of the Court. He referred to the cases of *Afolabi v Federal Republic of Nigeria* (2004) *supra*; *Madukola v Nkemdillm* (1962) 2 SCNLR 341; *AG Lagos State v Attorney-General of the Federation* (2003) NWLR (Pt 833) at page 74 and submitted that the *ratio decidendi* of the cases cited by the defendants are not on all fours with the case at hand. On the non-joinder of Commonwealth Secretariat, counsel submitted that the Commonwealth Secretariat is not a necessary party to this suit and that the non-joinder did not divest this Court of its jurisdiction to hear and determine the suit on merit. Furthermore counsel stated that the relationship between the plaintiff and the Commonwealth Secretariat ended/expired on 4 February 2004 when the contract between them came to an end and that made the Commonwealth Secretariat an unnecessary party to warrant the joinder as a party. Still on the joinder, counsel to the plaintiff stated that since there is no relief sought against the Commonwealth Secretariat and the Commonwealth Secretariat became an unessential party for them to be joined as a party to the action. He urged the Court to dismiss the preliminary objection on that ground.

6. On issue two, counsel to defendants contended that the plaintiff's claim was incompetent for failure to exhaust local remedies available to him as stipulated in article 56(5) of the African Charter on Human and Peoples' Rights on the grounds that his claim is based on articles 50 and 68 thereof. He contended that the Court cannot exercise jurisdiction over the plaintiff's claim in violation of articles 56(5) and 60 of the African Charter which enjoined that a plaintiff shall exhaust local remedy before he can access the Court as provided under article 10(5) of the Supplementary Protocol. He stressed that article 4(g) of the revised Treaty enjoined that the Member States of the Economic Community of West African States (ECOWAS), to ensure the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights. In reply, counsel to the plaintiff was of the view that this arm of objection was misconceived and that the provisions of articles 30 to 68 of the African Charter on Human and Peoples' Rights are not synonymous with the Community Court of Justice and are therefore inapplicable to this Court. He urged the Court to dismiss the objection.

7. On issue three, counsel to the defendant submitted that the case bordered principally on unlawful or wrongful termination of the respondents' appointment and not human rights violations. On the contrary, counsel to the plaintiff submitted that the plaintiffs claim is not predicated on a breach of contract of employment with the defendants but the breach of fundamental rights to equal pay for equal work done. He reiterated that human rights are political, social, economic and cultural rights. He submitted that rights falling under the above stated breakdown of human rights are justiciable and the preliminary objection should be dismissed.

Deliberation of the Court

8. The Court gave every issue arising from the application a thorough examination except the matters touching on the substantive/main case. For clarity, these issues are summarised as follows: that the plaintiff failed to join the Commonwealth Secretariat which is a necessary party to the claim and who were the architects of the employment relationship between the plaintiff and defendants, which is the main issue of the action.

9. On the issue of competence, it is trite that competence of the Court is enshrined in articles 9 and 10 of the Supplementary Protocol, which gave the Court the competence to adjudicate on matters including the contravention of human rights. Article 10(d) of the Supplementary Protocol of this Court states:

> Access is open to the following ... (d) individuals on application for relief for violation of their human rights; the submission of application for which shall:
>
> (i) not be anonymous; nor
>
> (ii) be made whilst the same matter has been instituted before another international court for adjudication ...

Also, article 4(g) of the revised Treaty states:

> The high contracting parties, in pursuit of the objectives stated in article 3 of this Treaty, solemnly affirm and declare their adherence to the following principles: recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights.

10. The principal question which is posed in the instant case, relates to whether the facts of the case did constitute a violation of the human rights of the plaintiff. Are the rights being claimed by the plaintiff fundamental human rights guaranteed by the African Charter on Human and Peoples' Rights and the UN Universal Declaration, 1948? Finally, does the plaintiff possess the right to come directly before the Court of Justice of ECOWAS?

11. While it can be stated right away that by article 10(d) of the Protocol of the Court the plaintiff can access the Court, the issue as to whether the matters complained of are human rights or not should be left for determination at the trial. However by the combined

effect of the said provisions as to the competence to adjudicate on the matters as human rights violations, same shall be determined at the trial, as provided in the African Charter on Human and Peoples' Rights and the Universal Declaration on Human Rights which the member states are signatory to.

The non-joinder of parties

12. The Court also considered that there are no grounds for the defendants to constitute a demurrer out of the fact that the Commonwealth Secretariat was not summoned to the action. Indeed, the *audi alteram partem* rule targets a case of an indispensable party that cannot be omitted and such a party is described as a necessary party. The doctrine of jurisprudence states that 'a party directly involved in' the litigation should be made a party as to allow his participation in the case, thus complying with the doctrine of *audi alteram partem* which may not be the case in this application. The defendants stated their inability to establish contact with the Commonwealth Secretariat for the renewal of the contract in question. The complaints by the parties are made up in diversity of legal points and some of them relate to the connection of the parties to the Commonwealth Secretariat and why the failure to join them is fatal to the plaintiff's claim.

13. On issue no 1, the defendants relied on the Supreme Court case, in the case of *A-G Lagos State v A-G Federation* and contended that the failure to join the Commonwealth as a party or proceed to arbitration as required was fatal to the plaintiff's case. Counsel to the defendants further relied on the cases of *Olajide Afolabi v Federal Republic of Nigeria* (2004) *supra* and *Madulolo v Nkemdelim* (1962) 2 SCNLR 341 wherein the condition for jurisdictional competence were relied upon.

14. On the converse, the applicant referred to the authorities relied upon by the defendants to submit that same are most irrelevant and inappropriate for the consideration of the instant case. He submitted that the non-joinder was never an issue in the cases relied upon, therefore the *ratio decidendi* are not on all fours with the instant case and urged the Court to discountenance them. As to the case of *Olajide Afolabi v FRN supra*, referred to by counsel to the defendant, which the counsel to the plaintiff contended that it was most irrelevant, and that in the face of the instant case is misconceived. The authority dealt inter alia on the competence of the Court to adjudicate in respect of a matter instituted by an individual as opposed to the provision of article 9 of the original Protocol of the Court in the instant case, the issue for the consideration of the Court is on the competence. The principles in the case of *Afolabi* therefore are on all fours with the instant case regarding the point on competence.

15. On the second point relating to non-joinder of parties, counsel to the plaintiff reiterated the fact that it is the claim of the plaintiff or applicant that determines the issue of jurisdiction of the Court and not the defendants to the case. It follows therefore that the non-joinder of Commonwealth Secretariat as a party cannot be fatal to the claim as to warrant the Court to uphold the preliminary objection. It is clear to the Court that there is no order sought against the Commonwealth Secretariat as to warrant their being joined as a party to the suit arid it is safe to conclude that the non-joinder of the Commonwealth Secretariat did not divest this Court of its jurisdiction to hear and determine the matter before it. See *Mabal Ayonkoya and 8 Others v E Aina Olukoya and Another* (1991) 4 NWLR (part 440) at 31 para E to F. *Alhaja Refatu Ayorinde and 4 Others. Alhaja Airat Oni and Another* (2000) 75 LRCN 206 at 234 to 235 para H-D; *Joseph Atuegbu and 4 Others v Awka South Local Government and Another* (2002) 15 NWLR (pt 791) 635 at 653 to 654 para H to B which were relied upon by Counsel.

16. It is a well established position of law that the Court has jurisdiction to join a person whose presence is necessary for that purpose. The significance of the issue of jurisdiction is that where a matter is heard and determined without jurisdiction it amounts to a nullity no matter how well conducted the case may be. The matter of joinder of parties is of great importance to the cause of action and there is a plethora of decisions in municipal and regional courts on the matter. See the Supreme Court case of *A-G Lagos State v A-G Federation supra* held at p 74 that 'where the grant of a relief will affect the interest of other persons not parties to a suit, those persons are necessary parties and they must be heard or given the opportunity to be heard: otherwise, If they are not before the court, the court cannot grant the claim'. This Court states that the latter view has sufficiently hit the nail on the head in that a party who is not shown to have material connection with the matter cannot be joined. Further to this, is that the Commonwealth has not been shown to have renewed the contract at this stage. In the circumstance, a non-joinder of the said Commonwealth Secretariat cannot be fatal. On that basis the objection is overruled.

17. Learned counsel to Plaintiff further argued that there is no order sought against the Commonwealth Secretariat as to warrant their being joined as a party to the suit and concluded that the non-joinder of the Commonwealth Secretariat did not divest this honourable Court of its jurisdiction to hear and determine the matter before it. On this note he relied on See *Mabal Ayonkoya and 8 Others v E Aina Olukoya and Another* (1991) 4 NWLR (part 440) at 31 para E to F. *Alhaja Refatu Ayorinde and 4 Others. Alhaja Airat Oni and Another* (2000) 75 LRCN 206 at 234 to 235 para H-D; *Joseph Atuegbu and 4 Others v Awka South Local Government and Another* (2002) 15 NWLR (pt 791) 635 at 653 to 654 para H to B. Even though the Court

appreciates the reliance on local authorities, learned counsel appearing before this Court should endeavour to expand the scope of their legal authorities to authorities from international courts. It is in consonance with the principles of law that the plaintiff has not made a claim against the Commonwealth Secretariat; any joinder of the said Commonwealth would amount to bringing a party which is not concerned with a case to court.

18. Without examining all the authorities because of their limitation as stated above, one cannot but rely on one of them for the purpose of emphasis. It is now widely acceptable position of law that the court has jurisdiction to join a person whose presence is necessary for the determination of the suit before it.

19. Turning to the points expressed regarding necessary parties, the Court considers whether the Commonwealth Secretariat is a necessary party. It has been defined that a necessary party to a proceeding is the party whose presence is essential for effectual and complete determination of the claim before the court. See *Ojo v Oseni* 1987 3 NWLR PT 66 page 422 and NNN Ltd v Ademola 1997 6 NWLR Pt 76 page 76 at 83 paragraphs A-B, wherein the Court decided that in considering whether a party has been properly joined in a suit or whether there is a cause of action against a party, a trial court can only look at the plaintiffs claim and not the defendant's defence. Applying these principles herein, it is the view that the disclosed facts in the application of the plaintiff disclosed no necessary constituents to warrant the Court to accede to the prayer sought in the preliminary objection for non- joinder of parties. All known jurisprudence states that a plaintiff can choose which party it deems fit to bring as a defendant, and he would only succeed on the strength of his own case and not on the weakness of the defendant's case. Applying these authorities to the instant application, it is the position of this Court that it is not necessary to impose on the plaintiff to join the Commonwealth Secretariat as a party to this suit and the failure to join them cannot be said to divest the Court of its jurisdiction. The law cannot be clearer and fairer than the expression on the non-joinder of Commonwealth Secretariat as a party. Consequently, the application on this point fails.

Non-exhaustion of local remedies

20. On issue two, learned counsel to the defendants submitted that it is apparent that the plaintiff has not exhausted local remedies as provided in article 56(5) of the African Charter. On that basis, he submitted that the plaintiff cannot be permitted to enter through the window of article 10(d) of the Supplementary Protocol of the ECOWAS Court. He further contended that article 4(g) of the revised Treaty of ECOWAS enjoined the Court to recognise, the promotion and protection of human and peoples' rights whenever same is

contravened but that such a claim shall be entertained after the exhaustion of local remedies. He urged the Court to strike out the application on the said grounds and direct the plaintiff to exhaust the local remedies in The Gambia. For clarity, the provisions are herein produced:

> Article 50: The Commission can only deal with a matter submitted to it after making sure that all the local remedies, if they exist, have been exhausted, unless it is obvious to the Commission that the procedure of achieving these remedies would be unduly prolonged.
>
> 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.

21. The plaintiff drew the attention of the Court to the fact that the claim was not based on articles 50 and 68 of the African Charter on Human and Peoples' Rights as submitted by the defendants. It is stated that articles 50 and 68 of the African Charter on Human and Peoples' Rights did not require the exhaustion of local remedies, but the determination as to whether the suit so filed is competent and that the reference to article 56(5) was a misconception. He therefore urged the Court to discountenance the argument proffered in support of issue two.

23. On examination of the said article 50, it is clear that the said article refers not to any organisation but the Commission. Consequently that provision of article 50 can not be applied *stricto senso* to this case pertaining to the exhaustion of local remedies and its relevance to this Court. [*eds-no para 22 in judgment*]

24. On the question of article 68 of the African Charter as raised by the defendants, it is the position of this Court that its application has no relevance whatsoever in the consideration of the claim before it and therefore the objection is untenable.

25. On issue three, the defendants relied on the case of *Abubakar Tatari All Polytechnic v Maina* reported in (2005) AFWLR page 225 to submit that the applicant having accepted part of integrated pay package and rejected the other part, the dispute revolves around whether his alleged claim of outstanding balance is enforceable, under the Commonwealth salary scale or the University of Gambia integrated pay scale. This point raises some facts connected substantially to the scale or the University of Gambia integrated pay scale. This point raises some facts connected substantially to the main/substantive matter, *lis pendens*, in this Court. As always the courts frown and discourage the consideration of substantive issues at the stage of interlocutory, on the ground that the court would be determining matters of substance without fully hearing the parties and their witnesses, if any. This Court endorses the principles in this case as to preclude the consideration of arguments on the issue of

part payment which is a matter for the main case. Article 87(5) of the Rules of Procedure provides that:

> The Court shall, after hearing the parties decide on the application or reserve its decision for the final judgment. If the Court refuses the application or reserves its decision, the President shall prescribe new time limits far the further steps in the proceedings.

26. At this juncture, it is necessary to mention a salient point raised by the defendants in respect of the competence of the Court for the alleged violation of fundamental human rights of the plaintiff. One of the innovations brought about by the Supplementary Protocol of January 2005 on the Court and the Community is the extension of its powers to cover human rights violations, as contained in article 10(d). The defendants maintain that the rights claimed by the plaintiff are not positively conferred by statute or contract but the plaintiff countered by stating a contrary arguments regarding same.

27. The important question herein is whether the rights of the plaintiff as discernible from the relationship of the parties are human rights as opposed to contractual rights and so on. Without delving into the issues in depth, the two parties concur, in invoking the African Charter on Human and Peoples' Rights and the Universal Declaration of Human Rights 1948. Article 10(d) of the Supplementary Protocol of the Court is a special provision and did relate to the parties accessing this Court on human rights contravention while those provisions of the African Charter on Human and Peoples' Rights relate to those cases under the purview of the Commission, particularly, the issue of local remedies as mentioned in article 50 of the said Charter has no bearing with the cases under the premise of article 10(d) of the Supplementary Protocol, on the grounds that the cases under article 10(d) made it quiet clear that the bar to bringing action to this Court must be those cases of *lis pendens* in another international court for adjudication.

28. Consequently, the objection herein regarding the non exhaustion of local remedies has no bearing with the requirement in bringing this action before this Court. The objection therefore is untenable. The action in this case having been made under human rights violation falls under the ambit of human rights infringement and amount to a justiciable claim. The material put before the Court is in the realm of the main claim. To raise such an argument herein would entail the full deliberation of the case prematurely. In the circumstance, the objection on this ground also fails. For the foregoing reasons as amplified, the preliminary objection fails in its entirety.

Decision

(1) Whereas the defendants have failed to justify the facts in support of the preliminary objection; the Court hereby decides that the preliminary objection is dismissed on all the grounds argued

except the points deferred for consideration in the main/substantive action as provided by article 87 of the Rules of Procedure of this Court.

(2) Whereas the defendants argued that the Court is devoid of its competence to determine this case without the joinder of the Commonwealth Secretariat; the Court decides that it is competent to hear the substantive case on its merit despite the non-joinder of the Commonwealth Secretariat and that the Commonwealth Secretariat is not a necessary party which must be joined by the plaintiff.

(3) Whereas the defendant argued that the Court is devoid of its jurisdiction for non-exhaustion of the local remedies as provided in article 56(5) of the African Charter on Human and Peoples' Rights; the Court decides that article 56(5) of the African Charter on Human and Peoples' Rights are available in the proceedings before the Commission on African Charter on Human and Peoples' Rights; and that article 10(d) of the Protocol gave no condition precedent in accessing the Court except where the action *lis pendens* before another international court.

(4) Whereas the defendants argued the issues of the contract relating to the parties subsisting and involving the Commonwealth Secretariat and that the issues of payments which the plaintiff accepted part of vitiate the action filed in breach of not exploring the settlement of same by is arbitration and that the main application was not properly instituted under the human rights violations and that the complaints of the plaintiff are not justiciable as human rights violations, the Court decides that the issues stated herein touch on the substantive case which by article 87(5) of the Rules of Procedure of this Court shall he taken in the substantive action.

Costs

Whereas the defendants made no specific application for cost in the preliminary objection proceedings and whereas the award of cost is usually made in the final judgment, with the award proceeding to the successful party, the Court decides that the award of costs shall be made at the final determination of the substantive proceedings. Consequently, no award of costs is made.

SADC TRIBUNAL

Mike Campbell (Pvt) Limited and Another v Zimbabwe

(2007) AHRLR 141 (SADC 2007)

Mike Campbell (Pvt) Ltd and William Michael Campbell v The Republic of Zimbabwe

SADC Tribunal decision, case no SADCT: 2/07, 13 December 2007
Judges: Mondlane, Mtambo, Tshosa

Interim measures granted in eviction case

Locus standi (2, 3)
Jurisdiction (human rights, 4-6)
Interim measures (8, 16, 17)
Admissibility (exhaustion of local remedies, 15)

[**1.**] On 11 October 2007 the applicants filed a case with the Tribunal challenging the acquisition of an agricultural land known as Mount Carmell in the District of Chegutu in the Republic of Zimbabwe by the respondent. An application was simultaneously filed pursuant to article 28 of the Protocol on Tribunal (hereinafter referred to as the Protocol) as read with rule 61 sub-rules (2) – (5) of the Rules of Procedure (hereinafter referred to as the Rules) for an interim measure restraining the respondent from removing, or allowing the removal of, the applicants from the agricultural land mentioned above and mandating the respondent to take all necessary and reasonable steps to protect the occupation by the applicants of the said land until the dispute has been finally adjudicated. In essence, the applicants are asking the Tribunal to order that the *status quo* in the agricultural land be preserved until the final decision is made in relation to the case.

[**2.**] Before dealing with the application, there are preliminary issues that should be determined. Firstly, whether the parties in the case are those that are envisaged by article 15(1) of the Protocol. The article provides: 'The Tribunal shall have jurisdiction over disputes between states, and between natural or legal persons and states.'

[**3.**] This is indeed a dispute between a natural and a legal person and a state. We hold that article 15(1) of the Protocol has been met and therefore that the matter is properly before the Tribunal.

[**4.**] Secondly, there is the issue relating to jurisdiction. Article 14 of the Protocol provides:

> The Tribunal shall have jurisdiction over all disputes and all applications referred to it in accordance with the Treaty and this Protocol which relate to; (a) the interpretation and application of the Treaty.

[**5.**] The interpretation and application of the SADC Treaty and the Protocol is therefore one of the bases of jurisdiction. For purposes of this application, the relevant provision of the Treaty which requires interpretation and application is article 4, which in the relevant part provides: 'SADC and member states are required to act in accordance with the following principles — (c) human rights, democracy and the rule of law.'

[**6.**] This means that SADC as a collectivity and as individual member states are under a legal obligation to respect and protect human rights of SADC citizens. They also have to ensure that there is democracy and the rule of law within the region. The matter before the Tribunal involves an agricultural land, which the applicants allege that it has been acquired and that their property rights over that piece of land have thereby been infringed. This is a matter that requires interpretation and application of the Treaty thus conferring jurisdiction on the Tribunal.

[**7.**] Thirdly, as indicated earlier, the application is brought pursuant to article 28 of the Protocol. The article provides:

> The Tribunal or the President may, on good cause, order the suspension of an act challenged before the Tribunal and may take other interim measures as necessary.

[**8.**] This clause is complemented by rule 61(2) – (5). The rule requires the application for an interim measure to be made by a party to a case during the course of the proceedings, stating the subject matter of the proceedings, the reasons for the application, the possible consequences if the application is not granted and the interim measure requested, and finally that the application for an interim measure shall take priority over all other cases. These provisions empower the Tribunal or the President of the Tribunal to make an appropriate interim order upon good cause being shown.

[**9.**] During the hearing the agents of the parties raised other preliminary issues. The applicants' agent raised the issue of the respondent's failure to file some documents within the timelines set by the Tribunal as required by rule 36(2) of the Rules. These documents are the 'notice of opposition' and an 'application for condonation for late filing of opposing papers', which were filed on the morning of the date of the hearing, 11 December 2007, according to the official date stamp of the Registry. The agent argued that

there is no basis for the documents in question to be considered by the Tribunal. He, however, submitted that in the interest of progress he could not insist on the point except that it should be placed on record that the respondent disregarded the Rules.

[**10.**] In reply, the respondent's agent denied that the respondent has disregarded the Rules concerning filing of papers. He said that failure to file the opposing papers on time was caused by administrative matters and consultations in the Republic of Zimbabwe. However, the agent argued that the respondent has substantially complied with the Rules and implored the Tribunal to use its inherent powers in terms of rule 2(2) to condone the late filing of the opposing papers to ensure that the ends of justice are met. The agent further argued that, in any case, the applicants have not shown that they have suffered any prejudice due to the late filing of the opposing papers. It should be noted that the agent of the applicants indicated that he did not wish to insist on the matter and that in the interest of progress the hearing could proceed. It was also the position of the Tribunal that in the interest of justice the application should proceed and therefore the Tribunal accepted the application for condonation for late filing of opposing papers by the respondent.

[**11.**] As regards the present application, the applicants' agent submitted that the applicants wanted protection pending the final determination of the dispute between them and the respondent. He argued that the Tribunal was set up to protect the interests of SADC citizens, and that in terms of article 21 of the Protocol, it has the powers not only to apply the Treaty and the protocols there under, but also to develop the Community jurisprudence having regard to applicable treaties, general principles and rules of public international law and any rules and principles of the law of states. He further argued that for the Tribunal to be effective it should be seen to be protecting the rights and interests of the SADC citizens. According to the applicants' agent, the Tribunal should adopt the criteria that are used in other jurisdictions when deciding whether or not to grant an interim measure. He said the criteria are the following:

(a) a *prima facie* right that is sought to be protected;

(b) an anticipated or threatened interference with that right;

(c) an absence of any alternative remedy;

(d) the balance of convenience in favour of the applicant, or a discretionary decision in favour of the applicant that an interdict is the appropriate relief in the circumstances.

[**12.**] The applicants' agent therefore argued that the application meets these criteria and that the balance of convenience tilts in favour of the applicants because they stand to suffer prejudice if the interim relief is not granted. Moreover, the agent argued that the respondent would not be prejudiced by the granting of the relief sought. This point was conceded by the agent of the respondent

during the hearing of the application. Regarding the application, it is observed that the respondent's agent did not oppose it. He only concentrated on the issue relating to exhaustion of local remedies. He submitted that in terms of article 15(2) of the Protocol, the applicants have not exhausted local remedies. The text provides:

> No natural or legal person shall bring an action against a state unless he or she has exhausted all available remedies or is unable to proceed under the domestic jurisdiction.

[**13.**] According to the respondent, it was argued, the applicants have not complied with this provision. The agent submitted that the applicants have a matter pending before the Supreme Court of Zimbabwe in which the relief sought is similar to the one that they are seeking from the Tribunal. The respondent's agent said that the matter referred to is awaiting judgment by the Supreme Court. The applicants' agent does not disagree. The respondent's agent therefore argued that the application cannot be brought before the Tribunal.

[**14.**] The respondent's agent also argued that if the applicants wanted protection pending the decision of the Supreme Court, they should have approached the domestic courts but they have not done so. Regarding the latter point, the applicants' agent contended that section 16B(3)(a) of the Constitution of Zimbabwe oust the jurisdiction of the courts in matters concerning land acquisition.

[**15.**] Referring to the issue of failure to exhaust local remedies by the applicants, we are of the view that the issue is not of relevance to the present application but that it may only be raised in the main case. It may not be raised in the present case in which the applicants are seeking an interim measure of protection pending the final determination of the matter. Thus the Tribunal need not consider the issue of whether or not the applicants have exhausted local remedies. In the circumstances, the contention relating to exhaustion of local remedies is unsuccessful.

[**16.**] We have observed above that the respondent did not oppose the present application. We have also alluded to the criteria advanced by the applicants' agent which should be applied in determining applications of this nature. We agree with the criteria. In the present application there is a *prima facie* right that is sought to be protected, which involves the right to peaceful occupation and use of the land; and there is anticipated or threatened interference with that right; and the applicants do not appear to have any alternative remedy thereby tilting the balance of convenience in their favour.

[**17.**] Accordingly, the Tribunal grants the application pending the determination of the main case and orders that the Republic of Zimbabwe shall take no steps, or permit no steps to be taken, directly or indirectly, whether by its agents or by orders, to evict from or

interfere with the peaceful residence on and beneficial use of the farm known as Mount Carmell of Railway 19, measuring 1200.6484 hectares held under Deed of Transfer no 10301/99, in the District of Chegutu in the Republic of Zimbabwe, by Mike Campbell (PvT) Limited and William Michael Campbell, their employees and the families of such employees and of William Michael Campbell.

[**18.**] The Tribunal makes no order as to costs.

DOMESTIC DECISIONS

KENYA

Waweru v Republic

(2007) AHRLR 149 (KeHC 2007)

Mr Peter K Waweru v Republic

High Court of Kenya at Nairobi, miscellaneous civil application 118 of 2004, 2 March 2006
Judges: Nyamu, Ibrahim, Emukule

Effects of discharging raw sewage in public water source and responsibility for providing safe sewage treatment

Equality before the law (selection of defendants not based on objective criteria, 12, 16)
Environment (responsibility to provide safe sewage treatment, 18-22, 41, 47, 52; right to a healthy environment, 26; precautionary principle, 29, 30; public trust, 31, 41, 42; sustainable development, 43, 47, 48; polluter pays, 30, 44, 45; inter-generational equity, 46-48)
Life (right to a healthy environment, 26, 31, 32, 34-40)
Interpretation (international standards, 28, 29, 38-40)
Health (lives endangered by pollution, 44)

[**1.**] The applicants and the interested parties were charged with the twin offences of (1) discharging raw sewage into a public water source and the environment contrary to section 118(e) of the Public Health Act (Chapter 242, Laws of Kenya), and (2) failure to comply with the statutory notice from the public health authority contrary to section 120(1) of the said Public Health Act. Section 118(1) of the Public Health Act sets out what acts are deemed to be nuisances liable to be dealt with in the manner provided in Part (II) (Sanitation and Housing) of the Act. Section 118(1)(e) deems to be a nuisance:

> Any noxious matters or waste water, flowing or discharged from any premises, wherever situated, into any public street, or into the gutter or side drawned of any street, or into any mullah or water course, irrigation channel or bed thereof not approved for the reception of such discharge.

And section 119 of the said Act empowers a medical officer of health if satisfied of the existence of a nuisance to serve a notice on the author of the nuisance or the occupier or owner of the dwelling or premises on which the nuisance arises or continues requiring him to

remove it within the time specified in the notice and to execute such work and do such things as may be necessary for that purpose, and if the medical officer of health thinks it desirable (but not otherwise) specifying any work to be executed to prevent a recurrence of the said nuisance.

Section 120(1) of the said Public Health Act provides that if the person on whom a notice to remove a nuisance has been served as aforesaid fails to comply with any of the requirements thereof within the time specified, the medical officer of health shall cause a complaint relating to such nuisance to be made before a magistrate and such magistrate shall thereupon issue a summons requiring the person on whom the notice was served to appear before this court.

[**2.**] The procedure is firstly that the Public Health Officer makes a complaint to the magistrate, and secondly that the magistrate issues a summons requiring the person upon whom a notice was served under section 120 to appear before him; that is the magistrate.

[**3.**] From the various attachments to the application, the applicant was not served with a summons to appear before the magistrate. Instead he was charged directly. So he applied pursuant to rule 3 of the Constitution of Kenya (Protection of Fundamental Rights and Freedom of the Individual) Practice and Procedure Rules, 20-01, (LN 133 of 2001), for leave to make a constitutional reference from the Court of the Magistrate (the subordinate court) to this Court, alleging that the applicant's fundamental rights and freedoms of the individual had been violated by his prosecution. The subordinate court granted the applicant's application to bring this constitutional reference.

[**4.**] So, following such leave, by an application brought by way of an originating summons dated 20 February 2004 (the application) one Peter K Waweru (the applicant), who claimed to be injured and prejudiced in that his rights and freedoms under the relevant law had been or were likely to be contravened sought and prayed for the orders following:

> (1) That the entire proceedings in criminal case number 6398 of 2003, consolidated with criminal case number 6399 of 2003, Kibera, be declared a nullity for violation of the applicant's rights to the equal protection of the law as guaranteed by section 82 of the Constitution.
>
> (2) That the proceedings in criminal case number 6398 of 2003 consolidated with 6399, Kibera, be declared a nullity for abrogating the rights of the applicant to the equal protection of the law as guaranteed under section 70, of the Constitution;
>
> (3) That a declaration be made that the applicant's fundamental rights and freedoms of the individual under section 72 and 76 of the Constitution have been contravened by the respondent and/or the Public Health Officer(s), Kajiado district;
>
> (4) That the commencement of proceedings in criminal case number 6398 of 2003 consolidated with criminal case number 6399 of 2003, Kibera, against the applicant is a violation of his constitutional Rights under section 70 and 77(8) of the Constitution of Kenya as the

responsibility to construct drainage system and sewerage plant, maintain sanitary condition, provide, contain and maintain sewage services in Kiserian Township is on the Olkejuado County Council under the Local Government Act, Chapter 265, Laws of Kenya;

(5) That a declaration that the applicant has been deprived of the protection of the law and his constitutional rights violated by charging him in criminal case number 6398 of 2003 consolidated with criminal case number 6399 of 2003 as the responsibility of constructing, providing and maintaining sewage system, sewage treatment facility and sewage plant is on the Local Authority under the Public Health Act, Chapter 242, Laws of Kenya;

(6) That a declaration that the applicant has been deprived of the protection of the law and his constitutional rights violated by charging him in criminal case number 6398 of 2003 consolidated with criminal case number 6399 of 2003, Kibera, as the responsibility of constructing, providing, containing and maintaining sewage system, sewage treatment facility and sewage plant is on the Water Services Board and/ or agents of the Water Services Board under the Water Act, 2002 (number 8 of 2002);

(7) That a declaration that the applicant has been deprived of the protection of the law and his constitutional rights violated by charging him in criminal case number 6398 consolidated with criminal case number 6399 of 2003 as the responsibility of constructing, providing and maintaining sewage system, sewage treatment facility and sewage plant is on the Olkejuado County Council under the Local Government Act, Chapter 265, Laws of Kenya;

(8) That as a result of the aforesaid the applicant has been charged and his constitutional rights have been abridged and he has been entitled to seek redress by virtue of or under section 84 of the Constitution.

In addition to the applicant the court on 8 July 2004 allowed the jointer of another 22 applicants as interested parties.

[**5.**] The application was supported by the affidavit of Peter K Waweru, sworn on 20 February 2004, together with ten annexures (PKW 1-10) attached thereto, and the affidavits of Edward Ngugi, the second Interested Party, sworn on 14 October 2004 and that of Charles Mwangi the first interested party, sworn on 8 November 2004 together with the annexures thereto.

The facts

[**6.**] The applicant and the interested parties are all plot owners in Kiserian Township, and on these plots, the applicant and interested parties have all erected residential-cum commercial buildings, whose buildings plans or drawings were first approved by the health and other authorities of the Olkejuado County Council before the erection or construction. Every building had a septic tank for the disposal of its solid waste, and other domestic washing waste water. Following the institution of criminal proceedings, the applicant and the interested parties formed Kiserian Township Welfare Group, all comprising about one hundred plot owners and other residents of the township of Kiserian. So in a sense, the outcome of the application by the applicant and the interested parties herein will concern this

country's treatment of environmental issues raised by this application.

[**7.**] According to the replying affidavit of one Paul M Tikolo a Public Health Officer, an employee of the Ministry of Health (MOH) and stationed at Ngong Division, of Kajiado District, Rift Valley Province, as the Officer-in-Charge, sworn on 14 July 2004 and filed on 20 July, 2004 he carried out investigations into complaints by the members of the public and the Ministries of Agriculture, Health and Environment and Natural Resources, and the Office of the President regarding the indiscriminate discharge of offensive smelling waste matters within the trading centre flowing out of various premises into open channels along the road to the environment and to the Kiserian River.

[**8.**] This deponent further states that following his investigations on these complaints, he established that most plot owners had connected underground pipes to their septic tanks to act, as overflow outlets, discharging liquid waste waters into the open environment and flowing downstream into the river.

[**9.**] Samples of this water were taken and upon analysis by the government chemist revealed that the waste water was alkalinic and strong in heavy metal making it toxic in nature, and requiring treatment before discharge into the environment of water bodies. This deponent also states, when his notices to stop discharges were ignored, his office issued three months statutory notices to one hundred and two (102) residents to abate and prevent a recurrence of the nuisance arising from discharging waste water into open drain and requiring each resident, to contain waste water in his plot and remove the pipes used in draining waste water in open drain.

[**10.**] The Public Health Officer deposes that following the issue of the notices, some of the persons affected resorted to *inter alia*, writing anonymous letters, lobbying with members of the Provincial Administration (the District Commissioner) holding defiance meetings/gatherings under cover of welfare, and accused the Public Health Staff of corruption, and that at the expiry of the notices some plot owners had complied with the notices, some were carrying out the works as advised, and yet others remained defiant. The Public Health Officer decided to institute criminal proceedings against 22 plot owners. The applicant and interested parties thereafter formed the Kiserian Welfare Group, presumably to chart out a common cause on how both to deal with the prosecution, and no doubt the future of how to deal with waste water and other waste matter generated within their premises in the Kiserian Township.

[**11.**] The foregoing is in essence, the factual situation in this application. It is only necessary to add that the applicant, and the interested parties did not savour their prosecution in a matter or matters in respect of which according to the submissions of Mr Munge,

learned counsel for the applicant who was and indeed largely the interested parties were, not the responsibility of either the applicant or the interested parties. So they brought this application seeking the orders first above set out.

Findings

[**12.**] The charges were brought under section 118 and 120 of the Public Health Act Chapter 242 of the Laws of Kenya. The required notice in respect of waste water was not given. Instead the applicants are charged with discharging of raw sewage which is contaminated into river Kiserian through laid down underground pipes. The provision of section 119 and 121 has not been complied with and in particular.

(a) No proper notice in terms of the Act.

(b) The notice given did not stipulate the time within which the requirements of the notice were to be met.

(c) The summons to show cause was not issued as per the provisions of the Act.

As a result we find that as due process was not adhered to the charges are not valid in law and an order of *certiorari* and prohibition must forthwith issue to quash the charges and the proceedings and to prohibit the charges on similar facts as prayed for in the application.

In view of the unchallenged evidence that all the property owners had built septic tanks and that the real issue is the disposal of waste matter charging the 23 applicants with the discharge of sewerage was arbitrary and oppressive. Moreover in view of the fact that the property owners are about 100 in number the selection of the 23 accused persons was not based on any objective criteria nor can it be said to have been reasonable in the circumstances. All the property owners should have been charged with the correct offences under the relevant law. The law does not permit discrimination either of itself or in its effect.

[**13.**] Under section 82(3) of the Constitution of Kenya, 'discriminatory' means

> affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

[**14.**] *Blacks Law Dictionary* (11th ed) defines 'discrimination' as under:

> Discrimination: In constitutional law the effect of a statute or established practice which confers particular privileges on a class arbitrarily selected from a large number of persons, all of whom stand in the same relation to the privileges granted and between them and those not favoured no reasonable distinction can be found.

[**15.**] 'Unfair treatment or denial of normal privileges to persons because of their race, age, sex, nationality or religion. A failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.' *Baker v California Land Title Company* DC CAL 349 F Supp 235, 238, 239.

[**16.**] This being a matter concerning health and environment the public health officials should have taken a broad view of the matter because at the end of the day it will take all the property owners and residents including the Local Authority, Water Ministry (Water Services Board) to solve the problem. Picking on a few in an arbitrary manner is in our view discriminatory and the charges framed cannot stand on this ground as well. The applicants have been discriminated due to their local connection.

[**17.**] Section 82(1) the Constitution provides that no law shall make provision that is discriminatory either of itself or in its effect. Section 82(2): discrimination in the performance of the functions of a public officer or public authority is prohibited.

[**18.**] The Court is also concerned with the disclosure that the area earmarked for the construction of sewerage treatment works is said to have been acquired for private use. Under the relevant law ie the Public Health Act and Water Act the responsibility falls squarely on the Olkejuado County Council and the appropriate Water Services Board and not on the individual owner of the plot to construct the treatment works. Since the digging of pits to contain waste water cannot be done we consider that under the Constitution this Court having found the two government agencies responsible has the power under section 84(2) under which the application was brought to issue an order of *mandamus* to compel both the Olkejuado County Council and the Ministry of Water (through the relevant Water Services Board to perform their duties as required under the applicable acts in each case. Orders of *mandamus* shall therefore issue to each of the authorities accordingly.

[**19.**] It has been contended by the applicants that they cannot comply with the health requirements concerning the waste water and that the cost of having treatment works in their respective plots would be out of reach of the individual property owners — and that the costs would be prohibitive. We have been unable to accept this argument firstly because sustainable development has a cost element which must be met by the developers and secondly because they have not stated that they have thought of other alternatives which could be more environmentally friendly to deal with the problem. For example the exhauster service could be tried and the property owners could pool their resources to address the problem on an interim basis pending the establishment of the sewerage treatment works as set out above. Going by the hydrologist expert report concerning the fact that the entire town sits on a water table it is our

view that the alternative to contain the problem in the short term should be explored and NEMA is called upon to assist in coming up with viable and sustainable alternatives in the short term including making appropriate restoration orders under section 108 of the Environment Management and Coordination Act, 1999 (EMCA).

[**20.**] The argument by the applicants' counsel that because some of the properties were built over 30 years ago they should not have been charged with offences on the principles established under *Githunguri II* case is not sound in law. Our finding on this however is that much as we salute the principles enunciated in the case concerning the reasonableness of bringing charges after nine years, we do not think that they apply in all the circumstances and in particular to this case because nuisance can by its very nature have a silent continuing effect – say with effluent percolating slowly into the water table and polluting the same without being detected and also because it has repetitive nature – one could comply this year or moment pursuant to the notices and repeat the same the following year.

[**21.**] Moreover as regards environmental offences the task of restoration could take the same period which the degradation took or more. Further in terms of ascertaining which property owner is causing greater pollution to the water table below or to the Kiserian River, it is very difficult for the authorities to identify or pinpoint a particular property owner as the greatest polluter and apportion blame because causation in this regard might be beyond the relevant authorities ability to scientifically apportion the blame and prosecute on this basis. Yet it is absolutely necessary for the relevant authorities to have taken the precautionary measures they took in identifying the problem and charging the 'culprits' although as we have found above they did not adhere to the due process. We do urge that the same precautionary measures continue to be taken but adhering to the due process whether in enforcing the provisions of the Public Health Act, the Water Act of 2002 or the EMCA.

[**22.**] Finally we are concerned that the quashing and prohibition of the preferred charges might lead the applicants to the erroneous conclusion that they have won and that they need not do anything further. Nothing could be further from the truth for the reasons appearing herein after.

[**23.**] As regards relief we decline to give the declarations sought except any declarations or findings and holdings as above and the specific orders we have given on the vital grounds as set out in the entire judgment.

[**24.**] The court is concerned that if the Kiserian Township is located literally on a water table and the structural developments have been approved by the relevant authorities and the accused persons are emptying effluent including solid waste into the Kiserian River, the

matter raises very serious environmental issues and challenges. We are told that the Kiserian River is used by other persons including their livestock downstream and for this reason the issue of environmental justice looms large in this case. The people's right to a clean environment although a statutory right under section 3 of Environment Management and Co-ordination Act (EMCA) raw sewage or waste water does threaten the lives of the users of the water downstream wherever they are located along the river and it further poses a serious threat to the water table in terms of pollution.

[**25.**] As regards the township itself this Court is concerned on whether or not in the circumstances described the development is ecologically sustainable. If the property owners plead that they are helpless without a sewage plant because they sit on a shallow water table what environmental considerations come into play as regards the present and the future? We must confess that what was described to the court by counsel and going through the documents and reports exhibited the town is a ticking time bomb waiting to explode. We are also concerned that the situation described to us could be the position in many other towns in Kenya especially as regards uncoordinated approval of development and the absence of sewerage treatment works.

[**26.**] As a court we cannot therefore escape from touching on the law of sustainable development although counsel from both sides chose not to touch on it although it goes to the heart of the matter before us. This larger issue should be of great concern to us as a court for the following reasons:

> (1) Under section 71 of the Constitution all persons are entitled to the right to life. In our view the right of life is not just a matter of keeping body and soul together because in this modern age that right could be threatened by many things including the environment. The right to a clean environment is primary to all creatures including man, it is inherent from the act of creation, the recent restatement in the statutes and the Constitutions of the world notwithstanding.
>
> (2) Section 3 of EMCA demands that courts take into account certain universal principles when determining environment cases. Apart from the EMCA it is our view that the principles set out in section 3 do constitute part of international customary law and the courts ought to take cognisance of them in all the relevant situations. Section 3 reads:
>
> 3(1) Every person in Kenya is entitled to a clean and healthy environment and has the duty to safeguard and enhance the environment. (2) The entitlement to a clean and healthy environment under subsection (1) includes the access by any person in Kenya to the various public elements or segments of the environmental for recreational, educational, healthy, spiritual and cultural purposes.
>
> (4) Provides for access to redress by the High Court – and the powers of the High Court are very widely set out. (5) Expands the standing to all persons provided the matter brought to court is not frivolous or vexatious or an abuse of the court process.
>
> (5) In exercising the jurisdiction conferred upon the Court under subsection 3, the High Court shall be guided by the following principles of sustainable development: (a) the principle of public participation in the development of policies, plans and processes for the management of

> the environment; (b) the cultural and social principles traditionally applied by any community in Kenya for the management of the environment or natural resources in so far as the same are relevant and are not repugnant to justice and morality or inconsistent with any written law; (c) the principle of international co-operation in the management of environmental resources shared by two or more states; (d) the principle of inter-generational equity; (e) the polluter pays principle; and (f) the precautionary principle.

[**25.**] The four principles which we consider directly relevant to the matter at hand are:

(1) Sustainable development;
(2) Precautionary principle;
(3) Polluter pays;
(4) Public trust (not spelt out in EMCA).

[**26.**] We shall shortly turn to each of the above principles when we consider the relevance and impact of each on the subject matter of this constitutional matter.

[**27.**] Klaus Topfer, the Executive Director of the United Nations Environment Programme (UNEP) which is in turn located in our great country, stated *inter alia* in his message to the UNEP Global Judges Programme 2005, in South Africa:

> The judiciary is also a crucial partner in promoting environmental governance, upholding the rule of law and in ensuring a fair balance between environmental, social and developmental consideration through its judgments and declarations.

Sustainable development

[**28.**] The Rio Declaration on Environment and Development 1992 adopted the following:

> In order to achieve sustainable development environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.

Precautionary principle

[**29.**] The Rio Declaration adopted this principle in these words:

> In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost – effective measures to prevent environmental degradation.

[**30.**] Under principle 16 the internationalisation of environmental costs and polluter pays principle was adopted as follows:

> National authorities should endeavour to promote the internationalisation of environmental costs and the use of economic instruments, taking into account the application that the polluter should in principle bear the cost of pollution with due regard to the public interest and without distorting international trade and investment.

Nothing summarises the concept of sustainable development better than the United Nations World Commission on Environment and Development (WCED) 1987 published report *Our Common Future* at

44: 'Development that meets the needs of the present without compromising the ability of future generations to meet their needs'.

Public trust

[**31.**] The essence of the public trust is that the state, as trustee, is under a fiduciary duty to deal with the trust property, being the common natural resources, in a manner that is in the interests of the general public. The best example of the application of the principle is in the Pakistan case of *General Secretary West Pakistan Salt Miners Labour Union v The Director of Industries and Mineral Development* 1994 s CMR 2061. The case involved residents who were concerned that salt mining in their area would result in the contamination of the local watercourse, reservoir and pipeline. The residents petitioned the Supreme Court of Pakistan to enforce their right to have clean and unpolluted water and filed their claim as a human rights case under article 184(1) of the Pakistan Constitution. The Supreme Court held that as article 9 of the Constitution provided that 'no person shall be deprived of life or liberty save in accordance with the law' the word 'life' should be given expansive definition, the right to have unpolluted water was a right to life itself.

[**32.**] In *Zia v Wapda Pld* [1994] SC 693 Justice Saleem Akhtar held as follows:

> The Constitution guarantees dignity of man and also right to 'life' under article 9 and if both are read together, question will arise whether a person can be said to have dignity of man if his right to life is below bare necessity line without proper food, clothing, shelter, education, healthcare, clean atmosphere and unpolluted environment.

[**33.**] The Court went on to establish a commission to supervise and report on the activities of the salt mining for the purpose of protecting the watercourse and reservoirs hence illustrating the public trust doctrine implicit in the decision.

Definition of life

[**34.**] Concise Oxford English Dictionary (11ed) defines life as under:

> The condition that distinguishes animals and plants from inorganic matter including the capacity for growth, functional activity and continual change preceding death – living things and their activity.

The Kenyan Constitutional provision on the right to life in section 71(1) of the Constitution states:

> No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence under the law of Kenya of which he has been convicted.

[**35.**] Whereas the literal meaning of life under section 71 means absence of physical elimination, the dictionary covers the activity of living. That activity takes place in some environment and therefore the denial of wholesome environment is a deprivation of life.

[**36.**] Although the point does not call for authoritative determination in this case, it has arisen to the extent that the court has found it necessary to compare the affected lives downstream Kiserian River with the economic activities of the Kiserian town developers in polluting their environment and therefore denying them of life. In balancing their rights we have found the two Pakistani authorities extremely persuasive.

[**37.**] We have added the dictionary meaning of life which gives life a wider meaning including its attachment to the environment. Thus a development that threatens life is not sustainable and ought to be halted. In environmental law life must have this expanded meaning as a matter of necessity.

[**38.**] The UN Conference on the Human Environment 1972 that is the seminal Stockholm Declaration noted that the environment was 'essential to the enjoyment of basic human rights — even the right to life itself'. Principle one asserts that:

> Man has the fundamental right to freedom, equality and adequate conditions of life; in an environment of a quality that permits a life of dignity and well-being.

Closer home, article 24 of the African Charter of Human and Peoples' Rights 1981 provided as under:

> All people shall have the right to a general satisfactory environment favourable to their development.

[**39.**] Finally the UN Conference on Environment and Development in 1992 – ie the Rio Declaration principle 1 has a declaration in these terms:

> Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.

[**40.**] It is quite evident from perusing the most important international instruments on the environment that the word life and the environment are inseparable and the word life means much more than keeping body and soul together. The orders we make in this case under section 84(1) are clearly intended to secure the right to life in the environmental context and the court is not limited in terms of the orders it can make under section 84(2).

Summary of remedies

Statutory remedies and the public trust

[**41.**] We accept the applicant's counsel argument that the responsibility to provide a safe sewerage treatment works under the Water Act and the Local Government Act respectively falls on the Water Ministry (ie relevant Water Services Board) and the County Council under which the township falls. There is mention of a treatment site having been identified and subsequently suspiciously acquired for private use. To this we find that both the Ministry of

Water and the Olkejuado County Council are under statutory duties to find a suitable site for the sewage treatment work for the township. The idea of the Council having been constitutionally mandated to handle trust land and also having the responsibility to deal with matters of public health in its jurisdiction places the Council in a position of public trust to manage the land resources in the township so as to ensure that adequate land is available for treatment works. We further declare that the government itself is both under a statutory obligation by virtue of the Water Act the Local Government Act and the Environment Management and Co-ordination Act and also under a public trust to provide adequate land for the establishment of treatment works. We further declare that both the government through the Water Ministry and under the Local Government Act is under a statutory obligation to establish the necessary treatment works and since the development of the township has been going on with government and the Local County Council approval and since the development poses a threat to life we order that a *mandamus* issues under section 84 of the Constitution to compel them to establish and maintain the treatment works.

[**42.**] In the case of land resources, forests, wetlands and waterways to give some examples the government and its agencies are under a public trust to manage them in a way that maintains a proper balance between the economic benefits of development with the needs of a clean environment.

Sustainable development

[**43.**] The government through the relevant ministries is under the law under an obligation to approve sustainable development and nothing more, which is development that meets the needs of the present generation without compromising the ability of future generations to meet their needs. To this end no further development in the township should be undertaken without satisfying all the environmental and health requirements. If septic tanks cannot provide an acceptable alternative in the short-term the alternative of exhauster services should be considered and enforced pending the establishment of the treatment works. We would recommend that the National Environmental Management Authority (NEMA) should immediately move in and come up with a Development Management Plan to tackle both the past and the future for the township, but for now no development should be sanctioned without NEMA's approval. On restoration NEMA should consider invoking section 108 of EMCA.

[**44.**] As regards the argument that the cost of environmental restoration including exhauster service would be beyond the owners of the properties we find this unacceptable to the court because there is no price for the lives of people downstream whose lives are endangered by the pollution from the property developers and

residents of the township. On this point we order the relevant authorities to apply the 'polluter pays principle' and cause them to pay for this including any viable alternatives. It must not be forgotten that the state of affairs as described to us is a health threat to the town dwellers as well.

[**45.**] As a long term measure the government should consider applying the principle in all townships so that the price of the development is increased to reflect the additional cost of establishing and maintaining proper treatment works. Development should be made to meet the cost of pollution which the development causes. Indeed this would be in line with the other principle of coming up with a policy of costing and pricing so as to maintain sustainable development.

[**46.**] As regards environmental justice as applied by the public health officials we recommend that the requirement of a septic tank be applied to all owners of the properties across the board, including any other acceptable alternatives. The same standard should be applied to all the developers and residents where applicable. This would achieve some inter-generational equity for the benefit of future residents, fauna and flora of the Kiserian area.

[**47.**] Given that the township sits on a water-table we consider that the environmental damage which is likely to result is immense and for this reason we do urge the relevant ministries and lead agencies as identified above to seriously reflect on the situation and come up with both short term and long-term scientific solutions to what appears a monumental problem. For now the fact that this Court was not told of any death of livestock or persons downstream Kiserian River is no reason for the government and the lead agencies including NEMA not to exercise maximum caution in approving any future development including stopping further development until the facilities are in place. Instead this is a case where they should put an end to further development and also deal with the existing development. They should apply section 3 of EMCA and especially the precautionary principle in halting further development. At this time and age no development is valid which cannot answer the requirements of sustainable development. As and when a plan of action is put in place as recommended it will be quite apparent to the policy makers and implementers that the Kiserian township time-bomb brings into play nearly all the major principles known to the world today — from the Stockholm Declaration to Rio and more recently in Johannesburg as indicated above. Indeed the act of balancing the rights of the Kiserian town developers with those of their brethren living along downstream Kiserian River does involve the application of the principle intragenerational equity or environmental justice. Intragenerational equity involves equality within the present generation, such that each member has an equal

right to access the earth's natural and cultural resources. In our view this includes the balancing of the economic rights of the town dwellers with the rights of the down-stream dwellers to use unpolluted water. If the balance is achieved the chances of achieving inter-generational equity shall have been enhanced.

[**48.**] Looking at the same problem from another level if the development of the township is slowly causing an irreversible damage to the water table and the adjoining Kiserian river which is believed to be a tributary of the even bigger river, the Athi River, the need to formulate and maintain ecologically sustainable development that does not interfere with the sustenance, viability and the quality of the water table and the quality of the river waters as described above does in our view also give rise to the equally important principle of inter-generational equity because the water table and the river courses affected are held in trust by the present generation for the future generations. Yes, the inter-generational equity obligates the present generation to ensure that health; diversity and productivity of natural resources are maintained or enhanced for the benefit of future generations. We observe that water tables and clean rivers are for this and future generations. A well known writer on the subject E Brown Weiss, in her unique work 'On fairness to future generations' 1989 at 36–37 has defined the inter-generational principle in these memorable words which we endorse fully:

> The proposed theory of inter-generational equity postulates that all countries have in inter-generational obligation to future generations, as a class, regardless of nationality ... There is increasing recognition that while we may be able to maximise the welfare of a few immediate successors, we will be able to do so only at the expense of our more remote descendants, who will inherit a despoiled nature and environment. Our planet is finite, and we are becoming increasingly inter-independent in using it. Our rapid technological growth ensures that this dependence will increase. Thus our concern for our own country must, as we extend our concerns into longer time horizons and broader geographical scales, focus on protecting the planetary quality of our natural and cultural environment. This means that, even to protect our own future nationals, we must co-operate in the conservation of natural and cultural resources for all future generations.

Environmental crimes

[**49.**] As is clear from the above we did quash and prohibit the charging of the applicants and the interested parties for the offences as described for both technical and constitutional reasons. However in view of the importance of the subject we felt privileged to travel the extra mile to demonstrate that in the circumstances presented to us, there are no winners or losers. Instead all the parties should look at the situation afresh and take this judgment as a challenge to both applicants and respondents. Environmental crimes under the Water Act, Public Health Act and EMCA cover the entire range of liability including strict liability and absolute liability and ought to be severely

punished because the challenge of the restoration of the environment has to be tackled from all sides and by every man and woman.

The challenge

[**50.**] Although E Brown Weiss has aptly described the challenge perhaps it is important for our generation not to ask for a sign before joining in this great fight for environmental justice. The reason for this is that this generation can never have the excuse of lacking in inspiration. It will be recalled that it is our generation that wholly depended on river water for home consumption and for livestock, water pipes and taps were invented in our lifetime but had not reached us. Our rivers had quality water that sustained all generations. Then came the tapped water with the cleansing power of chlorine — finally the water pipes and taps reached some of us — they still have not reached many and the majority of our brothers and sisters. It is our generation again which now says that you take tap water at your own risk — to be on the safe side take 'bottled water' yet it is a fact that only a chosen few have access to this new invention! What went wrong before our own eyes! In the name of environmental justice water was given to us by the Creator and in whatever form it should never ever be the privilege of a few — the same applies to the right to a clean environment.

[**51.**] Thus our inspiration to take up the challenge should spring from the fact that our generation has perhaps witnessed the greatest degradation of the environment more than any other past generation as clearly depicted by the bottled water phenomenon described above – we have witnessed the greatest and steepest drift from Grace (call it the Garden of Eden if you may) to the bottled water type of environment! We were created for greater things and no effort should be spared in restoring the lost Grace.

Conclusion

[**52.**] For the above reasons orders of *certiorari* and prohibition shall forthwith issue as prayed and the proceedings in the lower court in Kibera criminal cases 6398 of 2003 and 6399 of 2003 are hereby brought to this Court and the charges quashed and we further reiterate that an order of *mandamus* shall immediately issue to compel the Ministry of Water — ie the Nairobi Water Services Board and the Olkejuado County Council to construct Sewerage Treatment Works. In this regard it is noted that the Republic is a party to these proceedings via the Attorney General and the appropriate treatment works must be installed within a reasonable time and for this purpose there shall be liberty to apply. We further order that a copy of this judgment be served by the applicant on the Ministry of Water, Ministry of Local Government, Olkejuado County Council, NEMA, the Attorney General's office and whatever Ministry is concerned with

physical planning. NEMA is also urged to consider making such restoration order as may be appropriate in the circumstance. Finally as this matter came to us as a reference, the lower court is ordered to terminate the proceedings in Kibera criminal cases 6398 of 2003 and 6399 of 2003 forthwith in terms of this judgment.

[**53.**] As this is a matter of public interest, each party shall bear its own costs.

It is so ordered.

NAMIBIA

Luboya and Another v State

(2007) AHRLR 165 (NaSC 2007)

Tshimanya Williamson Luboya and Muhamad Ilyas Waheed v The State

Supreme Court of Namibia, case SA 27/2003, 3 May 2007
Judges: Maritz, O'Linn, Chomba

Procedure to be followed when deciding whether to grant legal aid or not

Equality, non-discrimination (discrimination on the grounds of nationality, 18, 19)
Fair trial (denial of legal aid, 21, 22, 24, 25, 35, 45, 47; right to be heard, 24, 25; defence, access to legal counsel, 42, 47)

[**1.**] The two foreign nationals, namely Tshimanya Williamson Luboya and Muhamad Ilyas Waheed, were arraigned on three counts of fraud and in the alternative three counts of theft. Luboya is a Congolese of the Democratic Republic of the Congo but is resident in the Republic of South Africa and at the time of his trial he held the latter country's passport. Waheed is a Pakistani national. The two were initially charged with three other persons, but were later tried separately from those other co-accused. The charges against them were as follows:

> Count 1: Theft
>
> In that between 20 and 27 July 2000 at or near Gobabis, the accused did wrongfully, unlawfully and falsely and with intent to defraud give out and pretend to the Telecom Namibia and/or E Kazongominya and/or Chris Nguapia that:
>
> - they were *bona fide* businessmen; and
> - that they needed telephone lines and an office to use in the course of their business;
> - and they intended to pay all the accounts for calls made by them.
>
> AND did there and then by means of the said false pretence and to the actual or potential loss or prejudice of Telecom Namibia and/or E Kazongominya and/or Chris Nguapia, induce the said E Kazongominya and/or Chris Nguapia to:
>
> - believe some or all these misrepresentations; and/or

- apply to Telecom Namibia for telephone lines in the name of Kalahari Communications, to be installed at Erf 133 Epako, the property or under the control of Chris Nguapia; and/or

- to make the said telephone lines with the account number 0103791227, installed at Erf 133, Epaku, in the name of Kalahari Communications and for the account of Chris Nguapia, available to them (ie the accused).

AND did there and then by means of the said false pretence and to the actual or potential loss or prejudice of Telecom Namibia and/or E Kazongominya and/or Chris Nguapia, induce the said Telecom Namibia to

- believe some or all these misrepresentations; and/or

- provide the accused and/or Chris Nguapia, who acted on their behalf and/or at their request, with telephone lines with the account number 0103791227 in the name of Kalahari Communications installed at Erf 133 Epako, Gobabis; and/or

- allow the accused to use the said installed telephone lines to make calls from the said telephone lines to the amount of N$549,727.62.

WHEREAS in truth and in fact the accused when they so gave out and pretended as aforesaid well knew that

- they were not *bona fide* businessmen;

- they did not intend to use the telephone lines in the course of ordinary practices; and/or

- they had no intention to pay the accounts

BUT that they used the telephone lines to sell calls to other people, both in, and outside Namibia; and that they vacated the premises where the lines were installed without settling the account

AND thus the accused are guilty of the crime of fraud.

ALTERNATIVELY

That the accused are guilty of the crime of theft.

In that between 20 and 27 July 2000, at or near Gobabis in the District of Gobabis the accused did wrongfully and unlawfully steal the amount of N$549,727.62 the property of or in the lawful possession of the Telecom Namibia and/or Chris Nguapia.

[**2.**] On the second count the particulars supporting the charge were similar to those constituting the first count, save for the following details, namely:

(i) The persons to whom the accused were alleged to have falsely made the wrongful and unlawful pretences were named as E Kazongominya and/or Gerson Nunuhe.

(ii) The telephone lines were allegedly to be installed at Erf BM21/16 GOBABIS, the property or under the control of the said E Kazongominya.

(iii) The account number allocated for the telephone transactions was number 103169801 in the name of Gerson Nunube.

(iv) The amount with which the said account was debited for the telephones made and out of which Telecom Namibia was allegedly defrauded was N$657,463.47.

[**3.**] In the alternative charge to the second count the amount allegedly stolen was said to be N$657,463.47.

[**4.**] Again on the third count, the offence charged was fraud with virtually similar particulars save that:

(i) The offence was alleged to have been committed between 4 and 31 July 2000.

(ii) The district in which the offence was allegedly committed was Windhoek.

(iii) The pretence was in the first place allegedly made to Telecom Namibia and alternatively to Anna M Ingwafa.

(iv) The telephone lines were allegedly to be installed at 11 Pullman Street, Windhoek North.

(v) The amount out of which Telecom Namibia was allegedly defrauded was N$45,904.30.

[**5.**] And the amount stolen in respect of the third alternative count was accordingly alleged to be N$45,904.30.

[**6.**] The cumulative alternative count to counts 1 to 3 alleged theft of a total amount of N$1,253,095.39, the property or in the lawful possession of Telecom Namibia and/or Gerson Nunube and/or Chris Nguapia and/or Anna M Ingwafa.

[**7.**] The appellants pleaded not guilty to all the charges and consequently stood trial which covered a period commencing from 28 May 2001 and ended on 29 October 2001, when judgment was delivered. They were convicted as charged on counts 1 and 2 and were later sentenced to 12 years imprisonment each.

[**8.**] The appellants were initially both represented by legal counsel during the pre-trial proceedings, but their counsel later withdrew from the case because they were not assured of payment of their professional fees.

[**9.**] For reasons which will be apparent as this judgment develops, I do not intend to review all the evidence given by the state witnesses, but it suffices to mention that this appeal constitutes a case record covering eleven (11) volumes; there were ten (10) state witnesses who gave evidence; and 32 documents were produced as part of the state's case.

[**10.**] The following appears in the first volume of the appeal record as the summary of substantial facts of the case against the appellants:

Counts 1 and 2

The accused are all foreigners. During June 2000 the accused approached Ephath Kazongominya and Anna M Ingwafa in Windhoek.

Through Kazongominya they made contact with Gerson Nunuhe and Chris Nguapia in Gobabis. The accused convinced the latter to apply for telephone lines in their own names. Three telephone lines were installed at Kazongominya's house, Erf BM21/16, Gobabis in the name of Gerson Nunuhe and four telephone lines were installed in the name of Kalahari Communications at Erf 133 Epako. Gobabis, the property of the said Chris Nguapia.

The accused operated on these lines fraudulently selling telephone calls to third parties. The accused built up accounts of N$657,463.47 and N$549,727.62 respectively before they vacated the premises without paying the accounts.

Count 3

During June, 2000 the accused approached Anna M Ingwafa, a student at the Vocational Training Centre, Windhoek, in Windhoek.

The accused convinced Anna M Ingwafa to rent a house for them and to apply for telephone lines in her name. She rented a house at Pullman Street 11, Windhoek North. Two telephones were installed at Pullman Street 11, Windhoek North in the name of Anna M Ingwafa.

The accused operated these lines, fraudulently selling telephone calls to third parties. The accused built up accounts of N$45,904.30. On 8 August members of Telecom Namibia and the Police went to 11, Pullman Street, Windhoek North. They found the accused 2, 3, 4 and 5 at the premises and arrested them. Accused 1 was arrested later (that) day while negotiating with Telecom Namibia for additional lines at other premises.

[**11.**] The first and second appellants in this court were the ones referred to in the court *a quo* as accused 1 and 5 respectively.

[**12.**] Needless to mention that the actual evidence given by the state witnesses was by far more extensive and detailed than the summary of substantial facts set out above. That evidence disclosed quite an intricate *modus operandi* which was said to have culminated in the sale of telephone calls internationally as well as locally. Some of the payments alleged to have been made for the calls were received in Namibia from as far afield as the Middle East and Pakistan, according to the evidence. The particular *modus operandi* the appellants were alleged to have employed was given the tag of 'Pakistan Fraudulent Scheme'. The state witness who gave that tag was Gideon Shivuka Iiyambo, an assistant administrator at Telecom Namibia, Traffic, Quality and Fraud Centre.

[**13.**] Mr Iiyambo's evidence was technically intricate and lengthy. However, it boiled down to the following. A foreigner coming to Namibia with the intent to operate the Pakistani Fraud Scheme would recruit Namibians to apply for telephone lines instead of doing so himself. This is because it is far cheaper for a local person to acquire the service from Telecom Namibia than it is for a foreigner. Once set up, the scheme facilitated a Namibian based fraudulent telephone operative to work in cahoots with a co-conspirator in the scheme based in, say Saudi Arabia. The Saudi based person would provide international telephone calls to customers in that country using the telephone fraudulently obtained in Namibia. The customers would pay for the service provided and the Saudi operative would subsequently remunerate the Namibian based counter-part but all the money so paid was pocketed by the latter and nothing went to Telecom Namibia. Before Telecom Namibia could bill the operative the latter would clandestinely vacate the premises operated from, thus leaving unpaid bills. Mr Iiyambo, who investigated the frauds, was able to trace initially the Namibian fronts used in the scheme and it was through those Namibian fronts that the appellants were traced and subsequently arrested and charged as earlier stated.

[**14.**] Answering to the prosecutor's question if there was anything else of relevance that he wished to inform the court about, state witness Iiyambo testified as follows:

> Just telling the court that this is an international scam; it is being done everywhere in any country; you don't need to be there in that particular country sometimes to run it, you can just establish it, go to another country and employ people who can also do the services for you. Like in some countries they employ the local people to do the services for them while they go to another country. They come to Namibia, they put up the whole thing, make the whole set up, go to South Africa, live in South Africa and these people here send them money by means, they normally use *modus operandi* they use the Western Union transfer or post offices depending on what facilities are available for them to transfer the money and pay the local people through any of the other institution and he receives his money from the other operators around the world while he is in the first country. That is also the way how they do it, how they operate the whole thing (see 210, 211, volume 2).

[**15.**] As already noted in this judgment, the appellants were convicted on the first and second counts and were then sentenced to a total of 12 years imprisonment each. Being dissatisfied with their fate they both applied to the judge *a quo* for leave to appeal, but their applications were refused. However, this court granted them leave to appeal against conviction only on both counts.

Grounds of appeal

[**16.**] No formal grounds of appeal were submitted on both appellants' behalf, but advocate Jan Strydom, who appeared as an *amicus curiae* on their behalf prepared and submitted detailed and substantial heads of arguments. These comprised arguments on the merits as to facts and arguments as to merits on the law. I shall confine this judgment to the latter arguments, the grounds as to merits on the law.

[**17.**] In essence the arguments were to the effect that the appellants did not have a fair trial in that they were not legally represented and that they were denied legal aid. As to the latter aspect relating to legal aid, the argument was that the denial was based on their foreign origin since they were not Namibians. It was argued that such a basis was discriminatory since by article 10(1) of the Constitution of the Republic of Namibia equality before the law was an entrenched right. An extension to that argument was that the Director of Legal Aid in the Department of Legal Aid infringed the provisions of the Constitution when he failed to assign any reasons at all for this refusal to grant legal aid to the appellants.

Merits as to the law — fair trial

Legal aid *vis-à-vis* foreign nationality

[**18.**] The argument that legal aid was withheld from the appellants on the ground of their foreign origin can be disposed of easily and briefly. The record shows that at one stage when the issue of legal aid was raised the following dialogue occurred:

> Court (to the present first appellant):
>
> Were you informed of the legal aid?
>
> Accused 1: No.
>
> Court: You were not informed?
>
> Accused 1: No
>
> Court: Is there anybody from legal aid?
>
> Potgieter (Public prosecutor): My Lord Mr Windstaan is present. Allow me My Lord to point out that according to our information all the remaining accused are foreigners and as such I submit they do not qualify for legal aid.
>
> Court: They do not?
>
> Potgieter: In my understanding it can perhaps just be confirmed.
>
> Court: The law makes a discrimination in that regard.
>
> Potgieter: Mr Windstaan could you come nearer please, near the microphone? Do I understand that foreigners are not qualified for legal aid?
>
> Windstaan: No My Lord it's not actually our way or how our decision is, it depends on whether they have applied, which we really don't think they did so My Lord. Further we have already made our decision just on the indictment that we received from the office of the Prosecutor-General, we have decided not to grant legal aid to all the accused.

[**19.**] What Mr Windstaan said, in effect, was that it was not the practice of the Legal Aid Directorate to deny an accused person legal aid on account of being a foreigner. That indeed was and continues to be the legal position. A close scrutiny of the provisions of the Legal Aid Act 29 of 1990 (the Legal Aid Act) shows that there is no discrimination based on nationality in the granting of legal aid. The sole criterion is one's indigence as regards the ability to engage a legal practitioner to represent one in criminal or civil trials.

[**20.**] There was therefore no substance in the appellants' argument that they were discriminated against on account of their foreign origin or that the state agency responsible for granting legal aid breached article 10(1) of the Constitution concerning equality before the law.

Refusal to grant legal aid

[**21.**] As we have seen from the preceding abstract of the appeal record, although the appellants did not apply for legal aid – they did not know about their right to apply for legal aid – it is evident that the Prosecutor-General's office did refer the indictment against the appellants to the Legal Aid Department. The Director of the Legal Aid

(the Director), according to Mr Windstaan's explanation at the pre-trial hearing, thereupon made a decision denying the appellants legal aid. He gave no reason for his decision, and Mr Windstaan said that under the enabling statute the Director was not obliged to give any reasons for his refusal to grant legal aid.

[**22.**] In the first place the Legal Aid Act does not contain any provision stating, as Mr Windstaan erroneously stated, that the Director is not obliged to give any reasons for refusing to grand legal aid. In so asserting Mr Windstaan was relying on a figment of his own imagination. Furthermore, this court has repeatedly stated that when public officials and administrative bodies are charged with the responsibility of making decisions which may adversely affect members of the public, they are in the first place required to comply with the *audi alterem partem* rule, thereby enabling the affected member of the public to be heard on the matter before the decision is made. See for example our unanimous judgment in the case of the *Minister of Health and Social Services v Eberhard Wolfgang Lisse*, appeal case SA 23/2004 (unreported). Our *ratio decidendi* is based on the interpretation of article 18 of the Constitution which provides as follows:

> Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials, by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent court or tribunal.

[**23.**] The dictum of O'Linn, J, as he then was, in the case of *Aonin Fishing v Minister of Fishing and Marine Resources,* 1998 NR 147 (HC) 150G was to the like effect. He said:

> There can be no doubt that article 18 of the Constitution of Namibia pertaining to administrative justice requires not only reasonable and fair decisions based on reasonable grounds, but fair procedures which are transparent.

[**24.**] In the present case the refusal to grant legal aid was made without the appellants even knowing that their fate regarding access to such aid was being considered to their detriment. Additionally no reasons for the decision were disclosed to them. Such exercise of public duty did not measure up to the requirement of the common law and did not accord with the precept of transparency required by article 18 of the Constitution. Transparency encapsulates the application of the *audi alterem partem* rule.

[**25.**] It is my considered view that the Director failed to comply with the requirements of article 18 of the Constitution. In particular, he failed to abide by the requirement to hear the appellants before deciding to deny them legal aid. Better still, and although he was not obliged under the law to do so, he should have given reasons for not granting them legal aid. Had he done so he might have forestalled the speculation which was aired by the appellants' counsel that they were denied legal aid because they were foreigners. We have seen that

article 18, *ibid*, provides that 'persons aggrieved by the exercise of such acts and decisions have the right to seek redress before a court or tribunal'. By necessary implication this means that the duty imposed on public officials and administrative bodies is owed to all persons for the time being resident in Namibia irrespective of their nationality.

Legal representation

[**26.**] At the expense of repetition I must say that the appellants did not have legal representation during the critical part of their ordeal, the trial: they were legally represented only at the pre-trial stage. At that stage they used their respective resources in putting their counsel in funds. However, when their resources ran dry the legal representatives they had boasted of during the pre-trial stage withdrew.

[**27.**] The record of appeal shows that in the wake of their loss of legal representation each appellant applied for bail so that once outside prison custody they could contact their relatives in their countries of origin to seek financial assistance from them. However, bail was refused. The reasons for so denying them bail were, understandably, cogent and to be expected: the appellants being foreigners had no residential basis in Namibia, nor friends or relatives here who could have paid bail money on their behalf. Granted that in the light of their unsuccessful bids to secure bail each one said initially that they would conduct their own defence, but in due course when they realised the gravity of the charges they were facing, they said that they did after all need to be legally represented. That notwithstanding the Judge *a quo* in the end allowed the appellants to stand trial without legal representation.

[**28.**] I have already observed that the charges the appellants faced in this case were serious and technically intricate; they were also prolix. Furthermore, the appellants faced the prospect of heavy custodial sentences if they should be convicted. The learned trial judge was alive to these daunting considerations. In his ruling on the appellants' applications for bail the judge stated, *inter alia*, the following:

> ... the Court as I have said earlier also has a discretion to refuse bail even where a court is satisfied that an accused person will stand his or her trial, but I will not even, at this stage, consider that option open to the court because I'm satisfied at this stage that it is highly unlikely that the accused persons, taking into account their particular circumstances, *the fact that they are faced with very serious offences, that if they should at the end of the trial be convicted they would face a long-term imprisonment*, that they would not stand trial should the court grant them bail (emphasis added).

[**29.**] Having been alive to the fact that the appellants faced serious offences and that in the event of a conviction they could face long-term imprisonment, was the learned judge right in not availing to

them the opportunity to secure legal aid and thereby allowing them to go through the lengthy trial without legal representation?

[**30.**] Ms Jacobs, counsel who represented the state in the appeal before us, impliedly gave an affirmative answer to the foregoing question because she staunchly defended the appellants' convictions. In doing so and thereby gainsaying the contention relied on by Mr Strydom, their legal counsel, that their trial was not a fair one, she averred that the appellants conducted their defence in a manner showing that they were equal to their task. She particularly asserted that the appellants evinced competence in the cross-examination of state witnesses.

[**31.**] Ms Jacobs, moreover, further contended, as I understood her, that there was no obligation on the part of the state to grant legal aid to the appellants as a matter of law or even in constitutional terms. In pursuing that line of argument, she prayed in her aid a number of decided cases. Among the authorities she cited was the case of *Nakani v Attorney-General* 1989 (3) SA 655 (Ck). Quoting from the dictum of Heath, J, who delivered the judgment in that case, Ms Jacobs said:

> Heath, J, concludes that the accused is entitled to legal representation requires nothing more than that the accused be aware of his rights and be given an opportunity to exercise them. If that is done and the Accused for lack of funds or any other reason, is unable to exercise his right to legal representation, he will simply have to bear the consequences, and no irregularity occurs if the trial proceeds without such representation.
>
> It is submitted that article 12(1)(e) of the Constitution and section 73(2) of the Criminal Procedure Act 51 of 1977 states no more than that an accused person enjoys the right to procure legal representation for himself and not that he has the right to be provided with representation that he wants, but is unable for lack of funds to procure.
>
> No rule of law, practice or procedure is transgressed should a court proceed with a trial in a matter both complex and serious after an Accused has sought and was given the opportunity, but lacked the means to obtain representation.

[**32.**] Ms Jacobs also embraced the cases of *S v Rudman and Another, S v Mthwana,* 1992 (1) SACR 70(A), from which she quoted the following passage:

> Legal aid is not obligatory in South Africa and there is no general right to legal aid. It may be granted on application. A person who cannot afford a lawyer may (in South Africa) apply for legal aid, he may approach other bodies for assistance, or he may even approach relatives, friends or a bank for money for a lawyer. To bring the options to an accused's attention is most desirable.
>
> There is not and at present cannot be a blanket right to have counsel (whether it be formal legal aid, voluntary legal assistance or a financial loan). In such circumstances, surely the failure to inform an accused of potential options (the word 'rights' is too loaded) to obtain legal assistance cannot normally be deemed a failure of such a nature that the proceedings should be set aside. In every case the time test should be whether substantive justice has been done. To elevate any of the requirements in issue in this case to the level of constitutional rights or such gross departure from the established Rules of Procedure that they

automatically void (or 'abort') the proceedings is unsound and the *Khanyile* and *Davids* requirements should be rejected.

[**33.**] The reference in the preceding quotation to 'the *Khanyile* and *Davids* requirements' is a reference to the case *of Khanyile & Another* 1988 (3) SA 795 (N), a case decided in the Natal Provincial Division in which it was held that in an instance where a trial without legal representation for an accused would be grossly unfair, the court should refuse to proceed with the trial until representation has been obtained through some agency (at 816 C – D). That ratio is now referred to as the '*Khanyile* rule' and it was followed in *S v Davids, S v Dladla* 1989 (4) SA 172(N). I shall deal with the *Khanyile* case presently but for the moment let me round off Ms Jacobs' submissions.

[**34.**] Having espoused the ratio in *Nakani, supra*, and *Rudman*, also *supra*, Ms Jacobs then, but oddly, also cited in support of her argument this Court's judgment in *The Government of the Republic of Namibia and two others v Mwilima and all other accused in the Caprivi Treason Trial* 2002 NR 235, (hereinafter *Mwilima*).

[**35.**] On a proper reading *Mwilima* cannot possibly advance the state's contention in the present case. That was a case in which *Mwilima* and his co-accused were arraigned on an indictment charging many serious offences including treason, murder, sedition, public violence and attempted murder. During the pre-trial period the accused collectively applied for legal aid but the state vehemently opposed the application. The matter was brought to the High Court by way of an urgent notice of motion. Three Judges *ex banc* heard the application and at the end of the day allowed the application. In doing so they, *inter alia*, made an order directing the Legal Aid Directorate to provide legal aid to the accused. The state, being aggrieved with the Court's order, appealed to this Court. In this Court the appeal was heard by a bench constituted by five Judges. In a land-mark leading judgment handed down by Strydom, CJ, a distinction was drawn between legal aid grantable under the Legal Aid Act 29 of 1990 as read with article 95(h) of the Constitution on one hand, and on the other, that which can be granted on a constitutional basis. The Chief Justice elaborated that legal aid of the former category can, in keeping with the directory principles of state policy enunciated by article 95(h), be granted only when the limitations of state financial resources so permitted, which presupposes that when such resources are not adequate or not available it cannot be granted. For the sake of clarity, I may mention that article 95(h) of the Constitution of Namibia, falling under Chapter eleven (11) relating to the Principles of State Policy, provides that:

> The state shall actively promote and maintain the welfare of the people by adopting, *inter alia*, the following:

A legal system seeking to promote justice on the basis of equal opportunity by providing free legal aid in defined cases with due regard to the resources of the state.

[**36.**] Article 101 which falls under the same chapter, provides to the effect that the principles of state policy shall not be justiciable. In short, therefore, this kind of legal aid which he termed as 'statutory legal aid', was discretionary.

[**37.**] The Chief Justice then proceeded to consider the combined effect of articles 5, 12(1) and 25(2), (3) and (4) of the Constitution insofar as they have a bearing on the issue of legal aid and in the context of legal representation. His erudite reasoning went as follows, starting from page 255 at letter D:

The Constitution is, in my opinion, clear as to whom must uphold the rights and freedoms set out in Chapter 3. Article 5, which is part of Chapter 3 of the Constitution, provides as follows:

Protection of Fundamental Rights and Freedoms

The fundamental rights and freedoms enshrined in this chapter shall be respected and upheld by the executive, legislature and judiciary and all organs of government and its agencies and, where applicable to them, by all natural and legal persons in Namibia and shall be enforceable by the courts in the manner hereinafter prescribed.

[**38.**] He went on:

Further elaboration of the powers of the court to enforce and protect the rights and freedoms (are) to be found in article 25. Sub-article (1) deals with the court's power in regard to legislative acts infringing upon such rights and freedoms whereas sub-articles (2), (3) and (4) are relevant to the present instance. They provide as follows:

'Article 25, Enforcement of Fundamental Rights and Freedoms.

(1) ...

(2) Aggrieved persons who claim that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened, shall be entitled to approach a competent court to enforce or protect such right or freedom, and may approach the Ombudsman to provide them with such legal assistance or advice as they require, and the Ombudsman shall have the discretion in response thereto to provide such legal assistance as he or she may consider expedient.

(3) Subject to the provisions of this Constitution, the court referred to in sub-article (2) hereof shall have powers to make all such orders as shall be necessary and appropriate to secure such applicants the enjoyment of such rights and freedoms conferred on them under the provisions of this Constitution should the court come to the conclusion that such rights or freedoms have been unlawfully denied or violated, or hat grounds exist for the protection of such rights or freedoms by interdict.

(4) The power of the court shall include the power to award monetary compensation in respect of any damage suffered by the aggrieved persons in consequence of such unlawful denial or violation of their fundamental rights and freedoms, where it considers such an award to be appropriate in the circumstances of particular cases.'

Article 5 clearly requires from the first respondent (sic) and all its agencies as well as from the judiciary to uphold the rights and freedoms set out in Chapter 3. Whereas the judiciary must uphold them in the enforcement thereof in their judgments, the first respondent (sic) and its agencies have the duty to ensure that they do not over-zealously infringe upon these rights and freedoms in their multifarious

interactions with the citizens and must further ensure the enjoyment of these rights and freedoms by the people of Namibia.

[**39.**] He then goes on to state at page 258, letter D:

> In Namibia, statutory legal aid is not a right *per se* because it is contained in the policy statement and is made subject to availability of resources. As such, it is available to all indigent persons who cannot afford to pay for legal representation provided that the funds and other resources are available. However, Article 12 guarantees to accused persons a fair hearing which is not qualified or limited and it follows, in my opinion, as a matter of course, that if the trial of an indigent accused is rendered unfair because he or she cannot afford legal representation, there would be an obligation on the first respondent (sic) to provide such legal aid.

[**40.**] The conclusion we arrived at in *Mwilima*, *supra*, is consonant with the decision of Didcott, J, in *Khanyile*, *supra*. The following passage is culled from page 803H-J of that decision:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard (through) counsel. Even the educated and intelligent layman has small and sometimes no skill in the science of law. If charged with crimes, he is incapable generally of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel, he may be put on trial without a proper charge and convicted upon incompetent evidence or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defence, even though he has a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant or those of feeble intellect.

[**41.**] It was in the *Khanyile* case in which it was held (as pointed out earlier herein) that where a trial without legal representation for an accused would be grossly unfair, the court should refuse to proceed with the trial until legal representation is secured.

[**42.**] Thus the decision in *Mwilima* cannot conceivably provide a leg on which the state can stand, as Ms Jacobs purported to show in her arguments. The dictum of Heath, J, in *Nakani*, *supra*, which Ms Jacobs purported to lean on does not also help her. That dictum is out of accord with the Constitution of Namibia. In terms of Heath, J's statement of the law on the point, all that the court is required to do is to inform the accused person of his or her right to seek legal aid of his or her choice and at his or her own expense. If, for lack of resources, he or she is unable to privately obtain legal assistance, and therefore he or she cannot secure legal representation, then, 'he will simply have to bear the consequences of such inability'. That statement goes against the grain of article 5 of the Namibian Constitution which imposes a duty on the judiciary to uphold the rights and freedoms of the individual as we have already seen herein before. That duty is two-pronged, namely:

(a) to respect and uphold the rights and freedoms; and
(b) to enforce the same.

[**43.**] The right to a fair trial is among those rights the judiciary, *inter alia*, is enjoined to respect and uphold. It is a right enshrined in article 12(1) which provides as follows:

> Article 12 – Fair trial
>
> (1)(a) In the determination of their civil rights and obligations or any criminal charges against them, all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court or Tribunal established by law; provided that such Court or Tribunal may exclude the press and/or the publication of all or any part of the trial for reasons of morals, the public order or national security, as is necessary in a democratic society.
>
> (b) A trial referred to in sub-article (a) hereof shall take place within a reasonable time, failing which the accused shall be released.
>
> (c) Judgments in criminal cases shall be given in public, except where the interest of juvenile persons or morals require.
>
> (d) All persons charged with an offence shall be presumed innocent until proven guilty according to law, after having had the opportunity of calling witnesses and cross-examining those called against them.
>
> (e) All persons shall be afforded adequate time and facilities for the preparation of their defence before the commencement of and during their trial and shall be entitled to be defended by a legal practitioner of their choice.
>
> (f) No persons shall be compelled to give testimony against themselves or their spouses, who shall include partners in a marriage by customary law, and no court shall admit in evidence against such persons testimony which has been obtained from such person in violation of Article 8(2)(b) hereof.

[**44.**] This court's decision in *Mwilima* was compliant with the duty imposed by article 5 of the Namibian Constitution. In the event if this court was to endorse the *ratio decidendi* in *Nakani* as espoused by Ms Jacobs, it would be negating its own decision in *Mwilima*. Under the doctrine of *stare decisis* this court is, as a general rule, bound by its earlier decisions. Therefore, as no persuasive contention has been submitted on the state's behalf, I find it inopportune at this moment, to depart from *Mwilima*. For that reason I do not agree with Ms Jacobs' argument based on the passage quoted from *S v Rudman and Another, S v Mthwana, supra*, to wit:

> To elevate any of the requirements in issue in this case to the level of Constitutional rights or such gross departure from the established Rules of Procedure that they automatically void (or 'abort') the proceedings is unsound and the *Khanyile and Davids* requirements should be rejected.

[**45.**] Reverting to the current case, it is my strongly held view that the interest of justice dictated that legal aid ought to have been granted to the appellants, which would have facilitated securement of legal representation for them. Instead legal aid was withheld from them and the Director of Legal Aid, according to Mr Windstaan, gave no reasons for his refusal to give legal aid as the Director, so Mr Windstaan said, was not obliged to do so.

[**46.**] I have already referred to article 18 of the Constitution which obliges administrative bodies and administrative officials to act fairly and reasonably, and to comply with the requirements imposed upon

them by the common law and any relevant legislation. I have also referred to article 5 which imposes on the executive, the legislative and judiciary a duty to respect and uphold the entrenched rights and freedoms of the individual. As a member of the executive the Director breached article 18 by his inaction or negative action in relation to granting legal aid to the appellants. He also failed to uphold the duty imposed upon him by the Constitution to uphold and respect the right of the appellants to constitutional legal aid as defined by Strydom, CJ in *Mwilima*, *supra*.

[**47.**] The court *a quo* equally failed to respect and uphold the appellants' rights. I have already shown herein that it was evident to the Judge *a quo* that the charges which the appellants were facing in the trial before him, were quite serious and that they faced a prospect of long-term imprisonment in the event of being convicted as charged. Yet he allowed the trial to proceed to conclusion without allowing the appellants an opportunity to seek legal aid as was done by the accused in the *Mwilima* case. Had the judge handled the case in that manner his action would have conformed with the *Khanyile* principle which, as I have earlier herein indicated, states that where a judge perceives that a trial without legal representation would be grossly unfair he or she should refuse to proceed with it until legal representation for the accused is secured. The failure by the judge to do so did, in my considered view, constitute a denial of the appellants' right to a fair trial which is guaranteed to them by article 12(1)(a) of the Namibian Constitution.

[**48.**] In the event I have come to the conclusion that the convictions of the appellants are unsafe and unsound; they are not only bad, but incurably bad. I would therefore uphold the appeal and in doing so I hereby make the following orders:

(1) The appeal is allowed;

(2) The appellants' convictions on both counts are quashed;

(3) The sentences of 12 years imprisonment imposed on them are set aside;

(4) I leave it open to the state to consider the question whether or not the appellants should be prosecuted anew;

(5) In the event that a new prosecution is to be undertaken, any sentences to be imposed if they are to be convicted shall take into account the periods already served pursuant to the sentences hereby set aside.

NIGERIA

Inspector-General of Police v All Nigeria Peoples Party and Others

(2007) AHRLR 179 (NgCA 2007)

Inspector-General of Police v All Nigeria Peoples Party, National Conscience Party, Peoples Redemption Party, National Democratic Party, Democratic Alternative, All Progressives Grand Alliance, Peoples Salvation Party, Nigerian Peoples Congress, Movement for Democracy and Justice, Communist Party of Nigeria

Court of Appeal of Nigeria in the Abuja Judicial Division, appeal no CA/A/193/M/05, 11 December 2007
Judges: Mohammad, Adekeye, Aboki
Extracts. Full text on www.chr.up.ac.za

Whether the requirement to obtain a police permit for holding a rally or procession violated the freedom of assembly

Interpretation (status of African Charter, 7, 37; relevance of foreign law, 15, 36; constitutional interpretation, 18, 19, 21; intention of the law maker, 20, 22; constitution to be interpreted as a whole, 29, 35; presumption that legislature does not intend to breach an international obligation, 37)
Expression (necessary for democracy, 12, 34)
Assembly (necessary for democracy, 12, 25, 34; permit not required, 16, 23, 25, 28, 31, 32, 35)
Limitations on rights (reasonably justifiable in a democratic society, 13, 23, 25, 27, 28, 33)
Constitutional supremacy (17, 35)

[**1.**] This is an appeal against the judgment of the Federal High Court Abuja delivered on 24 June 2005. The respondents before this court are twelve political parties registered in Nigeria. They commenced this suit by way of an originating summons dated 9 February 2004 as follows:

(1) Whether the police permit or any authority is required for holding a rally or procession in any part of the Federal Republic of Nigeria.

(2) Whether the provisions of the Public Order Act (Cap 382) Laws of the Federation of Nigeria 1990, which prohibit the holding of rallies or processions without a police permit are not illegal and unconstitutional

having regard to section 40 of the 1999 Constitution and article 11 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement Act (Cap 10) Laws of the Federation of Nigeria 1990.

[**2.**] The plaintiffs/respondents also claimed as follows:

(i) A declaration that the requirement of police permit or other authority for the holding of rallies or processions in Nigeria is illegal and unconstitutional as it violates section 40 of the 1999 Constitution and article 11 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act (Cap 10) laws of the Federation of Nigeria (1990).

(ii) A declaration that the provisions of the Public Order Act (Cap 382) Laws of the Federation of Nigeria 1990 which require police permit or any other authority for the holding of: rallies or processions in any part of Nigeria is illegal and unconstitutional as they contravene section 40 of the 1999 Constitution and article 7 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act (Cap 10) Laws of the Federation of Nigeria 1990.

(iii) A declaration that the defendant is not competent under the Public Order Act (Cap 382) Laws of the Federation of Nigeria 1990 or under any law whatsoever to issue or grant permit for the holding of raffles or processions in any part of Nigeria.

(iv) An order of perpetual injunction restraining the defendant whether by himself, his agents, privies and servants from further preventing the plaintiffs and other aggrieved citizens of Nigeria from organising or convening peaceful assemblies, meetings and rallies against unpopular government measures and policies.

...

[**3.**] I have painstakingly considered the submission of the learned counsel to both parties in this appeal. I am intrigued by the brilliant and elucidating submission of the learned counsel and especially that of the learned counsel for the respondents Mr Femi Falana on the core aspect of this appeal which by all means is the interpretation of sections 39 and 40 of the 1999 Constitution touching on the fundamental rights of the citizens of this country to freedom of expression and right to peaceful assembly and association and the application and the effect of the Public Order Act Cap 382 Laws of the Federation of Nigeria 1990 on same. This court appreciates the level of research put into the preparation of his brief particularly the opinion of courts on contemporary issues from other parts of the world. It is the conclusion of the lower court in the ruling now being challenged in this appeal that:

I hold the view that the Public Order Act does not only impose limitation on the right to assemble freely and associate with others, which right is guaranteed under section 40 of the 1999 constitution, it leaves unfettered the discretion on the whims of certain officials, including the police. The Public Order Act so far as it affects the right of citizens to assemble freely and associate with others, the sum of which is the right to hold rallies or processions or demonstration is an aberration to a democratic society, it is inconsistence with the provisions of the 1999 Constitution. The result is that it is void to the extent of its inconsistency with the provisions of the 1999 Constitution. In particular section 1(2),(3)(4)(5) and (6), 2, 3 and 4 are inconsistent with the fundamental rights provisions in the 1999 Constitution and to the extent of their inconsistency they are void — I hereby so declare.

The court proceeded to answer the first question raised in the originating summons in the affirmative and the second question in the negative and accordingly granted all the reliefs claimed by the plaintiffs/respondents.

Issue number 1

Whether in view of section 45(1) of the 1999 Constitution the provisions of the Public Order Act are not inconsistent with the said 1999 Constitution.

[**4.**] As rightly observed by the learned counsel to the appellant this issue seeks to determine the validity of the Public Order Act against the background of the provision of section 40, 45 of the 1999 Constitution and article 11 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Cap 10 laws of the Federation of Nigeria 1990. It is imperative to give insight into the relevant provisions of the Constitution and the Public Order Act.

[**5.**] Section 40 of the 1999 Constitution reads:

> Every person shall be entitled to assemble freely and associate with other persons and in particular he may form or belong to any political party, trade union or any other association for the protection of his interests.
>
> Provided that the provisions of this section shall not derogate from the powers conferred by the Constitution on the Independent National Electoral Commission does not accord recognition.

[**6.**] Section 45(1) reads:

> Nothing in section 37, 38, 39, 40 and 41 of this Constitution shall invalidate any law that is reasonably justifiable in a democratic society:
>
> (a) In the interest of defence, public safety, public order public morality or public health or for the purpose of protecting the rights and freedom of other persons
>
> (b) An act of the National Assembly shall not be invalidated by reason only that it provides for the taking during periods of emergency of measures that derogate from the provisions of section 33 or 35 of this Constitution but no such measures shall be taken in pursuance of any such act during any period of emergency save to the extent that those measures are reasonably justifiable for the purpose of dealing with the situation that exist during that period of emergency.
>
> (c) Provided that nothing in this section shall authorise any derogation from the provisions of section 33 of this Constitution except in respect of death resulting from acts of war or authorise any derogation from the provisions of section 36(8) of this Constitution.

[**7.**] By article 11 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Cap 10 Laws of the Federation of Nigeria 1990, the African Charter is an understanding between concerned African states to protect the human rights of their citizens within the territorial jurisdiction of their countries. It is now part of the domestic laws of Nigeria and like all other laws courts must uphold it. These rights are already enshrined in our Constitution.

[**8.**] The Public Order Act Cap 382 Laws of the Federation of Nigeria 1990. The preamble to the Act reads:

> An act to repeal all public order laws in the states of the Federation and to replace them with a Federal Act for the purpose of maintaining public order and to prohibit the formation of quasi-military organisations, regulate the use of uniforms and other matters ancillary thereto.

[**9.**] The sections under searchlight in this appeal are section 1, subsections 2, 3, 4, 5 and 6, and sections 2, 3 and 4 of the Act which read as follows:

> Section (1): For the purpose of the proper and peaceful conduct of public assemblies, meetings and processions and subject to section 11 of this Act, the governor of each state is hereby empowered to direct the conduct of all assemblies, meetings and processions on public reads or places of public resort in the state and prescribe the route by which and the times at which any procession may pass.
>
> Subsection 2: Any person who is desirous of convening or collecting any assembly or meeting or of forming any procession in any public road or place of public resort, shall unless such assembly meeting or procession is permitted by general licence granted under subsection (3) of this section, first make application for a licence to the Governor not less than 48 hours thereto, and if such Governor is satisfied that the assembly, meeting or procession is not likely to cause a breach of the peace he shall direct any superior police officer to issue a licence, not less than 24 hours thereto, specifying the name of the licence and defining the conditions on which the assembly, meeting or procession is permitted to take place, and if he is not so satisfied, he shall convey his refusal in like manner to the applicant within the time herein before stipulated.
>
> Subsection 3: The Governor may authorise the issue of general licences by any superior police officer mentioned in subsection (4) of this section setting out the conditions under which and by whom and the place where any particular kind or description of assembly meeting or procession may be convened, collected or formed.
>
> Subsection 4: The Governor may delegate his powers under this section
>
> (a) In relation to the whole state or part thereof to the commissioner of police of the state or any superior police officer of a rank not below that or a chief superintendent of police and (b) In relation to any local government area or part thereof, but subject to any delegation made under paragraph (a) above to any superior police officer or any police officer for the time being acting as the district police officer.

[**10.**] Subsection 5 makes provision for airing of grievances against the decision of the Commissioner of Police to the Governor, or from the decision of any police officer to the Commissioner of Police and from there ultimately to the Governor. The decision of the Governor on the issue shall be final. This issue to my mind deals with the interpretation of the constitutional provisions embodied in sections 40 and 45 of the 1999 Constitution and article 11 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Cap 10 Laws of the Federation of Nigeria 1990. The interpretation of the statutory provision of the Public Order Act Cap 382 Laws of the Federation 1990 is also brought into focus.

[**11.**] It is however noteworthy that the Public Order Act is an Act of National Assembly. There is no gainsaying about it that the 1999 Constitution empowers the National Assembly to make laws among

other things for public safety and public order — in short any law that is reasonably justifiable in a democratic society for the maintenance of public order and for protecting the rights and freedom of persons in short the Public Order Act can be adjudged as a creation of the Constitution. The Public Order Act is also an existing law by virtue of section 315 of the 1999 Constitution.

[**12.**] The rights to freedom of assembly and freedom of expression are the bone of any democratic form of government. Besides their embodiment in the supreme law of the land — the 1999 Constitution and the African Charter on Human and Peoples' Rights locally adopted as Ratification and Enforcement Act Cap 10 Laws of the Federation of Nigeria 1990, a plethora of decisions of our courts have endorsed same.

[**13.**] Section 45(1) of the 1999 Constitution provides that nothing in sections 37, 38, 39, 40 and 41 of the Constitution shall invalidate any law that is reasonably justifiable in a democratic society.

[**14.**] There is no doubt about it that by virtue of chapter 11 of the 1999 Constitution and particularly section 14(1), the Federal Republic of Nigeria is a sovereign state based on the principles of democracy and justice outlined in section 14(2). The question which now arises for the determination of this court is whether the provisions of the Public Order Act, particularly that which requires conveners of meetings or political rallies to obtain police permit in the exercise of their constitutional rights to freedom of assembly and expression guaranteed by sections 39 and 40 of the Constitution be held to be a law reasonably justifiable in a democratic society as maintained by the appellant or that they are inconsistent with the constitution and such provisions are illegal and unconstitutional and void in the opinion of the respondent. The learned counsel to the respondents held that the requirement of a permit under the Public Order Act is not being just administrative or procedural but has assumed the part of a substantial conditionality for the exercise of freedom of assembly and association.

[**15.**] The two counsel for the parties furnished this court with an array of local, and particularly the respondents' counsel, foreign authorities in defence of their stand. I must explain at this stage that a document such as the Nigerian Constitution, which is written, cannot be interpreted following judicial decisions based on principles of common law or judicial decisions that interpreted statutes or constitutions which are not in *materia* with the provisions of the Constitution. However judicial decisions based on foreign statutes and constitutions with similar or identical provisions as the Nigerian Constitution carry some measure of weight and persuasive effect, but they lack binding effect on Nigerian principle of *stare decisis*. *Nigerian Ports Authority v Ali Akar & Sons* 1965 1 All NLR 526; *Obadara v President Ibadan West District Council Grade B Customary*

Court 1964 1 All NLR 336; *Alhi v Okulaja* 1972 2 All NLR 351; *A-G Ondo State v A-G Federation* 2002 9 WLR pt 772 222; *Olafisoye v Federal Republic of Nigeria* (2004) 4 NWLR pt 804 580; *Adigun v A-G Oyo State* (no 2) 1987 2 NWLR pt 56 197.

[**16.**] The scenario leading to instituting the action before the lower court was that the respondents being registered political parties requested the defendant/appellant, the Inspector-General by a letter dated 21 May 2004 to issue police permits to their members to hold unity rallies throughout the country to protest the rigging of the 2003 elections. The request was refused. There was a violent disruption of the rally organised in Kano on 22 September 2003 on the ground that no police permit was obtained. In the circumstance the police based the reason for the performance as violence and breach of the peace which may occur at the holding of the rally.

[**17.**] The constitution of any country is the embodiment of what the people desire to be their guiding light in governance, their supreme law the *grundnorm* of all their laws. All actions of the government in Nigeria are governed by the Constitution and it is the Constitution as the organic law of a country that declares in a format, emphatic and binding principles the rights, liberties, powers and responsibilities of the people both the governed and the government. *FRN v Ifegwu* (2003) 15 NWLR pt 842 113; *A-G Abia v A-G Federation* (2002) 6 NWLR pt 763 264; A*bacha v Fawehinmi* (2000) 6 NWLR pt 660 228.

[**18.**] I agree with the reasoning of my Lord Pat Acholonu JSC (of blessed memory) in the case of *FRN v Osahon* that

> in the interpretation of the Constitution, beneficial interpretation which would give meaning and life to the society should always be adopted in order to enthrone peace, justice and egalitarianism in the society.

[**19.**] The duty of the courts is to simply interpret the law or Constitution as made by the legislators or framers of the Constitution. It is not the constitutional responsibility of the judiciary to make laws already made by the legislature.

[**20.**] Courts cannot through its interpretation amend the Constitution, neither can they change the words used. Where saddled with the obligation of interpreting the Constitution the primary concern is the ascertainment of the intention of the legislature or law makers.

[**21.**] The Constitution cannot be strictly interpreted like an act of the National Assembly and it must be construed without ambiguity as it is not supposed to be ambiguous.

[**22.**] All its provisions must be given meaning and interpretation even with the imperfection of the legal draftsman. All cannons of Constitution must he employed with great caution. A liberal approach must be adopted. Where the provisions of a statute are clear and unambiguous, effect should be given to them as such unless it would

be absurd to do so, having regard to the nature and circumstance of the case. The court of law is without power to import into the meaning of a word, clause or section of the Constitution or statute what it does not say. Indeed it is a corollary to the general rule of construction that nothing is added to a statute and nothing is taken from it unless there are grounds to justify the inference that the legislature intended something which it omitted to express. The court must not or is not concerned with the result of its interpretation that is it is not the court's province to pronounce on the wisdom or otherwise of the statute but to determine its meaning. The court must not amend any legislation to achieve a particular object or result. *Awolowo v Shagari* (1979) 6-9 SC 51; *Alamieyeseigha v FRN* (20O6) 16 NWLR pt 1004 1; *Rabiu v State* (1980) 8-11 SC 130; *A-G Bendel State v A-G Federation* (1981) 10 SC 1; *Owena v NSE Ltd* (1997) 8 NWLR pt 515; *Bronik Motors Ltd v Wema Bank Ltd* (1983) 1 SCNLR 296.

[**23.**] The relevant question to consider in the determination of the poser before this court as to issuance of a permit under the Public Order Act under relatively calm and peaceful demonstration as opposed to periods of emergency and eruption of political violence, is in short what is the mischief the legislators envisage and are determined to arrest? The underlying factor in the peculiar circumstance of this case is the possibility of violence and breach of the peace while the rally is in progress. This first and foremost I regard as an indictment on our police force and their inadequacy to discharge their statutory duties under the Police Act Cap 439 Laws of the Federation to maintain law and order. Secondly, the reason is not only untenable but highly speculative and I am of the impression that it is not pungent enough to deprive a citizen of a right enjoyed by virtue of the Constitution. The learned trial judge relied on two cases considered in other jurisdictions — the Supreme Court of Ghana in the case of *New Patriotic Party v Inspector General of Police* 1992-93 GLR 585 (2000) 2 HRLRA 1 where the learned trial judge held that:

> Police permit has outlived its usefulness, statutes requiring such permits for peaceful demonstrations, processions and rallies are things of the past. Police permit is the brain child of the colonial era and ought not to remain in our statute books.

[**24.**] The case of *A-G Botswana v Dow* (1998) 1 HRLRA 1 was aptly considered where the Court of Appeal of Botswana declared the Citizenship Act of Botswana 1984 unconstitutional.

[**25.**] I am persuaded by the incident cited by the learned counsel for the respondent that Nigerian society is ripe and ready to be liberated from our oppressive past. The incident captured by the *Guardian Newspaper* edition of 1 October 2005 where the federal government had in the broadcast made by the immediate past President of Nigeria, General Olusegun Obasanjo, publicly conceded the right of Nigerians to hold public meetings or protest peacefully against the

government against the increase in the price of petroleum products. The honourable President realised that democracy admits *of* dissent, protest, marches, rallies and demonstrations. True democracy ensures that these are done responsibly and peacefully without violence, destruction or even unduly disturbing any citizen and with the guidance and control of law enforcement agencies. Peaceful rallies are replacing strikes and violence demonstrations of the past.

[**26.**] If this is the situation, how long shall we continue with the present attitude of allowing our society to be haunted by the memories of oppression and gagging meted out to us by our colonial masters through the enforcement of issuance of permit to enforce our rights under the Constitution.

[**27.**] I hold in unison with the reasoning in the case of *Shetton v Tucker* 364 US 479 488 (1960) where the United States Supreme Court observed that:

> Even though the government's purpose may be legitimate and substantial that purpose cannot be pursued by means that broadly stifle fundamental personal liberties.

[**28.**] The Police Order Act relating to the issuance of police permit cannot be used as a camouflage to stifle the citizens' fundamental rights in the course of maintaining law and order.

[**29.**] The same observation was made by our Apex Court in the case of *A-G Federation v Abubakar* (2007) 10 NWLR pt. 1041 1 that:

> One of the basic principles of interpretation of the Constitution and statutes is that the legislature will not be presumed to have given a right in one section of a statute and then take it in another.

Osadebay v A-G Bendel State 1991 1 NWLR pt 169 pg 525.

[**30.**] The constitutional power given to legislature to make laws cannot be used by way of condition to attain unconstitutional result.

[**31.**] The power given to the governor of a state to issue permit under Public Order Act cannot be used to attain the unconstitutional result of deprivation of right to freedom of speech and freedom of assembly.

[**32.**] The right to demonstrate and the right to protest on matters of public concern are rights which are in the public interest and that which individuals must possess, and which they should exercise without impediment as long as no wrongful act is done.

[**33.**] If as speculated by law enforcement agents that breach of the peace would occur our criminal code has made adequate provisions for sanctions against breakdown of law and order so that the requirement of permit as a conditionality to holding meetings and rallies can no longer be justified in a democratic society.

[**34.**] Finally freedom of speech and freedom of assembly are part of democratic rights of every citizen of the Republic; our legislature

must guard these rights jealously as they are part of the foundation upon which the government itself rests.

[**35.**] The Constitution should be interpreted in such a manner as to satisfy the yearnings of the Nigerian society. The 1999 Constitution is superior to other legislations in the country and any legislation which is inconsistent with the Constitution would be rendered inoperative to the extent of such inconsistency. Section 1 subsections (2), (3), (4), (5), (6), and sections 2, 3, 4 of the Public Order Act are inconsistent with the Constitution — they are null and void to the extent of their inconsistency. *Osho v Phillips* (1972) 4 SC 259; *A-G Abia State v A-G Federation* (2002) 6 NWLR pt 763 264; *Ifegwu v FRN* (2001) 13 NWLR pt 229 103; *Ikine v Edjerode* (2001) 18 NWLR pt 725 446.

[**36.**] Public Order Act should be promulgated to compliment sections 39 and 40 of the Constitution in context and not to stifle or cripple it. A rally or placard-carrying demonstration has become a form of expression of views on current issues affecting government and the governed in a sovereign state. It is a trend recognised and deeply entrenched in the system of governance in civilised countries. It will not only be primitive but also retrogressive if Nigeria continues to require a pass to hold a rally. We must borrow a leaf from those who have trekked the rugged path of democracy and are now reaping the dividend of their experience.

[**37.**] The African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act Cap 10 Laws of the Federation of Nigeria 1990 is a statute with international flavour. Being so, therefore, if there is a conflict between it and another statute its provisions will prevail over those of that other statute for the reason that it is presumed that the legislature does not intend to breach an international obligation. *Abacha v Fawehinmi* (2000) 6 NWLR pt 660 228.

[**38.**] Issues one and two having been considered together are resolved in favour of the respondents.

Issue number 3

Whether the defendant is competent under the Public Order Act or any other law whatsoever to stop the holding of any assembly, meeting, procession or rally without permit or licence.

[**39.**] I have restated the relevant provisions of Public Order Act earlier on in this judgment. On a proper perusal of the provisions, particularly section one, subsections 1-6, and sections 2-4, there is no place where the name of the Inspector-General is mentioned in connection with the issuance of permit for the purpose of conducting peaceful public assemblies. Such application is to be forwarded to the Governor within 48 hours of holding such. The Governor may delegate his powers under the Act to the Commissioner of Police of the state

or any superior police officer of a rank not below that or a Chief Superintendent of Police as applicable to this case in hand.

[**40.**] The Act makes it a matter to be handled at state level and not federal level. Protocol will not allow the Commissioner of Police to delegate such power to a more superior officer. It is the stand of the appellant that under section 215 of the Constitution the Commissioner of Police is under the command of the Inspector-General of police and is therefore not under any obligation to take instructions from the Governor. Further that the function of the police under the Police Act and the Public Order Act are interwoven. The appellant is sued under section one of the Public Order Act. The foregoing submission of the appellant is not only rebuttable but it is equally untenable. It is the cardinal principle of interpretation of statute that where the language of a statute is clear and unambiguous, the court must give meaning to it as such, for in that case the words of the statute speak the intention of the legislature. It is not the constitutional responsibility of the judiciary to make laws or to amend the laws made by the legislature, but to declare the laws accordingly.

[**41.**] The name of the appellant has been omitted from the Public Order Act. Where there is a gap in a statute the proper remedy is an amendment of the statute by the legislature. The Court can not add to or subtract from the law as enacted by the legislature under the guise of interpretation of a statute which the appellant is quietly asking this court to do. *Global Excellence Comm Ltd v Duke* (2007) 16 NWLR pt 1059 22; *A-G Federation v Abubakar* (2007) 10 NWLR pt 1041 1.

[**42.**] This issue is resolved in favour of the respondents.

[**43.**] In the final analysis this court has no legally justifiable reason to deem it necessary to interfere with the decision of the lower court. The appeal lacks merit and is accordingly dismissed. N20 000 costs of this appeal is awarded in favour of the respondents.

ZIMBABWE

Dzvova v Minister of Education, Sports and Culture and Others

(2007) AHRLR 189 (ZwSC 2007)

Farai Dzvova v (1) Minister of Education Sports and Culture (2) Ruvheneko Primary School (3) F Nyahuye

Supreme Court of Zimbabwe, Harare, civil application 291/06, 10 January 2007
Judges: Chidyausiku CJ, Sandura JA, Cheada JA, Ziyambija and Malaba JA

Rastafarian child expelled from school for wearing dreadlocks

Religion (definition, 20-23)
Equality, non-discrimination (discrimination on the grounds of religion, 30, 32, 48, 58)
Limitations (power to impose limitations on rights, 37, 39, 45, 50, 51, 53-55)
Education (discrimination, 37, 38, 47, 48)

[**1.**] The applicant is the father of a six year-old child Farai Benjamin Dzova (hereinafter referred to as 'the child').

[**2.**] The first respondent is the Government Minister responsible for Education, Sports and Culture, under whose Ministry the second respondent falls (hereinafter referred to as 'the Minister').

[**3.**] The second respondent is the primary school in which the child was enrolled (hereinafter referred to as 'the school').

[**4.**] The third respondent is the headmaster of the school (hereinafter referred to as 'the headmaster').

[**5.**] At the beginning of March 2005 the child was enrolled in grade (0) at the school in line with the new education policy of the Ministry of Education which required that children's pre-schools be attached to primary schools so that the children would automatically attend the primary schools from pre-schools. The child graduated from the pre-school system and was then enrolled in the primary school system. The fees were paid and all necessary books and stationery were purchased.

[**6.**] The child's father said while in pre-school the child's hair was never cut and was kept what is commonly known as dread locks until the child graduated from pre-school.

[**7.**] The child's father was called to the school a few weeks into January 2006 to discuss the issue of the child's hair with the teacher-in-charge and asked to write a letter to explain. By then the child was being detained and was no longer going to the classroom with other children. The father sent a letter from his church.

[**8.**] On 27 January 2006, one Brighton Zengeni brought a letter from the school addressed as follows:

> Ruvheneko Government Primary School
> P.O Box GN8
> Glen Norah
> Harare
> 25 January 2006
> Dear Parent
> Ref: Farai Benjani Dzvova's hair
> You are cordially advised that one of our regulations as a school, is that hair has to be kept very short and well combed by all pupils attending Ruvheneko Government Primary School, regardless of sex, age, race or religion: You are therefore being asked to abide by this regulation, failure to which, you will be asked to withdraw or transfer your child Farai Benjamin Dzvova to any other school. This is to be done with immediate effect.
> Yours faithfully
> F Nyahuye
> School-head

[**9.**] The applicant went and discussed the matter with the deputy headmaster and the teacher-in-charge who maintained that they could not accept the child's continued learning in the school so long as his hair was not cut to a length acceptable by the school.

[**10.**] A further discussion with the headmaster of the school and the Regional Education Officer did not resolve the matter.

[**11.**] The applicant then made an application to the High Court and obtained the following provisional order:

> **Terms of order made**
> That you show cause to this honorable Court why a final order should not be made in the following terms:
> **Terms of interim relief**
> By consent of the parties
> 1. Pending the resolution of this matter by the Supreme Court it is ordered that:
> (i) The respondents be and are hereby compelled to allow the minor Farai Benjamin Dzvova to enter upon the second respondent school for purposes of education until the Supreme Court determines the matter.
> (ii) The respondents are hereby interdicted from in any way negatively interfering with the minor Farai Benjamin Dzvova's education, more particularly in that the respondents be and are hereby barred from:

(a) separating Farai Benjamin Dzvova from his classmates;

(b) otherwise detaining Farai Benjamin Dzvova in solitary or in the sole company of adults;

(c) in any other way discriminating against Farai Benjamin Dzvova on the basis of his hairstyle or his religious beliefs pending the determination of the matter by the Supreme Court.

2. The case is referred to the Supreme Court for the determination of:

(i) whether the exclusion of the minor child Farai Benjami Dzvova was done under the authority of a law as envisaged in s 19(5) of the Constitution and in the event the court finds it was done under the authority of a law;

(ii) whether such a law is reasonably justifiable in a democratic society.

[**12.**] In accordance with paragraph 2 of the above order the application has now been brought to this Court in terms section 24 of the Constitution alleging that the child's right guaranteed by section 19(1) of the Constitution has been violated.

[**13.**] In his founding affidavit the applicant says he is a Rastafarian as well as his wife and they were customarily married in 1991. His wife, Tambudzayi Chimedza, is the mother of the child. They have been practicing Rastafarianism for almost a decade. They initially attended Chaminuka Rastafarian House in St Mary's, Chitungwiza, which is the headquarters of the National Rastafarian Council. He said about four years ago in 2002 they opened a branch of the church in Glen Norah for which he is 'Elects of Priesthood'.

[**14.**] Church services are held every Sabbath day and in good weather they begin the preceding Friday evening. He said it is an integral part of the Rastafarian faith that they take certain vows as part of their religion. The vows include that they do not eat refined food, but only eat food in its natural state. Further to this, they do not drink alcohol. Also central to this is the vow that they do not cut their hair (my underlining). He said the vow not to take alcohol or eat refined food and to shave their hair is the Nazarene vow which is biblically present in Numbers 6 verses 1-6.

[**15.**] He said their children are born Nazarites. Thus Farai Benjamin Dzvova, in line with the family religion, cannot cut his hair (my underlining).

[**16.**] He said they let their hair grow long and the twisting which eventually occurs is a natural result of African hair which is let to grow long. This is one of the visible distinguishing factors between genuine Rastafarian adherents and those who appear to have as their hairstyle for fashion purposes actually twist it, which is forbidden by their religion.

[**17.**] He said in accordance with their religion, before, and during his days at pre-school, their son's hair was never cut and it was in the inevitable locks.

[**18.**] He then narrated the events from March 2005 which led to the order that was later obtained at the High Court.

[**19.**] Section 19(1) of the Constitution provides as follows:

> Except with his own consent or by way of parental discipline, no person shall be hindered in the enjoyment of his freedom of conscience, that is to say freedom to change his religion or belief, and freedom, whether alone or in community with others, and whether in public or private, to manifest and propagate his religion or belief through worship, teaching, practice and observance.

In order to determine whether this application falls within the ambit of the above section, it is necessary to consider the following question: Is Rastafarianism a religion?

[**20.**] The appellant submitted that Rastafarianism is a religion. He stated in his founding affidavit the following:

> About four years ago in 2002 we opened a branch of the church in Glen Norah of which I am 'Elect of priesthood', that is, the priest. This is at Jah Ruins in Glen Norah B, behind, In-fill primary school. Church services are held every Sabbath day, that is, every Saturday. In good weather, they begin the preceding Friday evening.

[**21.**] The above shows that the Rastafarian organisation conducts services for worshipping purposes on week-ends. He further stated that the Rastafarian religion is based on the Bible which is a basis for many other religions.

[**22.**] The *New English Dictionary on Historical Principles*, VIII, gives the following definition of religion:

> (1) A state of life bound monastic vows ...
>
> (2) A particular monastic or religious order or rule ...
>
> (3) Action or conduct indicating a belief in, reverence for, and desire to please a divine ruling power, the exercise or practice of rites or observances implying this;
>
> (4) A particular system of faith and worship;
>
> (5) Recognition on the part of man of some higher or unseen power as having control of his destiny, and as being entitled to obedience, reverence and worship. The general mental and moral, attitude resulting from this belief, with reference to its effect upon the individual or the community; personal or general acceptance of the feeling as a standard of spiritual and practical life.
>
> (6) And devotion to some principle, strict fidelity or faithfulness, conscientiousness; pious affection or attachment.

[**23.**] What the applicant said about Rastafarianism falls within these descriptions, thus leaving no doubt that it is a religion.

[**24.**] The applicant also referred to cases in other jurisdictions in which it was decided that Rastafarianism is a religion.

[**25.**] These are: *Reed v Faulkner* 842 f 2d 960 (7th Cir 1988); *People v Lewis* 510 NYS 2 73 (Court of Appeals of New York, 1986); *Crown Suppliers (Property Svcs Agency) v Dawkins* (1993) 1 CR 517 (CA).

[**26.**] These cases were also referred to in a recent case that was before the Supreme Court, that is *In re Chikweche* 1995 (1) (ZLR) 235 (S) in which it was held that Rastafarianism is a religion.

[**27.**] The applicant's complaint is that the rules made by the respondent 'are unlawful and in contravention of my son's rights under s 19 of the Constitution which provision gives the right to protection of freedom of conscience and religion'.

[**28.**] The rules referred to, are under the following heading:

> **Ruvhenko government primary school, January 2005**
>
> **School rules for all pupils**
>
> (1) All pupils to be in school uniform all the time at the school.
>
> (2) All pupils to have short brush hair regardless of sex, age, religion or race.
>
> ...

[**29.**] The protection of the rights of an individual rules bear the signature of the school head. The applicant referred the Court to a number of cases from other jurisdictions which dealt with an issue similar to the one complained of in this case.

[**30.**] The protection of the rights of the individual against discrimination on religious grounds is in section 19 of the Constitution of Zimbabwe.

[**31.**] There have been several decisions on the nature and content of the rights. They include the following:

> (1) *In re Munhumeso & Ors* 1994(1) ZLR 49 where it was confirmed that every person in Zimbabwe is entitled to the fundamental rights and freedoms of the individual which are stipulated in the Constitution subject to certain limitations.
>
> (2) In *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) it was held that: '... Religion provides support and nurture and a framework for individual and social stability and growth. Religious belief has the capacity to awake concepts of self-worth and human dignity which form the cornerstone of human rights.'
>
> (3) In the English case of *The Queen on application of SB, the Claimant/Appellant and Head teacher and Governors of Denbigh High School, Defendants/Respondents*, the Supreme Court of Judicature, Court of Appeal (Civil Division) 2004 EWHC 1389 Lord Justice Scott Baker stated that:
>
> > Every shade of religious belief, if genuinely held, is entitled to due consideration under Article 9. What went wrong in this case was that the school failed to appreciate that by its action it was infringing the claimant's Article 9 right to manifest her religion.

[**32.**] This case shows that it is important to respect one's genuine religious beliefs.

[**33.**] The applicant referred to several useful international authorities based on similar provisions of the Human Rights Charter.

[**34.**] The distinction between the authorities and referred to in this case is that they inquired into the validity of regulations. This case deals with rules made by a school headmaster. The question is, on

what authority he made them. I now proceed to deal with this question.

[**35.**] As indicated earlier, the rules were issued and signed by the head master of the school.

[**36.**] Section 19(5) of the Constitution of Zimbabwe provides as follows:

> Nothing contained in or done under the authority of a law shall be held to be in contravention of subsection (1) or (3) to the extent that the law in question makes provision ...

[**37.**] The question is: Was the rule on the basis of which the applicant was barred from attending at the school made under the authority of a law? If it was, it would have been necessary to consider any derogations or justification provided in the Act. In this case it seems this was not done under a law since no law authorised such action. Section 4 of the Education Act [Cap 25:04] provides as follows:

> (4) Children's fundamental right to education in Zimbabwe
>
> (1) Notwithstanding anything to the contrary contained in any other enactment, but subject to this Act, every child in Zimbabwe shall have the right to school education.
>
> (2) Subject to ss (5), no child in Zimbabwe shall
>
> (a) be refused admission to any school; or
>
> (b) be discriminated against by the imposition of onerous terms and conditions in regard to his admission to any school; on the grounds of his race, tribe, place of origin, national or ethnic origin, political opinions, colour, creed or gender.

[**38.**] It follows that the attempt by the school to bar the child from the school contravenes not only the Constitution, but the above provision of the Education Act as well. Section 69 of the Education Act provides as follows:

> (1) The Minister may make regulations providing for all matters which by this Act are required or permitted to be prescribed or which, in his opinion, are necessary or convenient to be prescribed for carrying out or giving effect to the Act.
>
> (2) Regulations made in terms of ss (1) may provide for: ...
>
> (c) discipline in schools and the exercise of disciplinary powers over pupils attending schools, including the administration of corporal punishment and the suspension and expulsion of such pupils in respect of their attendance and conduct in schools, and in public places when not accompanied by their parents or by adult persons into whose custody they have been entrusted by their parents.

[**39.**] There is nothing in the Act which confers similar powers on the headmaster of a school to make similar rules or regulations. The respondents submitted that the Minister made regulations (Education (Disciplinary Powers) Regulations, 1998 S.I 362 if 1998). These regulations provide as follows:

> (2) Every pupil who enrolls in a government or non-government school shall conform to the standard of discipline enforced at that school, and shall render prompt obedience to the school staff.

[**40.**] The respondents concede that the school rules are not laws, but argue that they were made under the authority of a law.

[**41.**] The provisions of SI 362 of 1998 deal with discipline in the school and obedience to the school staff. It has not been suggested, nor can it be argued, that having long hair at the school is indiscipline or disobedience to the school staff.

[**42.**] It is only a manifestation of a religious belief and is not related to the child's conduct at school.

[**43.**] I therefore do not agree that these regulations are relevant to the matter complained of by the applicant.

[**44.**] In section 3 of the Interpretation Act [Cap.1:0], 'law' means any enactment and the common law of Zimbabwe. 'Regulation', 'rule', 'by-law', 'order', or 'notice', means respectively a regulation, rule, by-law, order or notice in force under the enactment under which it was made. There is nothing to link the school rules with any enactment. The rules were not made under any enactment. Section 26 of the Interpretation Act states as follows:

> Holders of offices
>
> Where any enactment confers a power, jurisdiction or right, or imposes a duty, on the holder of an office as such, then the power, jurisdiction or right may be exercised and the duty shall be performed, from time to time, by the holder for the time being of the office or the person lawfully acting in the capacity of such holder.

[**45.**] The question that follows then is: Was the headmaster authorised by the enactment to make rules? Section 69 of the Education Act confers powers to make regulations on the Minister regarding discipline in schools and other related matters. It does not confer any powers to make regulations on the headmaster. It does not authorise the Minister to delegate to the headmaster the power to make regulations regarding the conditions of the admission of a child to a school.

[**46.**] The regulations clearly specify the powers the headmaster can exercise over a pupil in cases of serious acts of misconduct only.

[**47.**] The Minister made the Education (Disciplinary Powers) Regulations, 1998, SI 362/98 ('the Regulations'). Section 2 of the Regulations provide as follows:

> Standard of discipline
>
> Every pupil who enrolls in a government or non government school shall conform to the standard of discipline enforced at that school, and shall render prompt obedience to the school staff.

[**48.**] I understand this to refer to the conduct or behaviour of pupils and obedience to the school staff generally. I do not consider that asking pupils to conform to a standard of discipline would include an aspect that infringes on a pupil's manifestation of his religion. There is no suggestion by the respondents that keeping dreadlocks is an act of indiscipline or misconduct.

[**49.**] If the head master believed that he had authority to make such rules then he was wrong.

[**50.**] The Minister did not make regulations concerning the type of hair to be kept by the pupils. Neither did he delegate the making of regulations on that subject-matter to the headmaster. Further to that, section 26 of the Interpretation Act provides as follows:

> Where any enactment confers a power, jurisdiction or right, or imposes a duty, on the holder of an office as such, then the power, jurisdiction or right may be exercised and the duty shall be performed, from time to time, by the holder for the time being of the office or the person lawfully acting in the capacity of such holder.

Section 27 provides as follows: 'An appointment made under an enactment may be made either by name or by reference to the holder of an office or post.'

[**51.**] It is clear that the enactment appointed only the Minister, and not the headmaster, to make regulations.

[**52.**] It is also clear that the headmaster of the school was never appointed to the office held by the Minister, and he did not act in that post at all.

[**53.**] The Minister allowed the school to maintain certain standards at the school, but never authorised the school to make any regulations.

[**54.**] It follows that the submission by the respondent that the rules were made under the authority of a law cannot be correct.

[**55.**] The head-teacher cannot make rules which constitute derogation from the constitutional rights of the pupils. He exceeded his powers which are stipulated in the SI 362 of 1998 and used powers which he did not have.

[**56.**] In so doing he was wrong as such powers were never, and could never have been, lawfully delegated to him.

[**57.**] Having concluded that the rules by the school were not made under a law, it is not necessary to consider the issue of justification raised by the respondents.

[**58.**] In conclusion, the following order is made:

(a) The respondents be and are hereby compelled to allow the minor Farai Benjamin Dzvova to enter upon the second respondent school for purposes of education.

(b) The respondents are hereby interdicted from in any way negatively interfering with the minor Farai Benjamin Dzvova's education, more particularly in that the respondents be and are hereby barred from:

(i) separating Farai Benjamin Dzvova from his classmates;

(ii) otherwise detaining Farai Benjamin Dzvova in solitary or in the sole company of adults;

(iii) in any other way discriminating against Farai Benjamin Dzvova on the basis of his hairstyle or his religious beliefs.

(c) It is hereby declared that expulsion of a Rastafarian from school on the basis of his expression of his religious belief through his hairstyle is a contravention of section19 and 23 of the Constitution of Zimbabwe.
(d) The respondents shall pay the costs of this application.