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# 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. 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](http://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. However, in the case of *Ivorian Human Rights Movement (MIDH) v Côte d'Ivoire* (2008) AHRLR 62 (ACHPR 2008) and *Wetsh'okonda Koso and Others v Democratic Republic of the Congo* (2008) AHRLR 93 (ACHPR 2008), in this volume more extensive edits have been done to ensure consistency with the French original.

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](mailto:ahrlr@up.ac.za)

# USER GUIDE

The cases and findings in the *Reports* are grouped together 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 linked 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
ECOWAS	Economic Community of West African States Community Court of Justice
HRC	United Nations Human Rights Committee
KeHC	High Court, Kenya
SASCA	South African Supreme Court of Appeal
SADC	Southern African Development Community Tribunal
UgCC	Constitutional Court, Uganda
UgHC	High Court, Uganda
ZaSC	Supreme Court, Zambia

## 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](http://www.ohchr.org)

African Commission on Human and Peoples' Rights  
[www.achpr.org](http://www.achpr.org)

African Court on Human and Peoples' Rights  
[www.african-court.org](http://www.african-court.org)

Centre for Human Rights, University of Pretoria  
[www.chr.up.ac.za](http://www.chr.up.ac.za)

Oxford Reports on International Law (ORIL)  
[www.oxfordlawreports.com](http://www.oxfordlawreports.com)

Interights  
[www.interights.org](http://www.interights.org)

*Association des Cours Constitutionnelles*  
[www.accpuf.org](http://www.accpuf.org)

Commonwealth Legal Information Institute  
[www.commonlii.org](http://www.commonlii.org)

Southern African Legal Information Institute  
[www.saflii.org](http://www.saflii.org)

Court of Appeal, Nigeria  
[www.courtofappeal.gov.ng](http://www.courtofappeal.gov.ng)

Nigeria Internet Law Reports  
[www.nigeria-law.org/LawReporting.htm](http://www.nigeria-law.org/LawReporting.htm)

Constitutional Court, South Africa  
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- 293/2004 *Zimbabwe Lawyers for Human Rights and Another* (2008) AHRLR 120 (ACHPR 2008)
- 300/2005 *Socio-Economic Rights and Accountability Project v Nigeria* (2008) AHRLR 108 (ACHPR 2008)
- 308/2005 *Majuru v Zimbabwe* (2008) AHRLR 146 (ACHPR 2008)

# **UNITED NATIONS HUMAN RIGHTS TREATY BODIES**





# ALGERIA

## Madoui v Algeria

(2008) AHRLR 3 (HRC 2008)

Communication 1495/2006, *Zohra Madoui (represented by counsel, Nassera Dutour) v Algeria*

Decided at 94th session, 28 October 2008, CCPR/C/94/D/1495/2006

### *Forced disappearance*

**Admissibility** (consideration by other international body, 6.2)

**Personal liberty and security** (forced disappearance, 7.2, 7.6)

**Equal protection of the law** (recognition as a person before the law, 7.7, 7.8)

**Cruel, inhuman or degrading treatment or punishment** (forced disappearance, 7.2)

**Life** (forced disappearance, 7.2)

**Evidence** (access to information, 7.3; absence of satisfactory explanation by the state, 7.4, 7.8)

**State responsibility** (duty to investigate, 7.3, 7.9)

**Remedies** (compensation, 9; duty to investigate and prosecute, 9)

1. The author of the communication, dated 19 July 2006, is Zohra Madoui, an Algerian citizen born in Algeria on 28 November 1944. She claims that her son, Menouar Madoui, born in Algeria on 9 February 1970, is a victim of violations by Algeria of article 7; article 9; article 16; and article 2(3) of the Covenant. She also claims that she herself has been a victim of violations by Algeria of article 7 and article 2(3) of the Covenant. The Covenant and the Optional Protocol entered into force for Algeria on 12 December 1989. The author is represented by counsel, Nassera Dutour.

### **Facts as presented by the author**

2.1. In early March 1997, Menouar Madoui, the author's son, and his friend Hassen Tabeth, were arrested by *gendarmes* and detained for failure to produce their identity documents during a check. Menouar Madoui was held for 13 days at the *gendarmerie* in Larbâa. When the author visited him in detention, she noticed that her son was soaking wet. He told her that he had been tortured with electric shocks.

2.2. On 7 May 1997, the city of Larbâa was cordoned off by the combined forces of the police, army and *gendarmerie*, who carried out a sweep of the city, searching most of the houses and making many arrests. Menouar Madoui was at the market that day and, when the combined forces stormed the market he took refuge in a friend's shop. When things calmed down he went to prayers at the main mosque in Larbâa, near the town hall, but by nightfall he had not returned home to his mother.

2.3. The next morning the author went to look for her son. At the mosque, a man told her he had witnessed some arrests the day before. Four young men had been arrested by plain-clothes police outside the mosque, handcuffed and put in an unmarked car. The author went to the *gendarmerie* where her son had been held a few months earlier. The *gendarmes* told her they had not arrested him. She then went to the barracks nearby, but the military referred her to the municipal police (*garde communale*), who in turn directed her to the police station. She went to the police station and then made the rounds of all the barracks in the town, at one of which a soldier told her that she should look in the *maquis* instead. As a last resort, in the late afternoon, the author went to the operational command headquarters (*poste de commandement opérationnel* - PCO) on the road to El Fâas, where a member of the legitimate defence group (GLD) said that her son had been brought in the night before and was being held there. She asked if she could bring him some food but he said she could only bring clothes.

2.4. After that the author went to the PCO every day to try to see her son. Every day the officers on duty gave her a different answer. Some admitted that her son was being held there, others said not. Meanwhile the author continued to go round all the police stations in the area, as well as prisons, barracks, the hospital and the morgue, to glean information about her son. She was sent back and forth from one to the other. By some she was told that her son had been transferred to the prison in Blida or Tizi-Ouzou, by others that he had been admitted to the psychiatric hospital in Blida, or even that he had been released.

2.5. On 21 May 1997 the author explained her position to the public prosecutor in Larbâa, who wrote to the chief of police of Larbâa and instructed the author to deliver the letter personally so that the police chief could launch an investigation into her son's disappearance. The author duly presented the chief of police with the letter and a file; she never received any report of an investigation. On 2 January 2000, a statement from the Larbâa police informed the author that the inquiry into her son's whereabouts ordered by the Larbâa public prosecutor had been closed.

2.6. Forty days after her son's disappearance, the author still had no news and returned to the PCO. A policeman told her that her son

was still there, but would probably be released the following day. She therefore waited outside the PCO the next day for him to be released. A senior officer noticed her and went over to ask what she was doing there. When she explained that she was waiting for her son to be released he told her to leave at once and threatened her. When she refused he became aggressive and, pinning her to the wall, slapped and punched her repeatedly. Shocked, the author fled; thereafter, her enquiries were less energetic.

**2.7.** In February 1998 the author went to the court in Blida, where she was seen by the government prosecutor, who wrote to the prosecutor with the court in Larbâa, who in turn wrote to the PCO commanding officer. As a result the author obtained a meeting with the PCO commanding officer, who again told her that her son's case was the responsibility of the Larbâa police. Two weeks later the anti-terrorist squad came to the author's home with a summons for questioning at the PCO. The author found an excuse not to go with them and said she would go later. She first told her relatives and then went to the PCO in the afternoon, where she was questioned again about her son's disappearance. Nothing ever came of that interview. The author subsequently received another two summonses from the Larbâa police station (9 January 2000 and 16 June 2001), one from the Larbâa *gendarmerie* (5 December 2005) and another from the *gendarmerie* at El Biar (21 December 2005).

**2.8.** In May 1998 Hassen Tabeth, who had been arrested with the author's son in March 1997 (see paragraph 2.1 above), went to see the author on his release from prison. He told her that a fellow-prisoner at Blida prison had told him he had been arrested along with her son and that her son had been taken to the prison in Boufarik. The author went to Boufarik but a warder told her that her son was not there. On 11 May 1998 the author lodged a complaint with the government prosecutor at the Bab Essabt court. She has never had a response.

**2.9.** In June 1998 another person confirmed that the author's son was indeed being held at Boufarik prison. The person said that he had been arrested on 8 May 1997, the day after the author's son, and that they had shared a cell in Boufarik prison. However, he said they were not held in an ordinary prison but shut underground in the dark. He said that, at the time of his release, the author's son had still been alive.

**2.10.** In 1999 Menouar Madoui's brother-in-law heard from someone who had just been let out after five years of *incommunicado* detention that he had shared a cell (cell No 6) with the author's son in Serkadji prison. The author went to Serkadji and was told she had to apply to the Supreme Court for a visiting permit if she wanted to see her son. As the author is illiterate, she consulted her friends, who suggested she apply to the Algiers Court for a permit. The Algiers Court informed her that issuing visiting permits was not one of its

tasks and she must approach the court in Lerbâa. The officials at the court in Lerbâa advised her not to pursue the matter further. Frightened, the author abandoned her quest for a visiting permit.

2.11. On 30 March 2004 the author filed a complaint with the Lerbâa public prosecutor, with a copy to the government prosecutor in Blida, challenging the transfer of her son's case to the district of Baraki when he had been arrested in Lerbâa. On 7 January 2006 she received a summons from the Lerbâa court. She went to the court on 6 February 2006 and was asked to produce the witnesses who claimed to have seen her son. However, since their safety could not be guaranteed, the witnesses refused to appear for fear of reprisals.

## Complaint

3.1. In respect of article 7, the author recalls that, when first arrested in March 1997, her son said he had been tortured with electric shocks. She argues that her son's forced disappearance is in itself a violation of article 7. She recalls that the Committee has accepted that being the victim of enforced disappearance may constitute inhuman or degrading treatment.<sup>1</sup>

3.2. As to the author herself, she claims that her son's disappearance has been a painful and agonising ordeal. She had found him in a serious condition once before, after his first arrest. This time, following his disappearance, she has no idea what has become of him. This is compounded by the fact that the various authorities she approached starting the day after he went missing continually sent her back and forth from one to the other. They all gave different answers, some simply confusing her but, at their worst, raising her hopes of finding her son. Those hopes were always dashed. The author recalls that the Committee has accepted that the disappearance of a loved one could constitute a violation of article 7 for the family.<sup>2</sup>

3.3. With regard to article 9, the author recalls that her son's detention was not entered in the registers of police custody and there is no official record of his whereabouts or his fate. The fact that his detention is not acknowledged and that the government authorities persistently refuse to reveal what has happened to him means that he has been arbitrarily deprived of his liberty and security of person in violation of article 9. The author cites the Committee's case law

<sup>1</sup> See communications 449/1991, *Mojica v Dominican Republic*, views adopted on 15 July 1994, para 5.7; 540/1993, *Celis Laureano v Peru*, views adopted on 25 March 1996, para 8.5; 542/1993, *Tshishimbi v Zaire*, views adopted on 25 March 1996, para 5.5; 992/2001, *Bousroual v Algeria*, views adopted on 30 March 2006, para 9.8; and 1196/2003, *Boucherf v Algeria*, views adopted on 30 March 2006, para 9.6.

<sup>2</sup> See communication 107/1981, *Quinteros v Uruguay*, views adopted on 21 July 1983, para 14; and concluding observations on the second periodic report of Algeria, CCPR/C/79/Add.95, 18 August 1998, para 10.

whereby any unacknowledged detention of a person constitutes a complete negation of the right to liberty and security of person guaranteed under article 9.<sup>3</sup>

3.4. As to article 16, the author believes that her son's forced disappearance is inherently a denial of the right to recognition everywhere as a person before the law. She cites the 18 December 1992 Declaration on the Protection of All Persons from Enforced Disappearance.<sup>4</sup>

3.5. As regards article 2(3), the author recalls that the state party has an obligation to provide an effective remedy for the violations she and her son have suffered.<sup>5</sup> She claims that, as the victim of enforced disappearance, her son has been denied the right to an effective remedy for his arbitrary detention and the various violations he has suffered. She has tried to find her son by all legal means and has exercised all available remedies to that end without result. The state has therefore violated its obligations to conduct a thorough and diligent investigation into his disappearance, to inform the author of the outcome of that investigation, to institute criminal proceedings against those held to be responsible for his disappearance, to try them and to punish them.

3.6. Regarding the exhaustion of domestic remedies, the author argues that, according to the Committee's case law, only effective and available remedies within the meaning of article 2(3) need to be exhausted.<sup>6</sup> Since this case concerns a serious violation of her son's fundamental rights, she recalls the Committee's case law whereby only remedies of a judicial nature need to be exhausted.<sup>7</sup> In this case the author has attempted remedies of every kind, administrative and judicial, without result. In the case of administrative remedies, she repeatedly sought information concerning her son's fate, approaching various authorities who continually sent her from pillar to post and gave her no clear information. On 6 July 1998 she approached the

<sup>3</sup> See communications 8/1977, *Weismann and Perdomo v Uruguay*, views adopted on 3 April 1980, para 16; 139/1983, *Conteris v Uruguay*, views adopted on 17 July 1985, para 10; 181/1984, *Arévalo v Colombia*, views adopted on 3 November 1989, para 11; 563/1993, *Bautista v Colombia*, views adopted on 27 October 1995, para 8.5; 612/1995, *Vicente et al v Colombia*, views adopted on 29 July 1997, para 8.6; 992/2001, *Bousroual v Algeria*, views adopted on 30 March 2006, para 9.5; and 1196/2003, *Boucherf v Algeria*, views adopted on 30 March 2006, para 9.5.

<sup>4</sup> See also concluding observations on the second periodic report of Algeria, CCPR/C/79/Add.95, 18 August 1998, para 10.

<sup>5</sup> See communication 1196/2003, *Boucherf v Algeria*, views adopted on 30 March 2006, para 11.

<sup>6</sup> See, for example, communication 147/1983, *Arzuada Gilboa v Uruguay*, views adopted on 1 November 1985, para 7.2.

<sup>7</sup> See communications 563/1993, *Bautista v Colombia*, views adopted on 27 October 1995, para 5.1; 612/1995, *Vicente et al v Colombia*, views adopted on 29 July 1997, para 5.2; and 778/1997, *Navarro et al v Colombia*, views adopted on 24 October 2002, para 6.2.

Ombudsman. On 4 August 1998 she approached the National Human Rights Observatory, which merely told her that her son had no criminal record. On 29 March 2004 she wrote a letter addressed to the President of the Republic, the Prime Minister, the Minister of Justice and the President of the National Advisory Commission for the Promotion and Protection of Human Rights. She received no reply. As for judicial remedies, she filed several complaints with a number of courts, none of which led to any serious investigation into her son's disappearance. Furthermore, with the adoption by referendum of the Charter for Peace and Reconciliation on 29 September 1995, and the entry into force of a presidential order implementing the Charter on 28 February 2006, the author believes there are no more effective remedies available to her.

3.7. The author mentions that her son's case was submitted to the United Nations Working Group on Enforced or Involuntary Disappearances. However, she notes that the Committee holds that extra-conventional procedures and mechanisms established by the former Commission on Human Rights do not constitute procedures of international investigation or settlement within the meaning of article 5(2)(a), of the Optional Protocol.<sup>8</sup>

3.8. The author asks the Committee to request the state party to order independent investigations with a view to locating her son and to bring the perpetrators of the enforced disappearance before the competent civil authorities for prosecution in accordance with article 2(3) of the Covenant. She also requests appropriate reparation for herself and her family, such reparation to include adequate compensation and a full and complete rehabilitation of her son including, for example, medical care and psychological support.

### State party's observations on admissibility and merits

4. On 28 July 2008, the state party indicated that it has made every effort to locate the author's son. Enquiries have been made with the civil and military authorities cited by the author, and they have categorically denied that her son was ever arrested. Investigations have also been made in all the places mentioned by the author and her son has never been detained in any of them. An examination of the register at Boufarik prison, referred to by the author, shows that her son has not been held there. There are signed statements from several witnesses, including his brother-in-law, Ramdane Mohammed, to the effect that the author's son is mentally ill and frequently runs away from home.<sup>9</sup>

<sup>8</sup> See communication 540/1993, *Celis Laureano v Peru*, views adopted on 25 March 1996, para 7.1.

<sup>9</sup> The state party has not provided these statements.

## Author's comments on the state party's observations

5.1. In comments dated 8 September 2008, the author argued that the state party was merely recapitulating the domestic judicial procedure. At no time does it produce concrete evidence to either deny or accept responsibility for the forced disappearance of the author's son. According to the Committee's case law, the state party must furnish evidence if it seeks to refute claims made by the author of a communication: it is no use the state party merely denying them, whether explicitly or implicitly.<sup>10</sup>

5.2. On the merits, the author recalls that, even though several witnesses saw her son being arrested and a policeman twice told her that her son was being held at the PCO on the road to El Fâas, the authorities deny having arrested him. Furthermore, he had also been arrested in March 1997, two months before the second arrest in May 1997, and on that occasion had been detained for 13 days in the Larbaâ *gendarmerie*, where he had been tortured. The author notes that the Algerian authorities never mention the case of Hassan Tabeth, who had been arrested along with her son and who told her when he came out of prison that a fellow-prisoner, Nourredine, had told him he had been in prison with her son at Boufarik.

5.3. Regarding the state party's claim that her son is mentally disabled, the author says that, in her description of the facts of the case, she certainly mentions having visited a psychiatric hospital in the course of her enquiries (see paragraph 2.4 above), but that is an instinctive reflex common to all families of missing persons after they have searched for a few days. The families are aware that torture is routine and assume that treatment of that kind could cause their relatives to lose their mind and be put in a psychiatric hospital. She says there has never been any question of mental disability in her son. Moreover, his brother-in-law, Mohammed Ramdane, has never been summoned by the authorities and has never signed any statement alleging that Menouar Madoui suffers from mental disability. She does however remember that, in the course of her enquiries, she one day explained to the *gendarmes* that her son Menouar was the household's sole breadwinner and that it was imperative that they should find him; she had then told them that her other son, Mohammed Madoui, born on 15 January 1965, was mentally disabled and unable to work. The *gendarmes* had asked her to provide documents to show her son was disabled, which she did, believing the *gendarmes* would act on them. This clearly shows that the authorities have never conducted any proper investigation.

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<sup>10</sup> See communication 107/1981, *Quinteros v Uruguay*, views adopted on 21 July 1983, para 11.

## Issues and proceedings before the Committee

### Admissibility considerations

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

**6.2.** As required under article 5(2)(a) of the Optional Protocol, the Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement. The Committee notes that the case was submitted to the United Nations Working Group on Enforced or Involuntary Disappearances.<sup>11</sup> However, it recalls that extra-conventional procedures or mechanisms established by the Commission on Human Rights or the Economic and Social Council, and whose mandates are to examine and publicly report on human rights situations in specific countries or territories or on major phenomena of human rights violations worldwide, do not constitute procedures of international investigation or settlement within the meaning of article 5(2)(a) of the Optional Protocol.<sup>12</sup> The Committee recalls that the study of human rights problems of a more global character, although it might refer to or draw on information concerning individuals, cannot be seen as being the same matter as the examination of individual cases within the meaning of article 5(2)(a), of the Protocol. Accordingly, the Committee considers the fact that Menouar Madoui's case was registered before the Working Group on Enforced or Involuntary Disappearances does not make it inadmissible under this provision.<sup>13</sup> As the Committee finds no other reason to consider the communication inadmissible, it proceeds with its consideration of the claims on the merits, under article 7; article 9; article 16; and article 2(3), as presented by the author.

### Consideration of the merits

**7.1.** The Committee has considered the present communication in the light of all the written information communicated to it by the parties, in accordance with article 5(1) of the Optional Protocol.

**7.2.** The Committee recalls the definition of enforced disappearance in article 7(2)(i) of the Rome Statute of the International Criminal Court:

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<sup>11</sup> The Working Group on Enforced or Involuntary Disappearances transmitted the case to the Algerian government on 27 June 2005. As yet no reply has been received from the government.

<sup>12</sup> See communication 540/1993, *Celis Laureano v Peru*, views adopted on 25 March 1996, para 7.1.

<sup>13</sup> As above.



Enforced disappearance of persons means the arrest, detention or abduction of persons by, or with the authorisation, support or acquiescence of, a state or a political organisation, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

Any act leading to such disappearance constitutes a violation of many of the rights enshrined in the Covenant, including the right to liberty and security of person (art 9), the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment (art 7) and the right of all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person (art 10). It also violates or constitutes a grave threat to the right to life (art 6).<sup>14</sup> In the present case, in view of her son's disappearance on 7 May 1997, the author invokes articles 7, 9 and 16.

**7.3.** The Committee notes that the state party has not provided satisfactory answers to the author's allegations concerning the forced disappearance of her son. It recalls that the burden of proof does not rest on the author of the communication alone, especially considering that the author and the state party do not always have equal access to the evidence and frequently the state party alone has the relevant information.<sup>15</sup> It is implicit in article 4(2) of the Optional Protocol that the state party has the duty to investigate in good faith all allegations of violations of the Covenant made against it and its representatives and to furnish to the Committee the information available to it. In cases where the allegations are corroborated by credible evidence submitted by the author and where further clarification depends on information exclusively in the hands of the state party, the Committee may consider an author's allegations substantiated in the absence of satisfactory evidence or explanations to the contrary presented by the state party.

**7.4.** In the present case, the Committee notes that the author's son disappeared on 7 May 1997 and that his family does not know what has happened to him. However, the author received certain information from various sources indicating that her son had been arrested by the authorities on that day and subsequently held in various places. Several soldiers told her that her son had been detained at the operational command headquarters on the road to El Fâas (see paragraphs 2.3, 2.4 and 2.6 above). Moreover, she also learned from at least two persons - including Hassen Tabeth, a friend of her son who had been arrested with him - that her son had been held in the prison in Boufarik (see paragraphs 2.8 and 2.9 above). She

<sup>14</sup> See communication 950/2000, *Sarma v Sri Lanka*, views adopted on 31 July 2003, para 9.3.

<sup>15</sup> See communication 139/1983, *Conteris v Uruguay*, views adopted on 17 July 1985, para 7.2; and communication 1297/2004, *Medjnoune v. Algeria*, views adopted on 14 July 2006, para 8.3.

also learned from another person that her son had been held in Serkadji prison (see paragraph 2.10 above). The Committee notes that the state party has merely replied that the author's son had not been arrested or detained by the authorities. The state party added that the author's son suffers from psychiatric problems and simply ran away from the family home. The Committee nevertheless observes that the state party has provided no evidence to substantiate its statements. In the absence of a satisfactory explanation by the state party regarding the disappearance of the author's son, the Committee considers that this disappearance constitutes a violation of article 7.

7.5. The Committee also notes the anguish and distress that the disappearance of the author's son on 7 May 1997 has caused the mother. It therefore is of the opinion that the facts before it disclose a violation of article 7 of the Covenant with regard to the mother.<sup>16</sup>

7.6. As to the alleged violation of article 9, the information before the Committee shows that the author's son disappeared on 7 May 1997 in Lerbâa. The Committee notes that this information has not been contested by the state party. According to the author, her son was arrested by agents of the state party on that day, which was confirmed by Hassen Tabet, a friend of her son who had been arrested with him (see paragraph 2.8 above). Moreover, several persons had confirmed to her that, following his arrest, her son had been held in various places (see paragraph 7.4 above). The Committee notes that the state party merely replies that the author's son was not arrested or detained by the authorities. Nevertheless, the Committee observes that the state party has provided no evidence to substantiate its statements. In the absence of adequate explanations by the state party concerning the author's allegations that her son's arrest and subsequent *incommunicado* detention were arbitrary and illegal, the Committee finds a violation of article 9.<sup>17</sup>

7.7. As to the alleged violation of article 16 of the Covenant, the question arises as to whether and under what circumstances a forced disappearance may amount to denying the victim recognition as a person before the law. The Committee points out that intentionally removing a person from the protection of the law for a prolonged period of time may constitute a refusal to recognise that person before the law if the victim was in the hands of the state authorities when last seen and, at the same time, if the efforts of their relatives to obtain access to potentially effective remedies, including judicial remedies (Covenant, art 2(3)) have been systematically impeded. In

<sup>16</sup> See communications 107/1981, *Quinteros v Uruguay*, views adopted on 21 July 1983, para 14; and 950/2000, *Sarma v Sri Lanka*, views adopted on 31 July 2003, para 9.5.

<sup>17</sup> See communication 1297/2004, *Medjnoune v Algeria*, views adopted on 14 July 2006, para 8.5.

such situations, disappeared persons are in practice deprived of their capacity to exercise entitlements under law, including all their other rights under the Covenant, and of access to any possible remedy as a direct consequence of the actions of the state, which must be interpreted as a refusal to recognise such victims as persons before the law. The Committee notes that, under article 1(2) of the Declaration on the Protection of All Persons from Enforced Disappearance,<sup>18</sup> enforced disappearance constitutes a violation of the rules of international law guaranteeing, *inter alia*, the right to recognition as a person before the law. It also recalls that article 7(2)(i) of the Rome Statute of the International Criminal Court recognises that the ‘intention of removing [persons] from the protection of the law for a prolonged period of time’ is an essential element in the definition of enforced disappearance. Lastly, article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance mentions that enforced disappearance places the person concerned outside the protection of the law.<sup>19</sup>

**7.8.** In the present case, the author says that her son was arrested along with three other people by plainclothes police on 7 May 1997. He was then allegedly taken to the operational command headquarters (PCO) and thence to the prison in Boufarik. There has been no news of him since that date. The Committee notes that the state party has failed to provide any satisfactory explanation concerning the author’s claim to have had no news of her son since 7 May 1997, and it appears not to have conducted a thorough investigation into the fate of the son or provided the author with any effective remedy. The Committee is of the view that if a person is arrested by the authorities and there is subsequently no news of that person’s fate, the authorities’ failure to provide information effectively places the disappeared person outside the protection of the law. Consequently, the Committee concludes that the facts before it in the present communication reveal a violation of article 16 of the Covenant.<sup>20</sup>

**7.9.** The author invokes article 2(3) of the Covenant, which requires states parties to ensure that individuals have accessible, effective and enforceable remedies for asserting the rights enshrined in the Covenant. The Committee attaches importance to states parties’ establishment of appropriate judicial and administrative mechanisms for addressing alleged violations of rights under domestic law. It refers to its General Comment 31, which states that failure by a state party to investigate allegations of violations could in and of itself give

<sup>18</sup> See General Assembly resolution 47/133 of 18 December 1992.

<sup>19</sup> See communication 1327/2004, *Grioua v Algeria*, views adopted on 10 July 2007, para 7.8.

<sup>20</sup> As above, para 7.9.

rise to a separate breach of the Covenant.<sup>21</sup> In the present case, the information before it indicates that the author did not have access to such effective remedies, and the Committee concludes that the facts before it reveal a violation of article 2(3) of the Covenant in conjunction with articles 7, 9 and 16, in respect of the author's son, and a violation of article 2(3) of the Covenant in conjunction with article 7, in respect of the author herself.

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 reveal violations of article 7, article 9 and article 16 and of article 2(3) in conjunction with articles 7, 9 and 16 of the Covenant in respect of the author's son; and of article 7 and of article 2(3) in conjunction with article 7 of the Covenant in respect of the author herself.

9. In accordance with article 2(3)(a) of the Covenant, the state party is under an obligation to provide the author with reparation in the form of compensation. While the Covenant does not give individuals the right to demand of a state the criminal prosecution of another person,<sup>22</sup> the Committee nevertheless considers the state party duty-bound not only to conduct thorough investigations into alleged violations of human rights, particularly enforced disappearances and acts of torture, but also to prosecute, try and punish the culprits.<sup>23</sup> The state party is therefore also under an obligation to prosecute, try and punish those held responsible for these violations. The state party is, further, required to take measures to prevent similar violations in the future.

10. 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 where 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 its views. The state party is also requested to publish the Committee's views.

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<sup>21</sup> See para 15.

<sup>22</sup> See communications 213/1986, *HCMA v The Netherlands*, views adopted on 30 March 1989, para 11.6; and 612/1995, *Vicente et al v Colombia*, views adopted on 29 July 1997, para 8.8.

<sup>23</sup> See communications 1196/2003, *Boucherf v Algeria*, views adopted on 30 March 2006, para 11; and 1297/2004, *Medjnoune v Algeria*, views adopted on 14 July 2006, para 10.

# TUNISIA

## Ali v Tunisia

(2008) AHRLR 15 (CAT 2008)

Communication 291/2006, *Saadia Ali v Tunisia*

Decided at the 41st session, 21 November 2008, CAT/C/41/D/291/2006

*Lack of response from authorities to complaint about torture*

**Admissibility** (exhaustion of local remedies, 12.3, 15.2)

**Torture** (15.4; more severe than cruel, inhuman or degrading treatment, 15.5; delay in instituting investigation, 15.7)

**Remedies** (redress, 15.8; compensation, 17)

1. The complainant is Ms Saadia Ali, a French-Tunisian national born in 1957 and currently a resident of France. She claims to be a victim of violations of the following articles of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: article 2(1), taken in conjunction with article 1, or, alternatively, article 16(1); and articles 11, 12, 13 and 14, taken separately or in conjunction with article 16(1). She is represented by counsel. The state party made the declaration under article 22 of the Convention on 23 October 1988.

### The facts as presented by the complainant

2.1. The complainant was born in Tunisia and holds dual French and Tunisian nationality. Her usual place of residence is in France. On 22 July 2004, during a trip to Tunisia, the complainant accompanied her brother to the court of first instance in Tunis, where he was to retrieve a document he needed for his forthcoming wedding. The official on the counter on the ground floor asked the complainant for the file number; she told him the number had been lost. The official told her she needed to open a new file, a procedure that would take three months. The complainant explained to him that the document was needed urgently for her brother's wedding, and asked him if he could not find the file by using her brother's name, date of birth and address to search for it. The official said he could not and, when she insisted, told her to let him get on with his work. She retorted that it was plain to see that he was not working and added, 'If you want to

know the truth, it's thanks to us that you are here'. The official asked to see her papers and she gave him her French passport; he then asked her to follow him. The complainant followed him, telling him, 'I hope you're not going to give me any problems. I know that Tunisia is a democratic country, unless it is just pretending to be one'. At this point, her brother begged the official to excuse his sister for what she had said. The official told him nothing would happen to her.

2.2. The complainant followed the official to the office of the vice-president of the court, where a man began to question her. He asked her to confirm what she had said to the official, including the phrase 'It's thanks to us that you are here', which she did. He then wrote something in Arabic on a piece of paper and asked her to sign it. As she did not understand what was written, she refused to sign it. The man called a plainclothes policeman and exchanged looks with him; the policeman asked the complainant to follow him. They went back down to the ground floor and along a corridor, where the complainant noticed that people seemed to be giving her worried looks, which deepened her unease. She tried to phone, using her mobile phone, Action by Christians for the Abolition of Torture (ACAT) in Paris, whose number she had. She managed to give her name and say that she was in Tunisia before the plainclothes policeman took her mobile phone and turned it off.

2.3. The complainant claims she asked him where they were going, but that he twisted her arm, out of sight of onlookers. Each time she protested, he increased the pressure. At that point she began to have serious worries about her safety. He took her down some stairs to the basement, to an entry hall where there was a desk and a guard, who snatched her bag from her. He made her go into a corridor where two women were sitting. The complainant asked where they were, to which one of the women replied in Arabic '*eloukouf*', adding, in French, that it meant 'prison'.

2.4. According to the complainant, another guard – a tall, beefy man with a big nose, fat lips and curly hair – came out of a door in the corridor and began punching and kicking the complainant. He swore at her as he continued to punch and kick her. The force of the blows forced the complainant further down the corridor, until she was outside cells containing about 50 handcuffed men. The guard ripped off her scarf and dress. The complainant was not wearing a bra and found herself half-naked. The guard hit her again and threw her to the floor. He took her by the hair and dragged her to an unlit cell, where he continued punching and kicking her on the head and body. The complainant huddled up and begged for mercy, screaming and in fear for her life. The guard pounded her on the head, back, buttocks, legs, knees and feet, all the while swearing at her and making threats against her family. She was already half-naked, and thought the guard was going to rape her. She was also fearful for the safety of her family

in Tunis and France, and thought she was going to die in the cell. She lost consciousness under the hail of blows. When she came to, she asked for a glass of water, but the guard refused to give her one.

**2.5.** The complainant adds that the guard made her leave the cell and left her beside the two women in the corridor, who tried to comfort her. The plainclothes policeman who had taken the complainant to the basement took her back to the ground floor, where she found herself in a room with him and a uniformed police officer. They laughed at her and insulted her and her Egyptian husband. The complainant wondered how they knew her husband was Egyptian, and began to fear for his safety. The plainclothes policeman took her to the stairs, which she recognised as the stairs that led down to the basement, whereupon she begged him not to take her down there, as she was afraid she would be beaten to death. He took her into an office where there were some women, one of whom introduced herself as a judge and asked her to confirm that she had said 'It's thanks to us that you are here'. The complainant did not reply, but started to cry. The judge told her she would be imprisoned for three months, and that that should teach her a lesson. She requested that her family be informed, but the judge refused. The plainclothes policeman spoke up for her, saying 'I don't think she'll do it again'. The judge asked the complainant to sign a document in Arabic, but she refused. The plainclothes policeman returned her bag and mobile phone, and asked her to check that everything was there. The complainant noticed that the ring she wanted to give her brother's fiancée was no longer in the bag. She tried to ask the policeman about it, but he immediately asked if she was accusing them of something. She said no, for fear of reprisals, and rushed out of the court. Later, she noticed that €700 were also missing.

**2.6.** The complainant states that the next day and the day after that, she went to the emergency clinic of Charles Nicolle hospital in Tunis for treatment. She obtained a medical certificate stating that she had been beaten on 23 July 2004, although the correct date was 22 July 2004.<sup>1</sup> She returned to France on 27 July 2004, and consulted a doctor in Paris on 30 July 2004. The medical examinations confirmed that she had been beaten and that her body was covered in bruises ('multiple ecchymoses: left arm, right foot, right buttock') and lesions ('contusions', 'contusions on the right wrist'). She had received a severe blow to the head ('cranial trauma'), which had given her constant headaches ('cephalalgia') and had various swellings ('oedema'), and she would need two weeks to recover from her injuries barring complications.<sup>2</sup> The abuse and ill-treatment caused her severe trauma, as shown by, for example, a state of constant anxiety, serious sleep problems and significant loss of short-

<sup>1</sup> Attached to file.

<sup>2</sup> Medical certificate dated 30 July 2004 attached to file.

term memory.<sup>3</sup> This also led to family problems, and the complainant made several visits to a psychologist at the Centre Françoise Minkowska in Paris, as well as to a psychiatrist, who prescribed her anti-depressants available only on prescription.<sup>4</sup>

## The complaint

**3.1.** As far as the exhaustion of domestic remedies is concerned, the complainant claims to have contacted a lawyer in Tunis on the day after the events. The lawyer found out that she had been given a three-month suspended prison sentence for attacking an official. On 30 July 2004, the lawyer filed a complaint on behalf of the complainant, describing her detention and the abuse she had suffered at the hands of the security officers, classifying the abuse as torture.<sup>5</sup> He attached copies of the medical certificates to the complaint and asked the prosecutor to open a criminal investigation. The complaint implicated the president of the national security centre at the *Palais de la Justice*, the court of first instance and all those who would be accused during the investigation. The complaint was rejected by the office of the state prosecutor at the court of first instance, with no reasons given. It has not been possible to obtain any document or official court stamp attesting to the rejection.

**3.2.** The complainant claims she tried unsuccessfully to pursue the domestic remedies available under Tunisian law. She maintains that there are no effective remedies available in Tunisia for torture victims; the rejection of the complainant's complaint is not an isolated case, as has been documented by several non-governmental organisations: 'Many citizens encounter enormous difficulties in trying to file a complaint against police officers who have used violence against them. A complaint filed at a police station or office of the state prosecutor is rejected and sometimes the accused officer is in charge of the investigation.'<sup>6</sup> Such practices are contrary to

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<sup>3</sup> The complainant also provides a statement from a human rights activist in Tunisia who says that she saw the complainant in August and that the bruises and marks were still clearly visible. The activist had learned of the complainant's questioning from ACAT on 22 July 2004 and had immediately contacted a representative of the French Ministry of Foreign Affairs in North Africa. The activist also posted an article on the Internet on 15 December 2004 to publicise the case.

<sup>4</sup> Attached to file.

<sup>5</sup> Complaint attached to file, with a translation into French. It also lists the objects not returned to the complainant after she was abused.

<sup>6</sup> See the attached 2001 report by the National Council of Liberties in Tunisia and the Tunisian League of Human Rights. See also the other reports mentioned by the complainant, including those by Amnesty International, the World Organization against Torture, the International Federation of Human Rights Leagues, the International Commission of Jurists, Human Rights First and Human Rights Watch. See also the press release issued on 16 November 2005 by several United Nations experts concerned with the situation in Tunisia, on freedom of expression and assembly and the independence of the judiciary.



internationally recognised standards on the administration of justice and, in particular, on the work of prosecutors.<sup>7</sup> They are also contrary to articles 25 and 26 of the state party's Code of Criminal Procedure, which stipulate that the state prosecutor represents the public prosecutor's office at the court of first instance and is responsible for 'recording all offences and receiving all reports sent to it by public officials or private individuals, as well as complaints from injured parties' (art 26). The refusal to register a complaint is the consequence and proof of the arbitrary exercise of the functions of the prosecutor. As this practice is common and widespread with regard to the victims of torture and cruel, inhuman or degrading treatment at the hands of the police and other security forces in the state party, the remedies provided for by law cannot be considered effective and available.

**3.3.** According to the complainant, in addition to the usual criminal prosecution by the authorities, the victim of a crime can initiate criminal proceedings by becoming a party to the prosecution. However, the legal system governing this procedure renders it a sham. Article 36 of the Code of Criminal Procedure permits the injured party to start criminal proceedings by initiating the prosecution if the prosecutor has dropped the case. However, if the prosecutor takes no decision either to drop or pursue the case, the victim cannot initiate proceedings of his or her own accord. The Committee has considered that such a failure to act on the part of the prosecutor poses an insurmountable obstacle to the use of this legal procedure, as it makes it highly unlikely that the criminal proceedings initiated by the civil party will bring relief to the victim.<sup>8</sup> In the present case, in which registration of the complaint was refused, it was impossible for the prosecutor to take a decision. Consequently, according to the complainant, it must be concluded that the rejection of the complaint constitutes an insurmountable obstacle to the initiation by the complainant of criminal proceedings.

**3.4.** The complainant explains that, under article 45 of the Code of Criminal Procedure, any person who becomes a civil party to the prosecution is liable under civil and criminal law towards the accused if the case is dropped. As the criteria for terminating proceedings are not clearly defined, and any decision to do so is subject to external pressures, this provision exposes the complainant to serious risks of punishment. The complainant notes that the Committee has already expressed concern that this provision may in itself constitute a

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<sup>7</sup> Counsel refers to the summary record of the first part (public) of the 358th meeting of the Committee against Torture, held on 18 November 1998 (CAT/C/SR.358, para 23), and the Guidelines on the Role of Prosecutors adopted at the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Havana, Cuba, 27 August-7 September 1990).

<sup>8</sup> Communication 207/2002, *Dragan Dimitrijevic v Serbia and Montenegro*, views adopted on 24 November 2004, para 5.4.

violation of article 13 of the Convention, as the conditions for filing a complaint could be seen as ‘intimidating a potential complainant’.<sup>9</sup> In the light of the risks posed by this procedure, it cannot be considered either effective or accessible.

**3.5.** According to the complainant, the civil action referred to in article 7 of the Code of Criminal Procedure is entirely dependent on the criminal proceedings, in that it must be associated with criminal proceedings or must be brought after a conviction has been handed down by the criminal courts. In the present case, the complaint by the complainant was rejected. The criminal proceedings were not instigated because the complaint was rejected by the office of the prosecutor, who neither dropped the case nor opened an investigation into it, rendering access to a civil remedy impossible.

**3.6.** According to the complainant, the general climate of impunity for the perpetrators of torture and the judiciary’s lack of independence in Tunisia render any remedy ineffective.<sup>10</sup> The complainant was the victim of arbitrariness in the Tunisian legal system, in that she was sentenced to a term of imprisonment following a summary trial without due process. There was no investigation into the facts in the case, she was not told what she was being charged with, she had no access to a lawyer and there was no prosecutor at the trial.<sup>11</sup> The judge did not take into account the violence inflicted on the complainant, even though she appeared before her in an extremely fragile and disturbed state.<sup>12</sup> The penalty imposed was disproportionate and the complainant was not formally notified of her conviction: all she had done was to criticise an official for careless behaviour, but her words were taken as an attack.<sup>13</sup> After sentencing her to three months’ imprisonment, the judge reduced the sentence after the plainclothes policeman intervened, since the

<sup>9</sup> Summary record of the first part (public) of the 358th meeting of the Committee against Torture, held on 18 November 1998 (CAT/C/SR.358, para 29).

<sup>10</sup> See n 6 above.

<sup>11</sup> According to counsel, this violates art 141 of the Code of Criminal Procedure (‘the assistance of a counsel for the defence is compulsory in the court of first instance ... when it is ruling on a criminal offence ... if the accused does not select a counsel, the president of the court will appoint one of his own accord’), as well as principles 10, 17 and 18 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by the General Assembly in its resolution 43/173 of 9 December 1988. See also General Comment 20 of the Human Rights Committee, para 11.

<sup>12</sup> Counsel refers to the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, of the Council of Europe, which requires the judge to take appropriate steps if there are any signs of ill-treatment (CPT Standards, CPT/Inf/E (2002) 1, para 45).

<sup>13</sup> Counsel refers to communication 1189/2003, *Fernando v Sri Lanka*, views adopted on 31 March 2005, in which the Human Rights Committee found that there had been a violation by the state party of article 9 of the Covenant in that the author had been sentenced to one year of rigorous imprisonment for raising his voice in court and refusing to apologise.

complainant would not 'do it again'. This interference in the administration of justice is evidence of the lack of separation of the judicial and executive powers.

**3.7.** In conclusion, the complainant alleges that Tunisian legislation theoretically provides remedies for individuals in situations like hers, but in practice they are futile and inadequate. Accordingly, the complainant had no access to a domestic remedy that could be expected to give her any relief. The requirements of article 22 of the Convention have therefore been met and the complaint is admissible.

**3.8.** The complainant claims that, with regard to the alleged violation of articles 1 and 2 taken together, the state party failed in its duty to take effective measures to prevent acts of torture and used its own security forces to submit the complainant to acts comparable to acts of torture. The aim was to punish and intimidate her because of what she had said to the official. The abuse to which the complainant was subjected was, in her view, comparable in its gravity to that in other cases in which the Committee considered that such abuse constituted acts of torture.<sup>14</sup> The complainant was also subjected to objectively credible threats that she and members of her family would be raped and to insults and obscenities that caused mental suffering which itself amounted to a form of torture.<sup>15</sup> The circumstances and unfolding of events, as well as the insults, leave no doubt that the intention was to trigger feelings of humiliation and inferiority.<sup>16</sup> The complainant was stripped by force by a person of the opposite sex in the presence of many other persons of the opposite sex. Tearing off her clothes could not be justified by security concerns: it was intended specifically to humiliate her. It also indicates a departure from the Standard Minimum Rules for the

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<sup>14</sup> Counsel refers to communication 207/2002, *Dragan Dimitrijevic v Serbia and Montenegro*, (a young detainee not charged with any offence beaten repeatedly by police officers in a police station), and communication 49/1996, *SV et al v Canada*, views adopted on 15 May 2001 (complainant brutally assaulted by soldiers and beaten about the head until he lost consciousness).

<sup>15</sup> Counsel refers to the report of the Special Rapporteur on the question of torture contained in document A/56/156: 'It is the Special Rapporteur's opinion that serious and credible threats, including death threats, to the physical integrity of the victim or a third person can amount to cruel, inhuman or degrading treatment or even to torture, especially when the victim remains in the hands of law enforcement officials' (para 8).

<sup>16</sup> Counsel refers to the case law of the European Court of Human Rights, which has considered that, in order to establish whether treatment is degrading, it is necessary to determine whether its object is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with article 3 of the European Convention on Human Rights. The Court concluded that obliging a person to strip naked in the presence of a person of the opposite sex shows a clear lack of respect for the individual concerned, who is subjected to a genuine assault on his or her dignity (see *Valašinas v Lithuania*, application 44558/98, ECHR 2001-VIII, and *Iwańczuk v Poland*, application 25196/94, 15 November 2001).

Treatment of Prisoners, article 8(a) of which requires institutions that receive both men and women to keep the whole of the premises allocated to women entirely separate.

**3.9.** According to the complainant, it is clear that this abuse was inflicted by public officials, as required by article 1 of the Convention, as it was committed by civil servants and members of the forces of law and order acting in that capacity. Moreover, this physical abuse was intentionally inflicted with the aim of punishing her for her remarks to an official. The various officials before whom the complainant was brought questioned her solely about those remarks, and the judge sentenced her on the basis of those remarks.

**3.10.** According to the complainant, the state party also failed in its obligation to take effective legislative, administrative, judicial or other measures to prevent acts of torture. For over 10 years, international human rights treaty-monitoring bodies have been expressing concern about the widespread use of torture and have made recommendations to get the state party to take effective measures to curb this practice.<sup>17</sup> According to the complainant, acts of torture and ill-treatment continue to take place and the Committee has mentioned several provisions of the state party's legal system that are not applied in practice, including the 10-day maximum period for pretrial detention and the obligation to have a medical examination carried out when there are allegations of torture.<sup>18</sup> The constant denial of these allegations by the state party contributes to a climate of impunity for those responsible and encourages the continuation of the practices in question. It follows that the state party has violated article 2(1) read in conjunction with article 1.

**3.11.** With regard to the alleged violation of article 11, the complainant claims that the acts of torture to which she was subjected were not an isolated incident or mistake. According to her, the widespread use of torture by the Tunisian security forces has been widely documented, but the serious concerns expressed by the Committee and other treaty bodies<sup>19</sup> about practices affecting detainees do not seem to have led to a review of the standards and methods that could put an end to such abuse. According to the complainant, the gap between the law and practice in Tunisia indicates that the state party is not keeping under systematic review interrogation rules, instructions, methods and practices with a view to preventing any cases of torture. The state party is thereby in

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<sup>17</sup> See n 6.

<sup>18</sup> Concluding observations of the Committee against Torture, A/54/44 (1999), paras 97 and 98. Counsel points out that these concerns were referred to by the Human Rights Committee in its concluding observations on Tunisia's report in 1995 (A/50/40 (1995)).

<sup>19</sup> Including those expressed by the Committee against Torture and the Human Rights Committee after their consideration of the state party's reports.

breach of article 11, taken either on its own or in conjunction with article 16(1).

**3.12.** The complainant goes on to claim, in respect of the alleged violation of article 12, that the Committee's jurisprudence on cases of torture and ill-treatment has elaborated on the obligation to carry out an investigation whenever there is reasonable ground to believe that an act of torture has been committed.<sup>20</sup> This obligation exists whatever the grounds for the suspicions. The complainant notes that the Committee has considered that allegations of torture are of such seriousness that a state party has an obligation to proceed automatically to a prompt and impartial investigation as soon as there is reasonable ground to believe that an act of torture has been committed.<sup>21</sup> In cases involving allegations of torture, it is not even necessary to submit a formal complaint. It is sufficient for the victim to bring the facts to the attention of the authorities to place them under an obligation promptly to investigate the allegation.<sup>22</sup> In the present case, the complainant was so upset when she appeared before a judge that her appearance suggested she had been abused. She subsequently gave a lawyer instructions to submit a complaint on her behalf, describing the incidents and expressly classing them as torture. Two articles on the brutal treatment inflicted on the complainant were also disseminated. In the complainant's view, the state party deliberately refused to take any measure that might throw some light on the accusations being made, which amounts to an aggravated violation of the obligation to conduct an investigation under article 12, taken either on its own or in conjunction with article 16(1).

**3.13.** In respect of her allegation under article 13, the complainant notes that the Committee has established that it is sufficient for the victim simply to formulate an allegation of torture to oblige the authorities to investigate the allegation. Neither a formal complaint nor an express statement of intent to institute criminal proceedings is required.<sup>23</sup> In the present case, the state party deprived the complainant of any remedy that might have led to ascertaining the facts and setting compensation.

<sup>20</sup> Counsel refers to communications 187/2001, *Dhaou Belgacem Thabti v Tunisia*, views adopted on 14 November 2003, para 10.4; 60/1996, *Baraket v Tunisia*, views adopted on 10 November 1999, para 11.7; and 59/1996, *Encarnación Blanco Abad v Spain*, views adopted on 14 May 1998, para 8.6.

<sup>21</sup> Communication 187/2001, *Dhaou Belgacem Thabti v Tunisia*, views adopted on 14 November 2003, para 10.4.

<sup>22</sup> Communication 6/1990, *Henri Unai Parot v Spain*, views adopted on 2 May 1995, para 10.4.

<sup>23</sup> Communications 59/1996, *Encarnación Blanco Abad v Spain*, para 8.6; 113/1998, *Ristic v Yugoslavia*, views adopted on 11 May 2001, paras 9.6-9.8; and 6/1990, *Henri Unai Parot v Spain*, para 10.4.

**3.14.** The complainant claims that she is the victim of a violation of article 14. According to her, the state party denied her right to obtain redress and the means for full rehabilitation, as it prevented her from making use of the legal channels for this purpose. The international courts have consistently held that allegations of torture made against the authorities of a state party are of such seriousness that a civil action alone cannot provide adequate redress.<sup>24</sup> Full redress comprises compensation for harm suffered and an obligation on the state party to establish the facts related to the allegations and to punish the perpetrators of the violations.<sup>25</sup> By not following up on the complainant's complaint, and by not proceeding with any kind of public investigation, the state party deprived her of the most basic and most important form of redress, in violation of article 14.

**3.15.** According to the complainant, with regard to compensation, even if this constituted sufficient redress for victims of torture, she was denied access to it. The civil actions theoretically available to her were in practice inaccessible. Tunisian law permits the complainant to undertake a civil action where no criminal proceedings have been initiated, but the complainant must waive the right to pursue any criminal proceedings (Code of Criminal Procedure, art 7). Even supposing that the complainant could win the case without the benefit of criminal proceedings, this limited form of redress would be neither fair nor adequate. If the state party was permitted to provide purely financial compensation to the complainant or other victims of torture and thereby claim to have fulfilled its obligations in this respect, that would amount to accepting that the state party is entitled to evade its responsibility in exchange for a certain sum of money. The complainant has not received the means for her rehabilitation, while the abuse inflicted on her has left deep psychological scars. Nor has she been able to obtain compensation for the property taken from her during her detention. In the light of all these points, the state party has deprived the complainant of fair and adequate compensation or redress of any

<sup>24</sup> Counsel refers to the jurisprudence of the Human Rights Committee (communications 563/1993, *Nydia Erika Bautista de Arellana v Colombia*, views adopted on 27 October 1995, para 8.2; and 778/1997, *José Antonio Coronel et al v Colombia*, views adopted on 24 October 2002, para 6.2) and of the European Court of Human Rights (*Assenov et al v Bulgaria*, judgment of 28 October 1998, *Reports of Judgments and Decisions*, 1998-VIII; *Aydin v Turkey*, judgment of 25 September 1997, *Reports of Judgments and Decisions*, 1997-VI; and *Aksoy v Turkey*, judgment of 18 December 1996, *Reports of Judgments and Decisions*, 1996-VI).

<sup>25</sup> Counsel refers to the jurisprudence of the Human Rights Committee (communications 749/1997, *McTaggart v Jamaica*, views adopted on 31 March 1998, para 10; 540/1993, *Ana Rosario Celis Laureano v Peru*, views adopted on 25 March 1996, para 10; and 84/1981, *Barbata et al v Uruguay*, views adopted on 21 October 1982, para 11).

kind, in violation of article 14, taken either on its own or in conjunction with article 16(1).<sup>26</sup>

**3.16.** The complainant considers that, with regard to the alleged violation of article 16, the serious abuse inflicted on her was tantamount to torture. If, however, this interpretation is not accepted, it is maintained that such treatment constituted cruel, inhuman or degrading treatment within the meaning of article 16.

**3.17.** In conclusion, the complainant asks the Committee to recommend that the state party take the necessary measures to conduct a full investigation into the circumstances surrounding the torture in her case, to communicate the outcome of the investigation to her and to take appropriate measures to bring those responsible to justice. She also asks the Committee to recommend that the state party take the necessary measures to ensure that she receives adequate and full redress for the harm suffered, including the cost of the medical care needed for her rehabilitation and the value of the property taken from her.

#### **State party's observations on admissibility and complainant's comments**

**4.** On 12 December 2006, the state party informed the Committee that the complaint in question, registered as case 5873/4, was the subject of a judicial investigation at the Tunis court of first instance. The investigation is taking its course.

**5.** On 9 February 2007, counsel for the complainant said that, despite having had nine months in which to reply to the complainant's allegations, the state party had addressed neither the admissibility nor the merits of the communication. As far as admissibility was concerned, the state party simply stated that the complainant's case was the subject of an internal judicial procedure without producing any evidence or details of the existence of such a procedure – such as judicial or procedural files or other official documents – or even indicating the type and nature of the procedure or whether the procedure was likely to result in a legal remedy that might satisfy the requirements of the Convention, in accordance with rule 109(9) of the Committee's Rules of Procedure.<sup>27</sup> Moreover, the state party made no comment on the merits of the case.

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<sup>26</sup> Counsel refers to communication 161/2000, in which the Committee considered that, even though article 16(1), makes no mention of article 14 of the Convention, the state party nevertheless has an obligation to grant redress and fair and adequate compensation to the victim of an act in breach of article 16 of the Convention.

<sup>27</sup> '... the state party is required to give details of the effective remedies available to the alleged victim in the particular circumstances of the case ...'

## Additional observations by the state party

**6.1.** With regard to the admissibility of the complaint, on 30 March 2007 the state party indicated that all necessary measures had been taken, at the current stage of the procedure, to enable the complainant to substantiate the claims in her complaint. As soon as the Tunisian authorities had been notified by the Committee of the complainant's communication, the Ministry of Justice and Human Rights, acting in accordance with article 23 of the Code of Criminal Procedure, referred the matter to the state prosecutor of the Tunis court of first instance. The preliminary inquiries were conducted by the Tunis prosecution service, which undertook the necessary investigations: the evidence collected was insufficient to justify a prosecution and the prosecution service decided on 27 June 2006 to open a preliminary judicial investigation, and ordered an investigating judge to investigate the incidents that are the subject of the complaint, including the circumstances of the arrest of the complainant on 22 July 2004 and the alleged incidents in relation thereto. The case was registered with the investigating judge as case 5873/4.<sup>28</sup> According to information received from the public prosecutor's office, the investigating judge proceeded to hear several witnesses and question individuals implicated by the complainant, and also seized documents that could be used as evidence. The matter is taking its course in accordance with the law pending completion of the investigation.

**6.2.** In its desire not to interfere in a matter that falls under the jurisdiction of the courts and not to influence the normal course of the investigation, the state party explains that it has refrained from submitting, at this stage of the procedure, any comments on the merits of the case, which would be contrary to the universally accepted principle of non-disclosure of the confidential findings of an investigation. The state party has restricted itself to the above-mentioned points pending the conclusion of the investigation, which, at this late stage of the procedure, should be completed shortly.

**6.3.** The state party notes that the opening of a judicial investigation is a legal remedy that satisfies the requirements of the Convention, in accordance with rule 109 of the Committee's Rules of Procedure. Once the judicial investigation has been opened, the investigating judge in charge of the case proceeds, in accordance with article 53 of the Code of Criminal Procedure, to hear the complainant, collect statements from witnesses, question suspects,

<sup>28</sup> The state party attaches a registration certificate and an unofficial translation into French: 'The registrar responsible for the fourth investigations office of the court of first instance in Tunis hereby certifies that the case registered as 5873/4, concerning the investigation of an unknown person in accordance with article 31 of the Code of Criminal Procedure, for the purposes of determining the circumstances of the arrest of Ms Saadia Ben Ali on 22 July 2004 and the alleged events in relation thereto, is still under investigation.'



visit the scene where necessary to make the usual observations, seize objects that could be used as evidence, order expert reports where necessary and take all necessary steps to establish the truth, considering evidence that both incriminates and exonerates the suspect.

**6.4.** According to the state party, complainants can also become a party to the prosecution by presenting themselves to the investigating judge conducting the investigation: this enables the complainant to follow the procedure as it takes its course, to submit conclusions where necessary and to appeal against the decisions of the investigating judge. Once the investigation is concluded, the investigating judge issues an order containing one of the following findings: (a) that there are no grounds for prosecution, including if the judge thinks that criminal proceedings are not in order, that the acts concerned do not constitute an offence or that there is insufficient evidence against the accused; (b) that the accused should be referred to the appropriate court, including if it is established that they committed the acts of which they are accused, and which are classed as offences or misdemeanours by law; or (c) that the accused should be referred to the indictments chamber, where the acts that have been proved constitute a criminal offence.

**6.5.** The state party explains that orders are communicated to the civil party, who may, within four days of notification, lodge an appeal against any order that adversely affects his or her interests. The appeal takes the form of a written or oral statement and is received by the registrar of the investigations office. The indictments chamber rules on the appeal; its decisions are enforceable with immediate effect. If the indictments chamber finds that the acts do not constitute an offence or that there is insufficient evidence against the accused, it discharges the accused. If, on the other hand, there are sufficient indications of guilt, it refers the accused to the appropriate court – in this case, the criminal court or the criminal section of the court of first instance. The indictments chamber can also order a further investigation, entrusting it either to one of its judges or to the investigating judge. It can also, under its power to raise issues, order new proceedings and investigate or order an investigation into acts that have not yet been investigated. Once notice of the decision has been served, the civil party can launch an appeal on points of law against a decision of the indictments chamber in the following cases: when the chamber orders the discharge of the accused; when it declares the civil action inadmissible; when it declares the criminal prosecution time-barred; when it finds, either of its own motion or in response to objections by the parties concerned, that the court to which the case was referred did not have jurisdiction; or when it fails to rule on one of the counts.

**6.6.** The state party argues that the complainant may also, if it is established that he or she has suffered injury as a direct result of an offence, pursue a claim for damages in civil proceedings. These proceedings can be held simultaneously with the criminal prosecution or separately, in a civil court, as set out in article 7 of the Code of Criminal Procedure. Civil proceedings in criminal courts are initiated by becoming a party to the prosecution; when pursued through the trial court, they are aimed at obtaining compensation for harm suffered. A person can become a civil party to a criminal prosecution by submitting a written request, signed by the plaintiff or his or her representative, to the court handling the case. The court considers the admissibility of the application to become a civil party and, where appropriate, declares it admissible. The court concerned joins the application to the merits, and rules on both in a single judgement. However, when the civil party is acting as the principal, the court issues an immediate ruling on the application.

**6.7.** In conclusion, the state party considers that the present communication is inadmissible under article 22 of the Convention, given that it has been established that the available domestic remedies have not been exhausted. The remedies recognised by Tunisian legislation to all plaintiffs are effective and enable them to substantiate the claims that are the subject of their complaint in a satisfactory manner. Consequently, the submission of the complaint by the complainant to the Committee is unjustified.

### **Complainant's comments on the state party's observations**

**7.1.** On 23 April 2007, the complainant wrote that the launch of an investigation by the Tunisian authorities solely as a result of the communication submitted to the Committee constitutes further irrefutable evidence of the ineffectiveness and futility of domestic remedies in Tunisia. The incident at the origin of the complaint took place on 22 July 2004 and the complainant immediately took steps to have her representative file a complaint with the appropriate authorities on 30 July 2004. Referring to the initial communication, the complainant reiterates that the Tunisian authorities refused to investigate her complaint or even to accept that it should be examined. The Tunisian judicial system offers no remedies to the victims of torture and ill-treatment, and it is therefore futile to attempt to exhaust them. The fact that the Tunisian authorities took no action for 23 months after the complaint was submitted, and that they then, as they have admitted, launched an investigation solely because the complaint had been submitted to the Committee, provides further evidence of the futility of attempting to exhaust domestic remedies in Tunisia. The action taken by the state party in response to her complaint is symptomatic of the tactics used by the state party to discourage complainants and to prevent their cases

from reaching the Committee, and does not reflect a genuine desire to investigate and prosecute officials of the state party.

7.2. The application of remedies in Tunisia is, according to the complainant, unreasonably prolonged, given that the state party waited 23 months before launching an investigation which is still in its preliminary phase, that is, in the phase where evidence is collected. No charges have yet been laid, still less have any proceedings been initiated. Even supposing that the investigation would be conducted in good faith and lead to the prosecution of the perpetrators, it could reasonably be expected that the proceedings would be very long, and perhaps drawn out over several years. Given the delay of 23 months before the investigation was even opened, these facts support the conclusion that the application of domestic remedies is unreasonably prolonged. The complainant draws attention to the jurisprudence of the Human Rights Committee, which concluded that ‘a delay of over three years for the adjudication of the case at first instance, discounting the availability of subsequent appeals, was “unreasonably prolonged” within the meaning of article 5, paragraph 2(b), of the Optional Protocol’.<sup>29</sup> In the present case, it is certain that this three-year limit set by the Human Rights Committee will be exceeded, since the investigation by the Tunisian authorities is still in its preliminary phase. The complainant reiterates that the state party’s failure to launch an investigation for 23 months constitutes a violation of article 12 of the Convention.<sup>30</sup>

7.3. According to the complainant, given the persistent refusal by the state party to comment on the merits of the complaint, the Committee should base its decision on the facts as she describes them. The Human Rights Committee and the Committee against Torture have 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.<sup>31</sup> The complainant reiterates that, in her case, the state party has not expressed any view on the merits; the complainant, however, has correctly proceeded to substantiate her allegations with a number of documents, including copies of her medical records, her complaint to the Tunisian judicial authorities, witness statements and a large amount of supplementary documentation. She considers therefore that the Committee should base its decision on the facts as described by her. As to the state

<sup>29</sup> Communication 336/1988, *Fillastre and Bizouarn v Bolivia*, views adopted on 5 November 1991, para 5.2.

<sup>30</sup> Communication 8/1991, *Halimi-Nedzibi v Austria*, views adopted on 18 November 1993.

<sup>31</sup> The complainant refers to the views of the Human Rights Committee on the following communications: 1353/2005, *Njiru v Cameroon*, views adopted on 19 March 2007; 1208/2003, *Kurbonov v Tajikistan*, views adopted on 16 March 2006; and 760/1997, *Diergaardt et al v Namibia*, views adopted on 25 July 2000.

party's claim that it cannot comment on the merits of the complaint as long as the internal investigation is ongoing, the complainant argues that responsibility for both the delay in instigating the internal procedure and the delay pending its conclusion lies with the state party, as it did not take any action for two years and finally acted only when her complaint was submitted to the Committee. The unreasonable delay in the internal procedure as a result of the state party's failure to act should not detract from the complainant's case to the Committee. To allow it to do so would be to do wrong both to the complainant and to the cause of justice.

7.4. According to the complainant, the state party has not been able to demonstrate that remedies are effectively available to victims in Tunisia. She points out that, under the rules of international law, the Committee considers 'effective' only those remedies available to the victim not only in theory but also in practice.<sup>32</sup> She argues that the judicial system in Tunisia is not independent and the courts generally endorse the government's decisions. In situations where it has been clearly demonstrated that access to the courts is denied to individuals like the complainant, the burden of proof is on the state party to prove the contrary. In the present case, the state party has not met this burden of proof because it has merely described the theoretical availability of remedies without contradicting any of the numerous pieces of evidence provided by the complainant to show that these remedies are not available in practice.<sup>33</sup>

### **Additional observations by the state party and additional comments by the complainant**

8.1. On 27 April 2007, regarding the complaint that the complainant claims to have filed on 30 July 2004 through her representative, the state party maintained that the file contains no credible evidence confirming her allegations. The rules of evidence exclude the attribution of evidentiary weight to certificates and documents drawn up on the complainant's own behalf. Consultation of the complaints register, the IT database and registered mail of the office of the Tunis prosecution service shows no record of the filing of the complaint. The prosecution service's alleged refusal to receive the complaint would in no way have prevented the complainant from filing the complaint by any means that would leave a written record.

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<sup>32</sup> The complainant refers to the jurisprudence of the Human Rights Committee (communication 147/1983, *Arzuada Gilboa v Uruguay*, views adopted on 1 November 1985).

<sup>33</sup> The complainant refers to her initial communication, as well as the chapter on Tunisia in the *World Report 2007* by Human Rights Watch, in which it is stated that: 'Prosecutors and judges usually turn a blind eye to torture allegations, even when the subject of formal complaints submitted by lawyers.'

8.2. On 2 May 2007, the complainant pointed out that the submission of a written affidavit constitutes a generally accepted form of evidence. She reiterated her previous arguments and said that the state party was deliberately refraining from recording complaints of official misconduct.

### **Additional observations by the state party and additional comments by the complainant**

9.1. On 31 July 2007, the state party said that Tunisian legislation provides for severe penalties against perpetrators of torture and ill-treatment. Numerous examples demonstrate that recourse to the Tunisian courts in similar cases has been not only possible but also effective. The Tunisian courts have reached decisions in dozens of cases concerning law enforcement officials on various charges. The sentences handed down have ranged from fines to up to 10 years' unsuspended imprisonment. Provisions are in place for disciplinary measures against law enforcement officials, and they may also be brought before the disciplinary council of the Ministry of the Interior and Local Development. Statistics published by the ministries concerned prove that no pressure or intimidation is used to prevent victims from filing complaints, and that there is no impunity.

9.2. The state party points out that the complainant's case remains under examination, and domestic remedies have therefore not been exhausted. The state party points out that it has consistently provided the Committee with all available information on the question, as well as on the preliminary investigation conducted by the Tunis prosecution service and the preparatory examination assigned to one of the investigating judges of the Tunis court of first instance (case 5873/4). On 8 May 2007, the investigating judge communicated the whole procedure to the public prosecutor, after having heard several witnesses, questioned the persons accused by the complainant and seized documents that could constitute evidence. Pursuant to article 104 of the Code of Criminal Procedure, the prosecutor set out written petitions for further investigations, including a summons sent to the complainant at her current residence in France. The investigating judge therefore undertook further measures by ordering, on 29 June 2007, an international letter of request to transmit a summons to the complainant in France, for her to present herself before the judge on 14 August 2007. The case is still under way. The state party requests the Committee to defer its decision on the merits pending the completion of the investigation.

10. On 30 August 2007, the complainant said that the state party had adduced no new argument. Regarding the state party's contesting the lack of effective remedy in Tunisia, the complainant notes that the state has not furnished any evidence in support of its allegations. The complainant contests the state party's affirmation

that the case is still under way, since she has not received any communication on that subject. If there had been any developments in the state party, she would have been informed by her Tunisian lawyer, who confirms that he is not aware of any new development and has not been contacted by the Tunisian authorities in this case. Consequently, the state party's claims that there have been developments in the national proceedings must also be considered as completely unfounded.

### **Additional observations by the state party**

11.1. On 25 October 2007, the state party presented copies of judgments that provide irrefutable proof that the Tunisian judicial authorities do not hesitate to prosecute cases of abuse of power by law enforcement agents, particularly acts of violence and ill-treatment, and to impose severe penalties if they are found guilty. Since criminal proceedings are without prejudice to the authorities' right to initiate disciplinary proceedings against officials, on the principle that criminal and disciplinary offences may be tried separately, the perpetrators of such offences are also generally subjected to disciplinary measures resulting in dismissal. The state party also lists cases brought against police and prison officers and officers of the National Guard in the Tunisian courts between 2000 and 2006. The state party states that it has always endeavoured to set up the necessary mechanisms to protect human rights, particularly monitoring and inspection mechanisms, while facilitating access to justice. In addition, human rights training courses for law enforcement agents have been introduced. This information shows that domestic remedies are effective and efficient. The state party points out that judicial proceedings are under way and that exhaustion of domestic remedies is a fundamental principle of international law. It requests the Committee to defer its decision for a reasonable period to allow the domestic courts to fully investigate the events referred to in the complaint. The complainant's persistence compels the state party to reveal some elements of the case that raise questions as to the complainant's credibility.

11.2. Firstly, the state party notes that the medical certificate corresponding to the complainant's visit to Charles Nicole hospital is dated 24 July 2004 and refers to events that occurred on 23 July 2004, whereas her complaint states that she went to the hospital the day after the alleged events, that is, 23 July 2004. This double contradiction of the facts as reported by the complainant herself is such that it eliminates any causal link between the injuries she alleges and her appearance at the court of first instance in Tunis. Secondly, according to a statement by one of the complainant's fellow detainees, taken by the investigating judge, the complainant had tried to bribe her, offering her money to make a false statement on her behalf to the effect that the complainant had been subjected

to acts of violence by the arresting officers. Thirdly, the complaint states that, immediately after her arrest on 22 July 2004, the complainant tried to use her mobile phone to call ACAT. Such a reaction immediately following her arrest suggests a premeditated act and a strategy planned in advance to simulate an incident that would provide the opportunity to submit a complaint against the Tunisian authorities. Fourthly, the hearing of the complainant's fellow detainees showed that she had not been subjected to ill-treatment. In this regard, the state party refers to its comments of 31 July 2007 as well as to summonses sent to the complainant at her addresses in Tunisia and France. This attests to the diligence with which the judge handling the case has been proceeding, despite the complainant's prevarication. The judge organised a hearing of the persons involved in the case, notably the police officers on duty on the date of the events at the centre of the complaint and the fellow detainees whose names were listed in the prisoners' register kept at the court of first instance in Tunis.

### **Deliberations of the Committee on admissibility**

**12.1.** At its thirty-ninth session, the Committee considered the admissibility of the complaint and, in a decision of 7 November 2007, declared it admissible.

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

**12.3.** With respect to the exhaustion of domestic remedies, the Committee noted that the state party challenged the admissibility of the complaint on the grounds that available and effective domestic remedies had not been exhausted. In the present case, the Committee noted that the state party had provided a description of the remedies available, under law, to any complainant. Nonetheless, the Committee considered that the state party had not sufficiently demonstrated the relevance of its arguments to the specific circumstances of the case of this complainant. In particular, the Committee took note of the information provided by the complainant on the complaint she had instructed the lawyer to file with the prosecutor's office on 30 July 2004. The Committee considered that the insurmountable procedural impediment faced by the complainant as a result of the refusal to allow the lawyer to register the complaint rendered the application of a remedy that could bring effective relief to the complainant unlikely. Such a refusal rendered the state's suggested consultation of the complaint registers completely ineffectual. The Committee also noted that the state party, in its observations, indicated that an investigation was under way, but that it provided no new information or evidence that would allow the

Committee to judge the potential effectiveness of that investigation, which had been launched on 27 June 2006, almost two years after the alleged incidents had taken place. The Committee concluded that, in the circumstances, the domestic proceedings had been unreasonably prolonged and considered that in the present case there was little chance that the exhaustion of domestic remedies would give satisfaction to the complainant.

**12.4.** The Committee took note of the state party's argument that submission of the complaint by the complainant was unjustified. The Committee considered that any report of torture was a serious matter and that only through consideration of the merits could it be determined whether or not the allegations were defamatory. With respect to article 22(4) of the Convention and rule 107 of the Committee's Rules of Procedure, the Committee saw no further obstacle to the admissibility of the complaint.

**12.5.** The Committee against Torture consequently decided that the communication was admissible with regard to article 2(1) taken in conjunction with article 1, or, alternatively, article 16(1); and articles 11, 12, 13 and 14, taken separately or in conjunction with article 16, paragraph 1 of the Convention.

### **State party's observations on the merits**

**13.1.** On 23 January 2008, the state party argued that the Committee's decision on admissibility was based solely on the 'misleading statements' of the complainant's Tunisian counsel. The new evidence obtained through the investigation, however, showed those statements to be unfounded. Indeed, when the complainant was heard by the investigating judge handling the case on 11 December 2007, she stated explicitly that 'she had never filed a complaint of ill-treatment with the state prosecutor in Tunis because she was not aware of the procedures, nor had she instructed a lawyer to do so'.<sup>34</sup> This revelation raises numerous questions, moreover, about the unstated motives of the complainant, who seems to have pursued international remedies in preference to domestic judicial ones. According to the state party, the domestic proceedings have not been unreasonably prolonged, as no complaint was ever received by the national judicial authorities, and those authorities decided to open a judicial investigation without delay, as soon as they had been notified by the Committee of the complainant's communication on 27 June 2006. This being the case, the complainant's Tunisian counsel twisted the facts in order to mislead the Committee. For all these reasons, the state party invites the Committee to reconsider its decision declaring the complainant's communication admissible.

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<sup>34</sup> The state party cites an annex in Arabic attached to its observations.



**13.2.** The state party provides additional evidence revealed during the hearing by the investigating judge of the complainant, her brother and all the law enforcement officers on duty on the day of the incident at the court of first instance in Tunis, and during the confrontation of the complainant and the witnesses. When she was heard on 11 December 2007, the complainant repeated her version of events, as presented to the Committee. She admitted, however, that she had tried to bribe one of her fellow detainees, asking the woman to testify in her favour in exchange for an unspecified gift. During his hearing by the investigating judge on 4 January 2008, the complainant's brother confirmed that she had accompanied him to the court of first instance in Tunis on 22 July 2004. He explained that he was not present, however, during the events that gave rise to the complaint, as he had gone to have coffee, and that he had only learned of her altercation with the registrar on his return to the court. He went to the prosecutor's office, where he found his sister waiting to be brought before the prosecutor. He then decided to go home. Furthermore, he told the investigating judge that, when she returned home, his sister bore no sign of violence, and she did not inform any family member of the ill-treatment to which she had allegedly been subjected at the court. He added that his sister behaved normally on her return from the court and did not mention having been to the hospital clinic to seek treatment.<sup>35</sup> The state party reports that, during the hearing of the law enforcement officers on duty at the court of first instance in Tunis on 22 July 2004, the officers categorically denied the complainant's allegations, asserting that she had not suffered any ill-treatment.<sup>36</sup>

**13.3.** The investigating judge conducted the usual confrontations, during which the complainant repeated that she had been subjected to ill-treatment, identifying two of the three law enforcement officers as having been on duty on the day of the incident. Of those two officers, one, according to the complainant, had played no part in the alleged events. She identified the other officer as the one who had taken her to the court's jail, gripping her arm, which had caused her pain. She said that a third officer, not the one who had been brought before her, had been responsible for the ill-treatment inflicted. However, the officer who had been brought before her stated that he had been the third officer on duty on 22 July 2004. In addition, the complainant reaffirmed that she had asked one of her fellow detainees to testify in her favour in exchange for a gift. She also admitted that she had not informed her family of the ill-treatment on her return home. The persons detained along with her and the law enforcement officers reiterated that the complainant had not been subjected to any ill-treatment while being held in the

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<sup>35</sup> As above.

<sup>36</sup> As above.

court's jail. The complainant's brother repeated his previous statements.

**13.4.** According to the state party, the evidence contained in the investigation file confirms the double contradiction noted in respect of the medical certificate submitted to the Committee by the complainant (see paragraph 11.2 above). It also confirms that the complainant was not subjected to ill-treatment at the court of first instance in Tunis. Consequently, the state party requests the Committee to reconsider its decision declaring the complaint admissible, since domestic remedies have not been exhausted, the investigation is still under way and the evidence uncovered by the investigation as to the merits demonstrates that the complaint is baseless.

### **Complainant's comments on the state party's observations**

**14.1.** On 7 April 2008, the complainant argued that the issue of admissibility had been settled by the Committee's decision of 7 November 2007. She made clear that she had indeed filed a complaint with the domestic courts and that she had twice travelled to Tunis in response to summonses by the investigating judge of the court of first instance, in order to be present at two hearings relating to the investigation into her complaint of torture and ill-treatment. The hearings were held on 11 December 2007 and 7 January 2008 at the fourth investigations office of the court of first instance. Three other hearings seem to have been organised, however, without her presence having been sought, on 30 August 2007, 31 August 2007 and 4 January 2008.

**14.2.** The complainant notes that the state party has included in the file a partial record of those hearings, contained in eight annexes in Arabic. The records are incomplete and confused and numerous passages have been omitted, without any explanation being provided by the state party. The complainant comments that these documents do not constitute records, since they do not reflect what was actually said during the investigating judge's interviews with the witnesses: they do not contain the statements as delivered by the witnesses but purport to be a summary thereof. The witnesses' actual statements remain unknown. These records therefore have no evidentiary value.

**14.3.** The complainant notes that, on 7 January 2008, on the conclusion of the hearings, she requested a copy of the complete file, including the records, but her request was refused. She was thus denied the opportunity to refute the state party's arguments and to submit to the Committee evidence from the file substantiating her complaint. She points out that, in its annual report on human rights practices, the United States Department of State expressed concern about the prevalence of this type of practice in Tunisia.<sup>37</sup> The applicant disputes categorically the veracity of the statements made

by the witnesses during the confrontation. For this reason, she refused to sign the record of the hearings, and she explained clearly to the investigating judge why she was doing so.

**14.4.** According to the state party, the complainant stated ‘explicitly’ before the investigating judge that she had never filed a complaint of ill-treatment. She notes, however, that the record of her evidence makes no reference whatever to any such statement on her part. Likewise, the state party asserts that she admitted having tried to bribe one of her fellow detainees. Yet the record contains no mention of any such statement by the complainant. The state party’s assertions are thus false and without foundation.

**14.5.** The complainant notes that certain documents submitted by the state party are incomplete, ending with unfinished sentences. She comments that the state party’s observations contain inaccuracies. The state party asserts that the complainant’s fellow detainees reaffirmed that she had not been subjected to any ill-treatment while being held in the court’s jail. It is clear, however, on reading the record of their evidence, that the witnesses confirmed that they had not seen the complainant being ill-treated.

**14.6.** The complainant stresses that she did indeed make a complaint to the domestic courts, through her Tunisian counsel. She points out that she transmitted a copy of the complaint to the Committee. She rejects the allegation that she tried to bribe a witness. The investigating judge never took evidence from the witness in question. The accusation is thus illogical.

**14.7.** Regarding her brother’s evidence, the complainant explains that she was too shocked and traumatised by the acts of torture and ill-treatment to which she had just been subjected to inform her family immediately of what had occurred. The injuries she sustained were to parts of her body that were covered by clothing, specifically her left arm, foot, buttocks, right wrist and head (but not her face), and could not therefore be seen by her family.<sup>38</sup> She explained all of these facts to the investigating judge. She comments that her relationship with her family is strained and that she did not therefore feel able to reveal to them the intimate details of the abuse she had just suffered. The tensions in the complainant’s family are confirmed by the record of the hearing of her brother: he stated that his sister had ‘ruined the atmosphere at his wedding’.

**14.8.** Lastly, the complainant refers to new information that has recently become available attesting to the existence of numerous procedural irregularities that permeate the Tunisian justice system and establishing that torture and ill-treatment are common practices

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<sup>37</sup> See United States Department of State, Country Reports on Human Rights Practices - 2007, Tunisia, 11 March 2008.

<sup>38</sup> The complainant cites the medical certificates attached to the initial complaint.

in Tunisia.<sup>39</sup> In conclusion, the complainant asserts that she has been consistent and has provided numerous details and that her version of events is therefore credible, and has been since the start of the proceedings. She has adduced a great deal of evidence to substantiate her complaint. The fact that she travelled to Tunisia twice to be present at the hearings demonstrates her good faith and her willingness to cooperate with the state party, with a view to shedding light on the case.

## Consideration of the merits

**15.1.** 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.

**15.2.** The Committee takes note of the state party's observations of 23 January 2008 challenging the admissibility of the complaint. It notes, however, that even though a judicial investigation was opened on 27 June 2006, the investigation has yet to result in a decision. It also takes note of the 'records' of the hearings and confrontations organised in the course of the investigation, while observing that the documents produced by the state party seem to be summaries - rather than records - of the hearings; that they are incomplete, some passages having been omitted; and that the statements imputed to the complainant do not appear in them. It therefore considers 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 four years of *lis alibi pendens*, which in the Committee's opinion justifies the view that the exhaustion of domestic remedies has been unreasonably prolonged (see paragraph 12.3 above). The Committee therefore sees no reason to reverse its decision on admissibility.

**15.3.** Accordingly, the Committee proceeds to its consideration of the merits and notes that the complainant alleges violations by the state party of article 2(1) taken in conjunction with article 1, or, alternatively, article 16(1); and articles 11, 12, 13 and 14, taken separately or in conjunction with article 16(1) of the Convention.

**15.4.** The Committee observes that 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

<sup>39</sup> See United States Department of State, Country Reports on Human Rights Practices - 2007, Tunisia, 11 March 2008; Human Rights Watch World Report 2008; the concluding observations of the Human Rights Committee on Tunisia (CCPR/C/TUN/CO/5, 28 March 2008); and the European Court of Human Rights judgement of 28 February 2008 in the case of *Saadi v Italy*, application 37201/06.

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 her for her words addressed to the registrar of the court of first instance in Tunis and to intimidating her. Although the state party disputes the facts as presented by the complainant, the Committee does not consider the state party's arguments to be sufficiently substantiated. In the circumstances, the Committee concludes that the complainant's allegations must be duly taken into account and that the facts, as presented, constitute torture within the meaning of article 1 of the Convention.

**15.5.** In the 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 of the Convention exceeds the treatment encompassed in article 16.

**15.6.** 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.

**15.7.** As to the allegations concerning the violation of articles 12 and 13 of the Convention, the Committee notes that the prosecutor never informed the complainant's lawyer, or the complainant herself, whether an inquiry was under way or had been carried out following the filing of the complaint on 30 July 2004. The state party has, however, informed the Committee that the competent authorities took up the case as soon as they had been notified by the Committee of the complainant's communication and that the Tunis prosecution service decided on 27 June 2006 to open a preliminary judicial investigation. The state party has also indicated that the investigation is still ongoing, more than four years after the alleged incidents, without giving any details. In addition, the Committee notes that the prosecutor rejected the complaint filed by the lawyer and that the complainant has thus effectively been prevented from initiating civil proceedings before a judge. The Committee considers that a delay of 23 months before an investigation is initiated into allegations of torture is excessive and does not meet the requirements of article 12 of the Convention,<sup>40</sup> 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

<sup>40</sup> Communication 8/1991, *Halimi-Nedzibi v Austria*, views adopted on 18 November 1993, para 13.5 (delay of 15 months).

under article 13 of the Convention to ensure that the complainant has the right to complain to, and to have her case promptly and impartially investigated by, its competent authorities.

**15.8.** 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 her of any form of redress by failing to act on her complaint and by not immediately launching a public investigation. The Committee recalls that article 14 of the Convention not only recognises 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 lack of information from the state party concerning the completion of the investigation still under way, the Committee concludes that the state party has also breached its obligations under article 14 of the Convention.

**16.** 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.

**17.** 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 acts inflicted on the complainant 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**





# ANGOLA

## Institute for Human Rights and Development in Africa v Angola

(2008) AHRLR 43 (ACHPR 2008)

Communication 292/2004, *Institute for Human Rights and Development in Africa v Republic of Angola*

Decided at the 43rd ordinary session, May, 2008, 24th Activity Report

*Mass expulsion of foreigners from Angola*

**Admissibility** (exhaustion of local remedies, rationale, 38; deportees, exile, 39-41)

**Equal protection of the law** (procedure and substance, 45, 47, 48)

**Cruel, inhuman or degrading treatment** (conditions of detention, 50-53; *non-refoulement*, 84, 87; remedies, 87)

**Evidence** (failure of state to respond to allegations, 53, 55, 76, 79)

**Personal liberty and security** (arbitrary arrest and detention, 54, 55, 57; no opportunity given to challenge detention, 58-65, 84)

**Expulsion** (due process of law, 63, 65; mass expulsion, 67-69; right to expel foreigners not absolute, 79, 84)

**Property** (confiscation, 72, 73)

**Work** (effect of arbitrary arrest, detention and deportation, 76)

1. The complaint is filed by the Institute for Human Rights and Development in Africa (IHRDA) on behalf of Mr Esmaila Connateh and 13 other Gambians deported from Angola in March, April and May of 2004.

2. The complaint alleges the capricious arrest and deportation, in violation of their human and peoples' rights, of the said Gambians who were alleged to have been legally residing and working in Angola.

3. It is alleged that the government of Angola put into effect the *Operação Brilhante*, a campaign with the objective of expelling foreigners from Angola. Many foreigners were deported from many areas especially those in the diamond mining areas. The complainants, who are of Gambian nationality, alleged that they

were arbitrarily arrested, detained and later deported from Angola without any legal protection. It is estimated that 126 247 foreigners were deported from Angola.

4. The complaint further alleges that those expelled were maltreated due to their nationalities and origin, and in the process the Angolan authorities confiscated their official documents, including passports, visas, residence permits, and work authorisation. In some cases, money was demanded from them, and those who could not afford the money were seriously beaten.

5. The complainant alleges further that those expelled were detained in detention centres in different areas of Angola including Cafunfu, Kisangili, Saurimo, and Launda, under conditions which were not suitable for human habitation. It is alleged that the detention camps were initially used to house animals and contained a plethora of animal waste. The detainees were faced with harsh conditions such as: no medical attention; lack of food; poor sanitation. For instance, there were only two buckets of water provided for 500 detainees to use in the bathroom; the bathroom was not separated from the sleeping and eating areas.

6. The complaint further alleges that the Angolan armed forces raided villages where the victims resided. They were arrested in their homes as well as on the streets at checkpoints. There were no arrest warrants issued or any reason given for the arrests. Moreover, the victims were not provided access to courts of law in order to challenge the reasons for their arrests.

7. It is further alleged that the victims' property was seized and they were denied to take their property during the alleged deportation. Some of the items that were confiscated from them they left behind, and that were confiscated from them include: television sets, shoes, wristwatches, clothing, generators, television, furniture and cash.

8. According to the complainant, although the victims had work permits and relevant documents to engage in mining activities in Angola, they were arrested on the mere premise that foreigners were not allowed to engage in mining activities in the country.

## **Complaint**

9. The complainant alleges violation of articles 1, 2, 3, 5, 6, 7(1)(a), 12(4), (5), 14 and 15 of the African Charter on Human and Peoples' Rights.

## **Procedure**

10. The complaint was dated 4 October 2004 and received at the Secretariat of the African Commission on 6 October 2004.

11. At its 36th ordinary session held in Dakar, Senegal from 2 November to 7 December 2004, the African Commission examined the complaint and decided to be seized thereof.
12. On 23 December 2004, the Secretariat wrote to the complainant and respondent state informing them of this decision and requesting them to forward their written submissions on admissibility before the 37th ordinary session of the Commission.
13. Similar reminders were sent out to the parties on 2 February and 4 April 2005.
14. On 14 April 2005, the Secretariat received the complainant's written submission on admissibility, which was forwarded to the respondent state on 23 April 2005.
15. At its 37th ordinary session held in Banjul, The Gambia from 27 April to 11 May 2005, the African Commission considered this communication and deferred its decision on admissibility to the 38th ordinary session.
16. On 12 May 2005, the Secretariat wrote to both parties to inform them of this decision and requested the respondent state to forward its written submissions on admissibility before the 38th ordinary session.
17. On 12 September 2005, the Secretariat sent a reminder to the respondent state.
18. At the 38th ordinary session held from 21 November to 5 December 2005 in Banjul, The Gambia, the African Commission considered the communication and deferred its decision on admissibility to the 39th ordinary session to allow the respondent state more time to forward its submissions.
19. On 30 January 2006, the Secretariat wrote to the complainant informing it of this decision.
20. On 5 February 2006, a similar notification was emailed and also sent by DHL to the respondent state also requesting it to forward its written submissions on admissibility.
21. At its 39th ordinary session, the African Commission considered this communication and declared it admissible.
22. The Secretariat of the African Commission informed the parties of this decision and requested them to forward their submissions on the merits before the 40th ordinary session. The respondent state's delegates were also provided with copies of this decision during the 39th ordinary session.
23. On 21 August 2006, the Secretariat of the African Commission received the submissions of the complainant on the merits, which was forwarded to the respondent state.

24. At its 40th ordinary session, the African Commission deferred the consideration of the communication on the merits pending the written submission on the same by the respondent state.

25. A copy of the complainant's submission on merits was availed to the delegates of the respondent state at the session.

26. At the request of the Angolan delegates present at the second brainstorming meeting on the African Commission in Maseru, Lesotho in April this year, the Secretariat of the African Commission emailed a copy of the complainant's written submission to the respondent state's embassy in Addis Ababa, Ethiopia in May 2007.

27. At its 41st ordinary session, the African Commission deferred the consideration of the matter to the 42nd ordinary session.

28. On 8 July 2007, the Secretariat of the African Commission notified both parties of this decision.

29. On 11 September 2007, the Secretariat of African Commission wrote to the respondent state requesting it to forward to the African Commission its written submissions and/or observations on the merits at its earliest convenience.

30. The respondent state is yet to forward its written submission on the merits.

31. At its 42nd ordinary session, the Commission considered the communication and decided to defer it to its 43rd session due to lack of time.

32. By *note verbale* of 19 December 2007 and letter of the same date, both parties were notified of the Commission's decision.

## Law

### Admissibility

33. The complainant submitted its written submissions on the merits. The respondent state, however, failed to respond to the various notifications addressed to it in the context of this communication.

34. In the face of the state's failure to address itself to the complaint filed against it, the African Commission has no option but to proceed with its consideration of the communication in accordance with its Rules of Procedure. In communications 155/1996, *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* [(2001) AHRLR 60 (ACHPR 2001)], and 159/1996 *Union Interafricaine des Droits de l'Homme and Others v Angola* [(2000) AHRLR 18 (ACHPR 1997)], the African Commission decided that it would proceed to consider communications on the basis of the submission of

complainants and information at its disposal, even if the state fails to submit.

**35.** In its submission on admissibility, the complainant alleges that the Angolan government embarked on a campaign termed *Operação Brilhante*, which was characterised by the systematic process of identifying and rounding up of foreigners working and residing in the diamond-mining regions of Angola, resulting in the detention and deportation of the victims. It avers that tens of thousands of non-nationals were deported from Angola, including Mr Esmaila Connateh and 13 other Gambians on whose behalf the present complaint is filed. Their immediate arrest, and the absence of prior notice being given to them, resulted in the automatic loss of their property. And during the course of the arrests, Angolan authorities confiscated and destroyed the identity documents belonging to the complainants, including their Gambian passports and visas, residence permits and work permits which explicitly authorised the Gambians to live and work in Angola. Physical property was inevitably abandoned with no possibility for the transfer of such to The Gambia and large amounts of money were extorted from the foreigners by the Angolan authorities. The complainant alleges that the victims were detained for several weeks, and some for months in a series of detention centres within Angola, under conditions below acceptable minimum human rights standards. Principles of due process of law and respect for international human rights norms were not respected during the process from arrest to their deportation.

**36.** The complainant further avers that the deportees were not given any opportunity to contest or challenge the irregularity and illegality of the detention and expulsion by the Angolan government in a court of law; that they did not have access to legal counsel provided at any stage before their deportations; that no national local remedy was made available to the Gambian nationals at any stage prior to the deportations. It further claims that as a matter of physical impossibility national remedies are no longer available to the Gambians as they are now no longer in the territory of Angola.

**37.** The African Commission notes that there are no indications in the submissions of the complainant that warrant a declaration of inadmissibility of the present communication. In terms of article 56(5) of the African Charter, however, the African Commission has further examined the assertions of the complainant on the matter as outlined in the preceding paragraphs. Article 56(5) stipulates that communications shall be considered only if they 'are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged'.

**38.** It is a well-established rule of customary international law that before international proceedings are instituted against a state, the various domestic remedies provided by the state should have been

approached. This is also known as the exhaustion of local remedies rule, which is a principle under international law permitting states to solve their internal problems in accordance with their own constitutional procedures before accepted international mechanisms can be invoked.

39. This, however, is not a strict requirement that must always be met. In the present communication, the African Commission notes that there were no domestic remedies available to the deportees as they were rounded up, detained and deported in such a manner that they could not gather their personal belongings or entrust same with friends and relatives for safe keeping, let alone be able to seize the appropriate authorities to challenge the manner of their detention, and subsequent expulsion.

40. Time and again, in communication 71/1992, *Recontre Africaine pour la Défense des Droits de l'Homme v Zambia* [(2000) AHRLR 321 (ACHPR 1996)], the African Commission held that the mass expulsions, particularly following arrest and subsequent detentions, deny victims the opportunity to establish the legality of these actions in the courts. In the present case, there is no indication as to whether the deportees were accorded the opportunity to contact their families, much less attorneys, thereby making the requirement of exhausting local remedies impracticable.

41. It is not a contested fact that the complainants are no longer in Angola, the territory where the action arose, and that they are unable to return thereto to seek redress. This, in accordance with the Commission's decisions in communications 101/1993, *Civil Liberties Organisation (in respect of Bar Association) v Nigeria* [(2000) AHRLR 186 (ACHPR 1995)] and 215/1998, *Rights International v Nigeria* [(2000) AHRLR 254 (ACHPR 1999)], constitutes constructive exhaustion of domestic remedies per the jurisprudence of the African Commission, and the latter could only but exempt the complainant from this particular requirement. In communication 159/96, *Union Interafricaine des Droits de l'Homme and Others v Angola*, the Commission arrived at a similar decision, holding that it would be impractical to require the complainants to return to Angola for purposes of seeking redress in the national courts.

42. For the above reasons, the African Commission declares this communication admissible.

### Decision on the merits

43. The complainant prays the African Commission to find the respondent state in violation of articles 1, 2, 3, 5, 6, 7(1)(a), 12(4), 12(5), 14 and 15 of the African Charter as a result of the alleged systematic arrest, detention and subsequent deportation of

thousands of foreigners from Angolan territory, including at least 205 Gambian nationals.

44. The African Commission will examine the allegations of the complainant under each of the provisions of the African Charter alleged to have been violated by the respondent state.

### **Alleged violations of article 3(2)**

45. The complainant alleges that the mass arrest, detention and expulsion of the Gambians from Angola violated their right to equal protection of the law. Equal protection of the law under article 3(2) relates to the right of all persons to have the same access to the law and courts and to be treated equally by the law and courts both in procedures and in the substance of the law. It is akin to the right to due process of the law, but in particular, applies to equal treatment as an element of fundamental fairness.

46. In terms of article 60 of the Charter, this Commission can also be inspired in this regard by the famous case of *Brown v Board of Education of Topeka*,<sup>1</sup> in which the Chief Justice of the United State of America, Earl Warren, argued that ‘equal protection of the law’ refers to ‘the right of all persons to have the same access to the law and courts and to be treated equally by the law and courts, both in procedures and in the substance of the law. It is akin to the right to due process of law, but in particular applies to equal treatment as an element of fundamental fairness’.<sup>2</sup>

47. In order for a complainant to establish a successful claim under article 3(2) of the Charter, therefore, it must show that the respondent state had not given the victims the same treatment it accorded to the others or that, the respondent state had accorded favourable treatment to others in the same position as the victims.

48. In the present communication, the Commission has examined the evidence submitted by the complainant and is of the view that it (the complainant) has not demonstrated the extent to which the victims in the present communication were treated differently from the other nationals arrested and detained under the same conditions. The Commission thus does not find the respondent state to have violated article 3(2) of the African Charter.

### **Alleged violation of article 5**

49. Article 5 of the African Charter provides that:

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

<sup>1</sup> 347 US 483 (1954).

<sup>2</sup> [www.legal-explanations.com](http://www.legal-explanations.com).

50. The complainant alleges that the condition of their detention in the detention centres were inhumane as the facilities were overcrowded and unsanitary. According to the complainant, the detention centre at Kisangili had been used to house animals just prior to its conversion into a detention centre to hold approximately 300 people and few measures had been taken to accommodate the detainees, including cleaning out the animal waste. The complaint further alleges that since the Gambians, at any time from arrest, detention, leading to their expulsion, were not informed of the reasons of their detention and its duration thereof, which in itself, the African Commission had held, constituted a ‘mental trauma’.<sup>3</sup>

51. In further corroborating the failure of the respondent state, the complaint alleges that guards frequently beat the Gambians and extorted money from them. Food was not regularly provided and medical attention was not readily available, despite repeated requests. Complainants were transported between detention centres in overcrowded cargo planes and lorries. The detention centre in Saurimo had no roof or walls and complainants were exposed to the elements of weather for five consecutive days. At the Cafunfu detention centre, bathroom facilities consisted solely of two buckets for over 500 detainees, and these were located in the same one room where all detainees were compelled to eat and sleep. This, for the African Commission, is clearly a violation of article 5 of the African Charter since such treatment cannot be called anything but degrading and inhuman.

52. In communication 224/1998, *Media Rights Agenda v Nigeria* [(2000) AHRLR 262 (ACHPR 2000)], the African Commission held the terms ‘cruel, inhuman or degrading punishment or treatment’ to be ‘interpreted so as to extend to the widest possible protection against abuses, whether physical or mental’,<sup>4</sup> referring to any act ranging from denial of contact with one’s family and refusing to inform the family of where the individual is being held,<sup>5</sup> to conditions of overcrowded prisons and beatings<sup>6</sup> and other forms of physical torture, such as deprivation of light, insufficient food and lack of

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<sup>3</sup> See the Commission’s decision in communication 225/1998, *Huri-Laws v Nigeria* [(2000) AHRLR 273 (ACHPR 2000)], para 27.

<sup>4</sup> Communication 224/1998, *Media Rights Agenda v Nigeria*, para 71.

<sup>5</sup> See the Commission’s decision in communications 48/1990, 50/1991, 52/1991 and 89/1993, *Amnesty International and Others v Sudan* [(2000) AHRLR 297 (ACHPR 1999)] para 54.

<sup>6</sup> See the Commission’s decision in communications 64/1992, 78/1992, *Achuthan and Another v Malawi* [(2000) AHRLR 144 (ACHPR 1995)] para 7.



access to medicine or medical care.<sup>7</sup> The African Commission also reiterates its position taken in *Huri-Laws v Nigeria*, in which it ruled that such ‘treatment meted out to the victim’ constituted a breach of article 5 of the African Charter, as well as the Minimum Standards of Treatment for Prisoners as laid out by the United Nations.<sup>8</sup>

53. There is nothing from the respondent state to counter these allegations and the African Commission, thus, is of the view that Angola is in violation of article 5 of the African Charter.

### **Alleged violation of article 6**

54. Article 6 of the African Charter provides for the prohibition of arbitrary arrest. In its Resolution on the Right to Recourse Procedure and Fair Trial, the African Commission further states that ‘persons who are arrested shall be informed at the time of arrest, in a language which they understand of the reason for their arrest and shall be informed promptly of any charges against them.’<sup>9</sup> Furthermore, the prohibition of arbitrary arrest includes prohibition of indefinite detention<sup>10</sup> and arrests and detentions ‘based on grounds of ethnic origin alone’.<sup>11</sup>

55. In the present case, there is nothing from the respondent state to indicate that the manner of victims’ arrests and subsequent expulsion was not arbitrary as alleged by the complainant. As the complainant puts it, at no point were any of the victims shown a warrant or any other document relating to the charges under which the arrests were being carried out. The African Commission thus finds the respondent state to have violated article 6 of the African Charter.

### **Alleged violation of article 7(1)(a)**

56. Article 7(1)(a) of the African Charter provides that:

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<sup>7</sup> See the Commission’s decision in communication 151/1996, *Civil Liberties Organisation v Nigeria* [(2000) AHRLR 243 (ACHPR 1999)] para 27. See also, at the international level, the UN Human Rights Committee’s views in communication 253/1987, *Kelly v Jamaica* where it held that respect of the inherent dignity of the human being required provisions of adequate medical care and food and basic sanitation facilities during detention. In *Kalenga v Zambia*, the UN Human Rights Committee went further to state that where the complainant was denied access to food and medical assistance during his detention, the detention did not respect the inherent dignity of the human being.

<sup>8</sup> See communication 232/1999, *Ouko v Kenya* [(2000) AHRLR 135 (ACHPR 2000)] para 24 in which the Commission held that a violation of the Minimum Standards of Treatment in the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment effectively constitutes a violation of article 5 of the Charter.

<sup>9</sup> See *Media Rights Agenda v Nigeria* para 43.

<sup>10</sup> See *Free Legal Assistance Group and Others v Zaire*, 25/89, 47/90, 56/91, 100/93 [(2000) AHRLR 74 (ACHPR 1995)] para 42.

<sup>11</sup> See *Organisation Mondiale Contre la Torture and Others v Rwanda*, 27/89, 46/91, 49/91, 99/93 [(2000) AHRLR 282 (ACHPR 1995)] para 29.

Every individual shall have the right to have his cause heard. This comprises the right to an appeal to competent national organs against acts of violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force.

57. The complaint alleges that prior to expulsion, the complainants were held in several Angolan detention centres, including Canfunfu, Saurimo and Kisangili. They were held there arbitrarily as they knew of no laws forbidding their residence and work in Angola prior to their arrest, and that during their detention they were afforded no explanations as to their arrest and detention and no the opportunity to speak to a lawyer or go before a judge.

58. The complaint alleges that circumstances of this case made it impossible for complainants to access the Angolan courts or other national organs to question their arrest, detention and deportation. The abrupt manner in which they were arrested, detained and deported denied them of the opportunity to engage a lawyer to take their case to court to challenge the regularity and legality of their arrest, detention and deportation. The African Commission has ruled that every individual has the right to appeal to competent national organs for violations of his/her fundamental rights, and as such, if one is detained without charge or trial<sup>12</sup> and there exists no legal remedy to challenge the detention,<sup>13</sup> it is a clear violation of article 7(1)(a).

59. In communication 71/1992, *Recontre Africaine pour la Défense des Droits de l'Homme v Zambia*, where the deportees similarly were denied 'the opportunity to seize the Zambian courts to challenge their detention or deportation', the African Commission found this to constitute violation of the deportees' rights under article 7.<sup>14</sup> Similarly, in communication 159/1996, *Union Interafricaine des Droits de l'Homme and Others v Angola*, the African Commission held that the state failed to afford the victims with the opportunity to challenge the matter before the competent jurisdictions which should have ruled on their detention, as well as on the regularity and legality of the decision to expel them was a violation of article 7(1)(a) of the African Charter.

60. The African Commission is thus of the view that, given the facts before it, the respondent state is in violation of article 7(1)(a) of the African Charter.

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<sup>12</sup> See communications 143/1995 and 150/1996, *Constitutional Rights Project and Another v Nigeria* (2000) AHRLR 235 (ACHPR 1999)], para 28.

<sup>13</sup> See *Huri-Laws v Nigeria*, para 45.

<sup>14</sup> See communication 71/1992, *Rencontre Africaine pour la Défense des Droits de l'Homme v Zambia*, para 30.

## Violation of article 12(4) of the African Charter on due process before expulsion

61. Article 12(4) of the African Charter provides that ‘a non-national legally admitted in a territory of a state party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law’.

62. The complaint alleges that the victims in the present communication were subjected to arbitrary arrest, detention and subsequent expulsion and were denied due process of law before their expulsion from Angola. Prior to their deportation, complainants were not taken before a court of law to answer any charge concerning their activities and stay in Angola or without a decision or order made in accordance with the applicable laws. It is alleged by the complainants that the victims were legally in the territory of the respondent state, and when they presented their legal documents to the authorities, they were either confiscated or destroyed. The African Commission finds no contrary submission from the respondent state to challenge these allegations.

63. In communication 159/1996, *Union Interafricaine des Droits de l’Homme and Others v Angola*, the African Commission stated that although African states may expel non-nationals from their territories, the measure that they take in such circumstances should not be taken at the detriment of the enjoyment of human rights, and that while the Charter does not bar a state’s right to deport non-nationals *per se*, it does require deportations to take place in a manner consistent with the due process of law.<sup>15</sup>

64. The African Charter’s requirement of due process as outlined above is also shared by similar systems elsewhere. The Human Rights Committee under the International Covenant on Civil and Political Rights, for instance, had expressed a similar concern over the treatment of aliens being deported from Switzerland when it held the latter liable for degrading treatment and use of excessive force resulting on some occasions in the death of the deportee during deportation of aliens.<sup>16</sup> The Committee recommended that Switzerland should ‘ensure that all cases of forcible deportation are carried out in a manner which is compatible with articles 6 and 7 of the Covenant’ and that ‘restraint methods do not affect the life and physical integrity of the persons concerned’.<sup>17</sup>

65. The African Commission notes that the import of this provision under the African Charter is to ensure that due process is followed before legally admitted non-nationals are expelled from a member state. Very clearly, the situation as presented by the complainant did

<sup>15</sup> As above para 23.

<sup>16</sup> UN Human Rights Committee, ICCPR, A/57/40 vol I (2002) para 76(13).

<sup>17</sup> As above.

not afford those expelled due process of law for protection of the rights that have been alleged to be violated by the respondent state and that they were not allowed access to the remedies under domestic law to at least challenge, if not reverse, their expulsion.<sup>18</sup> The African Commission thus holds the respondent state in violation of the provisions of article 12(4) of the African Charter.

### **Alleged violation of article 12(5)**

**66.** Article 12(5) of the African Charter reads ‘the mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups’.

**67.** In the present communication, the complainant alleges that the group of Gambians was expelled from Angola *en masse* on 23 May 2004.<sup>19</sup> In addition to the 217 Gambians, tens of thousands of other non-nationals have been expelled from Angola in the same year. The complaint further alleges that the Angolan government itself reported that 126 247 foreigners had been repatriated as of 14 May 2004. It quotes a United Nations estimate that 3 500 of this number originate from West Africa, with much of the remainder coming from the Democratic Republic of Congo.<sup>20</sup> It adds that nationals from many different countries have been affected, including individuals from the Democratic Republic of Congo, Guinea Conakry, Mali, Mauritania, Côte d’Ivoire, Senegal and Sierra Leone. These expulsions were hastily carried out, permitting little in the way of advance planning and coordination of resettlement assistance for those expelled.<sup>21</sup> It claims that the number, coupled with the subsequent expulsions under such conditions constitute mass expulsions under article 12(5) of the African Charter.

**68.** The African Commission has ruled that ‘mass expulsion was a special threat to human rights’, adding that a government action specially directed at specific national, racial, ethnic or religious groups is generally qualified as discriminatory in the sense that none of its characteristics has any legal basis or could constitute a source

<sup>18</sup> Communication 232/99, *Ouko v Kenya*.

<sup>19</sup> See, for instance, Ebrima JT Kubaji ‘217 Gambians deported from Angola’, *The Daily Observer*, 24 May 2004 at 24; Lugard WE Osayande ‘Consular meets deportees’, *The Daily Observer*, 27 May 2003 24 (both available at <http://www.observer.gm>).

<sup>20</sup> ‘Angola - Guinea: Deported Guineans complain of ill treatment’, UN Office for the Coordination of Humanitarian Affairs, 11 June 2004, at <http://www.irinnews.org/print.asp?ReportID=41644>.

<sup>21</sup> ‘Humanitarian situation in Angola Monthly analysis Apr 2004’, The United Nations Office of Coordination of Humanitarian Affairs, 30 Apr. 2004 at <http://www.reliefweb.int/w/rwb.nsf/6686f45896f15dbc852567ae00530132/41292ac0a994c0eb85256e9a00697388?OpenDocument> (‘Unfortunately, the entire process of this round of ‘Operação Brilhante’ was poorly executed, without respect for the dignity of those involved and rife with abuses, significant human rights abuses’).

of particular incapacity.<sup>22</sup> Similarly, the African Commission, held that:

African states in general and the Republic of Angola in particular are faced with many challenges, mainly economic. In the face of such difficulties, states often resort to radical measures aimed at protecting their nationals and their economies from non-nationals. Whatever the circumstances may be, however, such measures should not be taken at the detriment of the enjoyment of human rights. Mass expulsions of any category of persons, whether on the basis of nationality, religion, ethnic, racial or other considerations, constitute special violation of human rights.<sup>23</sup>

69. The respondent state has failed to advance any argument to justify its actions. As shown above, the position of the African Commission regarding mass expulsions is clear. And as the complainant avers, 'simply because the victims were a part of a larger group of non-nationals, not just Gambians, but also other West and Central Africans, does not negate discrimination on the part of the respondent state', and that the fact that 'so many aliens received the same treatment is tantamount to an admission of a violation of article 12(5)'. Moreover, the fact that the deportees as a group were arrested over a period of several months at different places and may have been served with deportation orders on different dates does not qualify, for purposes of the African Commission, to be sufficient to negate the *en masse* element of the expulsions.<sup>24</sup> The African Commission underscores that any expulsions or deportations must comply with the human rights obligations found in the African Charter. Accordingly, the African Commission finds the respondent state in violation of article 12(5) of the African Charter.

70. The African Charter is not unique in prohibiting mass expulsions. The European Convention on Human Rights provides some protection against expulsion. The fourth Protocol to the same Convention similarly prohibits collective expulsion of aliens as well as the expulsion of nationals from their own state. Its seventh Protocol prohibits expulsion of an alien lawfully resident in a state except when a decision to that effect is taken in accordance with law. Here, the person concerned is entitled to submit reasons against the expulsion, have the case reviewed and be represented for these purposes before a competent authority.

### **Alleged violation of article 14**

71. The complaint alleges that members of the Angolan armed forces raided villages where victims were living and began shooting live ammunition down the street, deliberately targeting items that would explode, such as generators. In the resulting confusion, mass numbers of people were arrested, including some of the

<sup>22</sup> 159/96, *Union Interafricaine des Droits de l'Homme and Others v Angola*.

<sup>23</sup> As above.

<sup>24</sup> As above, para 27.

complainants. Other complainants were arrested at checkpoints on the street. Violence frequently accompanied these arrests and victims' possessions were confiscated. In several cases, Angolan authorities attempted to extort money from complainants before proceeding to arrest them. Following their arrest, complainants were immediately taken to various detention centres where they were kept until their expulsion from the country.

72. The complainant alleges that in the course of the arrest, victims' property was confiscated by Angolan authorities, including television sets, shoes, wrist watches and clothing. It further claims that the abruptness of their arrest forced them to leave behind all property in Angola giving them no opportunity to make arrangements regarding the transport or disposal of their belongings.

73. The African Commission is of the view that the actions of the respondent state as shown in the preceding paragraphs not only denied fair treatment of the victims with opportunity to challenge their deportation but also failed to allow them opportunity to deal with their belongings. The complainant argues and the African Commission concurs that the type of deportations involved in the present case (ie mass expulsions without due process) challenge a series of rights and protections afforded by the Charter, including the right to property, and, as such, the measures taken by the respondent state in its arrest, detention and subsequent deportation of the victims 'called into question a whole series of rights recognised and guaranteed in the Charter', including the right to property. While the right to property under the African Charter is not absolute, the respondent state has not provided evidence to prove that its actions were necessitated either by public need or community interest. Without such a justification and the provision of adequate compensation determined by an impartial tribunal of competent jurisdiction, the African Commission finds the respondent state's actions in violation of the right to property under article 14 of the African Charter.<sup>25</sup>

### **Alleged violation of article 15**

74. Article 15 of the African Charter provides that: 'Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work'.

75. The complainant alleges that the victims were in possession of official documents, including passports, visas, work and residence permits, allowing them to stay and work legally in Angola. The victims were required on a monthly basis to pay for their work permits that enabled them to continue working in the mines. Nevertheless, they

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<sup>25</sup> See *Huri-Laws v Nigeria* para 53.

were arrested on the grounds that foreigners were not permitted to engage in mining activities in Angola.

**76.** As indicated above, the respondent state has regrettably not forwarded any arguments to refute any of the allegations made in this communications including the alleged violation under article 15 of the African Charter. The facts indicate and the African Commission agrees that the abrupt expulsion without any possibility of due process or recourse to national courts to challenge the respondent state's actions severely compromised the victims' right to continue working in Angola under equitable and satisfactory conditions. Accordingly, the African Commission holds that the respondent state's actions of arbitrary arrest, detention and subsequent deportation resulted in persons who were lawfully working in Angola losing their jobs in a manner that is in violation of article 15 of the African Charter.

### **Alleged violation of article 2**

**77.** The complaint alleges that the circumstances under which the victims were expelled constitute a violation of article 2 of the African Charter in that the victims had been living in Angola for varying lengths of time, after having obtained official documentation, including visas, residence and work permits, in order to lawfully reside and work in Angola. Several of the victims were engaged in diamond mining and had paid appropriate sums of money each month to obtain the required licenses. Nevertheless, despite possession of proper documentation, the victims were arrested, detained and expelled, and their property and documentation were confiscated, specifically because they were foreigners.

**78.** In interpreting the African Charter, the African Commission relies on its own jurisprudence, and as provided by articles 60 and 61 of the African Charter, on appropriate and relevant international and regional human rights instruments, principles and standards. In the present case, the African Commission has dealt with communications alleging similar violations of freedom from discrimination. Article 2 of the African Charter basically forms the anti-discrimination principle that is essential to the spirit of the African Charter and is therefore necessary in eradicating discrimination in all its guises.<sup>26</sup>

**79.** The facts as presented by the complainant are not challenged by the respondent state as the latter has not sent any submission whatsoever. It appears that the victims were targets of a government action which aimed at rounding up and deporting foreigners or non-nationals. Although governments have the right to regulate entry, exit and stay of foreign nationals in their territories, and as the

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<sup>26</sup> See communication 241/2001, *Purohit and Another v The Gambia* [(2003) AHRLR 96 (ACHPR 2003)] para 49.

complainant rightly avers that although the African Charter does not bar deportations *per se*, the African Commission reaffirms its position that ‘a state’s right to expel individuals is not absolute and it is subject to certain restraints’, one of those restraints being a bar against discrimination based on national origin. As mentioned above, there is no submission from the respondent state countering this in that the victims belonged to a larger group which did not consist of only Gambian nationals, but nationals of several foreign countries. However, even if such an argument were to be advanced here, the Commission has previously ruled that ‘the simultaneous expulsion of nationals of many countries does not negate the charge of discrimination’.

**80.** From the foregoing, it is clear that the various violations allegedly committed by the actions of the respondent state have, as their target, foreigners or non-nationals. This, in the opinion of the African Commission, is a clear violation of the provisions of the African Charter under article 2, which encapsulates crucial human rights holding at bay such practices as that of the respondent state. Rights under the African Charter are to be enjoyed by all, without discrimination, by citizens and non-national residents alike. Although some rights, like the right to vote and to stand for election, are reserved for citizens of the particular state, human rights are in principle to be enjoyed by all persons.<sup>27</sup>

### **Alleged violation of article 1**

**81.** Article 1 of the African Charter reads:

The member states of the Organisation of African Unity, parties to the present Charter shall recognise the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them.

**82.** The complainant alleges that a violation of any provision of the Charter automatically means a violation of article 1, so that ‘if a state party to the Charter fails to recognise the provisions of the same, there is no doubt that it is in violation of this article.’<sup>28</sup> The African Commission is of the view that state parties to the African Charter (including the respondent state) have the obligation of recognising the rights, duties and freedoms enshrined in the Charter, as well as the responsibility of providing an environment in which those rights and freedoms can be enjoyed through the adoption of legislative or other measures that give effect to them.

**83.** The African Commission had held that article 1 of the African Charter proclaims a fundamental principle that not only do the states parties recognise the rights, duties and freedoms enshrined in the

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<sup>27</sup> See, for example, General Recommendation 30 of the UN Committee on the Elimination of Racial Discrimination (CERD), HRI/GEN/1/Rev.7/Add.1, para 3.

<sup>28</sup> Communications 147/95 and 149/96, *Jawara v The Gambia* [(2000) AHRLR 107 (ACHPR 2000)], para 46.



Charter, they also commit themselves to respect them and to take measures to give effect to them.<sup>29</sup> In other words, if a state party fails to ensure respect of the rights contained in the African Charter, this constitutes a violation of the African Charter even if the state or its agents were not the perpetrators of the violation. The actions of the respondent state constitute a violation of certain provisions of the Charter and hence are in violation of the provisions of article 1 of the African Charter, since instead of adopting measures to promote and protect human rights, the respondent state pursued a course of action which failed to take into account the various safeguards envisioned by the African Charter.

**84.** The African Commission wishes to emphasise that there is nothing in the African Charter that requires member states of the African Union to guarantee for non-nationals an absolute right to enter and/or reside in their territories. This, however, does not in any way mean that the African Charter gives member states the free hand to unnecessarily and without due process deal with non-nationals to such an extent that they are denied the basic guarantees enshrined under the African Charter for the benefit of everyone. Member states may deny entry to or withdraw residence permits from non-nationals for various reasons including national security, public policy or public health. Even in such extreme circumstances as expulsion, however, the affected individuals should be allowed to challenge the order/decision to expel them before competent authorities, or have their cases reviewed, and have access to legal counsel, among others. Such procedural safeguards aim at making sure that non-nationals enjoy the equal protection of the law in their country of residence, ensure that their daily lives are not arbitrarily interfered with, and that they are not sent back/deported/expelled to countries or places they are likely to suffer from torture, inhuman or degrading treatment, or death, among others. For these reasons, the African Commission finds the respondent state in violation of articles 1, 2, 5, 6, 7(1)(a), 12(4), 12(5), 14 and 15 of the African Charter, but holds that there was not enough evidence to establish a violation of article 3 of the Charter.

**85.** In its submission, the complainant pleads the African Commission to order the respondent state to remedy the violations enumerated above by way of , including but not limited to, replacing the travel and work documents of the complainants, which were taken from them at the time of their arrest prior to their expulsion; reinstating the victims to works they had been lawfully engaged in and paying compensation to the victims as a result of unlawful mass expulsion; ensuring the restitution of complainants' property forcibly taken from them at the time of their arrest prior to their expulsion, providing for compensation to those complainants physically harmed

<sup>29</sup> Communication 231/99 *Avocats Sans Frontières (on behalf of Bwampamye) v Burundi* [(2000) AHRLR 48 (ACHPR 2000)] para 31.

as a result of their inhumane arrest and detention and clarify and make the necessary changes in its deportation procedures, such that the process from arrest through detention and deportation comply with the provisions of the African Charter on Human and Peoples' Rights.

**86.** The African Commission recommends that the respondent state takes the necessary measures to redress the violations enumerated in the preceding paragraphs, taking into account its obligations under article 1 of the African Charter and the exigencies of the situation.

**87.** The African Commission notes that the present communication is not the first in which it found similar violations of the human rights of non-nationals in the context of mass expulsions/deportations by the Republic of Angola. It, therefore, recommends that the Republic of Angola should:

- Ensure that its immigration policies, measures and legislations do not have the effect of discriminating against persons on the basis of race, colour, descent, national, ethnic origin, or any other status, and particularly take into account the vulnerability of women, children and asylum seekers;
- Take measures to ensure that all persons in detention are provided with proper medical examination and medical treatment and care;
- Ensure regular supervision or monitoring of places of detention by qualified and/or experienced persons or organisations;
- Put in place mechanisms allowing all detained persons access to effective complaint procedures regarding their treatment with a view to curb, in particular, cases of physical and/or psychological abuse;
- Put in place procedural safeguards or clear procedures/policies that guarantee for all persons deprived of their liberty (nationals and non-nationals alike) effective access to competent authorities such as administrative tribunals and courts responsible for prison/detention oversight and/or review;
- Establish a Commission of inquiry to investigate the circumstances under which the victims were expelled and ensure the payment of adequate compensation of all those whose rights were violated in the process;
- Institute safeguards to ensure that individuals are not deported/expelled to countries where they might face torture or their lives could be at risk;
- Allow representatives of the African Commission, relevant international organisations, ICRC, NGOs, concerned consulates and others access to detainees and places of detention, including to those where non-nationals are held;
- Institute human rights training programmes for law enforcement agencies and relevant civil servants dealing with

matters involving non-nationals on non-discrimination, due process, and the rights of detainees, among others;

- The African Commission further requests that the Republic of Angola report back to it, at a later stage, measures it has taken to implement the recommendations made in this communication.

# CÔTE D'IVOIRE

## Mouvement Ivoirien des Droits Humains (MIDH) v Côte d'Ivoire (I)

(2008) AHRLR 62 (ACHPR 2008)

*Communication 262/2002, Ivorian Human Rights Movement (MIDH) v Côte d'Ivoire*

Decided at the 43rd ordinary session, May 2008, 26th Activity Report. Edits have been done to ensure consistency with the French original

*Law on rural land ownership discriminating on the basis of origin*

**Amicable settlement** (referral of decision on merits, 30, 31)

**Admissibility** (insulting language, 47, 48; exhaustion of local remedies, 49-52, 54-56, local remedies must be available, effective and sufficient, 55)

**State responsibility** (amendments to legislation which violated human rights do not wipe out violation, 73)

**Evidence** (violation not disputed by state party, 77, 78)

**Equality, non-discrimination** (discrimination on the grounds of origin, 78)

**Property** (land ownership, discrimination on the grounds of origin, 78)

1. On 24 October 2002, the Secretariat of the African Commission on Human and Peoples' Rights received from Mr Zoro Bi Ballo Epiphane, President of the Ivorian Human Rights Movement (MIDH),<sup>1</sup> a communication filed on behalf of this NGO, in application of article 55 of the African Charter on Human and Peoples' Rights (the African Charter).

2. The communication was instituted against the Republic of Côte d'Ivoire (a state party<sup>2</sup> to the African Charter and hereinafter referred to as Côte d'Ivoire) and the MIDH alleged therein that the current policy of denial of identity which has been in force for several years in Côte d'Ivoire and which some people call 'Ivoirité', has led

<sup>1</sup> The MIDH is an NGO based in Côte d'Ivoire which has enjoyed observer status with the African Commission on Human and Peoples' Rights since October 2001 (30th ordinary session).

<sup>2</sup> Côte d'Ivoire ratified the African Charter on 6 January 1992.

to the passing of laws by this state party which are of an unprecedented discriminatory nature in the country.

3. Alluding to the Constitution currently in force in Côte d'Ivoire and which is said to prevent a certain category of Ivorians from acceding to certain public offices including that of President of the Republic, due to their origin as well as the law on the identification of Ivorians which is said to be intended in actual fact to deprive some Ivorians of their nationality for political reasons, the communication alleges specifically that Law 98-750 of 23 December 1998 establishing the regulation of Rural Land Ownership, in its article 26, paragraphs 1 and 2, is in contradiction with the relevant provisions of the African Charter on Human and Peoples' Rights.

### Complaint

4. The MIDH contends that Law 98-750 of 23 December 1998 establishing the regulation of Rural Land Ownership, in its article 26, paragraphs 1 and 2, is in contradiction with articles 14 and 2 of the African Charter on Human and Peoples' Rights.

5. The MIDH therefore requests the African Commission to recommend to Côte d'Ivoire that it review Law 98-750 of 23 December 1998 establishing the regulation of Rural Land Ownership, in its article 26, paragraphs 1 and 2.

### Procedure

6. In its letter ACHPR/COMM 262/2002 of 30 October 2002, the Secretariat of the African Commission acknowledged receipt of the communication to MIDH specifying that this communication would be recorded in the agenda of the African Commission which would consider it for submission at its 33rd ordinary session scheduled for 5 to 19 May in Niamey, Niger.

7. During its 33rd ordinary session which took place from 15 to 29 May 2003 in Niamey, Niger, the Commission examined this communication and decided to be seized of it.

8. By means of *note verbale* ACHPR/COMM/262/2002 of 11 June 2003, the Secretariat of the Commission wrote to the respondent state informing it of the decision and requesting it to send its arguments on the admissibility of the case to the Commission within three months. A copy of the complaint was attached to this memo. It is important to recall that the copy of this complaint had been handed to the delegate of the respondent state during the 33rd ordinary session of the Commission which had taken place in May 2003 in Niamey, Niger.

9. In its letter ACHPR/COMM/262/2002 of the same date, the Secretariat of the Commission informed the complainant of the

Commission's decision and requested it to furnish the latter with its arguments on the admissibility of the case within three months.

10. During its 34th ordinary session which was held from 6 to 19 November 2003 in Banjul, The Gambia, the delegation from the respondent state presented Côte d'Ivoire's reaction to the communication. The delegation further delivered to the African Commission a written memo in which figured the said observations and arguments pertaining to the admissibility of the communication.

11. At its 35th ordinary session which was held from 21 May to 4 June in Banjul, The Gambia, the African Commission considered the communication and deferred its decision on the admissibility of the complaint to its 36th ordinary session.

12. In letters dated 21 June 2004, the Secretariat of the African Commission communicated this decision to all the parties to the communication and requested them to submit to the Commission, for all intents and purposes, any extra arguments they may have on admissibility.

13. On 27 September 2004, the Secretariat of the African Commission received a letter from the complainant in which it outlined its reaction to the arguments put forward by the respondent state with regard to the admissibility of the complaint.

14. On 11 October 2004, the Secretariat conveyed this memo to the respondent state.

15. At its 36th ordinary session which took place from 23 November to 7 December 2004 in Dakar, Senegal, the African Commission examined the complaint and declared it admissible.

16. By means of a *note verbale* of 20 December 2004, the Secretariat conveyed this decision to the respondent state and invited it to submit its arguments on the merits within three months, to enable it examine the complaint at this stage during the 37th ordinary session.

17. On this same date a letter had been sent to the complainant informing it of the African Commission's decision and requesting its arguments on the merits of the complaint.

18. During its 37th ordinary session which took place from 27 April to 11 May 2005 in Banjul, The Gambia, the African Commission examined the complaint and, granting the request of the respondent state, decided to defer its ruling on the merits of the communication to its 38th ordinary session.

19. This decision was conveyed to the parties to the complaint on 30 June 2005. On this occasion, the Secretariat had notably reminded the respondent state that its arguments on the merits of the case were still awaited.

20. On 12 September 2005, in the absence of any reaction from the respondent state, a reminder letter was sent to it.
21. On 7 November 2005, the respondent state conveyed its arguments on the merits of the communication to the Secretariat.
22. On 10 November 2005, the Secretariat acknowledged receipt and conveyed the said arguments to the complainant for its reaction.
23. During the 38th ordinary session which was held from 21 November to 5 December 2005 in Banjul, The Gambia, the African Commission examined the complaint and, in the absence of any reaction from the complainant with regard to the supplementary arguments submitted by the respondent state on the merits of the complaint, decided to defer the case to its 39th session.
24. On 10 January 2006, the Secretariat informed the parties of this decision.
25. On 23 March 2006, the Secretariat sent a reminder to the complainant for its reaction to the memo from the respondent state on the merits of the case. A copy of the document was attached to the reminder letter, for all intents and purposes.
26. During its 39th ordinary session held in Banjul from 11 to 25 May 2006, the Commission decided to defer its decision on the merits to its 40th ordinary session and informed the parties of this in its letter ACHPR/LPROT/COMM 262/2002/RK dated 30 June 2006.
27. On 28 September 2006, the Secretariat of the African Commission wrote a letter ACHPR/LPROT/COMM 262/2002/VC to the complainant reminding it that its reaction to the arguments of the respondent state was still pending.
28. The complainant did not react to the arguments submitted by the respondent state on the merits of the complaint. Another reminder was again sent to it in September 2006 and this also remained without response. The African Commission gave a last chance to the complainant to react to the arguments submitted by the respondent state and deferred its consideration of the merits of the complaint to the 41st ordinary session.
29. The complainant, in its letter dated 17 November 2006 sent to the Secretariat of the Commission on 20 November 2006, indicated that it did not have any new arguments to submit following the memorandum on the merits submitted by the Ivorian government.
30. During its 41st ordinary session held in Accra, in May 2007, the African Commission registered the request submitted by one of the parties, notably the Ivorian State, which consisted in requesting the ACHPR to defer its decision on the merits on the grounds that the current reconciliation process in Côte d'Ivoire would take care of the

subject of the dispute which opposed the MIDH and the Ivorian state, in the context of an amicable settlement.

31. The African Commission, at its 41st ordinary session held in Accra, Ghana in May 2007, decided to grant the request submitted by the respondent state and deferred its decision on the merits to the 42nd ordinary session scheduled to take place in Brazzaville, Congo, from 14 to 28 November 2007.

32. Since its decision on deferment taken at its 41st ordinary session in Accra, Ghana, up to the 42nd Session held in Brazzaville, Congo, the African Commission had not received any other comment or request from the two parties, namely neither from the complainant party, the MIDH, nor the respondent state, Côte d'Ivoire.

33. However, during the 42nd ordinary session, the delegation of the State of Côte d'Ivoire, represented by the Ambassador, His Excellency Yapi Koffi Evariste, handed the Secretariat of the Commission a letter dated 16 November 2007, reminding the Commission of its request for the deferment of a decision on the merits, submitted during the 41st session, in Accra, on 27 May 2007.

34. In this same letter, dated 16 November 2007, the state of Côte d'Ivoire provided, in an annexe, the transcript of the negotiations with the High Council of 'Maliens de l'Etranger' (Maliens Abroad) Section Côte d'Ivoire, and also promised to send subsequently to the Commission the results of negotiations with the other organisations (Ivorian Movement for Human Rights and Open Society Justice Initiative).

## Law

### Admissibility

35. The African Charter on Human and Peoples' Rights stipulates in its article 56 that for communications referred to in article 55 to be considered, they must necessarily be sent after exhaustion of local remedies, if any, unless the procedure of exhaustion of local remedies is unduly prolonged. It is important to examine the applicability of the conditions governing the exhaustion of local remedies in the present communication.

36. In this case, the complainant indicated that 'in Côte d'Ivoire, remedies against laws should be brought before the Constitutional Council. Whereas, according to article 77 of the Ivorian Constitution, laws can only be brought before the Constitutional Council before they are promulgated'. It concluded therefore that 'the law in question can no longer be brought before the Ivorian Constitutional Council as it has already been promulgated, indeed as well as all of its decrees of application'.



37. The complainant further contended that it could not have had recourse to a local remedy in this case as article 77 of the Constitution of Côte d'Ivoire stipulates that laws can only be brought before the Constitutional Council by the Speaker of the National Assembly, or by at least one tenth of the National Assembly members, or by parliamentary groups, or by human rights associations which are legally established but only where it is a question of laws which are relative to the public liberties about which the said associations are concerned, which was obviously not the case of the contentious law currently being called into question.

38. The MIDH concluded therefore that the obligation for the exhaustion of local remedies beforehand was not, as a result, applicable to the present complaint.

39. In its memorandum conveyed to the African Commission in November 2003, the respondent state argued that, for its part, the communication was inadmissible due to the 'non-exhaustion of local remedies and to the disparaging and insulting nature of the said communication'.

40. The respondent state pointed out that pertaining to the non-exhaustion of local remedies, contrary to the affirmation of the complainant, there does exist, by virtue of the provisions of article 96 of the Ivorian Constitution, the possibility for any complainant to invoke a plea on the unconstitutionality of a law, since the modalities for the implementation of this remedy are governed by law. The fact that the complainant did not use this remedy, contended the respondent state, showed that it had not exhausted local remedies and that the communication should therefore be declared inadmissible.

41. Reacting to this argument in a counter memorandum addressed to the African Commission in September 2004, the complainant argued that no local remedy had been available in this case, even if other parties had access to such a remedy. The complainant further observed that, before the African Commission, the condition for the exhaustion of local remedies should be assessed in relation to the plaintiff (in this case the MIDH) and the plaintiff alone, and not in relation to third parties who may be entitled to complain about the alleged violation.

42. Thus, the complainant argued that the recourse to a plea of unconstitutionality, invoked by the respondent state to maintain that a final remedy existed locally, was not available to it as it is only possible to invoke a plea of unconstitutionality of a law during a hearing. Whereas the MIDH, a legal entity which does not own property in the domain of rural landownership, could not be the subject of a suit of expropriation or dispute, making possible the application of the law in question and where the possibility of the

remedy alluded to by the respondent state could be implemented. The very fact that MIDH cannot initiate the remedy of a plea of unconstitutionality shows, argued the complainant, that this remedy is not available to it.

43. Furthermore, concluded the complainant, the implementation of the recourse to a plea of unconstitutionality by foreign individuals, owners of land in the rural real estate is 'illusory', given the context which currently prevails in Côte d'Ivoire where 'any questioning of decisions by the public authorities is seen as an act of belligerence'.

44. With regard to the 'disparaging and insulting nature' of the communication, the respondent state indicated that the complainant referred to Côte d'Ivoire as 'a xenophobic and exclusionist country' and where 'foreigners are called invaders', the nationals as 'Ivorians of extraction' and 'appropriate Ivorians' in the name of a 'policy of denial of identity'. The respondent state considered, in particular, that the use of these terms is insulting towards Côte d'Ivoire which has more than 26% of foreigners within its entire population.

45. Moreover, the respondent state contended that the use of the words like 'xenophobia' and 'exclusionist' to describe Côte d'Ivoire or to lead people to believe that this country is trying to establish a policy of 'denial of identity' is an insult. The respondent state concluded that the communication, for the abovementioned reasons, should be declared inadmissible.

46. The complainant reacted to these arguments by saying that the words quoted were not used to describe the state or its institutions but simply to describe a situation which is 'much sadder' where large-scale assassinations of individuals had been perpetrated 'just because of their nationality or presumed nationality of origin'.

### **On the disparaging and insulting nature of the words used in the communication**

47. The respondent state contended that the words used by the complainant in the communication are disparaging and insulting for Côte d'Ivoire. Indeed, words like 'xenophobia', 'exclusionist', 'discriminatory', are used in the communication but the African Commission considers that these words are not used in an insulting and disparaging context for the respondent state but rather have been used to describe a situation which has been condemned and it would be difficult to describe it differently.

48. The African Commission therefore does not accept the argument that the words used in the communication are disparaging and insulting against the respondent state.

## On the non-exhaustion of local remedies

49. On the arguments submitted by the parties to this complaint, the African Commission observes that local remedies exist for the law being challenged but it would appear that the complainant does not have the necessary qualifications to exercise this remedy.

50. In effect, the remedy consisting in bringing the disputed law before the Constitutional Council is only available for a certain category of citizens, in this case, the President of the Republic of Côte d'Ivoire and the members of Parliament.

51. With regard to the remedy of a plea of unconstitutionality of the law in question, while it does exist, it is clear that the complainant cannot use it. Not being a landowner in the rural real estate domain, the complainant is indeed hardly likely to be a party to a possible suit linked to the implementation of the law being challenged.

52. As a legal entity, the complainant is indeed justified in questioning a legal provision of a state party to the African Charter which is said to violate the said Charter, without prejudice to the option reserved to third parties to institute proceedings against the provision in question before the national courts.

53. Now, under the terms of article 19 of Law 2001-303 of 5 June 2004 determining the organisation and functioning of the Constitutional Council the proceedings for a plea of unconstitutionality take place during a hearing. Therefore it logically follows that the recourse to a plea of unconstitutionality is not available for the complainant.

54. The African Commission accepts that remedies against the law in question exist locally but also notes that the complainant cannot use them as it does have the qualification/possibility to do so. Whereas the African Commission feels that the assessment of the capacity to use and exhaust local remedies is made in relation to the complainant and the complainant alone.

55. In this context it is important to recall the jurisprudence of the African Commission pertaining to the condition of exhaustion of local remedies. In effect, the African Commission considers that local remedies must be available (for the complainant), effective and sufficient. Thus, the African Commission considers that a local remedy is available if the plaintiff can institute a lawsuit without any obstacle; the remedy is effective if it offers the plaintiff a prospect of success and if this remedy is sufficient and capable of rectifying the alleged violation.<sup>3</sup>

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

56. Since in this particular case it appears clearly that the complainant does not have the qualification/possibility to use the available local remedies, the African Commission considers that it is as if no local remedy were available for the complainant. For these reasons, the African Commission declares the communication admissible.

### Merits

57. The respondent party, in its arguments on the merits, challenges the MIDH's assertion that the law on rural land ownership is one of the major reasons for the civil war which is tearing Côte d'Ivoire apart.

58. The respondent party considers this assertion as serious and inaccurate. Serious because it insinuates that it is foreigners, the only ones concerned by article 26 of the law being questioned, who have taken up arms against the state of Côte d'Ivoire. Inaccurate because this is not the cause being invoked by those who have taken up arms, and that besides, 'the number of persons concerned by the effects of article 26 is 112, of which 40 are companies and 112 are natural persons'. The respondent party notes that the communications from the complainant are merely episodes in the undertaking in preparation and justification of the violence.

59. After its preliminary observations on what it calls the 'real reasons' of the complainant, the respondent party was particularly anxious to send the African Commission a copy of the *Official Gazette* of the Republic of Côte d'Ivoire containing the promulgation decree signed by the President of the Republic, of the new Law 2004-412 of 14 August 2004 amending article 26 of Law 98-750 of 23 December 1998 relating to rural land ownership.

60. On the basis of this new Law 2004-412 which modifies the provisions of article 26 of the former Law 98-750 on which the complainant has based its communication, the Ivorian government requests the African Commission to declare communication 262/2002 of the MIDH as groundless and to close this case by applying the principle of topicality which requires that all administrative or legal bodies assess the facts of the case in the condition in which they are on the day of ruling.

61. The complainant considers it needless to submit fresh arguments since on the one hand the admissibility of the communication has not been questioned, and on the other, because the Law 98-750 of 23 December 1998, identified as being in violation of the provisions of articles 2 and 14 of the African Charter on Human and Peoples' Rights has been judged prejudicial to fundamental Human Rights by numerous courts whose competence and integrity have been unanimously recognised.

62. Furthermore, the complainant observes that the various peace negotiations on the Ivorian crisis have, after the MIDH, tackled the issue and recommended the modification of article 26 of Law 98-750 of 23 December 1998. The same is true for the Marcoussis Agreements of 24 January 2003, in their item IV – land property system, paragraph 2.

63. The complainant all the same accepts, as does the government of Côte d'Ivoire, that following the Marcoussis Agreements, the National Assembly of Côte d'Ivoire passed a new Law 2004-412 dated 14 August 2004 on the amendment of article 26 of Law 98-750 of 23 December 1998 and relative to rural land ownership.

64. The complainant thus feels that it has scored a victory and requests the African Commission to mention this credit in its decision on the merits.

### **Debate on the need to pursue consideration of the merits or otherwise**

65. The Commission takes note of the request from the respondent party to declare the communication submitted by the MIDH as groundless, due to the fact that the provisions of article 26 of Law 98-750 challenged by the complainant were modified by the new Law 2004-412 and that as a result this modification gives the plaintiff satisfaction.

66. The Commission notes with interest the arguments raised by the Ivorian state to justify its request for declaring the communication groundless and for closing the case, notably the principle of topicality which requires that all judicial or administrative bodies assess the facts of a case in the state in which they are on the day of its ruling.

67. The Commission further notes that the Ivorian state, in its arguments on the merits, alludes to former jurisprudence of the Commission (notably communications 66/92 *Lawyers Committee for Human Rights v Tanzania* [(2000) AHRLR 313 (ACHPR 1994)], 22/88 *International Pen v Burkina Faso* [(2000) AHRLR 47 (ACHPR 1994)] and 16/88 *Comité Culturel pour la Démocratie au Bénin and Others v Benin* [(2000) AHRLR 23 (ACHPR 1995)]). The Commission observes that the respondent party relies mainly on the said jurisprudence to base its request for the communication to be pronounced groundless and for the closure of the case.

68. The Commission observes, furthermore, that the complainant, in spite of the fact that it did not bring any new arguments following the findings on the merits by the Ivorian government, does not for all that renounce its suit before the Commission and does not withdraw its complaint. What is more, the complainant is asking that the Commission, when making its decision, give it credit for having been

the first organisation to have drawn attention on the prejudicial nature of article 26 of Law 98-750 on rural landownership with regard to human rights.

**69.** The Commission moreover notes the concern expressed by the complainant for ensuring the effective implementation of the provisions of Law 2004-412 amending article 26 of the Law, and above all, helping compensation to be made for the prejudices suffered by numerous populations for the six years during which Law 98-750 of 23 December remained in force.

**70.** From the preceding arguments submitted by the two parties, the Commission considers it its responsibility to determine whether or not to pursue the consideration of the merits of the present communication.

### **View of the Commission on the need to pursue consideration of the merits or otherwise**

**71.** The Commission considers that communications 66/92, 22/88 and 16/88 invoked by the respondent party to justify its request to the Commission to declare the communication groundless and to close the case, should be assessed on a case by case basis and can in no way constitute a well-established jurisprudence of the Commission.

**72.** Relying on its jurisprudence, the Commission has always dealt with communications by ruling on the alleged facts at the time of the presentation of the communication (see communications 27/89, 46/91 and 99/93, *Organisation Mondiale Contre la Torture and Others v Rwanda* [(2000) AHRLR 282 (ACHPR 1996)]). This ruling has been confirmed by more recent decisions relating to communications 222/98 and 229/99, *Law Office of Ghazi Suleiman v Sudan* [(2003) AHRLR 137 (ACHPR 2003)].

**73.** The Commission has taken due note of the amendments to article 26 introduced by the new Law 2004-412 and which are geared towards better guaranteeing the right to property, but wishes to clarify that these new legislative provisions do not wipe out past violations caused by the application of the former Law 98-750 the effects of which lasted for six years, and that it is therefore beholden, by virtue of its mandate of protection, to rule on communication 262/2002.

**74.** The Commission thereby concludes that, even if the law has been amended since then, this change does not automatically result in a decision by the Commission to close the case. Consequently, the Commission decides to pursue consideration of the merits of communication 262/2002 submitted by MIDH against the Republic of Côte d'Ivoire.

## **Consideration of the merits: Provisions of the Charter alleged to have been violated**

**75.** The complainant alleges the violation of article 2 of the African Charter on Human and Peoples' Rights which stipulates that:

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

**76.** The complainant also alleges the violation of article 14 of the African Charter on Human and Peoples' Rights which stipulates that:

The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and this in accordance with the provisions of appropriate laws.

**77.** The Commission notes that in its observations on the merits, the government of Côte d'Ivoire does not dispute the violations of articles 2 and 14 of the African Charter by article 26 of Law 98-750 on rural land ownership. On the contrary, it simply points out that its effects are limited as 'the number of individuals concerned is 112 of which 40 are companies and 112 natural persons, and that among these, there is a very small minority of Africans'.

**78.** As a result, the Commission considers that the provisions of article 26 of Law 98-750 are in violation of articles 2 and 14 of the African Charter on Human and Peoples' Rights and notes that the argument that its effects would be limited to a certain number of persons and only affect a very small minority of Africans is irrelevant from the legal point of view and therefore cannot stand. On the other hand, such an interpretation confirms the violation of article 2 of the African Charter which guarantees the enjoyment of rights and freedoms without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national or social origin, fortune, birth or other status. Furthermore, the Commission considers that the application of article 26, paragraphs 1 and 2 of Law 98-750 would give rise to the expropriation of their land from a category of the population, on the sole basis of their origin; whereas, it observes that the Ivorian government, in its remarks on the merits, does not advance any argument linked to 'public need' or to 'the general interest of the community' which could exceptionally justify an infringement of the right to property as guaranteed by the Charter, specifically in its article 14.

For these reasons, the African Commission:

- Observes that the Republic of Côte d'Ivoire is in violation of the provisions of articles 2 and 14 of the African Charter on Human and Peoples' Rights.
- Observes that, even if article 26 of Law 98-750 of 23 December 1998 has been amended by the Law 2004-412 of 14 August 2004,

its effects were already felt during the six years of its application.

- Takes note of the current reconciliation process and of the ongoing negotiations in Côte d'Ivoire.
- Recommends that the government of Côte d'Ivoire ensure the effective application of the provisions of the new Law 2004-412 of 14 August 2004 amending article 26 of the Law 98-750 of 14 August 2004.
- Recommends that the government of Côte d'Ivoire ensure, if this has not already been done, that the rights of all landowners who may have been deprived of their land by virtue of the application of the former provisions of article 26 of the Law 98-750 are restored.
- Urges the government of Côte d'Ivoire, within the framework of the current drive to achieve national reconciliation, to evaluate, if this has not already been done, the damages that the victims may have suffered by virtue of the application of the provisions of article 26 of the Law 98-750, and to effect, if need be, fair and equitable compensation.
- Strongly encourages the Ivorian state to pursue, within the framework of the current national reconciliation process, the amicable settlement of all the disputes arising out of the application of the former discriminatory laws and to scrupulously ascertain that the principle of equality before the law, as stipulated in the African Charter, notably in its article 2, is respected under all circumstances.



# Mouvement Ivoirien des Droits Humains (MIDH) v Côte d'Ivoire (II)

(2008) AHRLR 75 (ACHPR 2008)

Communication 246/2002, *Mouvement Ivoirien des Droits Humains (MIDH) v Côte d'Ivoire*

Decided at the 5th extraordinary session, July 2008, 25th Activity Report

*Eligibility to stand for election to high offices limited to Ivorians whose parents had Ivorian citizenship from birth. Amnesty for perpetrators of human rights violations*

**Admissibility** (compatibility, *prima facie* violation, 44; exhaustion of local remedies, remedies must be available, effective and sufficient, 45-51)

**Limitations** (71, 72)

**Political participation** (discrimination, 76, 84, 85; right to stand for political office, 80, 81, should not be linked to citizenship of parents, 83-85; restrictions on political participation, should not be unreasonable and unjustifiable, 84)

**Interpretation** (international standards, 77, 78)

**Equality, non-discrimination** (discrimination on the grounds of origin, 86)

**Amnesty** (complete immunity under Constitution, violation of right to an effective remedy, 89-97)

1. On 8 February 2002, the Secretariat of the African Commission on Human and Peoples' Rights (the African Commission) received from Mr Ibrahima Doumbia, First Vice-President of the *Movement Ivoirien des Droits Humains* (MIDH)<sup>1</sup> a communication submitted pursuant to article 55 of the African Charter on Human and Peoples' Rights (the African Charter).

2. The communication was filed against the Republic of Côte d'Ivoire (state party<sup>2</sup> to the African Charter, hereunder referred to as Côte d'Ivoire) in which MIDH alleges that the Constitution of Côte d'Ivoire, adopted by a minority of citizens during the Constitutional Referendum of 23 July 2000, contained provisions which are

<sup>1</sup> The MIDH is an NGO based in Côte d'Ivoire and enjoys Observer Status with the African Commission on Human and Peoples' Rights since October 2001 (30th Ordinary Session).

<sup>2</sup> Côte d'Ivoire ratified the African Charter on 6 January 1992.

discriminatory to some citizens of Côte d'Ivoire, prohibiting them from performing political functions.

3. The communication alleges furthermore that the provisions granting immunities to some persons, particularly the members of the National Committee for Public Security (CNSP), the military executive organ which ruled the country during the military transition period (from 24 December 1999 to 24 October 2000), as well as the authors of the *coup d'état* of 24 December 1999, were discriminatory.

### Complaint

4. The complainant alleges that the events cited above constitute a violation of articles 2, 3 and 13 of the African Charter and requests the African Commission to recommend to Côte d'Ivoire to review articles 35, 65 and 132 of the Constitution adopted on 23 July 2000.

### Procedure

5. During the 31st ordinary session held in Pretoria, South Africa, from 2 to 16 May 2002, the African Commission considered this communication and decided to be seized of it.

6. By *note verbale* ACHPR/COMM 246/2002 dated 11 June 2002, the Secretariat of the Commission informed the respondent state (Côte d'Ivoire) of this decision and requested it to provide within two months its arguments on the admissibility of the communication.

7. By letter ACHPR/OBS/266 of 11 June 2002, the Secretariat of the African Commission informed the complainant (MIDH) of this decision and requested it to provide within two months its arguments on the admissibility of the case.

8. By *note verbale* 563/MEMREIE/AF/AJC/BAB/VG of 16 October 2002, the Minister of State, Ministry of Foreign Relations and Ivorians living abroad requested the African Commission for extra time to present its arguments and observations on the communication.

9. This request from the respondent state which the African Commission received during the 32nd Ordinary Session held from 17 - 23 October in Banjul, The Gambia, prompted the Commission to defer its decision on the admissibility of the communication to the 33rd ordinary session.

10. By *note verbale* ACHPR/COMM 246/2002 of 28 October 2002, the Secretariat of the Commission informed the respondent state that an extra period of three months was granted and that its arguments and observations on the communication were expected by the end of January 2003.

11. The same information was communicated to the complainant by letter ACHPR/COMM 246/02 of 28 October 2002.

12. Having received no reply from the respondent state by the end of January 2003, the Secretariat of the African Commission sent a reminder by *note verbale* ACHPR/246/02 of 10 February 2003, drawing the attention of Côte d'Ivoire to the fact that its arguments and observations on the communication were necessary for the Commission to take a well informed decision on the admissibility of the case during its 33rd session scheduled for May 2003.

13. During its 33rd ordinary session held from 15 to 29 May 2003 in Niamey, Niger, the Commission decided to defer its decision on the admissibility of this communication to its 34th session, thus granting the verbal request of the delegate of the respondent state attending the session for extra time to present its arguments, particularly on the admissibility of the case.

14. The Secretariat of the Commission also gave a copy of the complaint to the delegate of Côte d'Ivoire attending the session.

15. On 11 June 2003, through its *note verbale* ACPHR/246/2002, the Secretariat sent a copy of the complaint to the respondent state by DHL, requesting a rapid response, in any case before the end of August 2003, to enable the Commission to make a ruling on the admissibility of the case.

16. The Secretariat also wrote to the complainant on 11 June 2003 explaining to him the reasons of the postponement of the decision of the Commission on the admissibility of the Communication.

17. During its 34th ordinary session which was held from the 6 to 19 November 2003 in Banjul, The Gambia, the representatives of the respondent state made an oral presentation before the Commission and conveyed the substance of their observations on the issue in a written memo to the Secretariat.

18. During the 35th ordinary session which was held from the 21 May to 4 June 2004 in Banjul, The Gambia, the African Commission considered the communication and decided to declare it admissible.

19. On 21 June 2004, the Secretariat notified the decision of the African Commission to the parties and requested them to submit their submission on merits within three months.

20. At its 36th ordinary session, which was held from 23 November to 7 December 2004, in Dakar, Senegal, the African Commission considered the communication and deferred it to the 37th ordinary session pending receipt of the arguments of the respondent state on the merits of the case.

21. On 20 December 2004, the Secretariat of the African Commission notified this decision to the respondent state and requested its submission on the merits as early as possible.

22. On the same date, a similar letter was sent to the complainant requesting him to submit, at the earliest, his arguments on the merits of the case.

23. At its 37th session, the African Commission, acceding to the request of the respondent party, deferred its decision on the merits of the complaint pending receipt of its arguments. This decision was conveyed to both parties on the 3 June 2005.

24. On 12 September 2005 a reminder was sent to the respondent state.

25. On 8 November 2005, the respondent state forwarded its supplementary submissions on the merits of the complaint.

26. The Secretariat acknowledged receipt of these submissions and conveyed them to the complainant on 10 November 2005.

27. At its 38th ordinary session which took place from the 21 November to 5 December 2005 in Banjul, the Gambia, the African Commission considered the complaint and deferred its decision to the 39th session.

28. On 7 December 2005, the parties were informed of this decision.

29. At its 41st ordinary session held in Ghana in May 2008, the African Commission considered the above communication and decided to defer it to its 42nd session on the request of the respondent state who informed the Commission that it had initiated amicable settlement of the matter with the complainant.

30. By *note verbale* of 7 July 2007 and by letter of the same date, both parties were notified of the Commission's decision.

31. At its 42nd ordinary session, held in Brazzaville, Republic of Congo, the African Commission considered the communication and deferred its decision to the 43rd ordinary session due to confirm from the complainant whether they were engaged in amicable settlement as suggested by the state.

32. By *note verbale* of 19 December 2007 and by letter of the same date, both parties to the communication were notified of the Commission's decision.

## Law

### Summary of parties' submissions on admissibility

#### Summary of complainant's submissions on admissibility

33. The complainant submits that the only possible remedy against the Ivorian Constitution is to request its revision, which, though provided for in the said Constitution, 'is impossible in the present

state of affairs'. He added that, under article 124 of the Ivorian Constitution, 'the initiative for the review of the Constitution is a joint undertaking by the President of the Republic and the members of the National Assembly'.

34. He argues further that the President of the Republic has on several occasions clearly expressed his opposition to any review of the Constitution. The complainant also alleges that the President of the Republic has peremptorily asserted that he will never submit the Constitution to a review, which clearly expresses his intention of not applying this mechanism which only he and the Speaker of the National Assembly have the prerogative to initiate.

35. The complainant alleges further that, the Speaker of the National Assembly, speaking on behalf of all the deputies of the Forum for National Reconciliation, rejected the possibility of a Constitutional review by asserting that 'the people of Côte d'Ivoire do not want a constitutional review'.

36. The complainant further argues that the final hope to have the authorities (the President of the Republic and the Speaker of the National Assembly) reconsider their position remained with the 'National Forum for National Reconciliation held from 9 October 2001 to 18 December 2001 in Abidjan'. And yet, the Forum, in its final resolutions, did not rule on a review of the Constitution.

37. The complainant contends therefore that there is no possible domestic remedy in this particular case and asks the African Commission to draw the appropriate conclusions by declaring the communication admissible.

### **Summary of the respondent state's submissions on admissibility**

38. The respondent state, in a memorandum conveyed to the African Commission on 10 November 2003 claims that as far as it is concerned, the communication is 'inadmissible and baseless'. The respondent state maintains that there is indeed a local remedy 'constituted by the imminent revision of articles 124 and others of the Constitution'.

39. The respondent state further notes that the complainant has not submitted any evidence on the use and exhaustion of existing local remedies. The respondent state which considers 'local remedies' as any legal and lawful action undertaken to 'ensure the cessation of the alleged violations' claims that the complainant did not attempt anything of the sort.

40. Concerning the request of the complainant relative to the revision of certain articles of the Ivorian Constitution, the respondent state intimates that the Ivorian people freely espoused this Constitution which in no way 'either grossly or manifestly negates

human dignity'. It concludes therefore that the request for revision of this Constitution by the complainant is not 'compatible with the provisions of the OAU Charter and the African Charter on Human and Peoples' Rights' and that the communication should therefore be declared inadmissible by the African Commission, because it is not in conformity with article 56(2) of the African Charter.

### **The African Commission's decision on admissibility**

41. The admissibility of communications submitted to the African Commission pursuant to article 55 is determined by seven requirements provided for under article 56 of the African Charter. In communications 147/95 and 149/96, *Jawara v The Gambia* [(2000) AHRLR 107 (ACHPR 2000)], the Commission held that these requirements must all be satisfied for a communication to be declared admissible.

42. In the present communication, without making references to the other requirements, the complainant submits that local remedies are not available in his circumstance, as the remedy available could only be used by the President and the members of the National Assembly. He then concluded that for this reason, there are no remedies and the communication should be declared admissible. The state on the other hand avers that the communication is incompatible with the OAU Charter and the African Charter, and without specifying, also notes that the complainant has not attempted the remedies available to him. The state concludes that for the above reasons, the communication should be declared inadmissible.

43. In view of the foregoing, the African Commission notes that since the state did not raise objections on the other requirements under article 56, it is presumed that they have been complied with by the complainant. The Commission will therefore pronounce on the two requirements in dispute, that is, article 56(2); incompatibility with the Charter, and article 56(5); exhaustion of local remedies.

44. Compatibility, according to the Black's Law Dictionary means 'in compliance' or 'in conformity with' or 'not contrary to' or 'against'. The African Commission has interpreted compatibility under article 56(2) of the Charter to mean the communication must reveal a *prima facie* violation of the Charter. In the present communication, the complainant alleges that the Côte d'Ivoire Constitution of 2000 includes provisions which are discriminatory and do not provide citizens of the country equal opportunity to fully participate in the governance of their country. The complainant claims that in terms of article 35 of the Constitution 'The President of the Republic ... should be of Ivorian origin, born of a father and mother of Ivorian origin ...'. Article 65 of the Constitution stipulates that a candidate to the presidential elections or to the functions of Speaker or Deputy Speaker of the National Assembly 'should be of

Ivorian origin, with both parents being of Ivorian origin, should never have renounced Ivorian nationality, and should never have acquired another nationality. Article 132 according to the complainant accorded civil and criminal immunity to the members of the former National Committee for Public Security (CNSP), an executive military body which had directed the transition, and to the perpetrators of the events which brought about the change of government following the *coup d'état* of 24 December 1999. These allegations in the opinion of the Commission do raise a *prima facie* violation of human rights. Based on this, the African Commission holds that the requirement of article 56(2) of the African Charter has been sufficiently complied with.

45. Secondly, the respondent state contends that the complainant has not attempted any domestic remedies. The complainant has stated clearly that the remedy available to secure a revision of the Constitution can be used only by the President and the members of Parliament. It is not available to any other individual or citizen. The respondent state did not dispute this fact but instead indicated, without elaborating, that the complainant has not submitted any evidence on the use and exhaustion of existing local remedies, adding that 'local remedies' include any legal and lawful action undertaken to 'ensure the cessation of the alleged violations'.

46. In *Jawara v The Gambia*,<sup>3</sup> the African Commission made it clear that a local remedy is available if the complainant is able to pursue it without any hindrance; the remedy is effective if it offers the complainant the possibility of success and if this remedy is adequate and capable of providing reparation for the alleged violation.

47. Where the complainant demonstrates to have exhausted all remedies, the burden shifts to the respondent state which has to show the remedies available and the extent to which the complainant could use them to remedy his/her claim. Making a general statement on the availability of local remedies without substantiating is not sufficient. This view is supported by the Human Rights Committee in *Mukong v Republic of Cameroon*,<sup>4</sup> where the Committee stated that the state party had merely listed *in abstracto* the existence of several remedies without relating them to the circumstances of the case, and without showing how they might provide effective redress in the circumstances of the complainant's case.

48. In the *Velasquez Rodriguez* case,<sup>5</sup> the Inter-American Court on Human Rights, in interpreting article 46 of the American Human Rights Convention (article similar to article 56 of the African Charter) on the matter of exhaustion of local remedies, declared that, for the

<sup>3</sup> Communication 147/95 and 149/96, *Jawara v The Gambia*.

<sup>4</sup> Communication 458/1991.

<sup>5</sup> *Velasquez Rodriguez* case, judgment of 29 July 1988, Inter-Am Ct H R (Ser C) No 4 (1988).

necessary condition of the exhaustion of local remedies to apply, the local remedies of the state concerned should be available, adequate and effective so that they can be used and exhausted.

49. In the present case, the complainant does not have the possibility of resorting to any judicial means to remedy the alleged violation as the mechanism provided for by article 124 of the Constitution is not available to him. In effect, the complainant does not have the necessary capacity to initiate the local remedy because this is reserved exclusively for the President of the Republic and for the members of the National Assembly. It can therefore be concluded that the remedy offered by article 124 of the Constitution is neither adequate nor available to the complainant.

50. The respondent state is under obligation to provide all possible, effective and accessible remedies for its citizens by which means, the latter can seek, at the national level, recognition and remedying of the alleged violations of their rights, even if it means resorting, should the need arise, to the international systems of protection of human rights like the African Commission for Human and Peoples' Rights.

51. In view of the foregoing, the African Commission considers that in the context of the present communication, the domestic remedies are not available and as such the condition for exhausting them as envisaged by article 56 of the African Charter cannot be invoked. The African Commission therefore concludes that the objections raised by the respondent state in terms of article 56(2) and (5) are not substantiated, and thus holds that the present communication is admissible.

## **Decision on the merits**

### **Complainant's submissions on the merits**

52. The complainant claims that the provisions of articles 35 and 65 of the 2000 Constitution of the Republic of Côte d'Ivoire contravene both articles 2 and 13 of the African Charter. Article 35 of the said Constitution stipulates that: 'The President of the Republic ... should be of Ivorian origin, born of a father and mother who themselves must be Ivorian by birth ...'.

53. Article 65 of the Constitution stipulates that the candidate to the presidential elections or to the posts of Speaker or Deputy Speaker of the National Assembly 'should be of Ivorian by birth, with both parents being of Ivorian origin, should never have renounced Ivorian nationality, and should never have acquired another nationality'.

54. The complainant contends that in establishing the rules and conditions of access to the above-mentioned public offices, the



Constitution makes a distinction between Ivorians on the basis of their places of origin and their birth, and divides Ivorians into categories, applying different standards to different categories, something the complainant finds discriminatory and contrary to article 2 of the African Charter.

**55.** In terms of article 35 of the Constitution, the following categories of citizens cannot be eligible to run for the office of President of the Republic, or to be elected as Speaker of the National Assembly or Deputy Speaker of the National Assembly:

- (a) Ivorians who acquired Ivorian nationality other than by birth, that is, either through marriage or naturalisation;
- (b) Ivorians who although Ivorians by birth, were born of Ivorian parents, who, at some stage in their lives, held another nationality; and
- (c) Ivorians who had once renounced Ivorian nationality.

Such a distinction, according to the complainant, would result in the exclusion of more than '40% of the Ivorian population ... from submitting candidature to the above-mentioned public offices ...', and this would reduce the choice left to citizens to freely choose their fellow citizens to direct the affairs of their nation, contrary to articles 13(1) of the African Charter.

**56.** On the allegation that the Constitution violates article 3 of the African Charter, the complainant points out that the Constitution, in its article 132, accords civil and criminal immunity to the members of the former National Committee for Public Security (CNSP), an executive military body which had directed the transition, and to the perpetrators of the events which brought about the change of government following the *coup d'état* of 24 December 1999.

**57.** According to the complainant, this immunity is 'total and unlimited' in time and would prevent certain persons, victims of the acts perpetrated by those granted amnesty to bring their cases to court in order to obtain compensation for the wrongs done to them. According to the complainant this constitutes unequal protection of the law contrary to article 3(2) of the Charter.

### **Respondent state's submissions on the merits**

**58.** The respondent state, for its part, while disputing the assertion that the constitutional provisions in question have excluded 'more than 40% of the population' of Côte d'Ivoire from access to the said offices as argued by the complainant, justifies instead the need of the said provisions by the fact that the state has the right to legally determine the category of citizens to whom 'the accomplishment of a specific act or the access to a specific situation' should be entrusted.

59. The respondent state considers it legitimate to require 'a certain level of loyalty from whoever aspires to preside over its highest offices in the land', which is the case for the office of President of the Republic or that of Speaker of the National Assembly or that of Deputy Speaker of the National Assembly.

60. Moreover, the respondent state refutes the notion of discrimination advanced by the complainant in this case, and contends that the Ivorian Constitution rather makes a 'distinction' between the different citizens of the same country. Whereas, argues the respondent state, it is not discrimination when the distinction between individuals placed under similar conditions is made on a 'reasonable and objective' basis.

61. The respondent state quotes the American, Algerian, Beninoise, Burkinabé and Gabonese examples where access to the office of President of the Republic is restricted by various criteria including, for instance, that of nationality.

62. The respondent state further argues that the discrimination and exclusion denounced by the complainant can no longer be put forward before the African Commission considering that within the context of the Pretoria Accord,<sup>6</sup> which the parties had concluded under the aegis of the African Union, the President of the Republic of the Côte d'Ivoire, making use of the exceptional powers vested in him by the Constitution (article 48) had declared eligible all the candidates designated by the parties in the Marcoussis Accord.<sup>7</sup>

63. For the respondent state, it appears from the terms of the communication (currently under consideration) that its main objective is the candidature of all those who want it, notably that of Mr Alassane Dramane Ouattara. Since this requirement has been satisfied in accordance with the principles of the African Union, article 56(7) of the Charter can be applied.

64. On the allegation of unequal protection of the law, the respondent state argues that the immunity granted to the perpetrators of the events which brought about the change of government on 24 December 1999 is neither total nor limitless in time, and that it only covers 'the Members of the National Committee for Public Security (CNSP) and all the perpetrators of the events'. Therefore, the other perpetrators of the looting, whether civilians or military, committed during the military transition period, are not covered by this immunity.

65. With regard to the possibility of the victims instituting legal proceedings in order to obtain compensation for the wrongs they have suffered, the respondent state contends that there is no inequality as

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<sup>6</sup> The Accord was concluded in April 2005 in Pretoria, South Africa.

<sup>7</sup> This Accord was concluded at Marcoussis, France, in January 2003.

no victim can be allowed to institute proceedings against the people benefiting from the amnesty.

### **The African Commission's decision on the merits**

**66.** At its 41st ordinary session held in Accra, Ghana in May 2007, the state informed the Commission that it was in the process of dealing with the civil crisis in the country, and the issues raised in the present communication would be dealt with. The Commission regrets the state party's failure to provide any further information with regard to developments on the substance of the author's claims since then.

**67.** Having received submissions on the merits from both parties, and in the absence of any indication that this matter has been or is being resolved by the parties amicably, the Commission will proceed to consider this communication on the merits.

**68.** In the case under consideration, the complainant alleges violation by the respondent state of articles 2, 3 and 13 of the African Charter. The African Commission has analysed these allegations in the light of the information at its disposal.

**69.** The Commission will deal with allegations regarding violation of articles 2 and 13 together, and allegations regarding the violation of article 3 separately.

### **Allegations on the violation of articles 2 and 13 of the African Charter**

**70.** Article 2 of the African Charter stipulates that:

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

And article 13(1) of the Charter provides that:

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

**71.** The African Commission considers that the restrictions which can be imposed on the enjoyment of the rights prescribed by the African Charter should only be applied, where the need arises, in the spirit of the conditions provided for by the Charter.

**72.** In *Civil Liberties Organisation (in respect of Bar Association) v Nigeria*,<sup>8</sup> the Commission stated that 'in regulating the exercise of this right [referring to the right to association] the competent authorities should not enact' legislation which would limit the right.

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<sup>8</sup> Communication 101/93 [(2000) AHRLR 186 (ACHPR 1995)].

In *Constitutional Rights Project and Another v Nigeria*,<sup>9</sup> the Commission while restating the above statement added that 'with these words, the Commission states a general principle that applies to all rights, not only freedom of association'. The Commission went further to state that 'Governments should avoid restricting rights, and take special care with regard to those rights protected by constitutional or international human rights law ...'.

**73.** The Ivorian Constitution of 2000, in its articles 35 and 65, as conditions of eligibility to certain high offices of state, imposed limitations which effectively disqualified a certain percentage of the Ivorian population from aspiring to these positions. The complainant puts the figure at 40%, and although the respondent state disputes this figure, it does not dispute the existence of the situation itself. According to the state, the disqualification clause is justified on the basis of exigencies of 'the level of loyalty'. It added that the practice is also current in other countries.

**74.** Article 2 of the African Charter provides that every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction on any kind such as '... national or social origin, fortune, birth or other status'. Article 13 provides that 'every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law'.

**75.** Unlike article 2 which talks of 'every individual', article 13 is even clearer as it talks of 'every citizen'. Under this article therefore, every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2, and without unreasonable restrictions, to take part in the conduct of government of his country, directly or through freely chosen representatives, which includes to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot.

**76.** The right to participate in government or in the political process of one's country, including the right to vote and to stand for election, is a fundamental civil liberty and human right, and should be enjoyed by citizens without discrimination. The reasons for this lies in the fact that, as historical experience has shown, governments derived from the will of the people, expressed in free elections, are those that provide the soundest guarantee that the basic human rights will be observed and protected.

**77.** Several other international instruments guarantee the rights under articles 2 and 13 of the African Charter, that is, non-discrimination and to participate in government. Article 5(c) of International Convention on the Elimination of Racial Discrimination

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<sup>9</sup> Communication 102/93 [(2000) AHRLR 191 (ACHPR 1998)].

(ICERD) states *inter alia* that: in compliance with the fundamental obligations laid down in article 2 of this Convention, states parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: ‘... (c) Political rights, in particular the right to participate in elections, to vote and to stand for election on the basis of universal and equal suffrage, to take part in the government as well as in the conduct of public affairs at any level and to have equal access to public service’. Article 2 in the ICERD refers to the obligation to eliminate racial discrimination and ‘to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists’. Article 21 of the Universal Declaration on Human Rights on its part, provides that: ‘everyone has the right to take part in the government of his country, directly or through freely chosen representatives,’ and ‘has the right to equal access to public service’. Article 25 of the International Covenant on Civil and Political Rights (ICCPR) recognises and protects the right of every citizen to take part in the conduct of public affairs, the right to vote and to be elected and the right to have access to public service. Whatever form of Constitution or government is in force, the Covenant requires states to adopt such legislative and other measures as may be necessary to ensure that citizens have an effective opportunity to enjoy the rights it protects.

**78.** The most elaborate interpretation of the right to participate in government has been provided by the Human Rights Committee of the United Nations. In its General Comment 25 on participation in public affairs and the right to vote,<sup>10</sup> the Committee stated *inter alia*, that

the effective implementation of the right and the opportunity to stand for elective office ensures that persons entitled to vote have a free choice of candidates. Any restrictions on the right to stand for election, such as minimum age, must be justifiable on objective and reasonable criteria. Persons who are otherwise eligible to stand for election should not be excluded by unreasonable or discriminatory requirements such as education, residence or descent, or by reason of political affiliation. No person should suffer discrimination or disadvantage of any kind because of that person’s candidacy.<sup>11</sup>

**79.** In the present communication, could it be said that the conditions set out in articles 35 and 65 of the Ivorian Constitution of 2000 are justifiable on objective and reasonable criteria and reasonable and non-discriminatory?

<sup>10</sup> CCPR/C/21/Rev 1/Add 7, General Comment 25, adopted by the Committee at its 1510th meeting (fifty-seventh session) on 12 July 1996.

<sup>11</sup> Human Rights Committee, General Comment 25, ‘The right to participate in public affairs, voting rights and the right of equal access to public service’, UN Doc CCPR/C/21/Rev 1/Add 7 (1996), para 15.

**80.** Article 35 of the said Constitution stipulates that the 'President of the Republic ... should be of Ivorian origin, born of a father and mother who themselves must be Ivorian by birth ...' Article 65 stipulates that a candidate to the presidential elections or to the posts of Speaker or Deputy Speaker of the National Assembly 'should be Ivorian by birth, with both parents being of Ivorian origin, should never have renounced Ivorian nationality, and should never have acquired another nationality'.

**81.** Admittedly, the Constitution places these restrictions only on the highest positions in the land. Many other countries, including European, American and African countries have similar provisions to determine those eligible to ascend to the highest offices. Most of these countries have the same justification given by the Ivorian government, that is, persons having these positions must have undoubted loyalty to the nation. It is doubtful though whether this is the only way to test loyalty or whether this is even the best way to test loyalty.

**82.** The Commission recognises the right of each state party to the Charter to adopt appropriate legislation that would regulate the conduct of elections. It is also for the states to determine criteria for eligibility for those who can vote and those who can stand for elections to whatever positions. The exercise of adopting criteria to regulate those who can vote and those who can stand for elections is in itself not a violation of human rights norms. In every society, some positive measure/actions need to be taken to regulate human behaviour in certain areas. However, these criteria must be reasonable, objective and justifiable. They must not seek to take away the already accrued rights of the individual.

**83.** The African Commission is of the view that the right to vote as well as the right to stand for election are rights attributable and exercised by the individual. This is why voting, in democratic societies, is by secret ballot, to the extent that even the individual's father or mother may not know who the individual has voted for. By the same token, the exercise of the right to stand for elections is a personal and individual right which must not be tied to the status of some other individual or group of individuals. The right must be exercised by the individual simply because he/she is an individual, and not tied to the status of another individual. Distinctions must thus be made between the rights an individual can exercise on his own and the rights he/she can exercise as a member of a group or community.

**84.** Thus, to state that a citizen born in a country cannot stand for elections because his/her parents were not born in that country would be stretching the limit of objectivity and reasonableness too far. The Commission recognises the fact that the position of President, Speaker and Deputy Speaker, and indeed other similar positions are very crucial to the security of a country, and it would be

unwise to put a blank cheque *vis-à-vis* accessibility to these positions. Placing restrictions on eligibility for these posts is in itself not a violation of human rights. However, where these restrictions are discriminatory, unreasonable and unjustifiable, the purpose they intended to serve will be overshadowed by their unreasonableness.

**85.** In the present instance, the rights to vote and to stand for elections are individual rights and conditions must be made to ensure that the individual exercises these rights without reference to his/her attachment to other individuals. The Commission thus finds the requirement that an individual can only exercise the right to stand for the post of a President not only if he/she is born in Côte d'Ivoire, but also that his parents must be born in Côte d'Ivoire unreasonable and unjustifiable, and finds this an unnecessary restriction on the right to participate in government guaranteed under article 13 of the African Charter. Article 35 is also discriminatory because it applies different standards to the same categories of persons, that is, persons born in Côte d'Ivoire are now treated on the places of origin of their parents, a phenomenon which is contrary to the spirit of article 2 of the African Charter.

**86.** This was also the Commission's position in *Legal Resources Foundation v Zambia*,<sup>12</sup> where the African Commission held that the right to equality is very important. It means that citizens should expect to be treated fairly and justly within the legal system and be assured of equal treatment before the law and equal enjoyment of the rights available to all other citizens. The right to equality is important for a second reason. Equality or lack of it affects the capacity of one to enjoy many other rights. For example, one who bears the burden of disadvantage because of one's place of birth or social origin suffers indignity as a human being, equal and proud citizen. He may vote for others but has limitations when it comes to standing for office. In other words, the country may be deprived of the leadership and resourcefulness such a person may bring to national life.

**87.** The complainant also alleges the violation by the respondent state of article 3 of the African Charter which stipulates:

- (1) Every individual shall be equal before the law.
- (2) Every individual shall be entitled to equal protection of the law.

**88.** The respondent state argues that the immunity granted to the perpetrators of the events which brought about the change of government on 24 December 1999 is neither total nor limitless in time, and that it only covers 'the members of the National Committee for Public Security (CNSP) and all the perpetrators of the events'. Therefore, the other perpetrators of the looting, whether civilians or military, committed during the military transition period, are not

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<sup>12</sup> Communication 211/98 [(2001) AHRLR 84 (ACHPR 2001)].

covered by this immunity. With regard to the possibility of the victims instituting legal proceedings in order to obtain compensation for the wrongs they have suffered, the respondent state contends that there is no inequality as no victim can be allowed to institute proceedings against the people benefiting from the amnesty.

89. It appears therefore that 'the members of the National Committee for Public Security (CNSP)' had total and complete immunity, and no action could be brought against them by anybody for whatever reason.

90. Over the years, the strict interpretation of clemency powers of pardons has been the subject of considerable scrutiny by international human rights bodies and legal scholars. There has been consistent international jurisprudence suggesting that the adoption of amnesties leading to impunity for serious human rights offences has become a rule of customary international law. In a report entitled 'Question of the impunity of perpetrators of human rights violations (civil and political)', prepared by Mr Louis Joinet for the Sub-commission on Prevention of Discrimination and Protection of Minorities, pursuant to Sub-commission decision 1996/119, it was noted that 'amnesty cannot be accorded to perpetrators of violations before the victims have obtained justice by means of an effective remedy' and that 'the right to justice entails obligations for the state: to investigate violations, to prosecute the perpetrators and, if their guilt is established, to punish them'.<sup>13</sup>

91. The report went on to state that

even when intended to establish conditions conducive to a peace agreement or to foster national reconciliation, amnesty and other measures of clemency shall be kept within certain bounds, namely: (a) the perpetrators of serious crimes under international law may not benefit from such measures until such time as the state has met their obligations to investigate violations, to take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that they are prosecuted, tried and duly punished to provide victims with effective remedies and reparation for the injuries suffered, and to take acts to prevent the recurrence of such atrocities.<sup>14</sup>

92. In its General Comment 20 on article 7 of the ICCPR, the UN Human Rights Committee noted that 'amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible'.<sup>15</sup> In the case of *Hugo Rodriguez v Uruguay*,<sup>16</sup> the Committee reaffirmed

<sup>13</sup> See E/CN.4/Sub.2/1997/20/Rev.1, paras 32 and 27.

<sup>14</sup> As above, principles 18 and 25.

<sup>15</sup> See Human Rights Committee General Comment 20 (44) on article 7, para 15.

<sup>16</sup> *Rodriguez v Uruguay*, communication 322/1988, UN Doc CCPR/C/51/D/322/1988 (1994).



its position that amnesties for gross violations of human rights are incompatible with the obligations of the state party under the Covenant and expressed concern that in adopting the amnesty law in question, the state party contributed to an atmosphere of impunity which may undermine the democratic order and give rise to further human rights violations.

**93.** The African Commission has also held amnesty laws to be incompatible with a state's human rights obligations.<sup>17</sup> Guideline 16 of the Robben Island Guidelines adopted by the African Commission during its 32nd session in October 2002 further states that

in order to combat impunity states should: (a) ensure that those responsible for acts of torture or ill-treatment are subject to legal process; and (b) ensure that there is no immunity from prosecution for nationals suspected of torture, and that the scope of immunities for foreign nationals who are entitled to such immunities be as restrictive as is possible under international law.<sup>18</sup>

**94.** In *Malawi African Association and Others v Mauritania*,<sup>19</sup> the Commission held that the amnesty law adopted by the Mauritanian legislature had the effect of annulling the penal nature of the precise facts and violations of which the plaintiffs are complaining; and that the said law also had the effect of leading to the foreclosure of any judicial actions that may be brought before local jurisdictions by the victims of the alleged violations. The Commission went further to note that its role consists precisely in pronouncing on allegations of violations of the human rights protected by the Charter of which it is seized in conformity with the relevant provisions of that instrument. It is of the view that an amnesty law adopted with the aim of nullifying suits or other actions seeking redress that may be filed by the victims or their beneficiaries, while having the force of law 'cannot shield that country from fulfilling its international obligations under the Charter'.

**95.** In *Zimbabwe Human Rights NGO Forum v Zimbabwe*,<sup>20</sup> this Commission reiterated its position on amnesty laws by holding that

by passing the Clemency Order No 1 of 2000, prohibiting prosecution and settling free perpetrators of 'politically motivated crimes' ... the state did not only encourage impunity but effectively foreclosed any available avenue for the alleged abuses to be investigated, and prevented victims

<sup>17</sup> See also communications 54/91, 61/91, 96/93, 98/93, 164/97, 210/98, *Malawi African Association and Others v Mauritania* [(2000) AHRLR 194 (ACHPR 2000)] and communications 83/92, 88/93, 91/93, *Degli and Others v Togo* [(2000) AHRLR 317 (ACHPR 1995)].

<sup>18</sup> Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (The Robben Island Guidelines), African Commission on Human and Peoples' Rights, 32nd Session, 17-23 October, 2002 Banjul, The Gambia. See also communications 54/91, 61/91, 96/93, 98/93, 164/97-196/97, 210/98, *Malawi African Association and Others v Mauritania*.

<sup>19</sup> Communications 54/91, 61/91, 98/93, 164/97-196/97, 210/98, *Malawi African Association and Others v Mauritania*.

<sup>20</sup> Communication 245/2002 [(2006) AHRLR 128 (ACHPR 2006)].

of crimes and alleged human rights violations from seeking effective remedy and compensation. This act of the state constituted a violation of the victims' right to judicial protection and to have their cause heard under article 7(1) of the African Charter.

**96.** If there appears to be any possibility of an alleged victim succeeding at a hearing, the applicant should be given the benefit of the doubt and allowed to have their matter heard. Adopting laws that would grant immunity from prosecution of human rights violators and prevent victims from seeking compensation renders the victims helpless and deprives them of justice.

**97.** In light of the above, the African Commission holds that by granting total and complete immunity from prosecution which foreclosed access to any remedy that might be available to the victims to vindicate their rights, and without putting in place alternative adequate legislative or institutional mechanisms to ensure that perpetrators of the alleged atrocities were punished, and victims of the violations duly compensated or given other avenues to seek effective remedy, the respondent state did not only prevent the victims from seeking redress, but also encouraged impunity, and thus reneged on its obligation in violation of articles 1 and 7(1) of the African Charter. The granting of amnesty to absolve perpetrators of human rights violations from accountability violates the right of victims to an effective remedy.<sup>21</sup>

**98.** For these reasons, the African Commission:

- (a) Finds that the respondent state is in violation of articles 1, 2, 3(2), 7 and 13 of the African Charter and requests it to take the appropriate measures to remedy the situation.
- (b) Requests both parties to inform the Commission on the progress made in reviewing the discriminatory provisions in the Constitution.
- (c) Offers its good offices in case it is needed to assist.

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<sup>21</sup> See the African Commission's Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, para C(d).

# DEMOCRATIC REPUBLIC OF THE CONGO

## Wetsh'okonda Koso and Others v Democratic Republic of the Congo

(2008) AHRLR 93 (ACHPR 2008)

Communication 281/2003, *Marcel Wetsh'okonda Koso and Others v Democratic Republic of Congo*

Decided at 44th ordinary session, November 2008, 26th Activity Report. Edits have been done to ensure consistency with the French original

*Civilians and soldiers accused of civilian offences tried by military court*

**Admissibility** (no response from state party, 39; exhaustion of local remedies, no appeal against judgments of military courts, 51, 53-55)

**Fair trial** (impartial court, 77, 80, 81; military court, 78, 82-87, 89; independence of courts, 79, 80; appeal 82; unreasoned judgment, 90)

**Evidence** (state to provide copy of judgment, 90)

**International law** (treaty only applicable if ratified, 92)

**Remedies** (compensation, 93; revision of legislation, 93)

1. On 23 September 2003, the Secretariat of the African Commission on Human and Peoples' Rights received from Maître Marcel Wetsh'Okonda Koso, advocate at the Kinshasa-Gombe bar and member of the NGO *Campagne pour les Droits de l'Homme au Congo*, from Maître Izua Kembo, advocate at the Kinshasa-Gombe bar and member of the NGO *Comité des Observateurs des Droits de l'Homme*, and from Maître Odette Disu, advocate at the Kinshasa-Gombe bar and member of the NGO *Asmeboken*, a communication, filed on behalf of the following five persons:

- Ngimbi Nkiamia Gaby, contractor, born on 19.04.1958 in Kinshasa
- Bukasa Musenga, trade inspector, born on 25.09.1967 in Kinshasa
- Duza Kade Willy, soldier, born on 30.10.1963 in Lisala
- Issa Yaba, soldier, born on 10.04.1958 in Irebu, and
- Muzaliwa Manoy, soldier, born on 10.05.1958

2. The communication was filed against the Democratic Republic of the Congo, (state party<sup>1</sup> to the African Charter, and hereinafter referred to as the DRC) in accordance with article 55 of the African Charter on Human and Peoples' Rights (the African Charter).

3. The complainants allege that, on 23 July 1999, Mr Ngimbi Nkiama placed an order for the supply of 3.5 cubic metres of petrol with ELF (a petroleum company) and took delivery of it on 26 June 1999 through SEP/Congo. Subsequently Mr Ngimbi Nkiama was arrested by policemen who allege that the latter collected 40 drums of fuel instead of the 34 drums he ordered, thus obtaining a surplus of 6 drums.

4. Moreover, the complainants maintain that on 4 August 1999 Mr Ngimbi Nkiama was arrested and sent to the *Conseil National de Sécurité* (National Security Council) together with four other persons, namely Bukasa Musenga, Duza Kade Willy, Issa Yaba, and Muzaliwa Manoy.

5. According to the complainants, on 11 September 1999, Mr Ngimbi Nkiama and his codefendants appeared before the Military Court of the DRC for 'participation, in wartime, in committing acts of sabotage to the detriment of the Congolese Armed Forces.'

6. The complainants maintain that the Military Court comprising five judges (of whom only one was said to be a trained jurist) found Mr Ngimbi Nkiama and his codefendants guilty on the evidence adduced against them and sentenced them to death, by a 'ruling on a pronouncement without the least motivation' and without the right to file an appeal, decisions of the Military Court being subject neither to opposition nor to appeal (decree 091 of 23 August 1997 establishing the Military Court of the DRC).

## Complaint

7. The complainants allege that the above-mentioned facts constitute a violation by the DRC of articles 7(1)(a) and 26 of the African Charter and of paragraph 3 of the Resolution on the Right to Recourse and Fair Trial adopted by the African Commission during its 11th ordinary session held in Tunis, Tunisia from 2 to 9 March 1992.

8. Furthermore, the complainants maintain that the aforementioned facts constitute a violation by the DRC of article 14(1) of the International Covenant on Civil and Political Rights.

9. Consequently, the complainants request the African Commission to:

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<sup>1</sup> The DRC ratified the African Charter on 20 July 1987.

- Declare government Decree 019 of 23 August 1997, establishing a military court, and its article 5, contrary to the international commitments of the DRC as far as fair trial is concerned as stipulated in the African Charter;
- Declare that the sole fact of submitting a dispute case to a Court the majority of whose members have no legal qualification whatsoever, constitutes a flagrant violation of article 26 of the African Charter;
- Declare that judicial decisions merely on pronouncement without the least motivation is a gross breach the rights and liberties acknowledged by the African Charter and violate the provisions of article 7 of the latter;
- Order the immediate release of the convicted persons and their compensation for all the harm they have suffered;
- Request the DRC to ensure that all its legislation complies with the commitments this state has subscribed to at international level and notably the African Charter and to initiate reforms so as to prevent further human rights violations.

## Procedure

10. On 21 October 2003, the Secretariat of the African Commission acknowledged receipt of this communication to the complainants through a letter with reference ACHPR/COMM 281/2003.

11. During its 34th ordinary session held from 6 to 19 November 2003 in Banjul, The Gambia, the African Commission examined this communication and decided to proceed with the case.

12. On 14 December 2003, the African Commission notified the respondent state of this decision by DHL, and at the same time sent it a copy of the complaint. The African Commission had also requested the Democratic Republic of Congo to provide it, within two months, with its reactions to this complaint to enable it take a decision on its admissibility during its 35th ordinary session.

13. On 12 February 2004 and in the absence of any reaction from the respondent state, the African Commission sent a copy of the complaint in question with an acknowledgement of receipt to the Ministry of Foreign Affairs, requesting its reaction as early as possible.

14. At its 35th ordinary session which was held from 21 May to 4 June 2004 in Banjul, The Gambia, the African Commission considered the communication and deferred its decision on the admissibility of the case, the delegation of the respondent state, which had participated in the session, having declared, contrary to all expectations, that the complaint had not reached the DRC.

15. The Secretariat of the Commission prepared a complete dossier of all the pending communications against the DRC, including communication 281/2003, which it delivered in exchange for a receipt, to the DRC delegation attending the session.

16. In a letter dated 21 June 2004, the Secretariat of the Commission informed the parties to the communication of the deferment of its decision on the admissibility of the complaint to its

36th session and requested them, once again, to provide it with their arguments in this regard so as to allow the African Commission to rule on the admissibility during its 36th session.

17. On 16 September 2004, the respondent state sent its comments on the admissibility of the communication to the Secretariat of the Commission.

18. The Secretariat acknowledged receipt of it on 11 October 2004, and sent the said comments to the complainants requesting their reaction to it as soon as possible.

19. During the 36th ordinary session of the African Commission which was held in November/December 2004 in Dakar, Senegal, the respondent state submitted its memorandum on the admissibility of the complaint to the Secretariat of the African Commission.

20. On 4 December 2004, the Secretariat of the African Commission acknowledged receipt of this memorandum and informed the respondent state that the African Commission would take its decision on admissibility of the complaint at its 37th ordinary session where the arguments raised would be taken into account.

21. On 23 December 2004, the Secretariat of the African Commission conveyed the submission of the respondent state on admissibility to the complainants, and requested their possible reaction to the arguments submitted therein and further informed them that the African Commission would take its decision on the admissibility during its 37th ordinary session.

22. At its 37th ordinary session which took place from 27 April to 11 May 2005 in Banjul, The Gambia, the African Commission heard the complainants on the condition of the exhaustion of local remedies.

23. During this same session, the African Commission declared the communication admissible.

24. On 6 June 2005, the Secretariat informed the parties of this decision and requested them to transmit their arguments on the merits of the case.

25. On 6 September 2005, the complainants submitted their arguments on the merits of the complaint.

26. The Secretariat conveyed these observations to the respondent state on 8 November 2005 at the same time requesting its memorandum as soon as possible.

27. During its 38th ordinary session, which was held from 21 November to 5 December 2005 in Banjul, The Gambia, the African Commission considered the complaint and, in the absence of the arguments of the respondent state on the merits of the case, decided to defer its decision at this stage to its 39th ordinary session.

28. On 10 January 2006, the Secretariat of the African Commission informed the parties of this decision and requested the respondent state to forward its arguments on the merits of the communication.

29. In the absence of reaction from the respondent state, the Secretariat sent a reminder on 28 March 2006. A copy of the submission of the complainants on the merits of the case was again enclosed.

30. In a *note verbale* dated 12 July 2006, the Secretariat urged the DRC to provide it with its observations on the merits of the case by 30 August 2006 at the latest. The Secretariat further reminded the DRC of previous *notes verbales* sent respectively on 6 June 2005, 8 November 2005 and 10 January 2006, all of which had not been followed up.

31. At its 40th ordinary session held in Banjul, the Gambia from 15 to 29 November 2006, the Commission deferred its decision on the merits to its 41st ordinary session scheduled to be held in Ghana from 16 to 30 May 2007, owing to the absence of arguments on the merits of the case from the respondent party.

32. In a *note verbale* dated 15 January 2007, the Secretariat informed the DRC of the decision of the Commission to defer the complaint to its 41st ordinary session and reminded the DRC of the previous four *notes verbales* still unanswered. It advised the DRC that it had until the end of February 2007 to produce its observations on the merits of the case, in the absence of which the Commission would be obliged to act in accordance with article 119(4) of its Rules of Procedure.

33. In a letter dated 16 January 2007, the Secretariat informed the complainants of the postponement of the case to the 41st ordinary session scheduled to be held from 16 to 30 May 2007 in Ghana. The complainant was also informed about the *note verbale* sent to the DRC.

34. In a *note verbale* dated 14 June 2007, the Secretariat of the Commission informed the respondent state that the communication was deferred to the 42nd ordinary session scheduled from 14 to 28 November 2007 in Brazzaville, Congo. In this *note verbale*, the Secretariat reminded the respondent state not only of the four previous *notes verbales* still unanswered, but also of the urgency to submit its arguments on the merits of the case, failing which the Commission would apply article 119(4) of its Rules of Procedure.

35. In a letter dated 15 June 2007 the Secretariat informed the complainant of the deferment of the case to the 42nd ordinary session of the Commission scheduled from 14 to 28 November 2007 in Brazzaville, Congo.

36. In a *note verbale* dated 17 September 2007 and a letter also dated 17 September 2007, the Secretariat of the African Commission sent a reminder both to the complainant and the respondent state.

37. By a *note verbale*, dated 20 March 2008, and a letter dated 19 December 2007 respectively, the parties were informed of the deferment of the case to the 43rd ordinary session scheduled in Ezulwini, Swaziland from 7 to 22 May 2008 to allow the Commission to take into consideration, in its decision on the merits, the conclusions submitted by the DRC on the merits.

38. In a *note verbale* dated 20 March 2008 and a letter dated 19 March 2008, reminders were sent to the parties to inform them of the deferment of the case to the 43rd ordinary session.

39. All attempts since then to obtain written responses from the respondent state having remained unsuccessful, the Commission decided to consider the communication on the merits.

40. During its 5th extraordinary session, which took place in Banjul, The Gambia from 21 to 29 July 2008, the African Commission considered the communication and finalised its decision on the merits.

## Law

### Admissibility

#### On the exhaustion of local remedies

41. The African Charter on Human and Peoples' Rights stipulates in its article 56 that the communications referred to in article 55 must, if they are to be considered, necessarily be sent after exhaustion of local remedies, if they exist, unless the procedure of exhaustion of local remedies is unduly prolonged.

42. In its memorandum on admissibility, the respondent state contended that the communication should be declared inadmissible. In support of this position the respondent state affirms that the complainants

do not provide evidence of having lodged an appeal with the court of cassation against the ruling in dispute, whereas this means of recourse remains open, in conformity with article 150, paragraph 3 of the Transitional Constitution of the Democratic Republic of the Congo.

43. According to the respondent state, it was possible for the complainants to lodge an appeal and to refer the disputed ruling to the Supreme Court of Justice, and that, since they did not use this remedy, their communication should be declared inadmissible for non-exhaustion of local remedies.

44. In a memorandum dated 17 April 2005, the complainants through the representative of their advisers made known the non-



existence of remedies at the time when the events occurred. They contended that the sentences passed on them by the Military Tribunal did not qualify for any remedies. In effect article 5 of Decree 019 of 23 August 1997 establishing the Military Tribunal stipulates that its rulings 'are subject neither to being opposed nor to appeal'.

45. They contended that a possible recourse to cancellation of the judgment in question, although provided for by article 272 of the Law of 23 August 1972 instituting the Code of Military Justice, could not be implemented due to lack of a 'court competent to hear it'; insofar as they could have appealed if the events, which dated back to 1999, were not prior to the Transitional Constitution which was adopted on 4 April 2003 and made it possible for citizens to appeal after the event against the rulings of the Military Tribunal.

46. The complainants contend moreover that the Transitional Constitution Decree of 9 April 1994 (in force at the time of the events - 1999) which stipulated in its article 102 that: 'The Supreme Court of Justice has jurisdiction over ... appeals lodged against rulings passed in final hearings by the Courts and Tribunals' did not take into consideration the decisions of the Military Tribunal.

47. The complainants consider therefore that local remedies were not available at the time the events occurred.

48. At the 37th ordinary session of the African Commission which was held from 27 April to 11 May 2005 in Banjul, The Gambia, the complainants made an oral presentation before the African Commission in reiteration of these arguments.

### **Opinion of the African Commission**

49. The question regarding the admissibility of the case under consideration is whether local remedies were in existence at the time when the facts occurred and, if so, whether they had been exhausted pursuant to article 56(6) of the African Charter on Human and Peoples' Rights.

50. In effect, the aforementioned article 56(6) stipulates that communications 'are submitted within a reasonable period after local remedies have been exhausted or from the date on which the matter is referred to the Commission'.

51. The African Commission is of the view that for events of such grave importance to be within the jurisdiction of an emergency court, all legal avenues should be offered to the accused persons for their defence in order especially to avoid any possible judicial error. That is moreover the rationale for having remedies in all proceedings, especially in criminal proceedings. All the standard remedies should be available to them.

52. An analysis of article 150, paragraph 3 of the Transitional Constitution of 4 April 2003, which the respondent state is using as an argument, shows that not only the events but also the decision sentencing the complainants predated it. In such circumstances, the Commission is of the view that applying such a law of a general scope would violate the principle of non-retroactivity of the law, especially as the new Transitional Constitution Decree does not expressly provide for such remedy.

53. In the present communication, it is the state that alleges that local remedies have not been exhausted and as such the burden is on it to prove the availability of such local remedies. Whereas it claims that such a procedure could have been undertaken under Decree 019 of 23 August 1997 establishing the Military Court; article 5 of the said Decree expressly provides that the rulings of the latter 'cannot be opposed nor are they subject to appeal'. Thus, it appears that the Decree includes a derogatory clause which precludes any opposition or appeal against the rulings of courts such as the Military Court. In other terms, the applicable law at the time the events occurred did not provide any remedy and therefore no opportunity for a new evocation; of annulment or revision of the sentences handed down by the Military Court. In a similar situation, the African Commission, based on its own well-established case law, had already found, in its communications 102/93 *Constitutional Rights Project v Nigeria*, 129/94 *Civil Liberties Organization v Nigeria* and other communications,<sup>2</sup> that 'it is reasonable to assume that the local remedies would not only be prolonged, but would not produce any definite results'.

54. Moreover, the same analysis can apply to the other standard remedy, namely the lodging of an appeal with the Supreme Court. In terms of the Transitional Constitution Decree of 9 April 1994 (in force at the time of the events - 1999), article 102 of which provides that 'the Supreme Court of Justice has jurisdiction of appeals lodged against rulings passed in final jurisdiction by the Courts and Tribunals' is only available for common law offences.

55. Consequently, the African Commission rules that local remedies were not available to the complainants. It therefore complies with its common law on exhaustion of local remedies.<sup>3</sup> Without it being necessary to examine the effectiveness of local remedies; the Commission is of the view that it was absolutely impossible for the victims to exercise the appropriate remedies; and thus logically could not exhaust them.

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<sup>2</sup> 102/93 *Constitutional Rights Project and Another v Nigeria* [(2000) AHRLR 191 (ACHPR 1998)], 129/94 *Civil Liberties Organisation v Nigeria* [(2000) AHRLR 188 (ACHPR 1995)].

<sup>3</sup> Communication 218/98 *Civil Liberties Organisation and Others v Nigeria* [(2001) AHRLR 75 (ACHPR 2001)].

**56.** On these grounds, the African Commission declares the communication admissible.

**57.** In accordance with rule 120 of the Rules of Procedure of the African Commission, where a communication submitted in accordance with article 55 of the Charter has been declared admissible, the Commission 'shall consider it in the light of all the information that the individual and the state party concerned have submitted in writing; and it shall make known its observation on this issue.'

**58.** In the present case, the conclusions brought to the dossier by the two parties both in terms of the procedure and on the merits of the case enable the Commission to make a decision; after analysis of the accounts and arguments of the parties to the suit.

### **The observations of the complainants**

**59.** The complainants point out with regard to the events that they allege that the African Charter was violated in its article 7(1)(a), (b) and (d) and article 26. They base this on the fact that the respondent state, in this instance the DRC, is party to the African Charter on Human and Peoples' Rights and they contest the idea of the Military Court as much for its legal basis and competence, as for the procedure that prevails there.

**60.** The claimants aver that the establishment of the Military Court contravenes article 96(1) of the Transitional Constitution which stipulates that 'courts, tribunals and war councils shall only be established by Law. No emergency commissions or tribunals shall be set up with whatsoever appellation.'

**61.** The claimants contend the incompetence of the said court due to its composition which guaranteed no impartiality insofar as all the judges, with one exception, were members of the military corps, whose strictness and discipline are well known. Moreover, nothing in the dossier under review proves that the members of this court were legal professionals; in this instance magistrates. To support these assertions, the claimants invoke the decision in communication 218/98<sup>4</sup> in which the African Commission decided that 'military tribunals must be subject to the same requirements of fairness, openness, justice, independence and respect for legal procedure that are required for other courts.'

**62.** The complainants also aver that the procedural situation was exacerbated by the excessive powers of the members of the court who purportedly followed a very arbitrary procedure in violation of article 137 of the Military Code of Justice, dated 25 September, according to which, the procedure before military courts shall be that

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<sup>4</sup> *Civil Liberties Organisation and Others v Nigeria* [para 44].

in force before common law courts, in conformity with the provisions of the normal Criminal Code which are not incompatible with those of the present code.

**63.** According to the claimants, there was no possible recourse allowing them to contest the decision of the court which sentenced the plaintiffs to death, according to article 5 of the government decree establishing the said court, neither could the decisions be appealed against or opposed. The claimants contend that the sentencing of the victims to death without possibility of appeal constitutes a violation of article 6 of the Covenant on Civil and Political Rights and ignores the guarantees required for the Protection of persons sentenced to death and in terms of which 'any individual sentenced to death is entitled to file an appeal with a higher court, and measures should be taken to ensure that these appeals are mandatory.'

**64.** The claimants also cited in support of the above the ruling of the Human Rights Committee in the case of *Arutyunyan v Uzbekistan* which states that

the imposition of a death sentence upon conclusion of a trial in which the provisions of the Covenant have not been respected, constitutes a violation of article 6 of the Covenant, if no further appeal against the death sentence is possible.<sup>5</sup>

**65.** The claimants further aver that the ruling of the court was not justifiable in view of the fact that the authorities refused to convey to the plaintiffs the ruling pronouncing their sentence despite all the attempts to that effect.

**66.** Consequently, the complainants call for the immediate release of the victims and request the African Commission to call on the government of the Democratic Republic of the Congo to grant each victim the sum of 10,000,000 Congolese Francs for moral wrong and to urge it to harmonise its legislation with its international commitments.

### **The arguments of the respondent state**

**67.** The respondent state refutes the claims of the complainants. It alleges that:

**68.** The establishment of the Military Court whose impartiality, independence and competence are being challenged by the applicants, was in conformity with article 156(2) of the Constitution which empowers the Head of State to suspend common law courts in the some or all parts of the territory, and to replace them with military courts in times of war. As the Congolese state was engaged in an armed conflict situation following the armed aggression led by

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<sup>5</sup> Communication 917/2000, 29 March 2004, para 6.4.

its neighbours, the state was obliged to implement the said provisions of the Constitution.

**69.** The respondent state points out that it was under these exceptional circumstances that the plaintiffs were tried and sentenced in all legality and avers that the latter have not adduced any proof of their assertion that the ruling as passed was not justifiable.

**70.** Regarding the complaint brought by the complainants pertaining to article 5 of the government decree establishing the Military Court, the respondent state alleges that the complainants should rather have lodged an appeal to highlight their allegations, in accordance with article 150 of the Transitional Constitution, which recognises the competence of the Supreme Court to judge decisions made by lower and higher courts.

**71.** The respondent state concludes that there is no need for compensation as the plaintiffs were duly found guilty, and eventually released from custody.

**72.** The Congolese state further alleges that it has subsequently harmonised its laws with its international commitments.

### **Observations of the Commission**

**73.** In the analysis of the applications, intentions and conclusions of the parties, the essential question that must be asked here is whether the provisions of articles 7(1) and 26 of the African Charter have been violated.

**74.** In terms of article 7 of the African Charter on Human and Peoples' Rights:

Every individual shall have the right to have his cause heard. This comprises:

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

**75.** Article 26 provides that:

State parties to the present charter shall have the duty to guarantee the independence of the courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.

**76.** In this instance, articles 7 and 26 both constitute the source of the guarantee of sound justice and in this capacity reveal two sorts of obligations: The inherent one of having access to appropriate

justice and the one relating to the independence of justice. The right to a fair trial is a corollary of the concept of access to appropriate justice. The right to a fair trial requires that one's cause be heard by efficient and impartial courts.

77. In a similar case relating to communication 151/96, *Civil Liberties Organisation v Nigeria* [(2000) AHRLR 243 (ACHPR 1999)], the Commission had already done a cross-reading of article 7 and article 26 and held that article 7 deals with the right to be heard by impartial courts, and article 26 insists on the independence of courts; the Commission notes that States have the duty to put in place credible institutions for the promotion and protection of human rights. Article 26 being therefore the necessary appendix of article 7, one can expect a fair trial only before impartial courts.

78. In the present case, the establishment of this court, which was nothing else but an emergency tribunal, was a violation of the provisions of the Charter, as already decided by the African Commission in the above-mentioned similar cases.

79. The African Commission notes that in all cases the independence of a court must be appreciated with regard to the degree of independence of the judiciary *vis-à-vis* the executive. This implies the consideration of the manner in which its members are appointed, the duration of their mandate, the existence of protection against external pressures and the issue of real or perceived independence: as the saying goes 'justice must not only be done: it must be seen to be done'.<sup>6</sup>

80. Regarding the competence of the court, the Commission admits that the ability of a court to rule depends not only on the competence of the court to hear a case, but also on the calibre of its members. In this instance, the very status of the members, who were not judges but rather men in uniform, predicted excessiveness, thus the iniquity of their decision. Another decision could not be expected, in view of the sociopolitical landscape at the time of the events.

81. In the case of *Amnesty International v Sudan* [(2000) AHRLR 297 (ACHPR 1999) paras 62, 69], the Commission decided that

[e]specially sensitive is the definition of 'competent' ... To deprive courts of the personnel qualified to ensure that they operate impartially ... denies the right to individuals to have their case heard ... Such actions by the government against the judiciary constitute violations of articles 6(1)(d) and 26 of the Charter.

<sup>6</sup> *Media Rights Agenda v Nigeria* [(2000) AHRLR 262 (ACHPR 2000)], paras 60, 61; *Amnesty International and Others v Sudan*, paras 68, 69; *Malawi African Association and Others v Mauritania* [(2000) AHRLR 149 (ACHPR 2000)] para 98; *Law Office of Ghazi Suleiman v Sudan* [(I) (2003) AHRLR 134 (ACHPR 2003)] paras 61-64.

The right to a fair trial presupposes that all the parties to the suit are equal. The flaws of a trial can be detected where a certain number of elements combined together have not been respected: the rights to defence, equality of means and the need for dissenting views. The requirements of a fair trial also presuppose that the courts are able to allow persons subject to trial to review the ruling passed. The principle of a two-tier court system is recognised by all. In the present case, there was rather the choice of justice in double-quick time which was not justified insofar as article 5 was applied differently depending on the person concerned.

**82.** The African Commission has given numerous rulings in similar circumstances and seems to have definitively settled the question of emergency tribunals in these previous rulings.

**83.** In the present case, the Military Court was established by a government decree in accordance with article 156(2) of the Congolese Constitution which authorises the President of the Republic to suspend common law courts and replace them with military tribunals, in times of war. Its competence includes jurisdiction over deeds committed by civilians. The said court judged and sentenced to death two civilians and three soldiers for deeds of a civilian nature.

**84.** Regarding such situations, the Commission had already stated several times its Resolution ACHPR/Res.41(XXVI)99 on the right to a fair trial as for example in the case of *Forum of Conscience v Sierra Leone* [(2000) AHRLR 293 (ACHPR 2000) para 16], in which the Commission said that:

In many African countries, military courts and special tribunals exist alongside regular judicial institutions. The purpose of military courts is to determine offences of a purely military nature committed by military personnel. While exercising this function, military courts are required to respect fair trial standards.

**85.** Furthermore, in its ruling on the *Media Rights Agenda v Nigeria* case [(2000) AHRLR 262 (ACHPR 2000) para 66], the Commission decided as follows: 'It could not be said that the trial and conviction of Malaolu [a civilian] by a special military tribunal presided over by a serving military officer ... took place under conditions which genuinely afforded the full guarantees of fair hearing as provided for in article 7 of the Charter.'

**86.** Consequently, in this particular case, the fact that civilians and soldiers accused of a civilian offence in this instance the theft of drums of diesel were tried by a military court presided over by military officers was a flagrant violation of the above-mentioned requirements of good justice.

**87.** In any event the respondent state did not prove that the court in its composition was independent and was capable of giving an impartial ruling. In the absence of any facts that could convince the

Commission of the opposite view, it cannot invalidate the submission by the complainants regarding the inexistence of a fair justice system.

**88.** The Commission therefore finds that the verdict of the military court did not offer guarantees of independence, impartiality and equity and therefore constitutes a violation of its Resolution No ACHPR/Res.41(XXVI)99 on the Right to a Fair Trial and Legal Assistance in Africa.

**89.** The complainants also allege that the verdict of the military court against the plaintiffs was not justifiable and that, to compound matters, the authorities refused to serve them with a copy of the judgement. In response to this allegation, the respondent State has not produced proof of the existence of the copy of the said judgement, despite multiple requests by the parties and the Commission itself. In this regard, the Commission has always deplored lack or inadequacy of motives for legal decisions as a violation of the right to a fair trial. In the judgement on the *Pinkney v Canada* case, the Human Rights Committee ruled that the exercise of an appellant's right of appeal had been prejudiced because the transcript of the lower court's proceedings had taken two-and-a-half years to be produced.

**90.** Regarding this analysis, it is important to note that the redress the victims needed was not effective in the sense of article 13 of the European Convention on Human Rights, redress being according to Senior Justice Louis Edmond Pettiti;

all processes through which a constitutive act or an alleged violation of the Convention is brought before a qualified body to seek, as the case may be, suspension of the act, its annulment, amendment or compensation.<sup>7</sup>

This is the case in the present instance, even though it is happening in a regional African context.

**91.** Regarding this overabundant argument, the complainants point out that they could not exercise the appropriate local remedies, as already dealt with at the admissibility stage.

**92.** Regarding the argument drawn from the violation of article 14(5) of the International Covenant on Civil and Political Rights which stipulates that 'everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law', the Commission could refer to it in terms of article 60 of the African Charter on Human and Peoples' Rights. However, nothing in the dossier shows that the respondent state has adopted and ratified this Covenant, therefore this argument seems ineffective.

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<sup>7</sup> Louis-Edmond Pettiti, Emmanuel Decaux, Pierre-Henri Imbert (eds) *La convention européenne des droits de l'homme, commentaire article par article*, Paris: Economica, 1999, 467.



93. Finally, the Commission does not have proof that the victims were released from prison and can therefore not legitimately make acknowledgement of this to the respondent state; in the same vein, there is no evidence that the respondent state has already harmonised its legislation with its international commitments. However, the very fact of recognising that its legislation is not in line with its international commitments is a confession of its culpability.

On these grounds, the Commission:

- Declares that, the Democratic Republic of the Congo has violated the relevant provisions of the African Charter on Human and Peoples' Rights, namely articles 7(1)(a), (b), (d) and 26.
- Finds that the establishment of a military court, whose competence extends to common law offences is a violation of article 7 of the African Charter on Human and Peoples' Rights.
- Recommends that the government of the Republic of the Congo guarantees the independence of tribunals and permits the establishment and functioning of appropriate national institutions responsible for the promotion and protection of the rights and freedoms guaranteed by the African Charter on Human and Peoples' Rights.
- Urges the government of the DRC to grant the victims a fair and equitable amount as compensation for the damage suffered.
- Advises the government of the DRC to harmonise its legislation with its international and regional commitments, if that has not yet been done.

# NIGERIA

## Socio-Economic Rights and Accountability Project v Nigeria

(2008) AHRLR 108 (ACHPR 2008)

Communication 300/2005, *Socio-Economic Rights and Accountability Project v Nigeria*

Decided at the 5th extraordinary session, July 2008, 25th Activity Report

*Requirement to exhaust local remedies with regard to socio-economic rights claim*

**Admissibility** (compatibility, 38; exhaustion of local remedies, *locus standi*, 53-58)

**Socio-economic rights** (justiciability, 62, 63, 65, 69)

1. The communication (herein referred to as the communication or complaint) is submitted by the Socio-Economic Rights and Accountability project (SERAP, the complainant) against the government of Nigeria (the respondent state). Nigeria is a state party to the African Charter on Human and Peoples' Rights (the African Charter), which it ratified on 22 July 1983.

2. In the complaint, SERAP states that the President of the Republic, Olusegun Obasanjo in a television broadcast of 22 March 2005, alleged that members of the Nigerian Senate and the House of Representatives took bribes from the Federal Minister of Education in order to increase the budget for education. That, according to the President, the Minister of Education invited his acting Permanent Secretary and some Directors to collect money from votes under their control to bribe some members of the National Assembly so that the budget for the Ministry could be increased.

3. The Directors then allegedly took from the votes under their control 35 million *naira*, while an additional loan of 20 million *Naira* was taken from the National Universities Commission (NUC) to pay a bribe totalling 55 million *naira* to named members of the National Assembly and a member of the Federal House of Representatives.

4. The petitioner contends that the above is an illustration of the grand corruption by high-level officials and that it is routine for

federal ministries to offer bribes to National Assembly members to have their budget estimates inflated. According to the complainant, large-scale corruption such as the one described above has contributed to serious and massive violations of the right to education, among other rights, in Nigeria. It further avers that in effect, Nigeria's human rights legal obligations under the African Charter to achieve the minimum core contents of the right to education have been honoured more in breach than in observance, resulting in:

- Failure of government to train the required number of teachers;
- Gross under-funding of the nation's educational institutions;
- Lack of motivation of teachers;
- Non-available class room seats and pupils sitting on bare floor;
- Non-availability of books and other teaching materials;
- Poor curricula;
- Poor and uninviting learning environments;
- Overcrowding;
- Persistent strikes by teachers and staff who have not been paid;
- Inability of supervising agencies to set and/or enforce standards; and
- Absence of infrastructure facilities.

5. The complainant further submits that the Nigerian government has deliberately failed to investigate all allegations of corruption and this has contributed in impeding its ability to utilise Nigeria's natural resources for the benefit of its peoples.

6. To demonstrate the gravity of the situation, the complainant quotes the concluding observations of the Committee on Economic, Social and Cultural Rights, where the Committee held that millions of children hold odd jobs and some who go to school are crammed in dilapidated classrooms. The poor quality of education is attributed to the fact that teachers are not devoted to work since their salaries do not meet their expectations. Furthermore, that, in 1997, fees were increased in the universities which caused a brain drain in academia because of long periods of closures, strikes, and so on.

## **The complaint**

7. The complainant alleges violation of articles 1, 2, 3, 17, 21 and 22 of the African Charter on Human and Peoples' Rights.

## **Procedure**

8. The Secretariat of the African Commission on Human and Peoples' Rights (the Secretariat) received the communication by letter of 29 March 2005. The Commission decided to be seized of the communication at its 37th ordinary session held in Banjul, The Gambia from 27 April to 11 May 2005.

9. On 18 May 2005 the respondent state was informed of the seizure and it was requested to submit its arguments on admissibility.

10. The complainant was also informed of the seizure and requested to submit its arguments on admissibility.

11. By a letter of 4 August 2005, the Secretariat received the complainant's arguments on admissibility, to which receipt of acknowledgement was sent on 25 August 2005.

12. The arguments on admissibility were also sent to the respondent state on 25 August 2005.

13. On 14 November 2005, a letter was sent to the respondent state party urging it to submit its arguments on admissibility.

14. The respondent state submitted its written observations on the admissibility of the communication during the 38th ordinary session.

15. At its 38th ordinary session held from 21 November to 5 December 2005 in Banjul, The Gambia, the African Commission considered this communication and deferred its decision on admissibility to the 39th ordinary session.

16. By a *note verbale* of 15 December 2005, the Secretariat notified the respondent state of this decision to defer decision on admissibility to its 39th ordinary session.

17. By a letter of 15 December 2005, the complainant was likewise notified.

18. At its 39th ordinary session held from 11 to 25 May 2006 in Banjul, The Gambia, the African Commission considered the communication and deferred consideration of the same to its 40th ordinary session. The Commission indicated that the complainant's allegation of 'serious and massive' human rights violation by the respondent state merits a hearing before the African Commission as per the latter's established practice.

19. At its 40th ordinary session, the African Commission considered the communication and deferred its decision on admissibility to the 41st ordinary session.

20. During the same session, the Secretariat received the additional written submissions of the respondent state's admissibility.

21. At its 42nd ordinary session held in Brazzaville, Republic of Congo, from 15-28 November 2007, the Commission considered the communication and deferred its consideration of the same to its 43rd ordinary session to allow the Secretariat to draft a decision on admissibility.

22. During the same session, the Secretariat received additional written submissions of the respondent state's admissibility which were forwarded to the complainant.

## Law

### Admissibility

#### Submissions by the complainant

23. The complainant submits that the communication raises a *prima facie* violation of the Charter and meets the conditions of admissibility in terms of article 56 of the Charter.

24. However, on the requirement of the exhaustion of local remedies in accordance with article 56(5), the complainant is requesting the Commission to invoke the exception rule. While admitting that local remedies have not been attempted, the complainant explains that such a course would have been futile for three reasons.

25. Firstly, that there is no local recourse readily available to SERAP because of the strict interpretation of the principle of *locus standi* in Nigeria, and that exhaustion of local remedies is inapplicable where it is impractical to seize the domestic courts due to the large number of potential plaintiffs (Nigerian students amounting over 5 millions at the primary, secondary and university levels) and potentially over-burdening the courts resulting in unduly prolonged processes.

26. Secondly, that there is no adequate or effective domestic remedies to address the violations alleged in this complaint since Nigerian courts do not generally regard economic and social rights as legally enforceable human rights. Furthermore, that there is no equivalent of the provisions of articles 17 and 21 of the African Charter relating to the right to education and the right of people not to be disposed of their wealth and natural resources under Nigeria's Constitution or legislation. For this reason therefore, Nigerian courts will not be easily disposed to hear the matter.

27. Thirdly, that the Nigerian judiciary process is weak and cases are unduly prolonged, making recourse to them ineffective.

#### Submissions by the respondent state

28. On its part, the respondent state submits that in Nigeria, social and economic rights are not justiciable under the Constitution as they fall under what may be termed the preamble of the Constitution, mapping objectives rather than enforcing and sanctioning compliance thereof. Hence there is no legal right that can give rise to rights of action.

29. The respondent state further argues that, this notwithstanding, the courts in Nigeria have creatively made socio-economic rights justiciable where it can be shown that a denial of these principles are likely to result in a denial of fundamental human rights guaranteed under the Constitution. The state added that the domestication of the African Charter by virtue of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act (Chapter 10, Laws of the Federation of Nigeria 1990) empowers the Nigerian courts to enforce or give remedies under the provision of the African Charter. Furthermore, that the Constitution of Nigeria contains provisions on socio-economic rights which, even though non-justiciable, states can be held accountable by the courts if they disregard them.

30. The state also argues that even though socio-economic rights are not justiciable, the government has enunciated some policies and created some institutions to address the issue, including the National Economic Empowerment and Development Strategy (NEEDS) and the State Economic Empowerment and Development Strategy (SEEDS). The institutions and programmes include the National Directorate of Employment (NDE), the National Poverty Eradication Programme (NAPEP) as well as the Small and Medium Enterprises Development Agency (SMEDAN) respectively. It further avers that these measures are all geared towards enhancing the peoples' economic and social welfare generally.

31. The respondent state further submits that the communication should be declared inadmissible because:

- The complaint does not disclose a breach of any municipal law within the Federal Republic of Nigeria or the breach of any international treaties or conventions to which Nigeria is a party;
- The factual basis for the communication is an allegation of criminal conduct which is currently the subject of an on-going criminal trial before the Federal High Court in Abuja;
- The conduct of a few officials does not, in law and in fact, amount to the abdication by Nigeria of her sovereign obligations to her citizens properly covered by any municipal law or international conventions or treaties to which Nigeria is a signatory;
- All the officers named by the complainant were forced to resign from their positions in the National Assembly and have since been defending the prosecution case filed against them;
- The sum of fifty-five million Naira involved in the illegal transaction has been recovered;
- Adequate local remedies exist in Nigeria and have been employed by the state, and the complainant has failed to exhaust these local remedies;
- The facts alleged by the complainant are purely criminal in nature and do not amount to an official policy by the government to deny the people of Nigeria the 'right to productive use of their resources' or their 'right to education' as alleged;
- The complaint has been filed before the African Commission on the basis of generalised statements and information obtained from unverified sources and that there are no statistical or other information supplied in support of these general statements; and

- The government has been carrying out various initiatives, including negotiating for debt relief with the Paris Club of Creditors, to significantly impact on the level of poverty in the country.

32. The respondent state in its additional submission on admissibility reiterates the fact that this communication offends the fifth ground of admissibility set out under article 56 of the African Charter. Furthermore, that Chapter 2 (sections 13 to 24) of the Nigerian Constitution of 1999 shows the state's commitment to promotion and protection of the socio-economic rights of its citizens.

### **Decision of the African Commission on admissibility**

33. The admissibility of communications before the African Commission is governed by the requirements of article 56 of the African Charter which provides seven requirements that must be met before the African Commission can declare a communication admissible. If one of these 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.

34. In the present communication, the complainants submit that they have complied with all the requirements under article 56 of the Charter, except article 56(5) due to the absence of local remedies. The state however argues that the communication does not satisfy article 56(5) of the Charter, as well as article 56(2) of the Charter. The African Commission will thus deal with the above provisions.

35. As indicated earlier, for a communication to be declared admissible, it must meet all the requirements under article 56. Thus, 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. However, the Commission shall also examine other requirements of article 56 which are not contested by the parties.

36. Article 56(1) of the African Charter provides that Communications will be admitted if the authors indicate their identity, even if they request anonymity. In the present case the author of this communication is SERAP, which is an NGO based in Lagos. The author of the communication is thus clearly identified.

37. 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. The state asserts in this regard that the complaint does not disclose a breach of any municipal law within Nigeria or the breach of any international treaties or conventions to which Nigeria is a party.

38. For a complaint to be compatible with the Charter or the Constitutive Act, it must prove a *prima facie* violation of the Charter. Compatibility according to the Black's Law Dictionary denotes 'in compliance with and in conformity with' or 'not contrary to' or 'against'. In this communication, the complainant alleges violation of the right to education, health and enjoyment of natural resources occasioned by the actions of the respondent state. These allegations do raise a *prima facie* violation of human rights guaranteed in the Charter. Based on the above, the African Commission is satisfied that Article 56(2) of the African Charter in the present Communication has been sufficiently complied with.

39. Article 56(3) of the Charter provides that a communication will be admitted if it is 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 does not, in the view of this Commission, contain any disparaging or insulting language, and thus fulfils the requirement of article 56(3).

40. 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 based on the testimonies given before the Nigerian National Assembly, text statements, reports by human rights organisations and first hand information from the Nigerian students themselves, 'who have been directly affected by the theft of Nigeria's natural resources'. Thus the requirement under article 56(4) has been fully complied with.

41. 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 the complainant has not sought the sufficient and effective local remedies available to them in the state, before bringing the present communication before the Commission. On the other hand, the complainant states that they could not comply with the requirement under this article due to reasons that will be outlined below.

42. Article 56(6) provides that, communications must be submitted within a reasonable period from the time local remedies are exhausted, or from the date the Commission is seized with the matter. From the wording of this article, the time-limit commences from the date when all local remedies are supposed to have been exhausted, and the phrase 'or from the date the Commission is seized with the matter' does not apply to the case before the Commission because a communication is only seized after the complainant must have submitted the same, and this communication has already been seized by the Commission. In addition, the African Charter does not expressly lay down a clear-cut time-limit for the complainant to



submit a complaint. In this regard, ‘reasonableness’ of the time-limit can rightfully be assessed by this Commission bearing in mind the circumstances of the case. The Commission is therefore of the opinion that the complaint was submitted within a reasonable time period because according to the facts herein, the complainant submitted when it thought it practicable to do so. Based on the above, and the fact that this article is not in contention with the respondent state, the Commission holds that article 56(6) has been satisfied by the complainant.

43. Lastly, article 56(7) provides that the communication must not deal with cases which have been settled by states, in accordance with the principles of the United Nations, or the Charter of the OAU or the African Charter. This communication has not been settled by any of these international bodies and thus the requirement of article 56(7) has been fulfilled by the complainant.

44. 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.<sup>1</sup>

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

46. These three major criteria are clearly expressed by the Commission in *Jawara v The Gambia*. In this case, 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 ...’.<sup>2</sup>

47. The complainant in the present communication submit that it could not exhaust local remedies because there are no provisions in the national laws of Nigeria allowing them to seek remedies for the violations alleged.

48. It further avers that there was no local recourse readily available to them, ‘due to the strict interpretation of *locus standi* in Nigeria’. Furthermore, that *locus standi* is not available in domestic courts due to the large number of students involved.

49. It also submits that, Nigerian courts will not easily be disposed to hear the matter because they do not enforce socio-economic rights. In addition, there is no equivalent of articles 17 and 21 of the African Charter relating to the right to education and ‘the right of

<sup>1</sup> See communications 25/89, 74/92 and 83/92, *Free Legal Assistance Group and Others v Zaire* [(2000) AHRLR 74 (ACHPR 1995)].

<sup>2</sup> See para 32 of communications 147/95 and 149/96 [(2000) AHRLR 107 (ACHPR 2000)].

people not to be disposed of their wealth and natural resources under Nigeria's Constitution or legislation'.

50. Lastly, the complainant avers that the Nigerian judiciary process is weak and cases are unduly prolonged, making recourse to them ineffective.

51. The respondent state on its part, submits that even though the rights alleged to have been violated are not justiciable under the Nigerian Constitution of 1999, the domestication of the African Charter by virtue of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act (Chapter 10, Laws of the Federation of Nigeria 1990) empowers the Nigerian courts to enforce or give remedies under the provision of the African Charter. Furthermore, that Chapter 2 (sections 13 to 24) of the Nigerian Constitution of 1999 portrays the state's commitment to promotion and protection of the socio-economic rights of its citizens, and that the government has enunciated some policies and institutions that are aimed at protecting the socio-economic rights of its citizens.

52. Considering the arguments brought by the complainant before this Commission, the latter is of the view that the complainant has failed to prove that local remedies are not available. It is simply casting doubts about the effectiveness and availability of the domestic remedies. However, it is also the Commission's view that the policies and institutions which have been enunciated by the government are administrative remedies and not legal remedies. Moreover, the respondent has not shown the potential effectiveness of the local remedies that are alleged to exist for the benefit of the applicants.

53. The complainant contends that it could not exhaust local remedies due to the strict interpretation of the principle of *locus standi* in Nigeria, especially when it involves a large number of plaintiffs. The Commission notes that, notwithstanding the strict interpretation of this rule, Nigerian courts allow class/representative actions where numerous persons have the same interest, right and a common grievance, and the judgement obtained is binding on all the persons represented.

54. Section 6(6)(b) of the 1979 Constitution in Nigeria, which is the same as section 6(6)(b) in the 1999 Constitution provides that:

The judicial powers vested in accordance with the foregoing provisions of this section shall extend to all matters between persons, or between governments or authority and to any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person.

55. On the basis of the above, Justice Belo of the Supreme Court of Nigeria in the case of *Abraham Adesanya v President of the Federal Republic of Nigeria*, held that:

Section 6(6)(b) can be interpreted to mean that, standing can only be accorded to a plaintiff who shows that his civil rights and obligations have been or are in danger of being violated or affected by the act complained of.<sup>3</sup>

56. The decision became a binding precedent for most class action litigations in Nigeria, even though there were dissenting opinions on the fact of considering section 6(6)(b) as a test for *locus standi*. It was held in *NNPC v Fawehinmo* for instance that:

This section is not [in]tended to be a catch-all, all purpose provision to be pressed into service for determining questions ranging from *locus standi* to the most uncontroversial questions of jurisdiction.<sup>4</sup>

57. Supporting Justice Belo's opinion in the *Adesanya* case, Justice Pats-Acholonu of the Supreme Court in *Ladejobi v Oguntayo*, also stated that:

it is dangerous to limit the opportunity for one to canvass his case by rigid adherence to the ubiquitous principle inherent in *locus standi* which is whether a person has standing in a case. The society is becoming highly dynamic and certain stands of yester years may no longer stand in the present state of our social and political development.<sup>5</sup>

58. With the above submissions, this Commission is of the view that Nigerian courts can properly employ the *locus standi* rule in class actions. The question should not be whether it is a public or private action, but whether the applicants sufficiently prove violation of the rights alleged and demonstrates enough interest. For this reason, the complainant cannot rely on the argument that it could not exhaust local remedies due to the large number of plaintiffs involved and the strict interpretation of the principle of *locus standi* in Nigeria.

59. With respect to the complainant's assertion that the courts in the respondent state are weak and ineffective, the African Commission is of the opinion that the complainant is simply casting doubts about the effectiveness of the domestic remedies.

60. The African Commission has held in *Article 19 v Eritrea*, that: 'it is incumbent on the complainant to take all necessary steps to exhaust, or at least attempt the exhaustion of local remedies', adding that: 'it is not enough for the complainant to cast aspersions on the ability of the domestic remedies of the state due to isolated incidences'.<sup>6</sup> In the same case, the Commission referred to the Human Rights Committee's (the Committee) decision in *A v Australia*, in which the Committee 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'.<sup>7</sup>

<sup>3</sup> (1981) 2 NCLR 358.

<sup>4</sup> (1998) 1 NWLR (pt 559) 598 612.

<sup>5</sup> (2004) All FWLR (pt 231) 1209 1235-1236.

<sup>6</sup> See communication 275/2003, *Article 19 v Eritrea* [(2007) AHRLR 73 (ACHPR 2007)] para 67.

<sup>7</sup> Communication 560/1993, UN Doc CCPR/C/69/D/560/1993 (1997).

61. Furthermore, the Commission held in *Chinhamo v Zimbabwe* that, ‘complainants are required 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.’<sup>8</sup> Thus, the Commission is of the opinion that, by not attempting local remedies or substantiating the weaknesses or ineffectiveness, the complainant cannot rely on this argument as reasons for their non-exhaustion of local remedies.

62. Regardless of the fact that there is no legislation in Nigeria domesticating the International Covenant on Economic, Social and Cultural Rights (the ESR Covenant), the 1999 Constitution of Nigeria has certain provisions which embody most of the rights enumerated in the ESR Covenant. These provisions are contained in Chapter II (Sections 13-24) of the Constitution and couched as Fundamental Objectives and Directive Principles of State Policy.

63. Even though it can be argued that these are not rights, but mere political, economic, social, educational, environmental, cultural and foreign policy directives and that these provisions are non-justiciable by virtue of section 6(6)(c) of the Constitution, the African Commission is of the view that this Chapter provides a foundation upon which economic and social rights could be enjoyed, and its provisions indicate that the courts are not excluded from entertaining cases relating to socio-economic rights.

64. Section 16(2)(d), for instance, requires the state to direct its policy towards ensuring that ‘suitable and adequate shelter, suitable and adequate food, reasonable national minimum living wage, old age care, pension, unemployment, sick benefits and welfare of the disabled are provided for the citizens’. Section 20 and 21, on the other hand, require the state to protect the environment and preserve and promote Nigerian cultures.

65. Furthermore, Nigeria is a state party to the African Charter and has domesticated the same. By reason of this domestication as required by section 12 of the 1999 Constitution, the African Charter has become part of Nigerian law. The African Charter therefore constitutes a normative base for socio-economic rights claims which allow any claim brought under the Charter to be litigated before the national courts.

66. This was substantiated in *Abacha v Fawehinmi*, where the Supreme Court of Nigeria recognised the African Charter as part of Nigerian law and that its provisions were justiciable. In that case, the Supreme Court stated that:

The African Charter which is incorporated into our municipal law becomes binding and our courts must give effect to it like all other laws falling within the judicial powers of the courts. Thus, if the individual rights contained in the African Charter are justiciable in Nigerian courts

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<sup>8</sup> Communication 307/2005 [(2007) AHRLR 96 (ACHPR 2007)] para 84.

and the African Charter does not recognise any generational dichotomy of rights, the articles conferring socio-economic rights are equally justiciable in the Nigerian courts.<sup>9</sup>

**67.** This decision was also reflected in *Ogugu v The State*, where the Supreme Court held that:

By reason of its domestication, the African charter has become part of Nigeria's domestic laws and the enforcement of its provisions ... falls within the judicial powers of the courts as provided by the Constitution and all other laws relating thereto since the African Charter is part of Nigeria's domestic laws. Furthermore, that human and people's rights of the African Charter are enforceable by several High Courts depending on the circumstances of each case and in accordance with the rules, practice and procedure of each court.<sup>10</sup>

**68.** In *Oronto Douglas v Shell Petroleum Development Company Limited*, for instance, the federal government together with oil companies, including Shell Petroleum Development Company as the Operator, decided to set up Nigeria's Liquefied Natural Gas Project at Bonny. This was in a bid to harness Nigeria's huge gas resources. However, the environmental impact assessment which is obligatory was not carried out until after the project was underway, and a private citizen's suit, challenging this was initially thrown out for lack of *locus standi*. The case was appealed and the Court of Appeal in Nigeria upheld the justiciability of an action brought on the basis of article 24 of the African Charter (Ratification and Enforcement) Act.<sup>11</sup>

**69.** All the Nigerian cases cited above are aimed at establishing the fact that socio-economic rights can be litigated in Nigerian courts. Thus the complainant could have made attempts to utilise the local remedies available instead of making presumptions that this complaint would not be heard since Nigerian courts do not generally regard economic and social rights as legally enforceable human rights. The African Commission thus holds that the complainant has not utilised the domestic remedies available and has not demonstrated why this could not be done. For the reasons outlined above, the African Commission declares this communication inadmissible.

<sup>9</sup> (2000) 6 NWLR (pt 600) 228.

<sup>10</sup> (1994) 9 NWLR (pt 336) 1, 26-27.

<sup>11</sup> (1999) 2 NWLR (pt 591) 466.

# ZIMBABWE

## Zimbabwe Lawyers for Human Rights and Another v Zimbabwe

(2008) AHRLR 120 (ACHPR 2008)

Communication 293/2004, *Zimbabwe Lawyers for Human Rights and the Institute for Human Rights and Development v Republic of Zimbabwe*

Decided at the 43rd ordinary session, May 2008, 24th Activity Report

*Functioning of electoral dispute settlement system*

**Evidence** (burden of proof, 44, 134, 135, 137, 140)

**Admissibility** (compatibility, *prima facie* violation, 45; insulting language, 47-56; exhaustion of local remedies, unduly prolonged, 58-61)

**Equality, non-discrimination** (denial of enjoyment of Charter rights, 121-122)

**Equal protection of the law** (difference in treatment, 127, 128)

**Fair trial** (right to be heard, decision within reasonable time, 130, 134; impartiality, 135; independence of courts, 141)

1. The communication is submitted by the Zimbabwe Lawyers for Human Rights and the Institute for Human Rights and Development in Africa (complainants) and deals with the Zimbabwean government's (respondent) failure to expedite administration of justice, the functioning of the judiciary and alleged violation of the right to participate in government.

2. The complainants allege that in the 2000 general elections that took place in Zimbabwe the results of 40 constituencies were contested and the court was petitioned to invalidate the results. It is alleged that Movement for Democratic Change (MDC), the main opposition party, filed petitions to invalidate results in 38 constituencies. The ZANU (PF), the ruling party, filed one petition and the Zimbabwe Union of Democrats (ZUD) filed one petition.

3. The complainants also allege that in an attempt to prevent the filing of petitions the President of the Republic of Zimbabwe passed a regulation giving him a wide variety of powers in order to alter

electoral laws as he sees fit. Further reasons for this action were to eliminate the jurisdiction of the courts from entertaining election petitions. According to the complainants, the Electoral Act (Modification) 3 Notice of 2000 Statutory Instrument 318/2000 (annexure 1) passed by the respondent had the effect of legalising the outcome of the elections and oust the jurisdiction of the courts from hearing the petitions.

4. The MDC challenged the Regulation in the Supreme Court, and the Court held in its favour stating that ‘the notice effectively deprived them of that rights ... The right of unimpeded access to courts is of cardinal importance for the adjudication of justiciable disputes’. This ruling opened the way for the filing of election petitions in 40 constituencies.

5. According to the complainants, in spite of the ruling, the Supreme Court has failed to provide meaningful redress to the petitioners. They claim that by delaying to address the grievances the courts have deprived the petitioners of the right to protection of the law, and have their matter heard within a reasonable time by an independent and impartial court and invariably, the citizens’ right to participate in their government.

6. The complainants further allege that by failing to respect their own judgments, the judiciary and the courts have proved ineffective in providing meaningful and practical redress which would constitute an effective remedy at national level. Thus, according to the complainants, the state has undermined the independence of the judiciary contrary to article 26 of the Charter.

7. The complainants hold that failure of the judiciary to expeditiously deal with the election petitions is not only in contravention of international norms but contrary to domestic laws of the country, in particular, rule 31 of the Electoral (Applications, Appeals and Petitions) Rules 1995, (SI 74A/95) which state that ‘the Registrar and all parties to any stated case, petition or application referred to in these rules shall take steps necessary to ensure that the matter is dealt with as quickly as possible’.

8. The complainants annexed to the communication the different classes of petitions that were submitted to the Court. Seven petitions presented by political parties have not been addressed and no decisions have been made concerning them; in addition, any efforts made to have the petitions addressed have been met with reluctance and indifference on the part of the Court. Furthermore, eleven petitions have been dismissed by the High Court; and any appeals made in regards to the dismissal of the petitions have not been resolved.

## Complaint

9. The complainants allege that the respondent has violated articles 1, 2, 3, 7(1)(a), (d), 13(1), and 26 of the African Charter on Human and Peoples' Rights.

## Procedure

10. The complaint was received at the Secretariat of the African Commission on 6 October 2004.

11. On 12 October 2004, the Secretariat wrote to the complainants acknowledging receipt of the complaint and informing them that it will be considered at the Commission's 36th ordinary session.

12. At its 36th ordinary session the African Commission considered the communication and decided to be seized thereof.

13. By *note verbale* of 13 December 2004 and letter of the same date the Secretariat informed the parties of the Commission's decision.

14. By letter dated 3 February 2005, the complainant submitted its arguments on admissibility and by letter dated 22 February 2004, the Secretariat acknowledged receipt of the complainant's submissions.

15. By *note verbale* dated 22 February 2005, the Secretariat transmitted the complainant's submission to the respondent state and informed the latter that the African Commission would like to receive its arguments by 13 March 2005.

16. By letter of 14 March 2005, the Office of the Attorney-General of Zimbabwe requested the African Commission to defer consideration of the communication to its 38th ordinary session as it had not had time to prepare the responses.

17. By letter of 18 March 2005 addressed to the Attorney-General, the Secretariat granted the state an extension of thirty days and requested it to submit its arguments by 18 April 2005.

18. At its 37th ordinary session held in Banjul, The Gambia, the African Commission deferred consideration on admissibility of the communication pending the respondent state's submission of its arguments.

19. By *note verbale* of 24 May 2005, the respondent state was notified of the Commission's decision and requested to submit its arguments within three months of the notification. By letter of the same date, the complainant was notified of the Commission's decision.

20. By *note verbale* of 2 September 2005, the respondent state was reminded to send its arguments of admissibility of the communication.



21. By *note verbale* of 18 October 2005, the respondent state was reminded to send its arguments of admissibility of the communication before 31 October 2005.

22. On 1 November 2005, the Secretariat received a *note verbale* from the respondent state indicating that the latter's submissions with regards to six communications brought against it were ready for submission but due to logistical problems beyond its control, the transmission of the submissions had been slightly delayed.

23. On 23 November 2005 the Zimbabwean delegation attending the 38th ordinary session of the Commission handed the respondent state's response on the communication. The Secretariat was informed that a copy had been given to the complainants, and the latter confirmed receipt thereof.

24. At its 38th ordinary session held from 21 November to 5 December 2005, the African Commission considered the communication and decided to declare it admissible.

25. By *note verbale* of 15 December 2005 and by letter of the same date, the Secretariat of the African Commission informed both parties of the African Commission's decision and requested them to submit their arguments on the merits within three months.

26. By letter of 21 December 2005, the complainant acknowledged receipt of the Secretariat's letter of 15 December and indicated that it will furnish its arguments on the merits 'within the procedurally stipulated period'.

27. By *note verbale* of 6 March 2006 and by letter of the same date the Secretariat of the African Commission reminded both parties to submit their arguments on the merits before 31 March 2006.

28. By letter dated 19 April 2006, the Secretariat received the submissions of the complainant on the merits of the communication. The Secretariat was informed that the state had equally been served with the same.

29. During the 39th ordinary session of the African Commission, the Secretariat received the submissions of the respondent state.

30. At its 39th ordinary session held from 11 to 25 May 2006 in Banjul, The Gambia, the African Commission considered the communication and deferred further consideration on the merits to its 40th ordinary session because the state's submissions were received late.

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

32. At its 40th session, the African Commission deferred consideration of the communication to its 41st session due to lack of time.

33. At its 41st ordinary session the African Commission deferred consideration of the communication to its 42nd session to allow the Secretariat more time to prepare the draft decision.

34. By *note verbale* of 10 July and letter of the same date, both parties to the communication were notified of the Commission's decision.

35. At its 42nd ordinary session held in Brazzaville, Republic of Congo, from 15 to 29 November 2007, the African Commission considered the communication and decided to defer its decision on the merits due to lack of time.

36. By *note verbale* of 19 December 2007, and by letter of the same date, both parties to the communication were notified of the Commission's decision.

## Law

### Admissibility

#### Submissions on admissibility

37. The respondent state argued that the communication be declared inadmissible claiming it does not meet the requirements of articles 56(2), (3), (4) and (5).

38. Article 56(2) stipulates that the communication should be in conformity with the Charter of the OAU and the African Charter on Human and Peoples' Rights. According to the state, and quoting from the African Commission's information fact sheet 3 - communication procedure, the author of a communication should make precise allegations of facts attaching relevant documents, if possible, and avoid making allegations in general terms. The state avers that the complaint is written in general terms and does not make any precise allegations. The state notes further that the complainants simply alleged that the state has violated the Charter without stating the rights violated, where the violation took place and the date on which the violation took place and that the complainants did not provide the names of the victims.

39. The complainants submit that four years after the elections the Supreme and High Court have failed to provide a speedy and effective remedy. That the High Court initially allocated three judges to handle the matters. One of the judges resigned citing threats after he had ruled in favour of the opposition. The three judges were replaced and the matters have not been completed. The violations that occurred during the election period have not been addressed for over four years.

40. The complainants on the other hand aver that the communication details infringements of the provisions of the African

Charter on Human and Peoples' Rights and according to them, a *prima facie* violation of human rights, and argued that the communication fulfilled the condition under article 56(2) of the Charter.

41. With respect to article 56(3), the state argues that the communication is written in disparaging language directed at the state of Zimbabwe and its judiciary. It indicates that the complainants allege a failure of the state to guarantee the independence and competent functioning of the judiciary, and that the government has failed to observe the principle of separation of powers. The state argues further that the communication alleges that a judge resigned under pressure after ruling in favour of the MDC. The state added that none of the judges have been victimised or resigned as a result of their judgment and concluded that the complaint is a misrepresentation of facts and full of false information which are insulting to the state and its judiciary – aimed at bringing the state into disrepute and therefore does not conform with the provisions under article 56(3) of the African Charter. The complainants aver that the communication is not written in an insulting or disparaging language, that no disparaging or insulting language of the government of the Republic of Zimbabwe or any institutions under the Organisation of African Unity has been used and as such it conforms to article 56(3).

42. The state further argues that the communication is based on information disseminated through the mass media or author's imaginations and as such not be admitted as stipulated under article 56(4) which stipulates that communications should not be exclusively based on news disseminated through the mass media. The state adds that the communication does not state who was discriminated against or in which case a party was discriminated and by which judge, as a result the complaint is illusory and should not be admitted. The complainants on their part argue that the communication has been compiled from affidavits and applications from the High and Supreme Court of Zimbabwe.

43. On the exhaustion of local remedies, the state argues that the complainants have not exhausted the local remedies available to them, noting that all election petitions are dealt with speedily and that all the petitions referred to by the complainants were dealt with, some were dismissed and some were withdrawn. The state indicates that it did nothing to frustrate the process as alleged by the complainants noting that in cases of any frustration, the parties to the petition can approach the Judge President or the Chief Justice and the government has no role to play in election petitions. The state notes that most of the petitions to the High Court were dealt with in 2001; some were appealed to the Supreme Court. The complainants argue that the exception to the rule on the basis of

unduly prolonged procedure applies in this case. They argue that the delays in the finalisation of the petitions by the Supreme and High Courts were unreasonable and warrants, according to the complainants, invoking of the exclusionary rule to the exhaustion of local remedies as they are non-existent.

### **Commission's decision on admissibility**

44. In its jurisprudence the African Commission on Human and Peoples' Rights (the Commission) has articulated a framework for allocating the burden of proof between complainants/petitioners and respondent states. For purposes of seizure the complainant needs only to present a *prima facie* case and satisfy the conditions laid down in article 56 of the Charter for admissibility. Once this has been done, the burden then shifts to the respondent state to submit specific responses and evidence refuting each and every one of the assertions contained in the complainant's submissions.

45. In the present communications, the complainants submit that the admissibility conditions in article 56 of the African Charter on Human and Peoples' Rights have been fulfilled while the state argues that some have not been, in particular article 56(2), (3), (4) and (5). Regarding the compatibility of the communication as provided in article 56(2), the African Commission notes that the communication establishes a *prima facie* violation of the provisions of the African Charter and is thus compatible with both the Constitutive Act and the African Charter. The communication alleges unreasonable delays in dealing with election petitions and as a consequence a violation of the right to fair trial under article 7(1)(d) and to participate of government under article 13 of the Charter. It is hard to find the incompatibility invoked by the state.

46. Article 56(3) requires that the communication is not written in an insulting or disparaging language. The state argues that by stating that the state has failed to guarantee the independence and competent functioning of the judiciary, and that the government has failed to observe the principle of separation of powers, the complainants have used disparaging language. The state argues further that the communication alleges that a judge resigned under pressure after ruling in favour of the MDC. The state concludes that the complaint is a misrepresentation of facts and full of false information which are insulting to the state and its judiciary - aimed at bringing the state into disrepute and therefore does not conform to the provisions under article 56(3).

47. A fundamental question that has to be addressed in the present communication is how far one can go in criticising the judiciary or state institutions generally in the name of free expression, and whether the statement made by the complainant constitutes insulting or disparaging language within the meaning of article 56(3) of the

African Charter. Indeed, the communication invites the Commission to clarify the ostensible relationship between freedom of expression and the protection of the reputation of state institutions.

**48.** The operative words in sub-paragraph 3 in article 56 are disparaging and insulting and these words must be directed against the state party concerned or its institutions or the African Union. According to the Oxford Advanced Dictionary, disparaging means to ‘speak slightly of ... or to belittle’ and insulting means to ‘abuse scornfully or to offend the self respect or modesty of’.

**49.** The judiciary is a very important institution in every country and cannot function properly without the support and trust of the public. Because of the importance of preserving public trust in the judiciary and because of the reticence required for it to perform its arbitral role, special safeguards have been in existence for many centuries to protect the judiciary against vilification. One such protective device is to deter insulting or disparaging remarks or language calculated to bring the judicial process into ridicule and disrepute.

**50.** The freedom to speak one’s mind and debate the conduct of public affairs by the judiciary does not mean that attacks, however scurrilous, can with impunity be made on the judiciary as an institution or on individual officers. A clear line cannot be drawn between acceptable criticism of the judiciary and statements that are downright harmful to the administration of justice. Statements concerning judicial officers in the performance of their judicial duties have, or can have, a much wider impact than merely hurting their feelings or impugning their reputations. Because of the grave implications of a loss of public confidence in the integrity of the judges, public comment calculated to bring the judiciary into disrepute and shame has always been regarded with disfavour.

**51.** In determining whether a certain remark is disparaging or insulting and whether it has dampened the integrity of the judiciary, or any other state institution, the Commission has to satisfy itself whether the said remark or language is aimed at unlawfully and intentionally violating the dignity, reputation or integrity of a judicial officer or body and whether it is used in a manner calculated to pollute the minds of the public or any reasonable man to cast aspersions on and weaken public confidence on the institution. The language must be aimed at undermining the integrity and status of the institution and bring it into disrepute.

**52.** To this end, article 56(3) must be interpreted bearing in mind article 9(2) of the African Charter which provides that ‘every individual shall have the right to express and disseminate his opinions within the law’. A balance must be struck between the right to speak freely and the duty to protect state institutions to ensure that while

discouraging abusive language, the African Commission is not at the same time violating or inhibiting the enjoyment of other rights guaranteed in the African Charter, such as, in this case, the right to freedom of expression.

**53.** The importance of the right to freedom of expression was aptly stated by the African Commission in communications 140/94, 141/94, 145/94 against Nigeria<sup>1</sup> when it held that freedom of expression is a basic human right, vital to an individual's personal development and political consciousness, and to his participation in the conduct of public affairs in his country. Individuals cannot participate fully and fairly in the functioning of societies if they must live in fear of being persecuted by state authorities for exercising their right to freedom of expression. The state must be required to uphold, protect and guarantee this right if it wants to engage in an honest and sincere commitment to democracy and good governance.

**54.** Over the years, the line to be drawn between genuine criticism of the judiciary and insulting language has grown thinner. With the advancement of the politics of human rights, good governance, democracy and free and open societies, the public has to balance the question of free expression and protecting the reputation of state institutions such as the judiciary. Lord Atkin expressed the basic relationship between the two values in *Ambard v A-G of Trinidad and Tobago* (1936) 1 All ER 704 at 709 in the following words:

But whether the authority and position of an individual judge or the due administration of justice is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticising in good faith in private or public act done in the seat of justice. The path of criticism is a public way ... Justice is not a cloistered virtue: she must be allowed to suffer scrutiny and respectful even though outspoken comments of ordinary men.

**55.** In the present communication, the respondent state has not established how by stating that the government has failed to observe the principle of separation of powers and that a judge resigned under pressure after ruling in favour of the MDC, the complainant has brought the judiciary and the government into disrepute. The state has not shown the detrimental effect of this statement on the judiciary in particular and state institutions as a whole. There is no evidence adduced by the state to show that the statements were used in bad faith or calculated to poison the mind of the public against the government and its institutions.

**56.** The African Commission does not therefore believe there has been any use of disparaging or insulting language against the government of the Republic of Zimbabwe or any of its institutions or the African Union. The African Commission is also of the view that the communication complies with article 56(4) which stipulates that

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<sup>1</sup> *Constitutional Rights Project and Others v Nigeria*, 13th Annual Activity Report, 1999-2000 [(2000) AHRLR 227 (ACHPR 1999)], para 36.

communications should not be exclusively based on news disseminated through the mass media. The present communication has been compiled from affidavits and applications from the High and Supreme Court of Zimbabwe.

**57.** Regarding article 56(5) relating to the exhaustion of domestic remedies the complainants argue that the exception to the rule on the basis of unduly prolonged procedure should apply. They argue that the delays in the finalisation of the petitions by the Supreme and High Courts were unreasonable and warrant, according to the complainants, the invoking of the exclusionary rule to the exhaustion of local remedies as they are non-existent.

**58.** What constitutes unduly prolonged procedure under article 56(5) has not been defined by the African Commission. There are therefore no standard criteria used by the African Commission to determine if a process has been unduly prolonged, and the Commission has thus tended to treat each communication on its own merits. In some cases, the Commission takes into account the political situation of the country, in other cases, the judicial history of the country and yet in others, the nature of the complaint.

**59.** The subject matter of the present communication is the validity of election results. Election results are supposed to be released as quickly as possible so as to enable those vying for office to know the outcome. In most jurisdictions, because of the very nature of elections, mechanisms are put in place to ensure that the results are released as expeditiously as possible and that whatever petitions are submitted by disgruntled contestants, they are dealt with speedily.

**60.** The exception under article 56(5) requires that the process must not only be prolonged but must have been done so ‘unduly’. Unduly means, ‘excessively’ or ‘unjustifiably’. Thus, if there is a justifiable reason for prolonging a case, it cannot be termed ‘undue’, for example, where the country is caught in a civil strife or war, or where the delay is partly caused by the victim, his family or his representatives. While the Commission has not developed a standard for determining what is ‘unduly prolonged’, it can be guided by the circumstances of the case and by the common law doctrine of a ‘reasonable man test’. Under this test, the court seeks to find out, given the nature and circumstances of a particular case, how any reasonable man would decide.

**61.** Thus, given the nature of the present communication, would a reasonable man conclude that the matter has been unduly prolonged? For all intents and purposes, the answer would be yes. More than four years after the election petitions were submitted, the respondent state’s courts have failed to dispose of them and the positions which the victims are contesting are occupied and the term of office has

almost come to an end. For the above reasons, the African Commission holds that the communication meets the exception rule under article 56(5) and the other requirements of article 56, and thus declares it admissible.

## Submissions on the merits

### Complainant's submissions

**62.** The complainants submit that the state party has violated articles 1, 2, 3, 7(1)(a), (d), 13 and 26 of the African Charter on Human and Peoples' Rights, and further that the violations were as follows:

(a) The right to equal protection of the law under articles 2 and 3 based on the fact that the law courts failed to decide on the election petitions within a reasonable time and that the petitioners were discriminated against on the protection of law due to the political opinions which were expressed in the petitions;

(b) The right to be heard and tried within a reasonable time by an impartial court or the tribunal under article 7 as the Zimbabwe courts failed to provide a remedy to the election petitions;

(c) The right of every citizen to participate freely in the government of his country either directly or through freely chosen representatives in accordance with provisions of the law under article 13 by enacting laws that curtailed freedoms such as association, assembly and expression ; and

(d) The duty of the state to guarantee the independence of the courts and the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the Charter under article 26 based on the fact that the principle of separation of powers was not duly observed as one of the judges resigned and fled the country citing threats after he ruled in favour of the opposition.

**63.** Regarding article 1, the communication alleges that the respondent state has failed to adopt legislative and administrative measures to give effect to the provisions of the Charter. It is submitted that the fact that elections that took place in Zimbabwe were organised in accordance with the Constitution and the laws of Zimbabwe does not mean that the manner in which those elections were conducted or their disputes were adjudicated does not violate provisions of the Charter. The law itself (including the constitutional provisions) can constitute the means whereby the rights protected under the Charter are violated.

**64.** The complainants rely on the jurisprudence of the Inter-American Court on Human Rights in the case *Velasquez Rodriguez* where the Court held that:

The obligation to ensure the free and full exercise of human rights is not fulfilled by the existence of a legal system designed to make it impossible to comply with this obligation ... it also requires the government to conduct itself so as to effectively ensure the free and full exercise of human rights.<sup>2</sup>

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<sup>2</sup> *Velasquez Rodriguez* case, judgment of 29 July 1988.



**65.** The complainants also quote the advisory opinion delivered by the Inter-American Court on Human Rights where the Court found that:

The fact that these are domestic laws adopted in accordance with the provisions of the Constitution means nothing if they are the means through which protected rights and freedoms are violated.<sup>3</sup>

**66.** It is submitted that although the respondent state has enacted laws that make provisions for remedies, it has failed to render those remedies efficient as the proceedings can be unduly prolonged as was the case in the matter under consideration where ‘it failed to implement and uphold electoral laws through reasonably expeditious resolution or other measures that protect the rights of the citizens’.

**67.** The complainants allege that the government of Zimbabwe has violated article 1 of the Charter because the existing electoral laws are not sufficiently certain, do not prevent candidates whose election is contested from sitting in the parliament before the courts rule on their cases, and do not create any obligation upon the courts to determine the electoral challenges brought before them within a fixed period. The complainants also rely on the jurisprudence of the Inter-American Commission on Human Rights, in the case of *Gustavo Arranza v Argentina* where it held that:

The absence of an effective remedy to violations of the rights recognised by the Convention is itself a violation of the Convention by the state party in which the remedy is lacking. In that sense, it should be emphasised that, for such a remedy to exist, it is not sufficient that it be provided for by the Constitution or by law or that it be formally recognised, but rather it must be truly effective in establishing whether there has been a violation of human rights and in providing redress. A remedy which proves illusory because of the general conditions prevailing in the country, or even in the particular circumstances in a given case, cannot be considered effective.<sup>4</sup>

**68.** The communication further recalls the interpretation made by the African Commission of article 1 in the case of *Jawara v The Gambia* [(2000) AHRLR 107 (ACHPR 2000) para 46], where the Commission found that:

Article 1 gives the Charter the legally binding character always attributed to international treaties of this sort. Therefore a violation of any provision of the Charter automatically means a violation of article 1. If a state party to the Charter fails to recognise the provisions of the same, there is no doubt that it is in violation of the article. Its violation therefore goes to the root of the Charter.

**69.** The complainants note that the respondent state’s failure to enact laws that further the enjoyment of the rights and freedoms enshrined in the Charter and its failure to provide real and efficient remedy in the events of the violation of the same rights and freedoms amount to a violation of article 1. It is further submitted that the failure of the judiciary to decide promptly, effectively and meaningfully to the alleged violations of rights and electoral

<sup>3</sup> Inter-American Court on Human Rights Advisory Opinion 13/93 paras 26-27.

<sup>4</sup> Case 10.087 (30 September 1997).

irregularities is imputable to the state since the judiciary is a branch of the latter. The communication then quoted the decision of the Inter-American Court on Human Rights in the aforementioned *Velasquez Rodriguez* case, where it is stated that:

This obligation implies the duty of the state party to organise all the state apparatus and in general, all structures through which the exercise of public power is manifested, in such a manner that they are able to legally ensure the free and full exercise of human rights.

**70.** The complainants allege that the respondent state cannot rely on its domestic law to justify its failure to perform its obligations under the Charter.

**71.** As for article 3 of the Charter, the communication recalls that equality before and equal protection of the law mean equality with regard to interpretation, application and enforcement of the law. It emphasised that rights are guaranteed to all regardless of one's political opinion.

**72.** The complainants note that successful petitions before Zimbabwean courts would have granted the opposition Movement for Democratic Change (MDC) a large majority in Parliament 'should be taken into consideration by the judiciary in terms of the urgency with which the matters were disposed of'. It is submitted that the MDC was victim of discrimination by the judiciary, although such discrimination might have been caused by the lack of resources or manpower to deal with the petitions. The lack of resources and manpower, it is alleged, cannot dispense the state from its obligation to respect and protect the rights enshrined in the Charter.

**73.** According to the authors of the communication, since the successful disposition of the petitions would have drastically altered the composition of Parliament, the failure of the judiciary to deal promptly with those petitions is tantamount to the absence of equality before the law and equal protection of the law for victims of human rights violations.

**74.** The complainants allege that the inordinate delay in dealing with petitions constitutes a violation of article 7(1)(d), as that affects the right to have one's case heard within a reasonable time (right to due process of law). The complainants quote the United Nations Human Rights Committee (HRC) General Comment 13, where the HRC held that the right to have one's case heard within a reasonable time includes not only the time by which the trial should start, but also the time by which it should end and the judgment rendered both in first instance and on appeal.

**75.** In the complainants' view, the right to due process of law was violated in the matter before the Commission as the courts have failed to rule on the electoral petitions within a reasonable period of time. It is also alleged that appeal to the High Court and the Supreme Court was ineffective. The communication recalls the approach of the

African Commission to the right to appeal adopted in its decision on *Amnesty International and Others v Sudan* [(2000) AHRLR 297 (ACHPR 1999) para 37], where the Commission held that:

[T]he right to appeal, being a general and non-derogable principle of international law, must, where it exists, satisfy the conditions of effectiveness. An effective appeal is one that, subsequent to the hearing by the competent tribunal of first instance, may reasonably lead to a reconsideration of the case by superior jurisdiction, which requires that the latter should, in this regard, provide all necessary guarantees of good administration of justice.

76. The authors of the communication further denounce the lack of the independence of the judiciary in Zimbabwe. They cite the report of the Special Rapporteur on the Independence of Judges and Lawyers submitted with the United Nations Commission on Human Rights Resolution 2002/43,<sup>5</sup> and conclude that the ‘absence or weakening of institutions whose mandate is to provide remedies in instances of violations supports the assertion of petitioners of institutions that are not competent to render real and effective remedies, contrary to the intentions of the drafters of the Charter under articles 7 and 26’.

77. As regards article 13 of the Charter, the communication recalls the importance of the right to political participation and insists, in the wake of the Resolution on Electoral Processes and Participatory Governance adopted by the Commission at its 19th ordinary session, that ‘elections are the only means by which the people can elect democratically the government of their choice in conformity to the African Charter on Human and Peoples’ Rights’.

78. That position, it is alleged, was confirmed by the Commission in *Constitutional Rights Project and Another v Nigeria* [(2000) AHRLR 191 (ACHPR 1998) para 50], where the Commission found that:

To participate freely in government entails, among other things, the right to vote for the representative of one’s choice. An inevitable corollary of this right is that the results of the free expression of the will of the voters are respected; otherwise, the right to vote freely is meaningless. In the light of this, the annulment of the election results, which reflected the free choice of voters, is in violation of article 13(1).

79. The complainants further submit that the right to freely participate in government is also rendered meaningless if the judiciary fails to decide expeditiously on the electoral disputes brought before it, since that allows candidates whose elections are contested to sit in Parliament while the petitions are still *lis pendens*. The complainants quote the Inter-American Commission on Human Rights according to which

the close relationship between representative democracy as a form of government and the exercise of the political rights so defined, also presupposes the exercise of other fundamental rights ... the concept of representative democracy is based on the principle that it is the people who are the nominal holders of political sovereignty and that, in the exercise of that sovereignty, elects its representatives, moreover, are elected by the citizens to apply certain political measures, which at the

<sup>5</sup> E/CN.4/2003/65/Add.1.25 February 2003.

same time implies the prior existence of an ample political debate on the nature of the policies applied – freedom of expression – between organised political groups – freedom of assembly. At the same time, if these rights and freedoms are exercised, there must be juridical and institutional systems in which laws outweigh the will of leaders and in which some institutions exercise control over others for the sake of guaranteeing the integrity of the expression of the peoples' will – rule of law. ... Indeed any mention of the right to vote and to be elected would be mere rhetoric if unaccompanied by a precisely described set of characteristics that the elections are required to meet.<sup>6</sup>

**80.** The complainants pray the African Commission to follow the jurisprudence of the Inter-American Commission and to find the respondent state to be in violation of article 13(1) of the Charter.

**81.** Regarding article 26 of the Charter, the authors of the communication recall the comment made by the Commission in its 9th Annual Report [*Civil Liberties Organisation v Nigeria* (2000) AHRLR 188 (ACHPR 1995) para 14], where it declared that:

Article 26 of the African Charter reiterates the right enshrined in article 7 but is even more explicit about state parties' obligations to 'guarantee the independence of the courts and ... allow the establishment and improvement of appropriate national institutions entrusted with the promotion and the protection of the rights and freedoms guaranteed by the present Charter'. While article 7 focuses on the individual's right to be heard, article 26 speaks of the institutions which are essential to give meaning and content to that right. This article clearly envisions the protection of courts which have traditionally been the bastion of protection of the individual's rights against the abuses of state power.

**82.** The complainants are of the view that trials conducted in accordance with the principles of due process of the law, and the conclusion of such trials within a reasonable time, *inter alia*, are essential tenets of a properly functioning judiciary. It is alleged that the failure by the respondent to decide on the election petitions within a reasonable time contravenes articles 13(1) and 26 of the Charter.

### **Respondent state's submissions on the merits**

**83.** The respondent state submitted that both parties to the election petitions filed in the Zimbabwean courts were afforded equal protection of the law evidenced by a reference to a number of decided cases. The state denies that the complainants were discriminated against on the basis of political opinions expressed in the petitions.

**84.** The respondent state submits further that in *Sibangani Mlanda v Eleck Mkandla*, HC 8228/00, the petitioner was a candidate for the Movement for Democratic Change party (MDC) in the general election of 24 and 25 June 2000. The respondent who was the candidate for Zimbabwe Africa National Union (Patriotic-Front) (ZANU-PF) won the parliamentary seat by 15 932 votes while the petitioner garnered 3

<sup>6</sup> Report 01/90 on cases 9768, 9780 and 9828 Mexico paras 41 and 42, Annual Report of the Inter American Commission 1989-1990.

967 votes. The petitioner alleged corrupt practices during the election and that the electorate was coerced to support and vote for the respondent and refrain from voting for him. He alleged that his campaign team were abducted, tortured and their property burned and destroyed. The Court held that it was grossly unfair for the respondent to canvass for votes and the election was set aside.

**85.** The state noted further, in spite of the political opinions expressed in the petition suggesting that ZANU-PF was a violent party which won elections through violence, the complainants were not discriminated upon by the courts, and were afforded equal protection, as was evidenced with the setting aside of the election result of the Gokwe North constituency.

**86.** To buttress its argument that the complainants were not discriminated, the respondent state drew the Commission's attention to the case of *Lameck Nkiwane Muyambi v Jaison Kokerai Machaya*, HC 8226/00, where the petitioner was an opposition member of the MDC while the respondent was a candidate of ZANU-PF. The petitioner alleged that the respondent and his party members were guilty of corrupt practices leading to a wide range of violent activities in the constituency. The Court decided to set aside the election results and ruled in favour of MDC. The state also indicated that in many other cases involving election petitions, the Courts have ruled in favour of the opposition, for example, *Phioneas Chivazve Chiota v Registrar-General of Elections and Ben Tumbare Mutasa*, HC 8221/00, *Moses Mope v Elliot Chauke*, HC 110/01, and *Edna Akino v Tobaiwa Muded NO and Davison Tsopo and City of Mutare*, HC 14490/99.

**87.** With respect to equal protection of the law, the respondent state thus submitted that since seven or more election petitions were ruled in favour of the MDC, it is enough proof that the courts have not been biased towards the ruling ZANU-PF, and have applied the law objectively, thus affording the petitioners equal protection of the law as guaranteed in article 3 of the African Charter and the Constitution of Zimbabwe.

**The right to be heard and tried within a reasonable time by an impartial court or tribunal under article 7(1)(d)**

**88.** The respondent state submitted that it has always afforded the complainants the right to be heard by impartial courts, and within a reasonable time, adding that Zimbabwean courts have in several judgments recognised this right.

**89.** The respondent state contends that all the petitions filed in the High Court and more recently, in the Electoral Court were heard within a reasonable time, in accordance with rule 31 of the Electoral (Application, Appeal and Petition Rules 1995) which provides that:

‘The Registrar and all parties to any case, petition or application shall take all steps necessary to ensure that the matter is dealt with as quickly as possible.’

90. According to the state, parties to an election petition have a duty to ensure the petition is determined quickly in accordance with rule 31, adding that in most of the cases brought before the courts, the complainants failed to expeditiously file papers to ensure the matters were dealt with quickly.

91. The state added further that in terms of section 182 of the Electoral Act [Chapter 2:13], ‘Every election petition shall be determined within six months from the date of its presentation’.

92. According to the respondent, in order to give effect to this law, it has set up an Electoral Court to have petitions dealt with within six months, which the state considers as a reasonable time. However, the MDC is challenging the composition of the Electoral Court which, as a result of that challenge, has delayed petitions before court, and it can therefore not be said that the judiciary itself has been reluctant to deal with petitions expeditiously.

93. It is further submitted by the state that it is the duty of the parties to avail the witnesses and apply for a set down date within the six months prescribed by law. In case of any frustrations, the concerned party can approach the Judge President or Chief Justice for redress. The complainants, according to the state, have failed to show, the specific frustrations faced, if any, in having the election petitions set down for hearing and what steps the petitioners undertook to have the matters expeditiously dealt with. Instead the complainants have only resorted to allegations that the judiciary has been reluctant to deal with, and finalising the petitions before it.

94. The respondent state submits that the government has no role in the determination of election petitions thus it is untrue to allege that it frustrated the petitioners in the hearing of their petitions. The state added that most petitions filed in the High Court in 2001 were heard and judgments delivered to the parties within six months.

95. To substantiate the above argument, the state cited a number of cases that were disposed of within six months, including *Lucia Makesea v Isaiah Shumba*, HC 8070/00, *Phineas Chivazve Chiota v Registrar General of Elections and Ben Tumbare*, HC 8221/00, which was set down for hearing on 18 July 2001 and judgment delivered on 23 January 2002; *Godfrey Don Mumbamarwo v Saviour Kasukuwere* set down on 9 July 2001 and judgment delivered on 17 January 2002; *Moses Mare v Elliot Chauke*, HC 8068/00, judgment delivered on 20 June 2001 and; *Patrick Tsumele v Aaron Baloyi*, HC 8072/00, judgment delivered on 21 June 2001.

96. More recently after setting up of the Electoral Court, petitions have been disposed of in six months. In cases decided by the High

Court, the losing parties appealed to the Supreme Court. The Supreme Court heard most of the appeals and the MDC lost in some of the cases, such as *Hove v Joram Gumbo* with respect to the Mberengwa West constituency. Some cases were dismissed as the appellants were not willing to prosecute their cases, for example, *Mazurani v Mbotekw*, with respect to the Zvishavane constituency and *Mumbamarwo v S Kasukuwere* with respect to the Mt Darwin constituency.

97. According to the respondent state, in the above cited cases the petitioners were asked by the Supreme Court to file their heads of argument but they failed and the cases were subsequently dismissed under rule 44 of the Supreme Court Rules for non-compliance with court rules. The same applies to order 238 rule 2(b) of the High Court Rules.

98. The state added that the petitioners have over time withdrawn petitions after realising the weaknesses of their cases and paid wasted costs to the respondents acknowledging their fault for bringing uncommitted and misconceived petitions. This was the case with respect to *Elphas Mukonoweshuro v Ben Mahofa*, case EP 11/05; *Aaron Chinhara v Lovemore Mupukuta*, EP 20/05; *Eileen Heather Dorothy Bennet v Samuel Undenge*, EP 11/05; *Evelyn Masaiti v Mike Nyambuya*, EP 18/05; *Hilda Suka Mafudza v Patrick Zhuwawo*, 16/05 and; *Ian Kay v Sydney Tigere Sekeremayi*, EP 16/05.

99. It is further submitted by the state that in the above-mentioned circumstances the government did not frustrate the petitioners in pursuing legal recourse according to the law. In fact, it is the petitioners who did not pursue their petitions expeditiously.

100. Further in terms of the Practice Directions of the Supreme Court, Practice Direction 1 of 1993 reported in the *Zimbabwe Law Reports* pages 241(5) the Supreme Court as per Gubbay CJ directed that:

If in any particular case, whether of a criminal nature, a delay in obtaining judgment should occur which is considered inordinate the aggrieved party or his legal practitioner is invited to bring such delay to the attention of the Chief Justice or the Judge President if it be in respect of a High Court matter, and to the Chief Magistrate, if it be a Magistrates Court matter. Upon receipt of such notification the Chief Justice, the Judge President or the Chief Magistrate whoever has been addressed to will proceed to investigate the complaint, and provided he is satisfied that in all circumstances the delay is unreasonable, will apply his best endeavors to obviate it.

101. The respondent state submits that the communication does not indicate if at any point the various complainants addressed the issue of delays to the Judge President or Chief Justice, and if that was so whether the Judge President and the Chief justice did nothing after receiving the complainant. The complainant's allegations are unsubstantiated and thus ought to be dismissed as unfounded.

**102.** Thus, in the opinion of the state, the judiciary and indeed relevant provisions of laws enable petitions to be concluded within a reasonable time contrary to the complainant allegations.

**103.** Concerning allegations of violations of article 13, the respondent state denied that the Republic of Zimbabwe violated article 13 by enacting laws curtailing freedoms of association, assembly and expression hence violating the rights of citizens to participate in governance issues and to exercise their right to a referendum in a transparent and conducive environment.

**104.** The state submitted that the complainants simply aver that the government has passed such laws, but did not state the specific laws enacted. Neither did they describe the human rights violations that took place, the dates or place the violations occurred, nor provide the names of the victims who suffered as a result of the enacted laws.

**105.** By making general and unsubstantiated allegations the complainants are being untruthful and their claims should not be accepted. The government is being called upon to ‘defend’ itself in the dark which is very unfortunate.

**106.** Further, it is submitted that in terms of the African Commission’s information sheet 3 on communication procedure, it is a requirement that the author of the communication should make precise allegations of fact attaching relevant documents and not general allegations. Hence the complainants have failed to prove a violation of article 13.

**107.** With respect to allegations regarding violations of article 26 of the Charter, the respondent state denied that it had violated this article. It denied that the government failed to guarantee the independent functioning of the judiciary. It submitted that the judiciary of Zimbabwe has always been independent and free from executive interference, adding that this was evidenced by the fact that the election petitions filed in the courts resulted in the courts setting aside the election results where irregularities were found. This, according to the state, was regardless of the party to which the petition belonged. The state added that quite a number of petitions were ruled in favour of the opposition, a situation which according to the state, would not have been so if there was executive interference, as alleged by the complainants.

**108.** On the issue of the legal status of the judges, the state submits that section 79B of the Constitution of Zimbabwe states that members of the judiciary ‘shall not be subject to the direction or control of any person or authority’.

**109.** On the issue of the removal of the judges from office, the state drew the Commission’s attention to section 87(1) of the Constitution of Zimbabwe which provides that ‘inability to discharge the functions of his office, whether arising from infirmity of body or mind or any



other cause, or for misbehaviour' is the only ground upon which dismissal may be authorised. The words 'any other cause', it is submitted, refer to medical causes or causes not relating to the moral blameworthiness of the judge in question.

**110.** On the issue of salaries payable to the judges, the state submits that the salaries of judges may not be reduced during the tenure of office in terms of the Constitution. This provision is meant to uphold the independence of the judiciary.

**111.** On the issue of judicial proceedings, the state notes that all court proceedings in Zimbabwe are carried out in open court in accordance with section 18(10) and (14) of the Constitution. This includes the announcement of the court's decision and the reasons for the decision delivered at the same time.

**112.** The respondent state affirms that all election petitions were held in open court, and that the state endeavoured to guarantee the independence of the courts.

**113.** The state concluded in this regard by submitting that in light of the above mentioned provisions to guarantee the independence of the judiciary, the complainant's assertion that a number of judges were victimised after they ruled in favour of the MDC is denied.

**114.** The state cited the case of Justice Makarau who according to the state, was re-appointed to the Electoral Court despite ruling against ZANU-PF in the Election Petitions, while Justice Ziyambi was promoted to the Supreme Court. The state added that several petitions were decided in favour of the MDC and none of the judges was victimised for the judgments.

**115.** The respondent state submits that Mr Morgan Tsvangirai, the leader of the opposition MDC, was acquitted of the treason charges. The presiding judge, Justice Paddington Garwe, was not victimised for the decision and he remains the Judge President of the High Court of Zimbabwe.

**116.** For all the judges who resigned from the bench, no specific reasons were availed as is mandatory in law. None has openly stated if they resigned because of political reasons.

**117.** The state submits that the complainants make bold allegations to the effect that one judge who ruled in favour of the MDC was victimised and fled the country without naming the judge or giving proof for the reasons of his resignation. Thus the complainants have failed to establish a case against the respondent state.

**118.** The respondent state submits that the relief sought by the complainants is not sustainable because the Republic of Zimbabwe has complied with the provisions of the African Charter in letter and spirit by:

Enacting laws which improve electoral transparency;

See section 182 of the Electoral Act [Chapter 2:13]; rule 31 of the Electoral (Applications Appeals and Petitions) Rules 1995 Statutory Instrument 74A/95;

Practice Directions of the Supreme Court 1 of 1993, relating to complaints on delays;

Constitution of Zimbabwe section 87(1), 79B, 18 (10) and (14);

Zimbabwe Electoral Commission Act 22/04, which Act established the Zimbabwe Electoral Commission and independent Board responsible *inter alia* of the preparation and conduct of elections in Zimbabwe;

Setting up the Electoral Court.

### **The African Commission's decision on the merits**

**119.** In this communication, the complainants alleged violation of articles 1, 2, 3, 7(1)(a), (d), 13(1) and 26 of the African Charter.

**120.** The complainants allege that article 2 was violated in the sense that there was discrimination in the protection afforded and equality before the law, and that this failure by the domestic courts to protect the rights of the petitioners amounted to discrimination. The complainants noted that if the courts had dealt with the petitions and finalised them as envisaged by the petitioners, then the composition of Parliament would have been different and this would have altered the balance of power. This, in the opinion of the complainants, is a 'plausible ground for supporting the assertion of non-equality in the protection of the law and discrimination'. The respondent state does not advance any arguments regarding the allegations of discrimination, but noted that all the parties to election petitions were afforded equal protection of the law.

**121.** To establish discrimination, it must be shown that, the complainants have been treated differently in the enjoyment of any of the Charter rights by virtue of their race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status.

**122.** The complainants have failed to set forth with clarity any particular instance in which they were denied the enjoyment of any of the Charter rights by virtue of the reasons set forth in article 2 of the African Charter. The claim under this head therefore fails.

**123.** The complainants also allege the violation of article 3 of the African Charter. This article provides: 'Every individual shall be equal before the law, and every individual shall be entitled to equal protection of the law.' According to the complainants, since the successful disposition of the petitions would have drastically altered the composition of Parliament, the failure of the judiciary to deal

promptly with those petitions is tantamount to the absence of equality before the law and equal protection of the law for victims of human rights violations. The state on its part cited a number of cases to demonstrate that both parties to the election petitions filed in the Zimbabwean courts were afforded equal protection of the law, and denied that the parties were discriminated against on the basis of political opinions. In fact, this position is confirmed through the analysis the Commission made on the list of different petitions that were cited in the complaint submitted to the Commission.<sup>7</sup>

**124.** Article 3 of the African Charter has two arms, one dealing with equality before the law, that is, article 3(1), and the other, equal protection of the law, that is, article 3(2). The most fundamental meaning of equality before the law or equality under the law is a principle under which each individual is subject to the same laws, with no individual or groups having special legal privileges. On the other hand, equal protection of the law under article 3(2) relates to the right of all persons to have the same access to the law and courts and to be treated equally by the law and courts both in procedures and in the substance of the law. It is akin to the right to due process of the law, but in particular, applies to equal treatment as an element of fundamental fairness.

**125.** In its decisions on communication 211/98, *Legal Resources Foundation v Zambia*,<sup>8</sup> the Commission makes this distinction even clearer by linking the principle of discrimination to that of equal protection of the law. This Commission held in that communication that:

Article 2 of the Charter abjures (sic) discrimination on the basis of any of the grounds set out among them 'language ... national and social origin ... birth or other status ...'. The right to equality is very important. It means that citizens should expect to be treated fairly and justly within the legal system and be assured of equal treatment before the law and equal enjoyment of the rights available to all other citizens. The right to equality is important for a second reason. Equality or lack of it affects the capacity of one to enjoy many other rights. For example, one who bears the burden of disadvantage because of one's place of birth or social origin suffers indignity as a human being ...'.

**126.** In terms of article 60 of the Charter, this Commission can also be inspired in this regard by the famous case *Brown v Board of Education of Topeka*,<sup>9</sup> in which the Chief Justice of the United States of America, Earl Warren, argued that 'equal protection of the law refers to the right of all persons to have the same access to the law and courts and to be treated equally by the law and courts, both in procedures and in the substance of the law. It is akin to the right to

<sup>7</sup> See para 8 which refers to annex in the communication, and also paras 84 and 86 above on petitions filed by both parties.

<sup>8</sup> See para 63, communication 211/98 [(2001) AHRLR 84 (ACHPR 2001)]. It is observed that the use of the word 'abjures' could have been intended to mean 'abhors', hence the use of the (sic) to show that it was an incorrect word.

<sup>9</sup> 347 US 483 (1954).

due process of law, but in particular applies to equal treatment as an element of fundamental fairness'.<sup>10</sup>

**127.** In order for a party to establish a successful claim under article 3(2) of the Charter therefore, it must show that, the respondent state had not given the complainants the same treatment it accorded to the others or that, the respondent state had accorded favourable treatment to others in the same position as the complainants.

**128.** In the present communication, the Commission has examined the evidence submitted by both parties and is of the view that the complainants have not demonstrated the extent to which the courts treated the petitioners differently from the respondent state, or vice versa, to the extent that their rights were violated. The Commission thus does not find the respondent state to have violated article 3 of the African Charter.

**129.** The complainants allege violation of article 7(1)(a) and (d) of the African Charter. This article provides:

Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts violating his fundamental rights recognised and guaranteed by conventions, laws, regulations and customs in force ... (d) the right to be tried within a reasonable time by an impartial court or tribunal.

**130.** It should be noted that even though the matter before the Commission is a civil matter, the principles enshrined under article 7(1) still apply in the consideration of this matter, that is, the principles to have one's cause heard and the principle to have one's matter decided within a reasonable time.

**131.** The complainants argue that the inordinate delay in dealing with petitions affects the right to have one's case heard within a reasonable time (right to due process of law). They refer to General Comment 13 of the United Nations Human Rights Committee (HRC), where the HRC held that the right to have one's case heard within a reasonable time includes not only the time by which the trial should start, but also the time by which it should end, and the judgment rendered both in first instance and on appeal. In their view, the right to due process of law has been violated as the courts have failed to rule on the electoral petitions within a reasonable period of time. It is also alleged that appeal to the High Court and the Supreme Court was ineffective.

**132.** On its part, the respondent state cited several cases to demonstrate that it has always afforded the petitioners the right to be heard by impartial courts or tribunals within a reasonable time. The respondent state contends further that all the petitions filed in the High Court and more recently, in the Electoral Court were heard within a reasonable time. The state cited rule 31 of the Electoral (Application, Appeal and Petition rules 1995) Statutory Instrument

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<sup>10</sup> [www.legal-explanations.com](http://www.legal-explanations.com).

74A/95 and section 182 of the Electoral Act [Chapter 2:13] and concluded that parties to an election petition have a duty to ensure the petition is determined quickly, adding that in the present situation, in most of the cases brought before the court, the petitioners failed to expeditiously file papers to ensure the matters were dealt with quickly. The state further submitted that it set up an Electoral Court to have petitions dealt with within a reasonable time. However, the MDC challenged the composition of the Electoral Court which delayed the petitions before it and it cannot therefore be said that the judiciary has been reluctant to deal with petitions expeditiously.

**133.** Article 7(1)(d) of the Charter imports two things; the right to be heard within a reasonable time and the right to be heard by an impartial tribunal. These are the issues which must be borne out by the evidence to warrant the Commission's findings of a violation thereof.

**134.** In respect of the first arm of this claim - the right to be tried within a reasonable time, the responded state conceded in its response to delays in disposing with some of the claims, but emphasised that the delay was occasioned by the complainants who had failed to file processes expeditiously before the courts as required by the law and/or failed to file their heads of arguments as required by the Supreme Court. These are not a mere blanket denial of the allegations; they raise serious irregularities against the complainant's averments, which were not controverted by the complainants.

**135.** In respect of the second arm of the claim - the right to be heard by an impartial tribunal, the submission of the respondent state and the evidence before the Commission show that the courts had actually resolved some cases in favour of the petitioners as against the ruling party (ZANU-PF), that the Supreme Court had thrown out some cases in which the petitioners failed to comply with the Court's directives requesting them to file their heads of arguments. There is no evidence to suggest that the courts refused to adjudicate on the complainants' cases as filed before the courts, but did so in respect of cases filed by the ruling party (ZANU-PF), or that the courts failed or refused to grant the Complainants the relief sought, but did so to other petitioners. This Commission does not therefore find any violation of article 7(1)(d) of the Charter.

**136.** The complainants also alleged violation of article 13(1) of the Charter which provides that:

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

**137.** The complainants' submissions in support of this allegation hinged on their argument that the courts failed to render judgment

on the elections petitions on time. According to the complainant, the right to freely participate in government is rendered meaningless if the judiciary fails to decide expeditiously on the electoral disputes brought before it, since that would allow for candidates whose elections are contested to sit in Parliament while the petitions are still *lis pendens*. The respondent state on its part argued on the expeditious disposal of petitions by the High Court, usually, within six months as stipulated by the law establishing the Electoral Court.<sup>11</sup> The complainants have not adduced any evidence before this Commission to contradict the assertions of the state. It is thus the findings of this Commission that the complainants have failed to convince it that there has been a violation of article 13(1).

**138.** The complainants submitted further that violation of article 7(1)(d) constitutes in one respect violation of article 26 of the Charter. Article 26 of the Charter provides that:

State parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.

**139.** According to the complainants, the judiciary is weak and ineffective. The complainants argue that the judiciary in Zimbabwe is not independent and further that judges who entered decisions against the government interest were victimised. The respondent state replied that the judiciary in Zimbabwe was independent and judges were not victimised for their decisions, adding that one such judge was promoted to the Supreme Court.

**140.** The respondent state submits that those judges who resigned never made any public statement as to the cause of the resignations. For the complainants to link their resignations to victimisation from the government, without leading any evidence in support thereto, does in the view of the Commission, amount to speculations.

**141.** The evidence before the Commission relating to the conduct of the judiciary in respect of the petitions forming the basis of this Communication does not show that the judiciary was influenced by other institutions or persons in the discharge of its functions but acted with full independence. The Commission does not therefore find a violation of article 26 of the Charter.

**142.** Relating to the issue of the violation of article 1 of the Charter, the Commission finds that the respondent state did not violate any of the rights, alleged by the complainants, and cannot therefore be held to have violated article 1 of the Charter. In conclusion, the African Commission on Human and Peoples' Rights finds that the respondent

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<sup>11</sup> See paras 95 and 96 for details about these petitions in which the judiciary disposed them within the prescribed time limit.

state has not violated articles 1, 2, 3, 7(1)(a) and (d), 13(1) and 26 of the African Charter as alleged by the complainants.

# Majuru v Zimbabwe

(2008) AHRLR 146 (ACHPR 2008)

Communication 308/2005, *Michael Majuru v Zimbabwe*

Decided at 44th ordinary session, November 2008, 25th Activity Report

*Requirement to exhaust local remedies when complainant resident abroad. Requirement of submission of communications to the Commission within reasonable time*

**Admissibility** (compatibility, 64, 72-73; exhaustion of local remedies, refugees, 90, 92-95, 100; state ignoring court rulings, 101-103; submission of communication within reasonable time, 108-110)

**Evidence** (author's claims not corroborated, 92, 93)

1. The complainant, Michael Majuru (hereinafter called the complainant), submitted this communication against the Republic of Zimbabwe (hereinafter called the respondent state), a state party to the African Charter on Human and Peoples' Rights (the African Charter). The complainant is a citizen of the respondent state and is currently residing in the Republic of South Africa.
2. The complainant submits that the respondent state has committed gross violations of human rights and fundamental freedoms against him through acts committed by the Minister of Justice, Legal and Parliamentary Affairs and the Central Intelligence Organisations (CIO) under the Office of the President and Cabinet.
3. The complainant alleges further that that in committing the gross violations, the aforementioned organisations, individuals and organs of the state were acting in the course and scope of their employment as respondent state's agents.
4. The complainant submits further that his rights were abused because of this role as a presiding Judge in a case in which the Associated Newspaper Group of Zimbabwe (ANZ), a publishing house in the respondent state, sought to challenge, before the Administrative Court, the respondent state's act of banning ANZ from publishing its two newspapers, the *Daily News* and the *Daily News on Sunday*. The matter was lodged before the Administrative Court on or about 23 September 2003 and he presided over the matter.



5. The complainant states that following his decision in favour of the ANZ, he became a target of human rights abuses wrought upon him by agents of the respondent state and recounts the chronology of events that depict incidents in which the respondent state allegedly violated his human rights.

6. The first incident is reported to have occurred on or about 24 September 2003. It is alleged that the Minister of Justice, Legal and Parliamentary Affairs, the Hon Patrick Chinamasa invited the complainant's workmate, who was also a Judge at the Administrative Court (Justice Chipo Machaka) to his office to issue instructions that the matter relating to the ANZ case that was to be presided over by the complainant should be conducted in a manner that the said Minister was going to dictate. Justice Machaka was instructed by the Minister to convey these instructions to the complainant, with an order that complainant should comply with such orders.

7. It is further alleged that the Minister also instructed that the Administrative Court should delay the court proceedings until February 2004, noting that the ANZ did not deserve impartial treatment by the judiciary because it was a front of western nations and 'other imperialists'. Secondly, Justice Machaka is alleged to have been told that if the ANZ were granted its application for an urgent appeal hearing and thereafter allowed publication at that stage this would jeopardise continuing negotiations between ZANU PF and the Movement for Democratic Change (MDC) (the biggest opposition party in Zimbabwe), which according to the Minister, had reached a delicate stage. As proof of this delicate relationship between ZANU PF and MDC, Justice Machaka was shown a draft constitution agreed upon between the two parties and some other supporting documents.

8. The complainant submits that he disregarded the aforesaid instructions and upon considering the ANZ's application on its merits ruled in favour of the ANZ by granting the application for an urgent appeal hearing on or about 27 September 2003. From 15 to 19 October 2003, the complainant presided over the appeal hearing between the two parties. He adjourned the matter for judgment to 24 October 2003.

9. Subsequently, the complainant states that he was summoned by Enoch Kamushinda, a suspected member of the CIO for a meeting at Kamushinda's office on 22 October 2003. This information was conveyed through another CIO operative with instructions that the complainant should dismiss the ANZ appeal. As a reward for dismissing the ANZ appeal, Kamushinda promised the complainant a fully developed farm in Mashonaland West Province.

10. The complainant further states that on 23 October 2003 at around 2100 hours, the Minister of Justice, Legal and Parliamentary Affairs, Hon Patrick Chinamasa, telephoned and enquired from the

complainant whether he had finalised the judgment in the ANZ matter and what decision he had reached. The complainant advised him that he was in the process of finalising the judgment and that he was going to allow the appeal. The complainant states that the Minister expressed his displeasure with the said decision and further attempted to unduly influence and/or threaten the complainant.

11. The complainant claims that he went ahead to deliver the judgment in favour of ANZ at about 1600 hours on 24 November 2003. Subsequently, at about 2130 hours, Hon Chinamasa in an angry telephone call to the complainant, accused the latter of pre-determining the matter and berated him for delivering a judgment dictated by British agents and other imperialist forces.

12. Subsequently, the Media and Information Commission (MIC) appealed to the Supreme Court against the decision of the Administrative Court. ANZ on the other hand decided to approach the Administrative Court seeking an order that its original decision be rendered operative notwithstanding the institution of an appeal by the MIC.

13. The complainant claims that upon the lodging of this application by the ANZ, the complainant was placed under immense pressure from agents of the respondent state urging him to desist from dealing with the matter. The complainant claims that the respondent sent members of the CIO to track, trail and monitor the complainant's movements and interactions with other people.

14. The complainant alleges that on several occasions he was approached by Ben Chisvo, a suspected CIO informer, a former ruling ZANU PF Councillor of the City of Harare and also a war veteran. Chisvo sought to persuade the complainant to excuse himself from presiding over the matter, claiming that the case was serious and sensitive and that President Mugabe did not want the ANZ to be registered. Chisvo further indicated that the President had set up a team led by a senior assistant commissioner of Zimbabwe, Changara, to monitor the proceedings in the ANZ matter and confirmed that the complainant was being monitored by state security agents.

15. On 23 November 2003, at around 2300 hours, the complainant received a telephone call from Chisvo in which he claimed that his car had had a puncture close to the complainant's residence and requested for assistance. Upon meeting the complainant, Chisvo demanded to know whether the former would preside over the ANZ matter or recuse himself as previously ordered. The complainant informed Chisvo that he would be presiding over the ANZ matter.

16. The complainant further alleges that, on 24 November 2003, following the complainant's postponement of the ANZ matter upon the request of the two parties to the case, he received a telephone call from Hon Chinamasa at around 2100 hours. The complainant

states that the Minister alleged that he had information linking the complainant to British agents and other imperialists and that the complainant was under investigation for these alleged links with the British agents and imperialist. The Minister also indicated that he was aware through his informants that the ANZ was going to succeed in the second matter which was pending before the complainant. Shortly thereafter, Justice Machaka phoned the complainant and advised him that the Minister of Justice had also phoned her ordering her to meet him at his office the following morning. She informed the complainant that the Minister wanted to be advised on how the complainant intended to decide the ANZ matter in order for him to brief the Cabinet that morning. Soon after this telephone call from Justice Machaka, the Minister telephoned the complainant once again ordering that they meet the following morning at his office at 0800 hours.

17. On 25 November 2003, the complainant met with the Minister as instructed. The Minister wanted to know what the complainant's decision in the ANZ matter would be but the complainant declined to inform him stating that he had not yet heard the parties' arguments on the matter and was therefore in no position to know the outcome. The complainant alleges that the Minister informed him that the Police Commissioner Augustine Chihuri had approached him the previous night with information that the complainant was under investigation for colluding with British agents over the ANZ matter and was considering arresting him.

18. The Minister is also reported to have shown the complainant the *Herald* newspaper which carried an article on its front page alleging that the complainant was under probe over the ANZ matter. The Minister also produced an affidavit, which he said had been obtained from Chisvo by the Police Commissioner. In the said affidavit, Chisvo had made statements to the effect that the complainant had informed Chisvo that the ANZ matter was predetermined.

19. The complainant claims that as a result of such sustained and relentless pressure he had no other option but to recuse himself from the matter. Notwithstanding the recusal, the complainant remained under surveillance by state security agents.

20. The complainant states that on 1 December 2003, he received a telephone call from a member of the legal fraternity and the police informing him that the respondent state was fabricating a case against him and that he was to be arrested and incarcerated on unspecified charges as punishment for defying the respondent's orders.

21. The complainant alleges that fearing for his safety and security, he decided to go into hiding until 9 December when he fled to South Africa, where he remains in exile.

22. The complainant submits that he is not the only member of the judiciary who has been persecuted but that there is a systematic, consistent and sustained pattern of interference with the judiciary by the executive in the Republic of Zimbabwe.

### Complaint

23. The complainant alleges that articles 3, 5, 8, 9, 14, 15, 16, 18 and 26 of the African Charter on Human and Peoples' Rights have been violated.

24. The complainant requests that the African Commission should:

- (a) Urge the respondent state to institute an inquiry and investigation that should result in the government of Zimbabwe bringing those who perpetrated the violations to justice.
- (b) Order the respondent state to pay compensation for the physical pain, psychological trauma, loss of earnings and job and access to family suffered by the complainant.

### Procedure

25. The communication is dated 2 November 2005 and was sent by email to the Secretariat, and was received on 8 November 2005.

26. On 17 November 2005, the Secretariat acknowledged receipt of the communication and informed the complainant that the communication would be scheduled for consideration by the African Commission at its 38th ordinary session.

27. At its 38th ordinary session held from 21 November to 5 December 2005 in Banjul, The Gambia, the African Commission considered the communication and decided to be seized of it.

28. By *note verbale* dated 8 December 2005, the Secretariat transmitted a copy of the communication to the respondent state by DHL and requested it to forward its submissions on admissibility within three months. The complainant was also requested to send his submissions on admissibility within three months.

29. By letter and *note verbale* dated 20 March 2006, the parties to the communication were reminded to forward their written submissions on admissibility of the communication.

30. On 3 April 2006, the Secretariat received submissions on admissibility of the communication from one Gabriel Shumba. By letter dated 12 April 2006, the Secretariat of the African Commission wrote to Gabriel Shumba informing him that the communication had been brought before the African Commission by Michael Majuru who had never made any indication to the African Commission that Gabriel

Shumba could make representations on his behalf. This letter was also copied to the complainant - Michael Majuru.

31. As at the 40th ordinary session there had been no reply from the complainant. The communication was therefore deferred to the 41st ordinary session pending the reply of the complainant and Mr Shumba, as well as the respondent state's submission on admissibility.

32. By letter and *note verbale* dated 11 December 2006, written to the complainant and respondent state respectively, the parties were informed by the Secretariat, about the decision of the African Commission during its 40th session, to consider the admissibility of the communication during its 41st session. The parties were asked to send their submissions on admissibility within three months of receiving the letters.

33. The complainant sent an email on 18 December 2006, confirming that Zimbabwe Exiles Forum to which Gabriel Shumba is the Executive Director are his agents in the matter and that the Secretariat should acknowledge submissions made by them.

34. By *note verbale* dated 4 January 2007, the Secretariat reminded the respondent state of the Commission's decision during its 40th ordinary session, and asked them to make their submissions on admissibility within 3 months of receipt of the notification. Another reminder by way of a *note verbale* dated 10 April 2007 was also sent to the respondent state.

35. On 24 April 2007, the Secretariat received the respondent state's submission on admissibility. It was forwarded to the complainant by email and he was asked to make additional submissions (if any), in order to address some important points which were raised by the respondent state in its submission.

36. During its 41st ordinary session, the African Commission decided to defer consideration of the communication to its 42nd ordinary session for its decision on admissibility.

37. By letter ACHPR/LPROT/COMM/308/2005/ZIM/TN dated 20 July 2007 and by *note verbale* ACHPR/LPROT/COMM/308/2005/ZIM/RE, with the same date, the parties were informed of the decision of the African Commission to defer consideration of the communication to its 42nd ordinary session.

38. At its 42nd ordinary session held in Brazzaville, Republic of Congo, the Commission considered this communication and decided to defer further consideration into the 43rd ordinary session due to lack of time.

39. By *note verbale* of 19 December 2007 and letter of the same date, the Secretariat of the Commission notified both parties of the Commission's decision.

## Summary of complainant's submission on admissibility

40. The complainant submitted that he has local standing before the African Commission as the communication is brought by himself, a citizen of Zimbabwe, the respondent state in this matter. Regarding compatibility, the complainant submitted that the communication raises a *prima facie* violation of the African Charter committed by the respondent state. He submitted further that the evidence he has submitted reveals that the communication is not based exclusively on news disseminated by the mass media, adding that it is based on first hand evidence – including reports by reputable human rights organisations.

41. On the exhaustion of local remedies, the complainant submitted that the onus is on the state to demonstrate that remedies are available, citing the Commission's decisions in the cases of *Rencontre Africaine pour la Défense des Droits de l'Homme v Zambia* [(2000) AHRLR 321 (ACHPR 1996)] and *Jawara v The Gambia* [(2000) AHRLR 107 (ACHPR 2000)]. The complainant added that the remedy in his particular circumstance is not available because he cannot make use of it. That he was forced to flee Zimbabwe for fear of his life and that of his immediate family, because of his work as a judge of the Administrative Court. That he fled to the Republic of South Africa following threats of arrest and unspecified harm by the respondent state.

42. The complainant drew the Commission's attention to its decision on *Rights International v Nigeria* [(2000) AHRLR 254 (ACHPR 1999)], 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 concluded by noting that considering the fact that he was no longer in the respondent state's territory where remedies could be sought, and that he fled the country against his will due to threat to his life, remedies could not be pursued without impediments.

43. The complainant also challenged the effectiveness of the remedies noting that remedies are effective only where they offer a prospect of success. He claimed the respondent state's reaction to court rulings that go against it is well documented by reputable international and African NGOs, noting that the respondent state treats court rulings that go against it with indifference and disfavour, and that he does not expect that in this case any decision of the court would be adhered to. He said there was a tendency in the respondent state to ignore court rulings that went against it and added that the Zimbabwe Lawyers for Human Rights had documented at least 12 instances where the state had ignored court rulings since 2000. He cited the ruling of the High Court in the *Commercial Farmers Union*, the *Mark Chavunduka* and *Ray Choto* cases, where, in the latter case,

the duo were allegedly abducted and tortured by the army. He concluded that given the prevailing circumstances and the nature of his complaint and the respondent state's well publicised practice of non-enforcement of court decisions, his case had no prospect of success if local remedies were pursued and according to him, not worth pursuing. Finally, the complainant submitted that he could not have exhausted local remedies as any such exhaustion would have to comply with the States Liabilities Act which prevents the complainant from suing the respondent state after the expiration of two months of the date of the incident complained of, if no prior notice has been given.

44. The complainant further submitted that the communication was submitted 22 months after the violation because he hoped that the situation in the country would improve to enable him to utilise domestic remedies. He said there is instead a deterioration of the situation and hope of improvement is highly unlikely in the near future, adding that 'continuing to wait whilst the complainant is undergoing tremendous psychological torture and suffering attributable to his persecution will undoubtedly cause irreparable harm'. The complainant added that since he fled to South Africa he has been undergoing psycho-therapy and was not in a position to submit his communication to the Commission.

45. The complainant indicated other reasons that prevented him from submitting his complaint on time, including the fact that the judiciary abides by a code of conduct in terms of which they do not ordinarily speak out and take positions against the establishment, noting that out of eight or so members who have left Zimbabwe because of persecution, he is the only one who was speaking out. He added that he was afraid for the lives of members of his immediate family that were at risk of persecution because of him and that he was unable to submit immediately for want of resources and facilities, noting that the submission was made possible through the assistance and support of well wishers.

46. Finally, complainant further submitted that the communication had not been before any other international body for settlement as required by article 56(7).

### **Respondent state's submission on admissibility**

47. The respondent state briefly restated the facts of the communication and indicated that it will attend to the matters of fact, pertaining to the complaint 'in order to put the communication in proper perspective'. The state submitted that the complainant was appointed to the Office of Administrative Court President in terms of section 79 of the Constitution of Zimbabwe, read together with the Administrative Court Act. The state added that while performing his

functions as a magistrate, presidents of the Administrative Court are not judges, noting that in essence, the complainant was not a judge.

48. According to the state, the complainant was supposed to be in a court in Bulawayo, but due to his poor health and his relationship with the Minister of Justice, he was appointed to the Administrative Court in Harare. The state noted that complainant was a sick man throughout his whole duration at the court and added that 'in fact from the time of his appointment as a Court President, the complainant used to travel to South Africa to seek medical attention'.

49. The state claims that complainant applied for two weeks vacation from 9 to 31 December 2003 and went to South Africa for medical attention. That he then tendered his resignation on 14 January 2004. The state observed that even though the letter has a Zimbabwean address, an examination of the delivery slip showed that it had been dispatched from South Africa. The state concluded that the above circumstances which show how complainant left the country do not amount to forced flight as he claims.

50. The state questioned why complainant would take steps to regularise his absence from office by applying for vacation leave and tender his resignation to the Minister who was threatening him. Without producing any document, the state added that it is apparent from the documents available that he was maintaining dialogue with a government which he claims was persecuting him. The state observed further that the letter of resignation even showed the address where the complainant was residing and 'assuming the government of Zimbabwe really wanted his life, it would have used the address he had volunteered to track him'. The state concluded by stating that the truth is that 'complainant was never threatened by anyone, anywhere both within and outside Zimbabwe'.

51. On the admissibility of the communication, the state argued that the communication be declared inadmissible for non-compliance with the provisions of article 56(2), (5) and (6) of the Charter.

52. The state argued that the communication is not compatible as required by article 56(2) of the Charter, as it makes general allegations without substantiating, adding that, for a complaint to be compatible with the Charter or the Constitutive Act, it must prove a *prima facie* violation of the Charter. According to the state, the facts raised in the communication do not raise any violation of the Charter, noting that 'basically the facts and issues in dispute do not fall within the *rationae materiae* and *rationae personae* of the jurisdiction of the Commission'.

53. On the exhaustion of local remedies under article 56(5), the state submitted that local remedies were available to the complainant, citing section 24 of the Constitution of Zimbabwe which provides the course of action to be taken where there is human rights



violation. The state added that there is no evidence to prove that the complainant pursued local remedies. The state further indicated that in terms of Zimbabwe 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.

54. On the effectiveness of the remedies, the state submitted 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.

55. The state dismissed the complainant's argument that his case is similar to those brought by Sir Dawda Jawara against The Gambia and Rights International (on behalf of Charles Baridorn Wiza) against Nigeria, adding that in the latter cases, there was proof of real threat to life. The state went further to indicate instances where the government has implemented court decisions that went against it.

56. The state further indicated 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 and the Supreme Court Act permit any person to make an application to either court through his/her lawyer. The state added 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 concluded that the complainant is not barred from pursuing remedies in a similar manner.

57. The state further submitted that since his resignation, the government of Zimbabwe continues to pay the complainant his pension benefits and argued that the excuse raised by the complainant of lack of resources to enable him submit his complaint on time is therefore without merit, adding that he could have instructed his counsel in Zimbabwe to attend to his claim on his behalf.

58. According to the state, the complainant sought to mislead the Commission by claiming that under the State Liabilities Act, claims against the state are prescribed within a period of sixty days. The state indicated that section 6 of the Act is clear that the sixty days is in respect of a notice of intention to sue. The Act prescribes that a summons against a state in certain matters must be delivered sixty days after the notice of intention to sue, and according to the state, this would actually work well for the complainant, adding that the period of proscription of claims is three years and complainant's claim was not yet three years and thus not proscribed.

59. The state also submitted that the complaint does not conform to article 56(6) of the Charter indicating that the 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 constitute 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 six months.

60. The state argued that the communication was submitted 22 months after the alleged violation, which according to the state 'was filed well out of time'. On complainant's submission that he had been seeking psychotherapy treatment, the state argued that complainant had been the centre of attraction in South African since 2004, demonising the respondent state, adding that articles published by complainant in the South African press do not show someone with a psychological ailment. The state added that no proof had been given of the alleged treatment or an expert diagnosis of how such condition was acquired. On complainant's claim that he had no resources, the state argued that he had his pension benefits which he could have used to submit his complaint to the Commission.

61. The state concluded 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.

## Admissibility

### Competence of the African Commission

62. In the present communication, the respondent state raises a 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 thus challenges the competence of the African Commission to deal with this communication. The Commission will thus, first deal with the preliminary issue of its competence raised by the respondent state.

63. Black's law dictionary defines *rationae materiae* 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'.

64. Given the nature of the allegations contained in the communication, such as 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 violation, and as such, it has competence *rationae materiae* to deal with the matter, because the communication alleges violations to human rights 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 regards 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 state have *locus standi* before the Commission, and the Commission thus has competence *rationae personae* to examine the communication.

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

### **African Commission's decision on admissibility**

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

67. In the present communication, the complainant avers that his complaint meets the requirement under article 56(1)-(4), (6) and (7). He admits that he did not attempt to comply with the requirement provided under article 56(5) dealing with the exhaustion of local remedies, but added that given the nature of his case, and the circumstances under which he left the respondent state, and is living in South Africa, the exception rule under this sub-section of article 56, should be invoked.

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

69. The African Commission will thus examine each of the provisions under article 56 of the African Charter, whether it is disputed or not, as the African Commission has a responsibility to ensure that every requirement in article 56 has been fulfilled before admitting a communication.

70. The 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. Thus, declaring a communication admissible does not mean the state party concerned has violated the provisions of the charter. It simply means that the communication meets the requirements necessary for it to be considered on the merits. 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 one of the requirements, the Commission must pronounce itself on the contentious issues between the parties, as well as the non-contentious issues.

71. 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 Michael Majuru, 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.

72. Article 56(2) of the African Charter provides that a communication must be compatible with the Charter of the OAU (now Constitutive Act of the African Union) 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. 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.

73. Compatibility denotes 'in compliance' or 'in conformity with' or 'not contrary to' or 'against'. In the present communication, the complainant alleges among others, violations of his right to personal integrity and being subjected to intimidation, harassment and psychological torture. He alleges further that agents of the intelligence service of the respondent state constantly harassed him and prevented him from exercising his duties freely. 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 the right to work under satisfactory condition as stipulated in the Charter. In the jurisprudence of this Commission, complainants 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. That, in the view of the Commission, has been established in this case. Based on the above, the African Commission is satisfied that the requirement of article 56(2) of the African Charter has been sufficiently complied with.

74. Article 56(3) of the Charter provides that a communication 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 (now the African Union). In the present case, the communication sent by the complainant, does not, in the view of the African Commission, contain any disparaging or insulting language, and as a result of this, the requirement of article 56(3) has been fulfilled.

75. 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 gives an account of his personal experience with the law enforcement agents of the respondent state. As a result of this, the requirement of article 56(4) has also been met.

76. Article 56(5) of the Charter provides that a communication will be admitted only after all local remedies have been exhausted. The respondent state contends that the complainant has not brought his case before the courts of the state in compliance with this provision of the Charter. 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.

77. 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 judicial system. This prevents the international tribunal from acting as a court of first instance, rather than as a body of last resort.

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

79. 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.

80. The complainant in the present communication claims that he left his country out of fear for his life due to intimidation, harassment and undue influence in the exercise of his duties. The complainant has also alleged a history of non-compliance with the orders of the court of the respondent, and alleges that a human rights NGO in Zimbabwe – the Zimbabwe Lawyers for Human Rights, has documented 12 cases since the year 2000, where the state has ignored court rulings that go against it. According to the complainant, it is noteworthy that although local remedies may be available in the respondent state, there is no assurance of its effectiveness or its implementation due to the fact that if the court rules in favour of the complainant there is no guarantee that the ruling will be complied with by the state.

81. The complainant cited the African Commission's decisions in the *Jawara* case and the cases of *Abubakar v Ghana* [(2000) AHRLR 124 (ACHPR 1996)] 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 and were in fact residing outside their country at the time the communications were brought before the Commission.

82. Having studied the complainant's submissions, and comparing it with the above cases cited in support of his claim, this Commission is of the opinion that the above cases cited by the complainant 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. Mr Jawara 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. He further alleged the abolition of the Bill of Rights as contained in the 1970 Gambia Constitution by Military Decree 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.

83. 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, ‘it would be an affront to common sense and logic to require the complainant to return to his country to exhaust local remedies’.

84. In the *Abubakar* case, it should be recalled that Mr Alhassan Abubakar was a Ghanaian citizen who was arrested by the Ghanaian authorities in the 1980s for allegedly cooperating 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.

85. In the early part of 1993, the 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.

86. 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 to 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 to 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

Magistrate 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.

**87.** In this case, the African Commission declared the communication admissible on grounds that there was 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 ... 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.

**88.** The present communication brought by Mr Michael Majuru should also be differentiated from *Shumba v Zimbabwe*. In the Shumba case, the complainant 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 an 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 (CIO) 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.

**89.** The complainant 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 claimed 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 the medical report describing the injuries found on his body. Following his interrogation, at around 7 pm of the same day, the complainant was unbound and forced to write several statements implicating himself 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.

90. In the above cases, 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 Commission observed that ‘it would be reversing the clock of justice to request the complainant to attempt local remedies’.

91. In the communication under consideration, however, Mr Michael Majuru alleges that he fled the country for fear of his life, that he was intimidated and harassed by the Minister of Justice and by suspected state agents. He also indicated that he received

a telephone call from a sympathetic member of the legal fraternity and the police that the respondent state was fabricating a case against him and that he was to be arrested and incarcerated on unspecified charges as punishment for defying the respondent’s orders.

92. In this communication, it is clear that the complainant has simply made general accusations and has not corroborated his allegations with documentary evidence, sworn affidavits or testimonies of others. He claims the Minister sent an instruction through a colleague of his but there is no way of ascertaining this fact. The applicant was the President of the Administrative Court, and has not shown how the instruction purportedly sent by the Minister through the complainant’s colleague, who the Commission is not told the kind of influence he had over the complainant, could have or did intimidate him. Apart from the direct telephone call the complainant claims he received from the Minister on 23 October and 24 November 2003, all the alleged threats, intimidations and harassment he claims, were perpetrated by persons he suspects were government agents. Most of his allegations are unsubstantiated. For example, he indicated in paragraph 2.5.4.7 of his submissions that ‘the Minister expressed his displeasure with the said decision and further attempted to unduly influence and/or threaten the complainant’. He fails to show how this attempted influence or threat by the Minister was carried out.

93. It is further observed by the Commission that the alleged threat or pressure claimed by the complainant to have been meted by Enoch Kamushinda, who the complainant himself refers to as a suspected Central Intelligence Organisation (CIO) operative, has not been substantiated; neither has the purported pressure and entrapment alleged to have been made by Mr Ben Chisvo, who according to the complainant, is a suspected CIO informer. Furthermore, the complainant alleged he received a telephone call from a sympathetic member of the legal fraternity and the police that the respondent state was fabricating a case against him, and that he was to be arrested and incarcerated on unspecified charges as punishment for defying the respondent's orders. All the above allegations are not substantiated. Take the latter for example, what if the 'sympathetic member of the legal fraternity' was a hoax? What if he was acting on his own or wanted to benefit from the misfortune of the complainant? His or her name is not even known.

94. It is not possible for the Commission to determine the level of intimidation or harassment that is needed to instil fear in a person, to force that person to flee for their life. However, in the instant case, there is no concrete evidence to link the complainant's fear to the respondent state.

95. It is therefore the opinion of the Commission that the complainant has not sufficiently demonstrated that his life or those of his close relatives were threatened by the respondent state, forcing him to flee the country, and as such, cannot hold that the complainant left the country due to threats and intimidation from the state.

96. However, the question is, having left the country, could the complainant still have exhausted local remedies or better still is he required to exhaust local remedies?

97. 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', 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.' According to the African 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. In the present communication, the question to be asked is whether there were remedies available to the complainant even from outside the respondent state?

98. 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 cited the *Ray Choto* and

*Mark Chavhunduka* case where 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 concluded that the complainant is not barred from pursuing remedies in a similar manner. The state further argues that since his resignation, the government of Zimbabwe continues to pay the complainant his pension benefits which he could have used to instruct his counsel in Zimbabwe to attend to his claim on his behalf.

99. 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.

100. The African Commission holds the view that having failed to establish that he left the country involuntarily, and in view of the fact that in Zimbabwe law, one need not be physically in the country to access local remedies, the complainant cannot claim that local remedies were not available to him.

101. 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* and the *Ray Choto* and *Mark Chavhunduka* cases, and added that the Zimbabwe Lawyers for Human Rights has documented at least 12 instances where the state has ignored court rulings since 2000.

102. The Rules of Procedure of the African Commission provide that '[t]he Commission shall determine questions of admissibility pursuant to article 56 of the Charter'. Generally, the Rules require applicants 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. The Human Rights Committee 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 itself, demonstrate the lack of exhaustion of all effective remedies. In the Committee's decision on *A v Australia*, it 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'. In *Article 19 v Eritrea* [(2007) AHRLR 73 (ACHPR 2007)], 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 aspersions on the ability of the domestic remedies of the state due to isolated incidences'. 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 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’.

**103.** 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.

**104.** Article 56(6) of the Charter provides that ‘communications received by the Commission will 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 with the matter ...’. The respondent state contends that the present communication was not submitted on time by the complainant, as required by the African Charter.

**105.** The present communication was received at the Secretariat of the Commission on 8 November 2005 (even though dated 2 November 2005). It was considered for seizure by the Commission in November 2005, that is, two years after the complainant allegedly fled from the country. The complainant never approached the courts of the respondent state. He left the country in December 2003 and only seized the Commission twenty two months later. The complainant submits without substantiating that he had been undergoing psychotherapy while in South Africa, and also indicated that he did not have the financial means to bring the case before the Commission. He also stated that he had hoped the situation in the country would improve to enable him utilise domestic remedies but there was instead a deterioration.

**106.** The Commission notes that the complainant is not residing in the respondent state and notes further that the complainant indicated that he was prevented from submitting his complaint on time, because the judiciary abides by a code of conduct in terms of which they do not ordinarily speak out and take positions against the establishment, noting that out of eight or so members who have left Zimbabwe because of persecution, he is the only one who was speaking out. He added that he was afraid for the lives of members of his immediate family that were at risk of persecution because of him.

**107.** The state on its part argues that ‘no cogent reasons have been given for the failure to pursue local remedies or remedies before the Commission within a reasonable time’. The state submits that the communication was submitted 22 months after the alleged violation, which according to the state ‘was filed well out of time’. On complainant’s submission that he had been seeking psycho-therapy treatment, the state argued that complainant had been the centre of attraction in South Africa since 2004 demonising the respondent state, adding that articles published by the complainant do not show

someone with a psychological ailment. The state added that no proof had been given of the alleged treatment or an expert diagnosis of how such condition was acquired. On complainants' claim that he had no resources, the state argued that he had his pension benefits which he could have used to submit his complaint to the Commission.

**108.** The Charter does not provide for what constitutes 'reasonable period'. However, the Commission has the mandate to interpret the provisions of the Charter and in doing so, it take cognisance of its duty to protect human and people's rights as stipulated in the Charter. The provisions of other international/regional instruments like the European Convention on Human Rights and Fundamental Freedoms and the Inter-American Convention on Human Rights, are almost similar and state that they '... may only deal with the matter ... within a period of six months from the date on which the final decision was taken', after this period has elapsed the Court/Commission will no longer entertain the communication.

**109.** The Commission is urged in articles 60 and 61 of the Charter to consider as subsidiary measures to determine the applicable principles of law 'other general or special international instruments, laying down rules expressly recognised by member states of the African Union ...'. Going by the practice of similar regional human rights instruments, such as the Inter-American Commission and Court and the European Court, six months seem to be the usual standard. This notwithstanding, each case must be treated on its own merit. Where there is good and compelling reason why a complainant could not submit his/her complaint for consideration on time, the Commission may examine the complaint to ensure fairness and justice.

**110.** In the present communication, the arguments advanced by the complainant as impediments for his late submission of the complaint do not appear convincing. The complainant does not supply the Commission with medical proof to indicate he was suffering from mental problems, he does not indicate what gave him the impression that things might improve in Zimbabwe, after he himself noted in his complaint that since 2000 there has been documented evidence to show that things were deteriorating, including the fact that the government does not respect court judgments. Even if the Commission accepts that he fled the country and needed time to settle, or that he was concerned for the safety of his relatives, 22 months after fleeing the country is clearly beyond a reasonable man's understanding of reasonable period of time. The African Commission thus holds that the submission of the communication was unduly delayed and thus does not comply with the requirements under article 56(6) of the Charter.

**111.** Article 56(7) of the African Charter 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.

112. The African Commission finds that in the present communication, that is, communication 308/05 – *Michael Majuru v Zimbabwe*, the complainant has not complied with sub-sections (5) and (6) of article 56 of the African Charter, and thus declares the communication inadmissible.

# **SUB-REGIONAL COURTS**





# ECOWAS COMMUNITY COURT OF JUSTICE

## Manneh v The Gambia

(2008) AHRLR 171 (ECOWAS 2008)

*Chief Ebrimah Manneh v The Republic of The Gambia*

Community Court of Justice of the Economic Community of West African States (ECOWA), suit ECW/CCJ/APP/04/07, judgment ECW/CCJ/JUD/03/08, 5 June 2008

Judges: Benin, Daboya, Tall

*Arbitrary detention of journalist; calculation of damages*

**Evidence** (failure of state party to respond to allegations, 4, 6, 10, 20, 28; witnesses, 7)

**Admissibility** (admissibility requirements before the ECOWAS Court, 16)

**Fair trial** (trial within reasonable time, 21, 22; presumption of innocence, 26)

**Personal liberty and security** (arbitrary arrest and detention, 22, 23, 27, 41)

**Remedies** (compensation, 29-32, 36, 39, 40; release, 44)

**Interpretation** (international standards, 33)

1. The plaintiff is a community citizen, a national of the Republic of The Gambia. The defendant is a member state of the Economic Community of West African States (ECOWAS).

2. Femi Falana with Chinedum Agwarambo (Mrs) and Sola Egbeyinka appeared for the plaintiff. Defendant failed to enter an appearance.

3. The plaintiff has come to this Court seeking the following reliefs:

(a) A declaration that his arrest by the National Intelligence Agency of The Gambia at the premises of *The Daily Observer* in Banjul on 11 July, 2006, is illegal and unlawful as it violates article 6 of the African Charter on Human and Peoples' Rights which guarantees his human right to personal liberty.

(b) A declaration that his detention on 11 July 2006, and his continual detention since then without trial is unlawful and a violation of his right

as guaranteed by articles 4, 5 and 7 of the African Charter on Human and Peoples' Rights.

(c) An order mandating the defendant and/or its agents to immediately release the plaintiff from custody.

(d) US\$ 5 000 000 (five million United States dollars) being compensation for the violation of the applicant's human rights to dignity, liberty and fair hearing.

4. The defendant was first served on 31 May 2007 with the application initiation the proceedings through its High Commission in Abuja, the capital city of the Federal Republic of Nigeria, where the Court has its seat and also by registered mail. The defendant failed to file a defence within the thirty day period stipulated for the filing of a defence without assigning any reasons for the failure. The Court served a hearing notice on the defendant through its High Commission in Abuja and by a registered mail on 14 June 2007. The defendant failed to appear in Court on 16 July 2007 when the case was due for hearing. The Court adjourned the case to 26 September 2007 to enable the defendant to enter an appearance and defend the action. A hearing notice was served on the defendant on 19 July 2007 through its High Commission in Abuja and by registered mail. Notwithstanding all the efforts of the Court in getting the defendant to take part in the proceedings, the defendant failed to enter an appearance or defend the action. Hence the case was heard on 26 September 2007 without the participation of the defendant. However, by a letter dated 23 August 2007, addressed to the President of the ECOWAS Commission, a copy of which was received by the Court on 28 September 2007, the defendant had decided not to 'participate or attend proceedings fixed for 26 September 2007'. Due to a change in the composition of the panel members on the case, the case had to be tried *de novo*. A hearing notice was accordingly sent to the defendant but again they failed to enter appearance on 26 November 2007 when the case was heard. Consequently the case proceeded to trial without the participation of the defendant.

### Summary of the facts

5. According to the facts contained in the plaintiff's application, (i) the plaintiff is a community citizen by virtue of his nationality of the Republic of The Gambia. (ii) The plaintiff is a journalist with the *Daily Observer* newspaper based in Banjul, The Gambia. (iii) The Plaintiff was arrested by two officials of the National Intelligence Agency of The Gambia at the *Daily Observer's* premises in Banjul on 11 July 2006 without any warrant of arrest. (iv) The reasons for his arrest have not been disclosed by the government of The Gambia. (v) Efforts by his family, friends and lawyers to know his whereabouts or have access to him have proved futile. (vi) Since his arrest the plaintiff has been detained at the National Intelligence Agency Headquarters, State Central Prison, Kartong, Police Station, Sibanor Police Station, Kuntaur Police Station and Fatoto Police Station.

(vii) The plaintiff has not been accused or charged with the commission of any criminal offence. (viii) The conditions under which the plaintiff is detained are dehumanising as detainees are made to sleep on bare floor in overcrowded cells. (ix) The plaintiff has been held in solitary confinement and denied access to adequate medical care. (x) The plaintiff's counsel's letter dated 16 March, 2007 demanding for the release of the plaintiff was ignored by the defendant.

6. In line with article 43 of the Court's Rules of Procedure, the Court demanded that evidence should be introduced to prove the facts, notwithstanding the absence of the defendant.

### Evidence of witnesses

7. On 26 November 2007 during the hearing the plaintiff called in three witnesses who testified on his behalf. The first witness, (PW1) Mr Usman S Darboe, a native of the Republic of The Gambia and the news editor of the *Daily Observer* newspaper said he was present at the time the plaintiff was arrested. He stated that he has personally known the plaintiff for well over 17 years and has worked with him for seven years. According to him, on 11 July 2006, while they were in the office, the Gambian police came and arrested the plaintiff. He further stated that he has not seen the plaintiff since his arrest, but as a journalist he made investigations about him in the course of his work and was informed that the plaintiff was detained at Mile 2 Central Prison, Banjul. PW1 also said that to the best of his knowledge the plaintiff has not been charged with any criminal offence. PW1 stated that sometime during the latter part of July 2006 it came to his knowledge that the plaintiff had been moved from the National Intelligence Agency (NIA) to Fatoto police station.

8. The second witness (PW2), Mr Yaya Dampha, is a journalist with the *Foroyaa* newspaper based in The Gambia. He stated that he knew the plaintiff as both of them worked as journalists in The Gambia. He mentioned that he does not know the whereabouts of the plaintiff presently but that he was informed of his arrest in July 2006. PW2 continued that he last saw the plaintiff in December 2006 after his office had a tip off that the plaintiff had been moved from the Central Prison in Banjul to an unknown location. He then embarked on a search mission and visited several prisons. He eventually saw the plaintiff in Fatoto police station when the plaintiff was being escorted back to his cell after a meal. Mr Yaya Dampha further testified that the *Foroyaa* newspaper published the arrest and detention of the plaintiff. This was tendered as exhibit 'A'. The publication did not elicit any reaction from either the police or National Intelligence Agency.

9. The third witness (PW3), Professor Kwame Karikari, is a native of the Republic of Ghana and a professor with the University of

Ghana, Legon. He is the executive director of an organisation called the Media Foundation for West Africa which has correspondents in each of the fifteen countries of ECOWAS. They monitor issues that concern the media and press freedom. Professor Kwame Karikari does not know the plaintiff in person, but as a journalist, who was working with the *Daily Observer* in The Gambia. The organisation received information that the plaintiff had been arrested and detained without any criminal charge(s) preferred against him in July 2006. This information was confirmed when they contacted other media men in The Gambia. The Media Foundation contacted lawyers in The Gambia to facilitate the release of the plaintiff but they were advised that they could not obtain justice in The Gambia so they should pursue the matter before the Community Court of Justice, ECOWAS.

10. The evidence of these witnesses stood uncontroverted. Even after the evidence of these witnesses, the Court by a ruling, gave another opportunity to the defendant to attend the next session to cross-examine the witnesses, and to present their side of the story, if they so desired, but they still failed or refused to attend. It is manifestly clear the defendant does not desire to be heard, so the trial proceeded in default.

11. The facts to the Court for determination are in respect of the violation of articles 2, 6 and 7(1) of the ACHPR, related to individual freedom, fair hearing and the prohibition of all forms of arbitrary detention.

## Issues for determination

### Issue 1: Whether the arrest and detention of the plaintiff is justified under the African Charter on Human and Peoples' Rights

12. The competence of the Community court of Justice in applications filed by individuals arises from articles 9(4) of the 1991 Protocol and 10(d) of the Supplementary Protocol on the Court of Justice. They provide:

Article 9(4) The Court has jurisdiction to determine cases of violation of human rights that occur in any member state.

Article 10(d) Access to the Court is open to individuals on application for relief for violation of their human rights.

These provisions enable an individual to access the Court directly in human rights issues, and to give the Court the competence to entertain such applications.

13. The application of the plaintiff was primarily premised on article 6 of the African Charter on Human and Peoples' Rights which reads as follows:

Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and

conditions previously laid down by law. *In particular, no one may be arbitrarily arrested or detained.* (Emphasis added).

14. Article 4(g) of the Revised Treaty of the Economic Community of West African States (ECOWAS) provides for the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights.

15. The effect of article 6 of the African Charter on Human and Peoples' Rights as stated above is that no one shall have his right to liberty limited or restricted unless it is in accord with a law previously laid down. In other words, the law under which a person is arrested and/or detained must have been valid and in force, before or at the time of such arrest and/or detention. Plaintiff alleges that his rights under article 6 of the African Charter on Human and Peoples' Rights have been violated and therefore the intervention of this Court is justifiable under article 9(4) of the Protocol of this Court, as amended.

16. This Court in the case of *Alhaji Hammani Tidjani v Nigeria*, suit ECW/CCJ/APP/01/06, judgment delivered on 28 June 2007 held that the combined effect of article 9(4) of the Protocol of the Court, as amended, article 4(g) of the Revised Treaty and article 6 of the African Charter on Human and Peoples' Rights is that the plaintiff must invoke the Court's jurisdiction by (i) establishing that there is a right recognised by article 6 of the African Charter on Human and Peoples' Rights; (ii) that this right has been violated by the defendant; (iii) that there is no action pending before another international Court in respect of the alleged breach of his right; and (iv) that there was no previously laid down law that led to the alleged breach of abuse of his rights.

17. In this case, applicant alleges his rights have been violated under article 6 of the ACHPR and seeks an end to be put to it, and this is what was done by hearing the witnesses.

18. Plaintiff witness 1 (PW1) stated that he was present when the plaintiff was arrested by two security operatives of the Republic of The Gambia in the office of the *Daily Observer* newspaper where they both worked. PW1 further stated that though the policemen were not in official uniforms, he knew they were police officers because he personally knew one of them, one Corporal Sey, from the National Intelligence Agency.

19. Furthermore, the arrest of the plaintiff was confirmed by Professor Kwame Karikari, plaintiff witness 3 (PW3). He stated that his organisation, the Media Foundation for West Africa raised an 'alert' in order to get confirmation about the arrest of the plaintiff when it came to their notice. PW3 stated that the arrest of the plaintiff was confirmed. PW3 also stated that his organisation made the necessary enquiries in order to secure the release of the plaintiff

but they were told that it was impossible because of the conditions prevailing at The Gambia at the time. They were therefore advised to pursue the matter at the Community Court of Justice, ECOWAS. The conduct of the plaintiff which amounted to a criminal offence for which he was arrested was not disclosed to him, neither was he told of the law which made that conduct a crime. PW1 stated that plaintiff was held *incommunicado* after his arrest and has since been detained without trial, neither has he been charged with the commission of any criminal offence known to the law of the Republic of The Gambia.

20. Plaintiff witness 2 (PW2) in his evidence stated that he saw the plaintiff at the Fatoto police station during his visits to several police stations when his firm, *Foroyaa* newspaper, got a tip-off that the plaintiff had been moved from the Central Prison to an unknown destination. PW2 further stated that though they followed the case of the plaintiff and other detainees, they were not arraigned before court within the seventy-two hours stipulated by the Gambian Constitution for detainees to be brought before court, and that the plaintiff till date has not been brought before court to his knowledge. All these facts stand uncontroverted, and they appear credible so the Court accepts them.

21. Article 7 of the African Charter on Human and Peoples' Rights is very instructive with regards to the treatment of people once they have been arrested. Article 7(1) of the African Charter on Human and Peoples' Rights stipulates thus:

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

Article 7(1) clearly states that every individual shall have the right to have his cause heard and this comprises among other things the right to be presumed innocent until proven guilty by a competent court or tribunal, the right to defence, including the right to be defended by counsel of his choice and the right to be tried within a reasonable time by an impartial court or tribunal. From the evidence of PW1, the plaintiff has been denied the right to have his cause heard by an impartial court or tribunal as the defendant has failed to put him before such a competent impartial court or tribunal for his guilt or innocence to be established.

22. The plaintiff was arrested on 11 July 2006 and has since been detained without trial and no criminal offence known to the law of the Republic of The Gambia has been levelled against him for a period exceeding one year. Holding a person for over a year without trial will be an unreasonable period unless proper and distinct justification is provided.

23. From the foregoing, it is clear that the arrest and detention of the plaintiff is contrary to the rules enshrined in Articles 6 and 7(1) of the African Charter on Human and Peoples' Rights.

**Issue 2: Whether the plaintiff is entitled to have his human rights to the dignity of the person, personal liberty and freedom of movement restored**

24. The fundamental human rights of the individual have been guaranteed by various human rights instruments. Among the core rights guaranteed by these various human rights instruments, including the African Charter on Human and Peoples' Rights are the right to life and the integrity of the person, personal liberty, freedom from torture and other inhuman and degrading treatment and the right to political or any other opinion.

25. Article 2 of the African Charter on Human and Peoples' Rights affirms the recognition and protection of the basic rights of the individual. Article 2 states that

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

26. Article 6 of the African Charter on Human and Peoples' Rights clearly states that the individual shall have the right to his liberty and personal freedom, with the proviso that that right may only be limited or restricted for reasons and conditions previously laid down by law. It is clear from the provisions of article 6 of the African Charter on Human and Peoples' Rights that there is a presumption of innocence in favour of the liberty of the individual. Therefore, any infringement on the liberty of the individual must clearly be in conformity with reasons and conditions previously laid down by law, otherwise any such deprivation or limitation of the liberty of the individual cannot be sustained.

27. From the facts of the present application, which facts have not been disputed, the plaintiff was arrested without a warrant of arrest. The reason for the arrest of the plaintiff has not been communicated to him. He has been detained since his arrest without any criminal charges being levelled against him. He has not been arraigned before any court of competent jurisdiction in order to ascertain his guilt or innocence. This is clearly contrary to the provisions of articles 2 and 6 of the African Charter on Human and Peoples' Rights which dictate that every individual, regardless of race, ethnic group, colour, sex, religion, political opinion or other like distinction shall have the right to liberty and to the security of his person in the absence of any reasons and conditions previously laid down by law.

28. The defendant refused to appear to defend this claim. Since the defendant has failed to establish that the arrest and detention of the plaintiff was in accord with the provisions of any previously laid down law, the plaintiff is entitled to the restoration of his personal liberty and the security of his person.

### **Issue 3: Whether the plaintiff is entitled to monetary compensation in the sum of US\$ 5 000 000**

29. Compensation that is given to a party that has been wronged in a legal action is referred to as damages. Generally speaking, there are three kinds of damages: special damages, general damages, and punitive damages. Special damages are the enumerable or quantifiable monetary costs or losses suffered by the plaintiff. For example, medical costs, repair or replacement of damages property, lost wages, lost earning potential, loss of business, loss of irreplaceable items, loss of support, etc. Special damages have to be specifically pleaded and proved in order for them to be awarded. This is compensation for losses that can easily be quantified and proved. The loss of a plaintiff's income as a result of an unlawful detention for instance can easily be proved and claimed accordingly as a special damage. Where the amount claimed for damages is quantified in the claim, the plaintiff is required to introduce facts to justify it. However, the plaintiff failed to plead and prove any ground under which the amount ought to be awarded. In the absence of any proven losses which will justify the award of special damages, no special damages will be awarded the plaintiff.

30. General damages are items of harm or loss suffered, for which only a subjective value may be attached. Examples of this might be pain, physical suffering, emotional trauma or suffering, loss of companionship, loss of consortium, disfigurement, loss of reputation, loss or impairment of mental or physical capacity, loss of enjoyment of life, etc.

31. Generally, punitive damages are not awarded in order to compensate the plaintiff, but in order to reform or deter the defendant and similar persons from pursuing a course of action such as that which damaged the plaintiff. Punitive damages are awarded only in special cases.

32. Having concluded in issues 1 and 2, above, that the plaintiff's right to his personal liberty has been abused, the plaintiff is entitled to some damages for the wrongs that he has suffered. The amount of damages, however, is dependent on the facts of this application and the relevant rules governing the award of damages. Learned Counsel for the plaintiff prayed this honourable Court to award the sum of \$ 5 000 000 as compensation to the plaintiff for his unlawful arrest and detention. Counsel stated that the essence of this Court awarding such a substantial amount is to deter other member states of the



Community from engaging in violations of the human rights of Community citizens contrary to their obligations under domestic and international law. Counsel urged this Court to award some punitive damages in favour of the plaintiff in order to deter governments of member states from infringing on the rights of Community citizens with impunity. However, as stated earlier, punitive damages are awarded only in limited circumstances as it is not awarded to compensate the plaintiff but to deter the defendant and others from very reprehensible behaviour.

33. Although this Court is not bound by the precedents of other international courts, it can draw some useful lessons from their judgments, especially when the issues involved are similar: in other words, such decisions can be of persuasive value to this Court.

34. The European Court of Human Rights has awarded damages to successful plaintiffs whose human rights were violated by various governments of the European Union. In *Selmouni v France* [2005] CHR 237, the European Court of Human Rights awarded damages to the plaintiff who established to the satisfaction of the Court that the treatment meted out to him by the French authorities amounted to torture, inhuman and degrading treatment contrary to the provisions of article 25 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

35. The European Court of Human Rights similarly awarded damages to the plaintiff in the case of *Cenbauer v Croatia* [2005] CHR 429 when the Court held that he had been treated in a way that violated article 25 of the European Convention on Human Rights.

36. Notwithstanding the fact that the European and the Inter-American Courts have been in existence for long, there is no record available to us that showed that any of them had awarded punitive damages in a human rights cause.

37. In the European Court of Human Rights, applicants first argued for the award of punitive damages in the case of *Silver and Others v United Kingdom*, 5 EHRR 347, 61 Eur Ct HR (Ser A). This case was referred to the Court in March 1981 by the European Commission of Human Rights. The case originated in seven applications against the United Kingdom of Great Britain and Northern Ireland lodged with the Commission on various dates between 1972 and 1975. The applicants complained that the stopping by the prison authorities of a number of letters written by or addressed to them constituted a violation of articles 8 and 13 of the European Convention of Human Rights and asked for general damages for violation of their rights. In addition, three of the applicants claimed punitive damages against the government of the United Kingdom. Among the issues for determination by the Court was whether the acts complained of by the applicants amounted to a violation of their rights under articles 8

and 13 and whether the applicants were entitled to the damages sought, including that of the punitive damages. By judgment of 25 March 1983, the Court held that the stopping by the prison authorities of a number of letters written by or addressed to the applicants had given rise to violations of articles 8 and 13 of the Convention. The Court, however, denied the request for punitive damages, without discussing the merits or otherwise in the claim. The attitude of the Court in the case cited above clearly indicated that the Court was not in favour of awarding punitive damages in a human rights cause such as the one that was before them.

**38.** In *Anufrijeva and Another v Southwark London Borough Council*; *R (Mambakasa) v Secretary of State for the Home Office*; *R(N) v Secretary of State for the Home Office* [2004] QB 1124 it was held that

Where an infringement of an individual's human rights has occurred, the concern will usually be to bring the infringement to an end and any question of compensation will be of secondary, if any, importance.

This point was emphasised in *R (Greenfield) v Secretary of State for the Home Department* [2005] UKHL 14, where Lord Bingham noted that the focus of the Convention is on the protection of human rights and not the award of compensation.

**39.** Thus it is clear that the object of human rights instruments is the termination of human rights abuses and in cases where the abuse has already taken place, restoration of the rights in question. Compensation is awarded in order to ensure 'just satisfaction' and no more. It is not the object of human rights instruments, including the African Charter on Human and Peoples' Rights on which this application is premised to award punitive damages against offenders of the instruments. This by no means deprives a successful human rights victim from claiming monetary compensation in appropriate cases, particularly where special damages are pleaded and proven at the trial.

**40.** With regard to general damages, the peculiar circumstances of this case would be taken into account. Plaintiff was arrested on 11 July 2006 and has since been detained. He has not been charged with any criminal offence and has not been put to trial before any court of competent jurisdiction. He has not even been told of the reason for his arrest. He has been held *incommunicado*. Plaintiff is a journalist who was working and living a normal life before he was arrested and detained. The Court considers an award of compensation to be justified in these circumstances.

## Decision

41. The Court has found that the applicant was arrested on 11 July 2006 by the police force of The Gambia and has since been detained *incommunicado*, and without being charged. He has not been told the reasons for his arrest, let alone the fact that it was in accord with a previously laid down law. The Court holds these acts clearly violate the provisions of articles 2, 6 and 7(1) of the African Charter on Human and Peoples' Rights. Furthermore, in view of the fact that these violations of applicant's human rights were caused by the defendant, which refused to appear in Court, it entitles the applicant to damages. And the Court considers that this violation should be terminated and the dignity of the applicant's person is to be restored.

## Costs

42. The plaintiff is adjudged to be entitled to the costs of this application to be borne by the defendant, as will be assessed, under and by virtue of article 66 of the Court's Rules of Procedure.

## Reasons

43. For these reasons, the Community Court of Justice, sitting in public after hearing the applicant, in the absence of the defendant who refused to appear, in first and last resort, considering article 4(g) of the Revised Treaty, as well as articles 2, 6 and 7(1) of the African Charter on Human and Peoples' Rights, and also the Supplementary Protocol of the Court and the Court's Rules of Procedure, declares this application to be admissible in human rights and the Court enters judgment for the plaintiff against the defendant, who is liable for this violation.

## Orders

44. Consequently, the Court orders:

- That the Republic of The Gambia releases Chief Ebrimah Manneh, plaintiff herein from unlawful detention without any further delay upon being served with a copy of this judgment;
- That the human rights of the plaintiff be restored, especially his freedom of movement;
- The Republic of The Gambia pay the plaintiff the sum of one hundred thousand United States dollars (US\$100 000) as damages;
- The defendant to pay the costs of this action to be assessed.

# Koraou v Niger

(2008) AHRLR 182 (ECOWAS 2008)

*Hadijatou Mani Koraou v The Republic of Niger*

Community Court of Justice of the Economic Community of West African States (ECOWAS), suit ECW/CCJ/APP/0808, judgment ECW/CCJ/JUD/06/08, 27 October 2008

Judges: Sanogo, Nana, Tall

Original judgment in French. Official translation

*Woman held in slavery for nine years*

**Admissibility** (no need to exhaust local remedies, 39-45, 49; *lis pendens* 49-53; claim for compensation only raised during course of proceedings, 94)

**Jurisdiction** (not consider laws in the abstract, 60, 61)

**Equality, non-discrimination** (discrimination by private individual not attributable to the state, 71, 96)

**Slavery** (76-81; national judge obliged to take action, 82-84; inaction of state, 85, 86)

**Personal liberty and security** (arbitrary arrest and detention, 90, 91)

**Remedies** (compensation, 96)

1. The applicant, Hadijatou Mani Koraou, is a Niger national, and a citizen of the Economic Community of West African States (ECOWAS).
2. The applicant, present in court, is unemployed and resides at the village of Louhoudou, in the *department* (administrative division) of Konni. Her counsel is Abdourahaman Chaïbou-Nanzir (a professional partnership of lawyers), a legal firm registered with the Court of Appeal of Niamey, in the Republic of Niger, and she is assisted by Mrs Helena Duffy and Mr Ibrahima Kane of Interights, London.
3. The defendant, the Republic of Niger, is a member state of the Economic Community of West African States (ECOWAS).
4. The defendant is represented by Mossi Boubacar Esq and Partners, lawyers registered with the Court of Appeal of Niamey, in the Republic of Niger.

5. The applicant brings a complaint against the defendant for violating her fundamental human rights, asks the Court to find such violation, and to sanction the defendant.
6. The defendant raised a preliminary objection of inadmissibility of the application.
7. The Court decided to join the preliminary objection to the merits, in accordance with article 87(5) of its Rules of Procedure.

### Presentation of the facts and procedure

8. In 1996, aged 12 years by then, the applicant, Hadijatou Mani Koraou of Bouzou customary background, was sold by the head of the Kenouar tribe, to El Hadji Souleymane Naroua of Hausa customary background, aged 46, for the sum of 240 000 CFA Francs.

9. This transaction was carried out within the context of *wahiya*, a practice obtaining in the Republic of Niger, which consists of acquiring a young girl, generally under the conditions of servitude, for her to serve both as domestic servant and concubine. A woman slave who is bought under such conditions is called a *sadaka*, or ‘the fifth wife’, that is to say, a woman outside those legally married (the number of which cannot exceed four, in accordance with the recommendations of Islam).

10. The *sadaka* generally carries out the domestic chores and caters for the ‘master’. The latter can, at any time, during the day or night, engage her in sexual relations.

11. One day, while she was working on her master’s fields, he came and pounced on her and sexually abused her. This initial, forced sexual act, was imposed on her under the aforesaid condition, at a time when she was still less than 13 years old. The applicant often became a victim of violent acts perpetrated by her master, in cases of presumed or real insubordination.

12. For about nine years, Hadijatou Mani Koraou served in the house of El Hadj Souleymane Naroua, carrying out all sorts of domestic duties and serving as a concubine for him.

13. On 18 August 2005, El Hadj Souleymane Naroua issued Hadijatou Mani Koraou with a certificate of emancipation (as a slave). This deed was signed by the beneficiary, the master, and countersigned by the chief of the village, who affixed his seal thereto.

14. Following the said deed of emancipation, the applicant decided to leave the house of the man, who not too long before then was her master. The latter refused to let her go, upon the grounds that she was and remained her wife. Nevertheless, upon the pretext of going to visit her sick mother, Hadijatou Mani Koraou finally left the house of El Hadji Souleymane Naroua.

15. On 14 February 2006, Hadijatou Mani Koraou brought her case before the Konni Civil and Traditional Court, to assert her desire to regain her total freedom and go and live her life elsewhere.

16. As regards the said request, the Konni Civil and Traditional Court, in its judgment No 6 of 20 March 2006, found ‘that there had never been a marriage in the proper sense of the word, between the applicant and El Hadji Souleymane Naroua, because there had never been the payment of any dowry, or any religious celebration of marriage, and that Hadijatou Mani Koraou was free to start her life all over with any person of her own choice’.

17. El Hadji Souleymane Naroua filed an appeal at the Konni High Court, against the judgment of the Konni and Traditional Court. By Ruling No 30, delivered on 16 June 2006, the Konni High Court reversed the contested judgment.

18. The applicant filed before the Judicial Chamber of the Supreme Court of Niamey, and appeal for the annulment of the latest decision, by asking for ‘the application of the law against slavery and slavery-related practices’.

19. On 28 December 2006, the Supreme Court, by judgment 06/06/Cout, quashed the Konni High Court ruling, on grounds of violation of article 5(4) of Law 2004-50 of 22 July 2004 in regard to the judicial set-up of Niger, without making any declaration on the question concerning Hadijatou Mani Koraou’s status as a slave. The matter was adjourned before the same court, differently composed, for re-examination.

20. Before proceedings were brought to a conclusion, Hadijatou Mani Koraou, who had returned to her paternal home, contracted a marriage with one Ladan Rabo.

21. Having learnt of the marriage of the applicant to Ladan Rabo, El Hadj Souleymane Naroua filed on 11 January 2007 a case of bigamy against her before the Konni Gendermerie Squad, who took down a statement of the case and transmitted it to the state prosecutor at Konni High Court.

22. By judgment No 107 of 2 May 2007, the criminal division of the Konni High Court sentenced Hadijatou Mani Koraou, her brother Koraou Mani and Ladan Rabo to six months imprisonment without remission and imposed a fine of CFA F 50 000 on each of them, in compliance with article 290 of the Penal Code of Niger, which punishes the offence of bigamy. In addition an arrest warrant was issued against them.

23. The same day, Hadijatou Mani Koraou filed appeal against the said judgment. Despite that, on 9 May 2007, Hadijatou Mani Koraou and her brother Koraou Mani were incarcerated at the Konni prison, in compliance with the arrest warrant issued against them.

24. On 17 May 2007, while Hadijatou Mani Koraou was still in detention, SPCA Chaïbi-Nanzir (a professional partnership of lawyers), Hadijatou Mani Koraou's counsel, filed a case before the state prosecutor at the Konni High Court, bringing a charge against Souleymane Naroua, for criminal offence of slavery, relying on article 270(2) and (3) of the Penal Code of Niger as amended by Law 2003-025 of 13 June 2003. The case, which was still pending, was being examined under number RP 22, RI 53.

25. Concurrent with these criminal proceedings, the Konni High Court, while adjudicating upon the case which was adjourned after being quashed by the Supreme Court, in Judgment No 15 of 6 April 2007, 'found in favour of Hadijatou Mani Koraou's divorce action; ... declared that she shall observe a minimum legal period of three months of widowhood before any remarriage'.

26. El Hadj Souleymane Naroua filed an appeal seeking the annulment of the last decision.

27. On 9 July 2007, while adjudicating on the appeal brought by Hadijatou Mani Koraou against the decision of the criminal division of the Konni High Court, the Criminal Chamber of the Court of Appeal of Niamey 'ordered in a preliminary ruling, the provisional release of the applicant from prison, together with her brother, ordered the automatic revocation of the arrest warrant issued against Ladan Rabo, and stayed examination of the merits pending the final decision of the divorce judge'.

28. On 14 September 2007, Hadijatou Mani Koraou seized the Community Court of Justice, ECOWAS, upon the basis of articles 9(4) and 10(d) of the Supplementary Protocol A/SP.1/01/05 of 19 January 2005 amending Protocol A/P.1/7/91 of 6 July 1991 on the Court, for the purposes of requesting the Court to:

- (a) Charge the Republic of Niger for violation of articles 1, 2, 3, 5, 6 and 18(3) of the African Charter on Human and Peoples' Rights;
- (b) Demand that the authorities of Niger introduce a new legislation which actually protects women against the discriminatory customs in issues of marriage and divorce;
- (c) Ask the authorities of Niger to revise the laws relating to courts and tribunals in such a manner that justice may fully play its role as a guardian of the rights of persons who are victims of the practice of slavery;
- (d) Require from the Republic of Niger that it abolishes harmful customs and practices founded upon the idea of inferiority of women;
- (e) Grant fair reparation to Hadijatou Mani Koraou, for the harm she had suffered during her nine years of captivity.

29. The defendant raised a preliminary objection, to the effect that:

- (a) The application was inadmissible, for lack of exhaustion of local remedies;

(b) The application was inadmissible, due to the fact that the case brought before instant Honourable Court was still pending before the domestic courts of Niger.

30. In compliance with article 87(5) of its Rules of Procedure, the Court of Justice of ECOWAS joined the preliminary objection to the merits, to adjudicate by virtue of one and the same judgment.

31. At the 24 January 2008 proceedings, scheduled for the hearing of the parties, counsel for the applicant, citing her state of extreme financial poverty, and the necessity of hearing witnesses residing in Niger (whose transport costs to Abuja seemed to be beyond the financial capacity of the applicant), requested that the Court's session be transferred to Niamey or any other venue in the Republic of Niger.

32. Counsel for the defendant averred that 'he did not mind if the court session was held outside the seat of the Court' but did, all the same, draw the Court's attention 'to negative media coverage and a possible politicisation of the proceedings', before concluding upon the pointlessness of holding such a session in Niger.

33. By its preliminary ruling ECW/CCJ/APP/08/08 of 24 January 2008, the Court ordered that the court session be held at Niamey in compliance with article 26 of the 1991 Protocol on the Court.

34. At the hearing of 7 April 2008, at Niamey, the parties as well as their witnesses appeared in court.

## **Consideration of the parties' pleas-in-law**

### **As to the preliminary objection**

35. The Republic of Niger raised, *in limine litis*, the inadmissibility of the application on grounds of non-exhaustion of local remedies, on one hand, and on the other hand, upon the grounds that the case brought before the Court of Justice of ECOWAS was still pending before the national courts of Niger.

### ***Regarding non-exhaustion of local remedies***

36. While acknowledging that the condition of non-exhaustion of local remedies does not form part of the conditions of admissibility of cases of human rights violations brought before the Court of Justice of ECOWAS, the Republic of Niger considered such absence as a *lacuna* which should be filled by the Court.

37. Beside, counsel for the defendant further averred that it is the rule of exhaustion of local remedies, which enables one to assert whether a state sufficiently or insufficiently safeguards human rights on its territory. He furthermore averred that the protection of human rights by international mechanisms is only a subsidiary protection



which is available only when a state, on the national plane, has failed to fulfil its duty of ensuring the observance of such rights.

38. Furthermore, by relying on article 4(g) of the Revised Treaty of ECOWAS, the defendant maintained that the Court of Justice of ECOWAS must apply article 56 of the African Charter on Human and Peoples' Rights, to make up for the silence of the texts governing the operation of the Court, particularly as regards the preliminary exhaustion of local remedies.

39. Even if it is irrefutable that the protection of human rights by international mechanisms is subsidiary in nature, it is no less true that such subsidiary nature of the protection has undergone, for some time now, a remarkable evolution which translates into a very flexible interpretation of the rule of exhaustion of local remedies. At any rate, this was what the European Court on Human Rights was saying, in its judgment on the case concerning *De Wilde, Ooms and Versyp v Belgium*, 18 June 1971, when it found that 'in accordance with the evolution of international practice, states may well renounce the benefits of the rule of exhaustion of local remedies'.

40. In refraining from making the rule of preliminary exhaustion of local remedies a condition for admissibility of applications filed before the Court, the Community lawmaker of ECOWAS has undoubtedly responded to this call. The renunciation of such a rule is binding on all the member states of ECOWAS and the Republic of Niger cannot claim to be an exception in that regard.

41. Moreover, in affirming in article 4(g) of the Revised Treaty that 'recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights', the Community lawmaker simply intended to subsume that instrument in the law applicable before the Court of Justice of ECOWAS.

42. The adherence of the Community to the principles of the Charter signifies that in the absence of ECOWAS legal instruments relating to human rights, the Court ensures the protection of the rights spelt out in the Charter, without necessarily proceeding to do so in the same manner as would the African Commission on Human and Peoples' Rights.

43. Indeed, from the interpretation of article 4(g) of the Revised Treaty, one cannot deduce that the modalities for the protection and promotion of human rights by the Court must be those provided for by the Charter.

44. A distinction must be made between the setting out of the fundamental principles of the Charter (part I), and the modalities for implementing such rights (part II). These modalities comprise the creation of the Commission (article 30), its composition (articles 31 to 41), its functioning (articles 42 to 45) and the procedure to be

followed before it (articles 46 to 59), whereas the Revised Treaty of ECOWAS on its part, has prescribed other mechanisms to the Court of Justice of ECOWAS, for implementing these same fundamental principles.

45. In the final analysis, there are no grounds for considering the absence of preliminary exhaustion of local remedies as a *lacuna* which must be filled within the practice of the Community Court of Justice, for the Court cannot impose on individuals more onerous conditions and formalities than those provided for by the Community texts without violating the rights of such individuals.

46. In tracing the origins of the entire pleadings filed before the national courts of Niger, the defendant averred that on 14 February 2006, the applicant brought a divorce case before the Konni Civil and Traditional Court; that the said court decided in favour of his request; that following the appeal filed, the judgment was reversed; that the reversed decision made upon appeal was quashed by the Supreme Court; that the decision made after the quashing, with an adjournment, was in favour of the applicant; that a second appeal was made by the defendant against the last decision, and that the Supreme Court has not yet brought its proceedings on the matter to a close.

47. The defendant further averred that on 11 January 2007, a criminal proceeding was initiated against the applicant; that an appeal was filed against the criminal sentence made against the applicant and her co-accused, delivered on 2 May 2007; that the Court of Appeal Niamey, after ordering the release from prison of the applicant and her brother, adjourned proceedings, pending the determination of the civil proceedings.

48. In this case, is there any basis for Hadijatou Mani Koraou, who has already seized the domestic courts, to bring her case before the Court of Justice of ECOWAS, whereas the said national courts have not exhausted their proceedings on the case?

49. In the terms of the provisions of article 10(d) of the Supplementary Protocol A/SP.1/01/05 relating to the Community Court of Justice, ECOWAS:

Access to the Court is open to ... 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

It therefore follows that the rule of exhaustion of local remedies is not applicable before the Court.

50. These provisions are essentially intended to prevent individuals from abusing the possibilities offered them for seeking redress in the courts, and to avoid the same case being handled by several bodies at the same time. See Cohen, Jonathan in *La Convention Européenne de*

*Sauvegarde des Droits de l'Homme et des Libertés Fondamentales*, Economica, Paris, 1989, 143, where it is rightly stated that this condition was expressly posed 'to exclude the accumulation of international proceedings'.

51. At the source of this condition, provided for in all the international mechanisms of examining and settling cases, can be found the idea of avoiding a situation whereby one and the same case is brought before several international bodies (Cf article 35(2)(b) of the European Convention on the Protection of Human Rights and Fundamental Freedoms, article 56(7) of the African Charter on Human and Peoples' Rights, article 46(c) of the American Convention of Human Rights, article 5(2)(a) of the Optional Protocol to the International Covenant on Civil and Political Rights).

52. But the interpretation of this rule has revealed, as Stefan Trechsel points out, in *Die europäische Menschenrechts-konvention ihr Schutz der persönlichen Freiheit und die schweizerischen Strafprozessrechte*, Stämpfli, Bern, 1974, 125, that it

is not limited to the '*non bis in idem*', but equally covers the situation of pendency of cases, since it is sufficient for a case to have been brought, in substance, before another international court. It is therefore a question of avoiding the parallelism of various international proceedings on one hand, and on the other hand, to avoid conflict between various international courts; indeed, there is no order of hierarchy between such international courts and it follows that none among them should be competent to revise, indeed, the decision of another international court.

53. Consequently, by providing for article 10(d)(ii) of the Supplementary Protocol in the manner it did, the Community lawmaker of ECOWAS intended to remain within the strict confines of what international practice has deemed appropriate to abide by. It is therefore not the duty of the instant Court to add to the Supplementary Protocol conditions which have not been provided for by the texts. Ultimately, and for all these reasons, the objection raised by the defendant cannot thrive.

### ***As to the applicant's status in the action brought***

54. In his last brief, and in his reply of 9 April 2008, the defendant raised the issue of the applicant's status in the action brought. He put forward that, being an emancipated *wahiya* at the time of her application, Hadijatou Mani Koraou was therefore not a slave anymore; that, on that score, she had come out of her condition of servitude; that she could have instituted proceedings before her emancipation; and that since she did not do so, her action had become ineffective and must be declared inadmissible on grounds of being unqualified to file the suit.

55. Such preliminary objection lately raised, must be declared inadmissible. Moreover, in regard to the provisions of articles 9(4) and 10(d) respectively, of its Supplementary Protocol, 'The Court has

jurisdiction to determine cases of violation of human rights that occur in any member state', and 'access to the Court is open to ... individuals on application for relief for violation of their human rights'.

**56.** It must be emphasised that human rights, in being inherent to the human person, are 'inalienable, irrevocable and sacred', and cannot therefore suffer any limitation whatsoever.

### **As to the pleas in the merits**

**57.** The applicant filed several pleas alleging violation of her rights. In the first place, she pleaded that the defendant did not take the necessary measures to guarantee its citizens the right and freedoms proclaimed in the African Charter on Human and Peoples' Rights, thus violating article 1 of the said Charter. She contended that this violation derives from the other violations contained in the other please filed before the instant honourable Court, in as much as article 1 of the said African Charter makes it binding upon the states to respect such rights; and that in the terms of the cited article, 'The member states ... shall recognise the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them'.

**58.** The applicant stated further that in accordance with the legislation of Niger, 'The Republic of Niger shall be a constitutional state; it shall ensure equality of the law before all, without distinction of sex, social, racial, ethnic or religious origin ...' (article 11 of 1996 Constitution); 'None shall be subjected to torture, abuses, or cruel, inhuman or degrading treatment' (article 12 of 1996 Constitution); 'Any individual ... who shall be guilty of acts of torture, ... or of cruel, inhuman or degrading treatment ... shall be punished in accordance with the law' (article 14 of 1989 and 1992 Constitutions).

**59.** The applicant pointed out that despite the existence of the aforementioned legislation, she faced sexually and socially-based discrimination because she was held in slavery for almost nine years; that after being emancipated, she was unable to fully enjoy her freedom despite her calls for justice, that she was put into detention, and that all these incidents contributed to the loss of her fundamental rights. She therefore asked that the defendant be charged for violation of the various articles cited in the African Charter on Human and Peoples' Rights, and demanded the adoption of new laws which are more protective of the rights of women against discriminatory customs.

**60.** As regards the applicant's first plea-in-law, the Court finds that it does not have the mandate to examine the laws of member states of the Community *in abstracto*, but rather, to ensure the protection of the rights of individuals whenever such individuals are victims of

the violation of those rights which are recognised as theirs, and the Court does so by examining concrete case brought before it.

The Court indicates that other mechanisms are employed in the consideration of cases, such as the checking of the situation in each country, the submission of periodic reports as provided for by certain international instruments, including article 62 of the African Charter on Human and Peoples' Rights, which provides: 'Each state party shall undertake to submit every two years, from the date the present Charter comes into force, a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognised and guaranteed by the present Charter'.

61. In this regard, the Court finds that such considerations have already taken place, notably before the Human Rights Committee and the Children's Rights Committee of the United Nations, particularly in regard to the Republic of Niger, followed by recommendations.

Consequently, the Court declares that it cannot overstep the bounds of its core jurisdiction, which is that of entertaining concrete cases of human rights violation and sanctioning such where necessary.

### ***As to discrimination***

62. The applicant maintained that she was a victim of sexually and socially-based discrimination, in violation of articles 2 and 18(3) of the African Charter on Human and Peoples' Rights; she further stated that she did not benefit from equal protection of the law and equality before the law as provided for by article 3 of the said Charter. She made it clear that the system of *sadaka* or the act of selling a woman to a man to serve as a concubine for him, is a practice exclusively affecting women and thus constitutes a form of discrimination based on sex; that, moreover, the fact that she was not in a position to freely give her consent to marry or to divorce do bear ample testimony of discrimination in relation to her social origin.

63. The following statement comes from the testimony of Djouldé Laya, a sociologist, and it was cited by the defendant during, the court session of 8 April 2008 at Niamey:

In the case of the *wahiya* woman, one does not say that she is emancipated, since she is a slave. Therefore, she is someone else's property; ... the *wahiya* system or 'fifth wife' is a system which was put in place by the advocates and practitioners of slavery; ... I consider that women are not emancipated from their *wahiya* condition; ... it is a system which permits the movement of a woman from one status to another, meaning that the slavery condition continues, in any case, because women still have to be captured, war must be fought, one has to buy.

64. After a careful consideration of all the pleas-in-law of the applicant, drawn from discrimination, equality before the law, and equal protection by the law, the Court finds that, as pointed out by Frédéric Sudre, on 259 of his work *Le Droit International et Européen*

*des Droits de l'Homme* (2005 ed), 'The principle of non-discrimination is a principle drawn from the general postulate according to which *all human beings are born free and equal in dignity and rights*' (cf article 1 of the Universal Declaration of Human Rights). It is this principle which helps to define the domain of equality.

65. According to the texts cited by the applicant, every form of discrimination based on race, ethnic group, sex, religion, and social origin, is forbidden, and constitutes a human rights violation recognised by the various constitutions of the Republic of Niger (1989, 1992 and 1996) and by the provisions of the Penal Code of Niger, which enshrines the same protective principles.

66. In the instant case, to determine if the applicant has been discriminated against or not, it is worthwhile to take a close look at the practice of *wahiya* or *sadaka* as described by the witnesses, in order to know whether, on one hand, all women have the same rights in respect of marriage, and whether, on the other hand, men and women have the same capacities of enjoying the rights and freedoms proclaimed in the international instruments ratified by the defendant.

Indeed, Halilou Danda, a farmer and livestock breeder, witness called by the applicant, declared during the hearing of Monday, 7 April 2008 that:

The *préfet* (district administrative officer) summoned us to his office to tell us that he had received a paper from Niamey which says that we should hand over El Hadj Souleymane Naroua's wife back to him. The *préfet* asked him: - Would you like to remarry her, since you have emancipated her? If so, bring cola and let us perform the marriage ceremony. El Hadj Souleymane Naroua said - No! I cannot marry her, since it is God who has already given her to me.

67. Besides, Almou Wangara, farmer and witness called by the applicant, declared that:

When the former master of Hadijatou was asked to bring the dowry, he said that it was God who gave him the woman and so how could we be asking him for money as payment for dowry? The *préfet* told the former master: - Since you have already emancipated this woman, what is appropriate to be done is to provide the dowry; we are going to implore her to accept the marriage. The former master got up and said - No! How! Am I to buy a woman and be asked to pay dowry on her? ... After this reaction, the *préfet* said - Listen, as for me, I can do nothing - you must go away.

68. The Court therefore holds that when summoned to the office of the administrative authority, namely, to the *préfet's* office, the applicant's former master not only refused to accomplish the marriage formalities with her but equally did not grant her the freedom due her, regardless of the certificate of emancipation.

69. In the Republic of Niger, the celebration of marriage is recognised by the payment of dowry and the holding of a religious ceremony. Now, in the instant case, El Hadj Souleymane Naroua

fulfilled neither the customary nor civil requirements in regard to the applicant.

70. Moreover, the Court holds that the applicant was discriminated against vis-à-vis the wives in the family of her former master.

71. The Court finds that even if the complaint drawn from discrimination – to which the applicant lays claim for the first time before the Court – is founded, that violation is not attributable to the Republic of Niger but rather to El Hadj Souleymane Naroua, who is not a party to the instant proceedings.

Consequently, the Court finds this plea-in-law inoperative.

### ***Was the applicant held in slavery?***

72. The applicant complains having been held in slavery, in violation of article 5 of the African Charter on Human and Peoples' Rights and other international instruments relating to human rights enacting absolute prohibition of slavery. She declared being born of parents who were themselves of the status of slaves and that she had always been treated as a slave under the roof of her former master, El Hadj Souleymane Naroua.

73. On its part, the defendant refuted the grounds of slavery and maintained that the applicant was certainly under conditions of servitude but was the wife of El Hadj Souleymane Naroua, with whom she had more or less lived happily as in the lives of all couples.

74. In the terms of article 1 of the Geneva Convention 1926, slavery is '[t]he status or condition of a person over whom any or all the powers attaching to the right of ownership are exercised' and slave trade was defined to include

all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves.

75. Thus defined, slavery is considered a grave violation of human dignity, and it is strictly prohibited by all the international instruments relating to human rights. Other instruments such as the European Convention on Human Rights and Fundamental Freedoms (article 4(1)), the American Convention on Human Rights (article 6), and the International Covenant on Civil and Political Rights (article 8(1) as ratified by the Republic of Niger) consider the prohibition of slavery as an inviolable right, that is to say, an unbreakable or a right which cannot be transgressed. Similarly, the Penal Code of Niger as amended by Law 2003-025 of 13 June 2003, in its article 270(1) to (5), defines and stamps out the crime and offence of slavery.

76. From the foregoing, it is incontrovertible that Hadijatou ManiKoraou was sold off from El Hadji Ghausmane to El Hadji

Souleyman Naroua, at the age of 12, at a monetary price of CFA 240 000. She was led to the home of her buyer, went through almost a decade of numerous psychological, forced labour in the home and on the farm, physical violence, insults, and a permanent constraint on her movements exercised by her buyer, who, on 18 August 2005, issued her with a document entitled 'certificate of emancipation (from slavery)', stating that from the date of signature of the said deed, 'she (the applicant) was free and was nobody's slave'.

**77.** The foregoing do portray the applicant's condition of servitude and they bring out all the indicators of the definition of slavery as contained in article 1 of the Geneva Convention 1926, and as interpreted by the Appeals Chamber of the International Criminal Tribunal for former Yugoslavia (ICTY), in the case concerning *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, judgment of 12 June 2002, IT096-23 & 23/1, para 119. According to that case, in addition to the attributes of the right of ownership which characterises slavery,

whether a particular phenomenon is a form of enslavement will depend on the operation of the factors or indicia of enslavement identified by the Trial Chamber. These factors include the 'control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour'.

**78.** The defendant, while acknowledging the continued existence of slavery, contended that this practice had become more discreet and had been confined to very restricted social circles. The defendant maintained that the applicant was rather the wife of El Hadj Souleyman Naroua, with whom she had lived a more or less happy marital relationship as in all homes, up to 2005, and that from their union, children were born.

**79.** The Court cannot countenance such a manner of arguing, for it is trite that slavery may exist without the presence of torture. Even with the provision of square meals, adequate clothing and comfortable shelter, a slave still remains a slave if he is illegally deprived of his freedom through force or constraint. All evidence of ill treatment may be erased, hunger may be forgotten, as well as beatings and other acts of cruelty, but the acknowledged fact about slavery remains, that is to say, forced labour without compensation. There is nothing like goodwill slavery. Even when tampered with humane treatment, involuntary servitude is still slavery. And the issue of knowing the nature of relationship between the accused and the victim is essential. See judgment of 3 November 1947, in *Trials of Major War Criminals before the Nuremberg Military Tribunals under Control Council Law No 10*, in the case concerning *United States of America v Oswald Pohl et al.*



**80.** The Court finds in the instant case that beyond well constituted deeds, the moral element in reducing a person to slavery resides, moreover, in the intention of El Hadj Souleyman Naroua to exercise the attributes of the right of ownership over the applicant, even so, after the document of emancipation had been made. Consequently, there is no doubt that the applicant, Hadijatou Mani Koraou, was held in slavery for almost nine years, in violation of the legal prohibition of such practice.

**81.** In Niger's criminal law, just as is evident in international instruments, the prohibition and stamping out of slavery are inviolable and fall within public policy. As was asserted by the International Court of Justice (ICJ), in the *Barcelona Traction* Judgment (5 February 1970), outlawing slavery is an *erga omnes* obligation binding on all organs of the state.

**82.** Consequently, the national judge who sat at the Konni High Court upon the case relating to persons whose condition was akin to that of Hadijatou Mani Koraou, was under an obligation to raise at the first instance, the issue of slavery and set in motion the procedure for stamping out such a practice, once the case brought to light an obvious issue of slavery.

**83.** In conclusion, as regards this particular point above, the Court finds that, the national judge of Niger before whom the case of *Hadijatou Mani Koraou v El Hadj Souleymane Naroua* was brought, instead of denouncing the slavery status of the applicant, as constituting a violation of article 270(1) to (5) of the Penal Code of Niger as amended by Law 2003-025 of 13 June 2003, rather affirmed that, 'The marriage of a free man with a slave woman is licit, in as far as he does not have the means of marrying a free woman, and if he fears falling into fornication'.

**84.** The Court considers that, acknowledge thus the status of Hadijatou Mani Koraou as a slave, without denouncing that condition constitutes a form of acceptance, or at least a tolerance of this crime, against which the domestic judge of Niger was under obligation to ensure that proceedings were instituted or that sanctions were preferred where necessary.

**85.** The Court further considers that even if the applicant's condition of being a slave arises from a supposedly customary or personal context, there was an avenue of protection open to her from the authorities of the Republic of Niger, be they administrative or judicial. And that, consequently, the defendant becomes responsible, in terms of both national and international law, for every form of human rights violation against the applicant, on the basis of slavery, as a result of the tolerance, passiveness, inaction, and abstention of these same authorities of Niger *vis-à-vis* the practice of slavery.

86. Ultimately, by failing to raise an instant charge regarding an act prohibited as a public policy, and in omitting to adopt or have adopted the appropriate measures for stamping out such prohibited act, the national judge of Niger has not carried out his mandate of protecting the rights of Hadijatou Mani Koraou, and has thereby committed the defendant into becoming liable on the same scale as the state administrative authority, when the latter declared that: 'Listen, as for me, I can do nothing – you must go away.'

87. Besides, by relying on international texts, notably, article 7(1)(c) and (g) of the Statute of the International Criminal Court, the applicant maintained that her status of being a slave is crime against humanity.

88. If it is true that slavery features on the list of acts constituting crimes against humanity, it is nevertheless worthy to indicate that, for it to constitute a crime against humanity, the slavery in question must form part of a 'widespread or systematic attack' as enshrined in article 7 of the Statute of the International Criminal Court.

89. Now, the appreciation of such cases fall within the jurisdiction of other international judicial set-ups, more precisely, the international criminal courts. The instant honourable Court is therefore incompetent to consider whether the complaint drawn from this particular plea-in-law is well founded or not.

### ***Are the arrest and detention of the applicant arbitrary?***

90. The applicant averred that her arrest and detention on 9 May 2008, as well as her detention at the Konni Prison, were arbitrary and do constitute a violation of article 6 of the African Charter on Human and Peoples' Rights. According to her, the said bigamy is unfounded, for lack of a marriage between her and El Hadj Souleymane Naroua - whereas it has been proved that the said detention was consequent upon the complaint deposited by El Hadji Souleymane Naroua, and whereas the arrest and detention of the applicant were decided upon following the same complaint which had been deposited by her ex-master before the Konni Criminal Court.

91. A detention is said to be arbitrary when it does not repose on a legal basis. Now, in the instant case, the arrest and detention of the applicant were carried out in implementation of the judicial decision made by the said Konni Criminal Court. This decision constitutes a legal basis, and it does not fall within the jurisdiction of the Court to consider whether such a decision is well founded or ill founded.

### ***Does the applicant have a right to relief for reparation?***

92. In her reply dated 7 April 2008, the applicant requested that the Republic of Niger be made to pay the amount of CFA 50 000 000 as relief for the reparation of the harm suffered.

93. In reaction to the foregoing, the defendant asserted that this request amounts to the filing of a new plea-in-law, and he cited article 37(2) of the Rules of Procedure of the Court, thus concluding upon the inadmissibility of the application for reparation.

94. The Court recalls that the inadmissibility provided for in article 37(2) of the Rules of Procedure concerns new pleas-in-law raised by a party during the course of proceedings. In the instant case, the quantification of the reparation asked for cannot be considered as a new plea-in-law, but rather, as a specification of the request for relief as contained in the application instituting proceedings. Consequently, there are grounds for dismissing the argument of the Defendant.

95. The applicant did not furnish the Court with any guideline for an accurate calculation of the amount involved as reparation for the harm pleaded. The Court deduces thereof that an all-inclusive amount may be paid to the applicant.

96. A close examination of the facts in cause clearly demonstrate that the applicant has gone through undeniable physical, psychological and moral harm, as a result of her nine years or servitude, justifying the award of a relief in reparation for the harm thus suffered.

### Consequently

1. Whereas in any instance where the texts do not make provision for particular conditions in respect of admissibility of applications, the Court cannot impose heavier ones thereof;
2. Whereas the practice of *wahiya* or *sadaka* – founded upon considerations of belonging to social class – put the applicant in an unfavourable condition and excluded her from the sure and certain benefits of equal dignity recognised for all citizens; whereas she was thus discriminated against by virtue of her belonging to a social class; but, whereas such discrimination is not attributable to the Republic of Niger;
3. Whereas the Court finds that the Republic of Niger did not sufficiently protect the rights of the applicant in regard to the practice of slavery;
4. Whereas this condition of slavery has caused the applicant undeniable physical, psychological, and moral harm;
5. Whereas the applicant is therefore entitled to an all-inclusive relief in reparation for the harm resulting from such practice of slavery.

### For these reasons

The Community Court of Justice, ECOWAS,

Adjudicating publicly, in first and last resort, after hearing both parties on the issue of human rights violation;

- Having regard to the 24 July 1993 Revised Treaty of ECOWAS;
- Having regard to the 10 December 1948 Universal Declaration of Human Rights;
- Having regard to the 18 December 1979 Convention on the Elimination of All Forms of Discrimination against Women;
- Having regard to the 25 September 1926 Convention relating to Slavery, and the 7 September 1956 Supplementary Convention relating to the Abolition of Slavery, Slave Trade and Institutions and Practices Similar to Slavery;
- Having regard to the 27 June 1981 African Charter on Human and Peoples' Rights;
- Having regard to the 6 July 1991 and the 19 January 2005 Supplementary Protocols on the Community Court of Justice, ECOWAS;
- Having regard to the 28 August 1992 Rules of Procedure of the Community Court of Justice, ECOWAS;
- Having regard to the 24 January 2008 Preliminary Ruling No ECW/CCJ/APP/08/08;

### **In terms of form**

- Dismisses the preliminary objection raised by the Republic of Niger as inadmissible in all its aspects;
- Admits the application of Hadijatou Mani Koraou and declares that she is qualified to bring such an application before the Court;

### **On merits**

- Declares that the discrimination from which Hadijatou Mani Koraou suffered is not attributable to the Republic of Niger;
- Declares that Hadijatou Mani Koraou was victim of slavery and that the Republic of Niger is to be blamed for the inaction of its administrative and judicial authorities;
- Receives the request of Hadijatou Mani Koraou for reparation of the harms she had suffered and grants her an all-inclusive award of CFA 10 000 000;
- Orders the said sum to be paid to Hadijatou Mani Koraou by the Republic of Niger;
- Dismisses all other points of request made by Hadijatou Mani Koraou;
- Asks the Republic of Niger to bear the costs, in accordance with article 66(2) of the Rules of Procedure of the Court;
- Thus made, adjudged and pronounced publicly by the Community Court of Justice, ECOWAS, at Niamey (Republic of Niger), on the day, month and year above.

# SADC TRIBUNAL

## Mike Campbell (Pvt) Limited and Others v Zimbabwe

(2008) AHRLR 199 (SADC 2008)

*Mike Campbell (Pvt) Limited and Others v Zimbabwe*

SADC Tribunal decision, case no SADC: 2/2008, 28 November 2008  
Judges: Pillay, Mtambo, Mondlane, Kambovo, Tshosa

Discriminatory land reform programme; ouster of jurisdiction of national courts

**Interim measures** (failure to comply, 9)

**Admissibility** (exhaustion of local remedies, 25-26, ouster of jurisdiction of courts, 27)

**Jurisdiction** (human rights, 31, 32)

**Fair trial** (access to courts and right to fair hearing, jurisdiction of courts ousted, 35, 47, 50-53)

**Equality, non discrimination** (discrimination on the grounds of race, 64-67, 71, 73-80, 92-95)

**Property** (expropriation, 77, 79, 80, compensation, 81-86)

### I Factual background

[1.] On 11 October, 2007, Mike Campbell (Pvt) Limited and William Michael Campbell filed an application with the Southern African Development Community Tribunal (the Tribunal) challenging the acquisition by the respondent of agricultural land known as Mount Carmell in the District of Chegutu in the Republic of Zimbabwe. Simultaneously, they filed an application in terms of article 28 of the Protocol on Tribunal (the Protocol), as read with rule 61(2)-(5) of the Rules of Procedure of the SADC Tribunal (the Rules), for an interim measure restraining the respondent from removing or allowing the removal of the applicants from their land, pending the determination of the matter.

[2.] On 13 December, 2007, the Tribunal granted the interim measure through its ruling which in the relevant part stated as follows:

[T]he 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.

[3.] Subsequently, 77 other persons applied to intervene in the proceedings, pursuant to article 30 of the Protocol, as read with rule 70 of the Rules.

[4.] Additionally, the interveners applied, as a matter of urgency, for an interim measure restraining the respondent from removing them from their agricultural lands, pending the determination of the matter.

[5.] On 28 March, 2008, the Tribunal granted the application to intervene in the proceedings and, just like in the Mike Campbell (Pvt) Ltd and William Michael Campbell case, granted the interim measure sought.

[6.] Mike Campbell (Pvt) Ltd and William Michael Campbell's case, as well as the cases of the 77 other applicants, were thus consolidated into one case, hereinafter referred to as the *Campbell* case - vide case SADC (T) 02/2008.

[7.] On the same day another application to intervene was filed by Albert Fungai Mutize and others (case SADC (T) 08/2008). The Tribunal dismissed this application on the basis that it had no jurisdiction to entertain the matter since the alleged dispute in the application was between persons, namely, the applicants in that case and those in the *Campbell* case and not between persons and a state, as required under article 15(1) of the Protocol.

[8.] On 17 June, 2008, yet another application to intervene in the proceedings was filed. This was by Nixon Chirinda and others - case SADC (T) 09/2008. The application was dismissed on the same ground as in case SADC (T) 08/2008.

[9.] On 20 June, 2008, the applicants referred to the Tribunal the failure on the part of the respondent to comply with the Tribunal's decision regarding the interim reliefs granted. The Tribunal, having established the failure, reported its finding to the Summit, pursuant to article 32(5) of the Protocol.

[10.] In the present case, the applicants are, in essence, challenging the compulsory acquisition of their agricultural lands by the respondent. The acquisitions were carried out under the land reform programme undertaken by the respondent.

[11.] We note that the acquisition of land in Zimbabwe has had a long history. However, for the purposes of the present case, we need to confine ourselves only to acquisitions carried out under section 16B

of the Constitution of Zimbabwe (Amendment 17, 2005), hereinafter referred to as Amendment 17. Section 16B of Amendment 17 provides as follows:

**16B: Agricultural land acquired for resettlement and other purposes**

(1) In this section:

‘acquiring authority’ means the Minister responsible for lands or any other Minister whom the President may appoint as an acquiring authority for the purposes of this section;

‘appointed day’ means the date of commencement of the Constitution of Zimbabwe Amendment (No 17) Act, 2004 (ie 16 September 2005)

(2) Notwithstanding anything contained in this Chapter

(a) all agricultural land:

(i) that was identified on or before 8 July, 2005, in the *Gazette* or *Gazette Extraordinary* under section 5(1) of the Land Acquisition Act [Chapter 20:10], and which is itemised in schedule 7, being agricultural land required for resettlement purposes; or

(ii) that is identified after 8 July, 2005, but before the appointed day (ie 16 September 2005), in the *Gazette* or *Gazette Extraordinary* under section 5(1) of the Land Acquisition Act [Chapter 20:10], being agricultural land required for resettlement purposes; or

(iii) that is identified in terms of this section by the acquiring authority after the appointed day in the *Gazette* or *Gazette Extraordinary* for whatever purposes, including, but not limited to

A. settlement for agricultural or other purposes; or

B. the purposes of land reorganisation, forestry, environmental conservation or the utilisation of wild life or other natural resources; or

C. the relocation of persons dispossessed in consequence of the utilisation of land for a purpose referred to in subparagraph A or B;

is acquired by and vested in the state with full title therein with effect from the appointed day or, in the case of land referred to in subparagraph (iii), with effect from the date it is identified in the manner specified in that paragraph; and

(b) no compensation shall be payable for land referred to in paragraph (a) except for any improvements effected on such land before it was acquired.

(3) The provisions of any law referred to in section 16(1) regulating the compulsory acquisition of land that is in force on the appointed day, and the provisions of section 18(1) and (9), shall not apply in relation to land referred to in subsection (2)(a) except for the purpose of determining any question related to the payment of compensation referred to in subsection (2)(b), that is to say, a person having any right or interest in the land:

(a) shall not apply to a court to challenge the acquisition of the land by the State, and no court shall entertain any such challenge;

(b) may, in accordance with the provisions of any law referred to in section 16(1) regulating the compulsory acquisition of land that is in force on the appointed day, challenge the amount of compensation payable for any improvements effected on the land before it was acquired.

[12.] Amendment 17 effectively vests the ownership of agricultural lands compulsorily acquired under section 16B(2)(a)(i) and (ii) of Amendment 17 in the respondent and ousts the jurisdiction of the courts to entertain any challenge concerning such acquisitions. It is

on the basis of these facts that the present matter is before the Tribunal.

## **II. Submissions of the parties**

[13.] It was submitted, in substance, on behalf of the applicants that:

- (a) the respondent acted in breach of its obligations under the Treaty by enacting and implementing Amendment 17;
- (b) all the lands belonging to the applicants which have been compulsory acquired by the respondent under Amendment 17 were unlawfully acquired since the Minister who carried out the compulsory acquisition failed to establish that he applied reasonable and objective criteria in order to satisfy himself that the lands to be acquired were reasonably necessary for resettlement purposes in conformity with the land reform programme;
- (c) the applicants were denied access to the courts to challenge the legality of the compulsory acquisition of their lands;
- (d) the applicants had suffered racial discrimination since they were the only ones whose lands have been compulsory acquired under Amendment 17; and
- (e) the applicants were denied compensation in respect of the lands compulsorily acquired from them.

[14.] Learned counsel for the applicants submitted, in conclusion, that the applicants, therefore, seek a declaration that the respondent is in breach of its obligations under the Treaty by implementing Amendment 17 and that the compulsory acquisition of the lands belonging to the applicants by the respondent was illegal.

[15.] The learned agent for the respondent, for his part, made submissions to the following effect:

- (1) The Tribunal has no jurisdiction to entertain the application under the Treaty;
- (2) The premises upon which acquisition of lands was started was on a willing buyer willing seller basis and that the land was to be purchased from white farmers who, by virtue of colonial history, were in possession of most of the land suitable for agricultural purposes;
- (3) The respondent continues to acquire land from mainly whites who own large tracts of land suitable for agricultural resettlement and this policy cannot be attributed to racism but to circumstances brought about by colonial history;
- (4) The respondent had also acquired land from some of the few black Zimbabweans who possessed large tracts of land;
- (5) The figures for land required for resettlement were revised from 6 to 11 million hectares. The applicants' farms were considered for allocation after they had been acquired as part of the land needed for resettlement;
- (6) The increase in the demand for land resulted in the portions left with the applicants being needed for resettlement;
- (7) The applicants will receive compensation under Amendment 17;
- (8) The compulsory acquisition of lands belonging to applicants by the respondent in the context must be seen as a means of correcting colonially inherited land ownership inequities, and
- (9) The applicants have not been denied access to the courts. On the contrary, the applicants could, if they wish to, seek judicial review.



### III. Issues for determination

[16.] After due consideration of the facts of the case, in the light of the submissions of the parties, the Tribunal settles the matter for determination as follows:

- Whether or not the Tribunal has jurisdiction to entertain the application;
- Whether or not the applicants have been denied access to the courts in Zimbabwe;
- Whether or not the applicants have been discriminated against on the basis of race; and
- Whether or not compensation is payable for the lands compulsorily acquired from the applicants by the respondent.

### IV. Jurisdiction

[17.] Before considering the question of jurisdiction, we note first that the Southern African Development Community is an international organisation established under the Treaty of the Southern African Development Community, hereinafter referred to as 'the Treaty'. The Tribunal is one of the institutions of the organisation which are established under article 9 of the Treaty. The functions of the Tribunal are stated in article 16. They are to ensure adherence to, and the proper interpretation of, the provisions of the Treaty and the subsidiary instruments made thereunder, and to adjudicate upon such disputes as may be referred to it.

[18.] The bases of jurisdiction are, among others, all disputes and applications referred to the Tribunal, in accordance with the Treaty and the Protocol, which relate to the interpretation and application of the Treaty – *vide* article 14(a) of the Protocol. The scope of the jurisdiction, as stated in article 15(1) of the Protocol, is to adjudicate upon 'disputes between states, and between natural and legal persons and states'. In terms of article 15(2), no person may bring an action against a state before, or without first, exhausting all available remedies or unless is unable to proceed under the domestic jurisdiction of such state. For the present case such are, indeed, the bases and scope of the jurisdiction of the Tribunal.

[19.] The first and the second applicants first commenced proceedings in the Supreme Court of Zimbabwe, the final court in that country, challenging the acquisition of their agricultural lands by the respondent.

[20.] The claim in that court, among other things, was that Amendment 17 obliterated their right to equal treatment before the law, to a fair hearing before an independent and impartial court of law or tribunal, and their right not to be discriminated against on the basis of race or place of origin, regarding ownership of land.

[21.] On 11 October 2007, before the Supreme Court of Zimbabwe had delivered its judgment, the first and second applicants filed an

application for an interim relief, as mentioned earlier in this judgment.

[22.] At the hearing of the application, the respondent raised the issue as to whether the Tribunal has jurisdiction to hear the matter considering that the Supreme Court of Zimbabwe had not yet delivered the judgment and, therefore, that the applicants had not ‘exhausted all available remedies or were unable to proceed under the domestic jurisdiction’, in terms of article 15(2) of the Protocol.

[23.] The concept of exhaustion of local remedies is not unique to the Protocol. It is also found in other regional international conventions. The European Convention on Human Rights provides in article 26 as follows:

The Commission (of Human Rights) may only deal with a matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law ...

[24.] Similarly, the African Charter on Human and Peoples’ Rights states in article 50 as follows:

The Commission can only deal with a matter submitted to it after making sure that all local remedies, if they exist, have been exhausted, unless it is obvious to the Commission that the procedure of achieving the remedies would have been unduly prolonged.

[25.] Thus, individuals are required to exhaust local remedies in the municipal law of the state before they can bring a case to the commissions. This means that individuals should go through the courts system starting with the court of first instance to the highest court of appeal to get a remedy. The rationale for exhaustion of local remedies is to enable local courts to first deal with the matter because they are well placed to deal with the legal issues involving national law before them. It also ensures that the international tribunal does not deal with cases which could easily have been disposed of by national courts.

[26.] However, where the municipal law does not offer any remedy or the remedy that is offered is ineffective, the individual is not required to exhaust the local remedies. Further, where, as the African Charter on Human and Peoples’ Rights states, ‘... it is obvious ... that the procedure of achieving the remedies would have been unduly prolonged’, the individual is not expected to exhaust local remedies. These are circumstances that make the requirement of exhaustion of local remedies meaningless, in which case the individual can lodge a case with the international tribunal.

[27.] In deciding this issue, the Tribunal stressed the fact that Amendment 17 has ousted the jurisdiction of the courts of law in Zimbabwe from any case related to acquisition of agricultural land and that, therefore, the first and second applicants were unable to institute proceedings under the domestic jurisdiction. This position was subsequently confirmed by the decision of the Supreme Court

given on 22 February 2008 in *Mike Campbell (Pty) Ltd v Minister of National Security Responsible for Land, Land Reform and Resettlement* (SC 49/07).

[28.] The Tribunal also referred to article 14(a) of the Protocol, and observed that Amendment 17 had indeed ousted the jurisdiction of the courts of law in that country in respect of the issues that were raised before us, and decided that the matter was properly laid before the Tribunal and, therefore, that the Tribunal had jurisdiction to consider the application for the interim relief.

[29.] It will be recalled that the Supreme Court of Zimbabwe delivered its judgment dismissing the applicants' claims in their entirety, saying, among other things, that the question of what protection an individual should be afforded in the Constitution in the use and enjoyment of private property, is a question of a political and legislative character, and that as to what property should be acquired and in what manner is not a judicial question. The Court went further and said that, by the clear and unambiguous language of the Constitution, the legislature, in the proper exercise of its powers, had lawfully ousted the jurisdiction of the courts of law from any of the cases in which a challenge to the acquisition of agricultural land may be sought. The Court further stated that the legislature had unquestionably enacted that such an acquisition shall not be challenged in any court of law. The Supreme Court, therefore, concluded that there cannot be any clearer language by which the jurisdiction of the courts has been ousted.

[30.] Such are the circumstances in which we are to consider the question of jurisdiction. The respondent first submitted that the Treaty only sets out the principles and objectives of SADC. It does not set out the standards against which actions of member states can be assessed. The respondent also contended that the Tribunal cannot borrow these standards from other treaties as this would amount to legislating on behalf of SADC member states. The respondent went on to argue that there are numerous Protocols under the Treaty but none of them is on human rights or agrarian reform, pointing out that there should first be a Protocol on human rights and agrarian reform in order to give effect to the principles set out in the Treaty. The respondent further submitted that the Tribunal is required to interpret what has already been set out by the member states and that, therefore, in the absence of such standards, against which actions of member states can be measured, in the words of its learned agent, 'the Tribunal appears to have no jurisdiction to rule on the validity or otherwise of the land reform programme carried out in Zimbabwe'.

[31.] In deciding this issue, the Tribunal first referred to article 21(b) which, in addition to enjoining the Tribunal to develop its own jurisprudence, also instructs the Tribunal to do so 'having regard to

applicable treaties, general principles and rules of public international law' which are sources of law for the Tribunal. That settles the question whether the Tribunal can look elsewhere to find answers where it appears that the Treaty is silent. In any event, we do not consider that there should first be a Protocol on human rights in order to give effect to the principles set out in the Treaty, in the light of the express provision of article 4(c) of the Treaty which states as follows: 'SADC and member states are required to act in accordance with the following principles ... (c) human rights, democracy and the rule of law'.

[32.] It is clear to us that the Tribunal has jurisdiction in respect of any dispute concerning human rights, democracy and the rule of law, which are the very issues raised in the present application. Moreover, the respondent cannot rely on its national law, namely, Amendment 17 to avoid its legal obligations under the Treaty. As Professor Malcolm Shaw in his treatise entitled *International law* at pages 104-105 aptly observed:

It is no defence to a breach of an international obligation to argue that the state acted in such a manner because it was following the dictates of its own municipal laws. The reason for this inability to put forward internal rules as an excuse to evade international obligation are obvious. Any other situation would permit international law to be evaded by the simple method of domestic legislation.

[33.] This principle is also contained in the Vienna Convention on the Law of Treaties, in which it is provided in article 27 as follows: 'A party may not invoke provisions of its own internal law as justification for failure to carry out an international agreement'.

## V. Access to justice

[34.] The next issue to be decided is whether or not the applicants have been denied access to the courts and whether they have been deprived of a fair hearing by Amendment 17.

[35.] It is settled law that the concept of the rule of law embraces at least two fundamental rights, namely, the right of access to the courts and the right to a fair hearing before an individual is deprived of a right, interest or legitimate expectation. As indicated already, article 4(c) of the Treaty obliges member states of SADC to respect principles of 'human rights, democracy and the rule of law' and to undertake under article 6(1) of the Treaty 'to refrain from taking any measure likely to jeopardise the sustenance of its principles, the achievement of its objectives and the implementation of the provisions of the Treaty'. Consequently, member states of SADC, including the respondent, are under a legal obligation to respect, protect and promote those twin fundamental rights.

[36.] As stated in De Smith's *Judicial review* (6th edition 2007) at paragraph 4-015:

The role of the courts is of high constitutional importance. It is a function of the judiciary to determine the lawfulness of the acts and decisions and orders of public authorities exercising public functions, and to afford protection to the rights of the citizen. Legislation which deprives them of these powers is inimical to the principle of the rule of law, which requires citizens to have access to justice.

[37.] Moreover, the European Court of Human Rights, in *Golder v UK* (1975) 1 EHRR 524, at paragraph 34 of its judgment stated as follows: 'And in civil matters one can scarcely conceive of the rule of law without there being a possibility of having access to the courts'.

[38.] The same Court held, in *Philis v Greece* (1991), at paragraph 59 of its judgment that:

Article 6, paragraph 1 (art 6-1) secured to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal; in this way the article embodies the 'right to a court', of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect. This right of access, however, is not absolute but may be subject to limitations since the right by its very nature calls for regulation by the state. Nonetheless, the limitations applied must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired.

[39.] The Inter-American Court of Human Rights, in its Advisory Opinion OC-9/87 of 6 October, 1987, *Judicial guarantees in states of emergency* (articles 27(2), 25 and 8 of the American Convention on Human Rights), construed article 27(2) of the Convention as requiring member states to respect essential judicial guarantees, such as *habeas corpus* or any other effective remedy before judges or competent tribunals – *vide* paragraph 41. The Court also considered that member states were under a duty to provide effective judicial remedies to those alleging human rights violations under article 25 of the Convention. The Court stated at paragraph 24:

According to this principle, the absence of an effective remedy to violations of the rights recognised by the Convention is itself a violation of the Convention by the state party in which the remedy is lacking. In that sense, it should be emphasised that, for such a remedy to exist, it is not sufficient that it be provided for by the Constitution or by law or that it be formally recognised, but rather it must be truly effective in establishing whether there has been a violation of human rights and in providing redress. A remedy which proves illusory because of the general conditions prevailing in the country, or even in the particular circumstances of a given case, cannot be considered effective.

[40.] The Court also, at paragraph 35 of its judgment, pointed out that the rule of law, representative democracy and personal liberty are essential for the protection of human rights and that

in a democratic society, the rights and freedoms inherent in the human person, the guarantees applicable to them and the rule of law form a triad. Each component thereof defines itself, complements and depends on the others for its meaning.

[41.] The right of access to the courts is also enshrined in international human rights treaties. For instance, the African Charter on Human and Peoples' Rights provides in article 7(1)(a) as follows:

Every individual shall have the right to have his cause heard. This comprises:

(a) The right to an appeal to competent national organs against acts violating his fundamental rights ...

[42.] The African Commission on Human and Peoples' Rights in its decision in *Constitutional Rights Project and Others v Nigeria*, communications 140/94, 141/94 145/95 [(2000) AHRLR 227 (ACHPR 1999)] held at paragraph 29 of its judgment that the ouster clauses introduced by the Nigerian military government which prevented Nigerian courts from hearing cases initiated by publishers against the search of their premises and the suppression of their newspapers 'render local remedies non-existent, ineffective or illegal. They create a legal situation in which the judiciary can provide no check on the executive branch of the government'.

[43.] The African Commission on Human and Peoples' Right also in its decision in *Zimbabwe Human Rights NGO Forum v Zimbabwe*, communication 245/2002 [(2006) AHRLR 128 (ACHPR 2006)], found that the complainant had been denied access to judicial remedies since the clemency order introduced to pardon 'every person liable for any politically motivated crime' had prevented in effect the complainant from bringing criminal action against the perpetrators of such crimes. The Commission began by stating at paragraph 171 of its decision:

The general obligation is on states parties to the different human rights treaties to ensure through relevant means that persons under their jurisdiction are not discriminated on any of the grounds in the relevant treaty. Obligations under international human rights law are generally addressed in the first instance to states. Their obligations are at least threefold: to respect, to ensure and to fulfill the rights under international human rights treaties. A state complies with the obligation to respect the recognised rights by not violating them. To ensure is to take the requisite steps, in accordance with its constitutional process and the provisions of relevant treaty (in this case the African Charter), to adopt such legislative or other measures which are necessary to give effect to these rights. To fulfill the rights means that any person whose rights are violated would have an effective remedy as rights without remedies have little value. Article 1 of the African Charter requires states to ensure that effective and enforceable remedies are available to individuals in case of discrimination ...

[44.] The Commission went on to point out at paragraph 174:

For there to be equal protection of the law, the law must not only be fairly applied but must be seen to be fairly applied. Paragraph 9(3)(a) of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms provides that everyone must be given the right to complain about the policies and actions of individual officials and governmental bodies with regard to violations of human rights and fundamental freedoms, by petition or other appropriate means, to competent domestic judicial, administrative or legislative authorities or any other competent authority provided for by the legal system of the state, which should render their decision on the complaint without undue delay.

[45.] It is useful, finally, to refer to the decision of the Constitutional Court of South Africa in *Zondi v MEC for Traditional and Local Government Affairs and Others* 2005 (3) SA 589 (CC). The Court found that certain provisions of the Pound Ordinance of 1947 of KwaZulu-Natal which allowed landowners to bypass the courts and recover damages against the owners of trespassing animals were inconsistent with section 34 of the Constitution which guarantees the right of access to courts.

[46.] At paragraph 82 of the judgment, Ngcobo J made the following pertinent observations:

The right of access to courts is an aspect of the rule of law. And the rule of law is one of the foundational values on which our constitutional democracy has been established. In a constitutional democracy founded on the rule of law, disputes between the state and its subjects, and amongst its subjects themselves, should be adjudicated upon in accordance with law. The more potentially divisive the conflict is, the more important that it be adjudicated upon in court. That is why a constitutional democracy assigns the resolution of disputes to 'a court or, where appropriate, another independent and impartial tribunal or forum'. It is in this context that the right of access to courts guaranteed by section 34 of the Constitution must be understood.

[47.] The right to a fair hearing before an individual is deprived of a right, interest or legitimate expectation is another principle well recognised and entrenched in law. Any existing ouster clause in terms such as 'the decision of the Minister shall not be subject to appeal or review in any court' prohibits the court from re-examining the decision of the Minister if the decision reached by him was one which he had jurisdiction to make. Any decision affecting the legal rights of individuals arrived at by a procedure which offended against natural justice was outside the jurisdiction of the decision-making authority so that, if the Minister did not comply with the rules of natural justice, his decision was *ultra vires* or without jurisdiction and the ouster clause did not prevent the Court from enquiring whether his decision was valid or not — *vide Attorney-General of the Commonwealth of the Bahamas v Ryan* (1980) AC 718.

[48.] Lord Diplock, for the Board of the Judicial Committee of the Privy Council, stated in that case as follows:

It has long been settled law that a decision affecting the legal rights of an individual which is arrived at by a procedure which offends against the principles of natural justice is outside the jurisdiction of the decision-making authority. As Lord Selborne said as long ago as 1885 in *Spackman v Plumstead District Board of Works* (1885) 10 App Cas 229, 240: 'There would be no decision within the meaning of the statute if there were anything ... done contrary to the essence of justice'. See also *Ridge v Baldwin* [1964] AC 40.

[49.] Moreover, in *Jackson v Attorney-General* UKHL 56 (2006) 1 AC 262, Baroness Hale made the following observations at paragraph 159:

The courts, will, of course, decline to hold that Parliament has interfered with fundamental rights unless it has made its intentions crystal clear. The courts will treat with particular suspicion (and might

even reject) any attempt to subvert the rule of law by removing governmental action affecting the rights of the individual from all judicial scrutiny.

[50.] We turn now to consider the relevant provisions of Amendment 17. It is quite clear that the provisions of section 18(1) and (9) dealing with the constitutional right to the protection of law and to a fair hearing have been taken away in relation to land acquired under section 16B(2)(a). Indeed, the Supreme Court of Zimbabwe explicitly acknowledges this in its judgment, cited above, when it stated:

By the clear and unambiguous language of s 16B(3) of the Constitution, the legislature, in the proper exercise of its powers, has ousted the jurisdiction of courts of law from any of the cases in which a challenge to the acquisition of agricultural land secured in terms of s 16B(2)(a) of the Constitution could have been sought. The right to protection of law for the enforcement of the right to fair compensation in case of breach by the acquiring authority of the obligation to pay compensation has not been taken away. The ouster provision is limited in effect to providing protection from judicial process to the acquisition of agricultural land identified in a notice published in the *Gazette* in terms of s 16B(2)(a). An acquisition of the land referred to in s 16B(2)(a) would be a lawful acquisition. By a fundamental law the legislature has unquestionably said that such an acquisition shall not be challenged in any court of law. There cannot be any clearer language by which the jurisdiction of the courts is excluded.

[51.] Learned agent for the respondent seized upon the following statement of the Supreme Court at page 38 of its judgment to argue that an individual whose property has been acquired can proceed by judicial review:

Section 16B(3) of the Constitution has not however taken away for the future the right of access to the remedy of judicial review in a case where the expropriation is, on the face of the record, not in terms of s 16B(2)(a). This is because the principle behind s 16B(3) and s16B(2)(a) is that the acquisition must be on the authority of law. The question whether an expropriation is in terms of s 16B(2)(a) of the Constitution and therefore an acquisition within the meaning of that law is a jurisdictional question to be determined by the exercise of judicial power. The duty of a court of law is to uphold the Constitution and the law of the land. If the purported acquisition is, on the face of the record, not in accordance with the terms of s 16B(2)(a) of the Constitution a court is under a duty to uphold the Constitution and declare it null and void. By no device can the legislature withdraw from the determination by a court of justice the question whether the state of facts on the existence of which it provided that the acquisition of agricultural land must depend existed in a particular case as required by the provisions of s 16B(2)(a) of the Constitution.

[52.] No doubt there is a remedy but only in respect of the payment of compensation under section 16B(2)(b) but judicial review does *not* lie at all in respect of land acquired under section 16B(2)(a)(i) and (ii), as correctly submitted by learned counsel for the applicants. Indeed, the applicants' land had been acquired under section 16B(2)(a)(i) and (ii). It is significant that, whereas under section 16B(2)(a)(iii), mention is made of the acquiring authority ie a minister whose decision can admittedly be subject to judicial review, no such mention is made in respect of section 16B(2)(a)(i) and (ii) so that in effect the applicants cannot proceed by judicial review or otherwise.



This is why specific reference is made to the fact that the provisions of section 18(1) and (9) do not apply in relation to land acquired under section 16B(2)(a). The applicants have been expressly denied the opportunity of going to court and seeking redress for the deprivation of their property, giving their version of events and making representations.

[53.] We are, therefore, satisfied that the applicants have established that they have been deprived of their agricultural lands without having had the right of access to the courts and the right to a fair hearing, which are essential elements of the rule of law, and we consequently hold that the respondent has acted in breach of article 4(c) of the Treaty.

## **VI. Racial discrimination**

[54.] The other issue raised by the applicants is that of racial discrimination. They contended that the land reform programme is based on racial discrimination in that it targets white Zimbabwean farmers only. The applicants further argue that Amendment 17 was intended to facilitate or implement the land reform policy of the government of Zimbabwe based on racial discrimination. This issue is captured in the applicants' heads of arguments, paragraph 175, in the following terms:

That the actions of the government of Zimbabwe in expropriating land for resettlement purposes has been based solely or primarily on consideration of race and ethnic origin ... It is being directed at white farmers ... In reality it was aimed at persons who owned land because they were white. It mattered not whether they acquired the land during the colonial period or after independence.

[55.] The applicants further argued at paragraph 128 of the heads of argument that:

The evidence presented to this Tribunal shows as a fact that the decision as to whether or not agricultural raw land in Zimbabwe is to be expropriated is determined by the race or country of origin of the registered owner. In terms of a policy designed to redress the ownership of land created during the colonial period, the GoZ has determined that no person of white colour or European origin was to retain ownership of a farm, and all such farms were to be expropriated. The fact that this could not be done through the normal procedures between 2000 and 2005 led to the enactment of Amendment 17, which was the ultimate legislative tool used by the GoZ to seize all the white owned farms.

[56.] The applicants went on to argue that, even if Amendment 17 made no reference to the race and colour of the owners of the land acquired, that does not mean that the legislative aim is not based on considerations of race or colour since only white owned farms were targeted by the Amendment. There is a clear legislative intent directed only at white farmers. According to the applicants, the Amendment strikes at white farmers only and no other rational categorisation is apparent therein. The applicants further contended that the targeted farms were expropriated and given to certain beneficiaries whom they referred to as 'chefs' or a class of politically

connected beneficiaries. These were, in the words of the applicants, 'senior political or judicial, or senior members of the armed services'.

[57.] It is on the basis of those arguments that the applicants, therefore, submitted in conclusion that the respondent is in breach of article 6(2) of the Treaty, prohibiting discrimination, by enacting and implementing Amendment 17.

[58.] The respondent, for its part, refuted the allegations by the applicants that the land reform programme is targeted at white farmers only. It argued instead that the programme is for the benefit of people who were disadvantaged under colonialism and it is within this context that the applicants' farms were identified for acquisition by the respondent. The farms acquired are suitable for agricultural purposes and happen to be largely owned by the white Zimbabweans. In implementing the land reform programme, therefore, it was inevitable that the people who were likely to be affected would be white farmers. Such expropriation of land under the programme cannot be attributed to racism but circumstances brought about by colonial history. In any case, according to the respondent, not only lands belonging to white Zimbabweans have been targeted for expropriation but also those of the few black Zimbabweans who possessed large tracts of land. Moreover, some white farmers have been issued with offer letters and 99-year leases in respect of agricultural lands. The respondent has, therefore, not discriminated against white Zimbabwean farmers and has not acted in breach of article 6(2) of the Treaty.

[59.] The Tribunal has to determine whether or not Amendment 17 discriminates against the applicants and as such violates the obligation that the respondent has undertaken under the Treaty to prohibit discrimination.

[60.] It should first be noted that discrimination of whatever nature is outlawed or prohibited in international law. There are several international instruments and treaties which prohibit discrimination based on race, the most important one being the United Nations Charter, which provides in article 1(3) that one of its purposes is:

To achieve international corporation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to *race, sex, language or religion*. (emphasis supplied).

[61.] There is also the Universal Declaration of Human Rights which provides in article 2 as follows:

Everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind, such as *race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status* (emphasis supplied).

[62.] Moreover, article 2(1) of the International Covenant on Civil and Political Rights and article 2(2) of the International Covenant on Economic, Social and Cultural Rights prohibit racial discrimination, respectively, as follows:

Each state party to the present Covenant undertakes to respect and ensure to all individuals within its territory without distinction of any kind such as *race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status*.

The states parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to *race, colour, sex, language, religious, political or other opinion, national or social origin, property, birth or other status* (emphasis supplied).

[63.] The above provisions are similar to article 2 of the African Charter on Human and Peoples' Rights (African Charter) and article 14 of the European Convention on Human Rights.

[64.] Discrimination on the basis of race is also outlawed by the Convention on the Elimination of All Forms of Racial Discrimination (the Convention). It is worth noting that the respondent has acceded to both Covenants, the African Charter and the Convention and, by doing so, is under an obligation to respect, protect and promote the principle of non-discrimination and must, therefore, prohibit and outlaw any discrimination based on the ground of race in its laws, policies and practices.

[65.] Apart from all the international human rights instruments and treaties, the Treaty also prohibits discrimination. Article 6(2) states as follows:

SADC and member states shall not discriminate against any person on grounds of gender, religion, political views, *race, ethnic origin, culture, ill health, disability or such other ground as may be determined by the Summit* (emphasis supplied).

[66.] This article, therefore, enjoins SADC and member states, including the respondent, not to discriminate against any person on the stated grounds, one of which is race.

[67.] The question then is, what is racial discrimination? It is to be noted that the Treaty does not define racial discrimination or offer any guidelines to that effect. Article 1 of the Convention is as follows:

Any distinction, exclusion, restriction or preference based on *race, colour, descent, or natural or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life* (the emphasis is supplied).

[68.] Moreover, the Human Rights Committee in its General Comment 18 on non-discrimination has, in paragraph 7, defined discrimination as used in the Covenant on Civil and Political Rights as implying

any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or

other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms. (the underlining is supplied).

[69.] The Committee on Economic, Social and Cultural Rights, for its part, in its General Comment 16 on the equal right of men and women to the equality of all economic, social and cultural rights underlined at paragraph 13 that

guarantees of non-discrimination and equality in international human rights treaties mandate both *de facto* and *de jure* equality. *De jure* (or formal) equality and *de facto* (or substantive) equality are different but interconnected concepts.

[70.] The Committee further pointed out that formal equality assumes that equality is achieved if a law or policy treats everyone equal in a neutral manner. Substantive equality is concerned, in addition, with the effects of laws, policies and practices in order to ensure that they do not discriminate against any individual or group of individuals.

[71.] The Committee went on to state at paragraphs 12 and 13 respectively that:

Direct discrimination occurs when a difference in treatment relies directly and explicitly on distinctions based exclusively on sex and characteristics of men or women, which cannot be justified objectively. *Indirect discrimination occurs when a law, policy or programme does not appear to be discriminatory but has a discriminatory effect when implemented.* (Emphasis supplied).

[72.] It is to be noted that what the Committee is stating about direct and indirect discrimination in the context of sex applies equally in the case of any other prohibited ground under the Covenant such as race.

[73.] The question that arises is whether Amendment 17 subjects the applicants to any racial discrimination, as defined above. It is clear that the Amendment affected all agricultural lands or farms occupied and owned by the applicants and all the applicants are white farmers. Can it then be said that, because all the farms affected by the Amendment belong to white farmers, the Amendment and the land reform programme are racially discriminatory?

[74.] We note here that there is no explicit mention of race, ethnicity or people of a particular origin in Amendment 17 as to make it racially discriminatory. If any such reference were made, that would make the provision expressly discriminatory against a particular race or ethnic group. The effect of such reference would be that the respondent would be in breach of its obligations under the article 6(2) of the Treaty.

[75.] The question is whether, in the absence of the explicit mention of the word 'race' in Amendment 17, that would be the end of the matter. It should be recalled that the applicants argued that, even if the Amendment could be held not to be racially discriminatory in

itself, its effects make it discriminatory because the targeted agricultural lands are all owned by white farmers and that the purpose of Amendment 17 was to make it apply to white farmers only, regardless of any other factors such as the proper use of their lands, their citizenship, their length of residence in Zimbabwe or any other factor other than the colour of their skin.

[76.] Since the effects of the implementation of Amendment 17 will be felt by the Zimbabwean white farmers only, we consider it, although Amendment 17 does not explicitly refer to white farmers, as we have indicated above, its implementation affects white farmers only and consequently constitutes indirect discrimination or *de facto* or substantive inequality.

[77.] In examining the effects of Amendment 17 on the applicants, it is clear to us that those effects have had an unjustifiable and disproportionate impact upon a group of individuals distinguished by race such as the applicants. We consider that the differentiation of treatment meted out to the applicants also constitutes discrimination as the criteria for such differentiation are not reasonable and objective but arbitrary and are based primarily on considerations of race. The aim of the respondent in adopting and implementing a land reform programme might be legitimate if and when all lands under the programme were indeed distributed to poor, landless and other disadvantaged and marginalised individuals or groups.

[78.] We, therefore, hold that, implementing Amendment 17, the respondent has discriminated against the applicants on the basis of race and thereby violated its obligation under article 6(2) of the Treaty.

[79.] We wish to observe here that if: (a) the criteria adopted by the respondent in relation to the land reform programme had not been arbitrary but reasonable and objective; (b) fair compensation was paid in respect of the expropriated lands, and (c) the lands expropriated were indeed distributed to poor, landless and other disadvantaged and marginalised individuals or groups, rendering the purpose of the programme legitimate, the differential treatment afforded to the Applicants would not constitute racial discrimination.

[80.] We can do no better than quote in this regard what the Supreme Court of Zimbabwe stated in *Commercial Farmers Union v Minister of Lands* 2001 (2) SA 925 (ZSC) at paragraph 9 where it dealt with the history of land injustice in Zimbabwe and the need for a land reform programme under the rule of law:

We are not entirely convinced that the expropriation of white farmers, if it is done lawfully and fair compensation is paid, can be said to be discriminatory. But there can be no doubt that it is unfair discrimination ... to award the spoils of expropriation primarily to ruling party adherents.

## VII. Compensation

[81.] The applicants have also raised the issue of compensation. Learned counsel for the applicants contended that expropriation of their lands by the respondent was not accompanied by compensation and that failure to do so is a breach of the respondent's obligations under international law and the Treaty. We note that the respondent does not dispute the fact that the applicants are entitled to compensation. It, however, argued that the independence agreement reached in 1978 in London provided that payment of compensation for expropriated land for resettlement purposes would be paid by the former colonial power, Britain.

[82.] As regards the question of who should pay compensation, ordinarily in international law it is the expropriating state that should pay compensation. This would mean that, respecting the matter at hand, the respondent should shoulder the responsibility of paying compensation to the applicants for their expropriated lands. We note, however, that section 16B(2)(b) of the Amendment provides as follows: 'No compensation shall be payable for land referred to in paragraph (a) except for any improvements effected on such land before it is acquired'.

[83.] This provision excludes payment of compensation for land referred to in paragraph (a), (i) and (ii) which is agricultural land that has been acquired for resettlement purposes. It is difficult for us to understand the rationale behind excluding compensation for such land, given the clear legal position in international law. It is the right of the applicants under international law to be paid, and the correlative duty of the respondent to pay, fair compensation.

[84.] Moreover, the respondent cannot rely on its national law, its Constitution, to avoid an international law obligation to pay compensation as we have already indicated above.

[85.] Similarly, in the present case, the respondent cannot rely on Amendment 17 to avoid payment of compensation to the applicants for their expropriated farms. This is regardless of how the farms were acquired in the first place, provided that the applicants have a clear legal title to them.

[86.] We hold, therefore, that fair compensation is due and payable to the applicants by the respondent in respect of their expropriated lands.

## VIII. Conclusions

[87.] For the reasons given, the Tribunal holds and declares that:

(a) By unanimity, the Tribunal has jurisdiction to entertain the application;

- (b) By unanimity, the applicants have been denied access to the courts in Zimbabwe;
- (c) By a majority of four to one, the applicants have been discriminated against on the ground of race; and
- (d) By unanimity, fair compensation is payable to the applicants for their lands compulsorily acquired by the respondent.

**[88.]** The Tribunal further holds and declares that:

- (1) By unanimity, the respondent is in breach of its obligations under article 4(c) and, by a majority of four to one, the respondent is in breach of its obligations under article 6(2) of the Treaty;
- (2) By unanimity, Amendment 17 is in breach of article 4(c) and, by a majority of four to one, Amendment 17 is in breach of article 6(2) of the Treaty;
- (3) By unanimity, the respondent is directed to take all necessary measures, through its agents, to protect the possession, occupation and ownership of the lands of the applicants, except for Christopher Mellish Jarret, Tengwe Estates (Pvt) Ltd and France Farm (Pvt) Ltd. that have already been evicted from their lands, and to take all appropriate measures to ensure that no action is taken, pursuant to Amendment 17, directly or indirectly, whether by its agents or by others, to evict from, or interfere with, the peaceful residence on, and of those farms by, the applicants; and
- (4) By unanimity, the respondent is directed to pay fair compensation, on or before 30 June 2009, to the three applicants, namely, Christopher Mellish Jarret, Tengwe Estates (Pvt) Ltd and France Farm (Pvt) Ltd.

**[89.]** By a majority of four to one, the Tribunal makes no order as to costs in the circumstances.

### **Dissenting opinion (Judge Tshosa)**

**[90.]** During the deliberations I agreed with my colleagues on the main conclusions reached on this case. I agreed because it was very clear to me that Amendment 17 denied the applicants a remedy under the national law of Zimbabwe, that they have been denied access to the courts by the ouster clause in the Amendment concerning compulsory acquisition of the agricultural lands and that the said Amendment excludes compensation for the compulsory acquisition of agricultural land. However, I did not agree with the conclusion reached on the issue of racial discrimination, which is to the effect that although Amendment 17 was not explicitly discriminatory, it is indirectly discriminatory against the applicants on the basis of race. The main basis of the majority view on this issue is that because the implementation of Amendment 17 affects the applicants and who own agricultural lands that are being acquired by the respondent for

resettlement purposes, that makes the Amendment racially discriminatory. This is the conclusion that makes me break ranks with my brethren.

[91.] I should observe that during the deliberations on the case, it was not entirely clear to us how the issue of racial discrimination would be resolved. It was only towards the end of the deliberations, that is, a day before the judgment was to be delivered, that the majority were inclined to hold that Amendment 17 indirectly discriminated against the applicants. This should also explain why my view is so brief.

[92.] It is not in dispute that the agricultural lands that were compulsorily acquired by the respondent, and are the subject of these proceedings belong to, or are owned by, the applicants. This means that the implementation of 17 Amendment applies mainly to agricultural lands owned by the applicants or rather the effects of the implementation of the Amendment will be felt mainly by the applicants. Thus on the face of it, one is inclined to conclude that although Amendment 17 does not explicitly relate to white farmers, its implementation only affects the applicants and is therefore indirectly discriminatory on the basis of race, and thereby in violation of the respondent's legal obligation under section 6(2).of the SADC Treaty outlawing discrimination, *inter alia*, on the basis of race.

[93.] In my view, there is no basis for this conclusion and these are my reasons. Firstly, the fact that the agricultural lands of the applicants have been, and being affected, by the implementation by Amendment 17 is not because they are of white origin. The Amendment 17 affects their land because the agricultural land that is required for resettlement purposes, and which is the subject of the Amendment is in their hands. In other words, Amendment 17 targets agricultural land and they are affected not because they are of white origin but because they are the ones who own the land in question. Thus, the target of Amendment 17 is agricultural land and not people of a particular racial group. This means that in implementing the Amendment it was always going to affect those in possession of the land be they of white, black or other racial background. In my view, this does not amount to racial discrimination whether directly or indirectly.

[94.] There is also the second reason for holding the view that the implementation of Amendment 17 is not indirectly discriminatory against the applicants. In oral arguments, and this is on record, the respondents were specifically asked by the Tribunal whether there were other people apart from the applicants whose agricultural land was compulsorily acquired on the basis of Amendment 17. The answer was in the affirmative and this was not challenged by the applicants. In my view, this means that the applicants or rather white Zimbabwean farmers were not the only ones who were affected by



the Amendment as to make it racially discriminated even indirectly. The Amendment is of a general application. It applies to all Zimbabweans who are in occupation of the land that is required for resettlement purposes irrespective of their racial origins.

[95.] Admittedly, non-white Zimbabweans in possession of agricultural land in question and who are affected by the Amendment are few in number as compared to white Zimbabwean farmers. But even if numerically these other groups of Zimbabweans are less compared to the white Zimbabwean farmers, the fact of the matter is that there are other Zimbabweans who are not white whose lands are affected by the Amendment. The land of these farmers may not have been expropriated yet but is not immune from expropriation, at least, on the basis of the Amendment. It is on these grounds that I am of the view that Amendment 17 does not discriminate against the applicants on the basis of race and therefore does not violate the respondent obligation under article 6(2) of the Treaty.

### **Dissenting opinion on cost (Judge Pillay)**

[96.] With regard to the issue of costs, I shall first refer to rule 78 of the Rules. Rule 78 provides as follows:

- (1) Each party to the proceedings shall pay its own legal costs.
- (2) The Tribunal may, in exceptional circumstances, order a party to the proceedings to pay costs incurred by the other party.

[97.] The general rule is that each party bears its own costs except where there are exceptional circumstances warranting the grant of costs in the interests of justice against a party.

[98.] The Tribunal has already construed rule 78 in a broad and purposive manner in the case of *Nixon Chirinda and others* (case SADC (T) 09/2008) and held that there were exceptional circumstances justifying the grant of costs in the interests of justice against a party that brought before the Tribunal a patently frivolous and vexatious application.

[99.] I cannot do otherwise but consider that there are indeed also exceptional circumstances, on the particular facts of the present case, justifying the award of costs to the applicants in the interests of justice, especially given that the applicants have suffered for a long time human rights abuses for remaining on their lands, three of them having been forcibly evicted from their lands without any compensation, and that the respondent has up to now failed to comply with the interim orders of the Tribunal directing the respondent to prevent its agents and others from interfering with the enjoyment of the lands occupied by those applicants who are still in occupation thereof.

[100.] Consequently, I made an order as to costs against the respondent under rule 78(2). The costs are to be determined by the Registrar if the parties are not agreed.

# **DOMESTIC DECISIONS**



# SOUTH AFRICA

## Mthembu v The State

2008 AHRLR 223 (SASCA 2008)

*Bongani Mthembu v The State*

Supreme Court of Appeal, 10 April 2008

*Evidence obtained through torture is inadmissible in Court*

**Evidence** (inadmissibility of evidence obtained through torture, 17, 21, 25-27, 29, 32-34, 36)

**Torture** (inadmissibility of evidence obtained through torture, 17, 21, 25-27, 29, 32-34, 36; absolute prohibition, 31)

**Interpretation** (international standards, 32)

[1.] This appeal, in the main, concerns the admissibility of evidence, obtained through the use of torture, from an accomplice. The question arises because the chief state witness against the appellant implicated him in several crimes through narrative and real evidence – but disclosed, when testifying at the trial more than four years later, that he had been beaten and tortured before leading the police to crucial evidence. The point at issue is whether that evidence can be used against the appellant.

[2.] The appellant, a former a police-officer, was convicted in the Verulam Regional Court (Mrs Pillay) of theft of a Toyota Hilux motor-vehicle on 5 January 1998 (count 2), theft of a Toyota Corolla motor-vehicle on 3 February 1998 (count 3) and robbery of a steel box containing R 60 000 in cash and also of a further amount of R 8450 from the Maidstone post office at Tongaat (counts 4 and 5) on 10 February 1998. For the theft of the two vehicles, taken together, he was sentenced to eight years' imprisonment, and for the robbery to 15 years' imprisonment - effectively 23 years' imprisonment.<sup>1</sup>

[3.] He appealed to the Durban High Court against his convictions and sentence. That court confirmed the convictions but reduced the sentence on counts 2 and 3 to five years' imprisonment and that on counts 4 and 5 to 12 years' imprisonment. The effective sentence was

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<sup>1</sup> The appellant originally faced seven charges. Only four are relevant to this appeal.

reduced to 17 years' imprisonment.<sup>2</sup> Leave to appeal was granted to this court.

[4.] At the trial, the following witnesses testified for the State: Mr Sudesh Ramseroop, Sergeant Selvan Govender, Mr Luke Krishna, Mr Zamani Mhlongo and Mr Dorasamy Pillay. In addition to testifying himself, the appellant also called Mr Nkosinathi Zondo and Mr Sithembiso Philip Ngcobo to testify on his behalf. Not all their evidence is relevant for this appeal. The foundation upon which the convictions rest is the evidence of Ramseroop, who was warned as an accomplice in terms of s 204 of the Criminal Procedure Act 51 of 1977.

[5.] Ramseroop was 32 years old at the time of these incidents. He had lived in the Emona area of Tongaat all his life and conducted business as a panel-beater from his home. He became acquainted with the appellant, who had left the police service to start a business as a taxi operator. The appellant often brought vehicles to him for panel-beating. He testified that towards the end of January 1998 the appellant, accompanied by Ngcobo, brought the Hilux in count 2 to him. The appellant asked him to repair and spray-paint the vehicle. They agreed on a price of R500. Two days later the appellant returned with a Mr DK Mhlongo, who he introduced to Ramseroop as his uncle from Hambanathi. The appellant informed him that Mhlongo wished to buy the vehicle. Two days later they returned to inspect it and the day thereafter they came back to collect the vehicle in return for payment of the agreed amount.

[6.] On 5 February 1998 the appellant brought another vehicle to Ramseroop's home. This was the Corolla in count 3. On this occasion an unknown male accompanied him. Ramseroop noticed that the vehicle's ignition switch had been damaged. The appellant removed the registration-plates and placed them in the boot. He also asked Ramseroop to spray-paint the vehicle. At the appellant's request Ramseroop parked the vehicle in his sunken lounge thereby concealing it. A few days later the appellant and his companion returned. He appeared, Ramseroop said, to be in a hurry. The appellant attached the registration-plates to the Corolla and drove the vehicle away. He returned later, parked the vehicle in the lounge and again removed the registration-plates. In the presence of Ramseroop's wife he also handed Ramseroop R 300 in note denominations of R 20. The appellant removed a metal box from the vehicle's boot and handed it to Ramseroop for disposal. After the appellant's departure, Ramseroop inspected the contents of the box and found that it contained paper clips and rubber bands. He decided to keep the box and hid it in the ceiling of his house.

<sup>2</sup> The order indicates that the sentence is 12 years' imprisonment. And counsel for the state accepted that this was so. It is however clear from the judgment that the effective sentence imposed was 17 years' imprisonment.

[7.] On 19 February 1998, at about midday, Sergeant Govender, who was stationed at the Tongaat police station arrived at Ramseroop's home. He was accompanied by five other police officers from the field unit. They were acting on information concerning a stolen vehicle. (Ramseroop's evidence was that this occurred on 10 February, but he was probably mistaken in this regard.) Ramseroop was outside his house at the time. Govender testified that he told Ramseroop that he was investigating the whereabouts of a stolen vehicle. In response Ramseroop spontaneously began telling him how the appellant had brought the vehicle to his home. Govender stopped him from completing his story and requested Ramseroop to first show him the vehicle. Ramseroop obliged and escorted him to his sunken lounge where the vehicle had been parked. After inspecting the vehicle and establishing that it had been stolen, Govender seized it, arrested Ramseroop and took him into custody. The main substance and sequence of this interaction Ramseroop confirmed in his evidence.

[8.] Following Ramseroop's interrogation at the police station he disclosed information regarding the Hilux to the police. As a result of this disclosure, Govender accompanied other members of the field unit and a few detectives to Mhlongo's home at Hambanathi. Ramseroop was present. Mhlongo was not at home. Instead they found his son Zamani, who directed them to another residence. There they found Mhlongo and the Hilux which, according to the testimony of Dorasamy Pillay, the complainant in count 2, had been taken from him at gun-point. Mhlongo was arrested and the Hilux seized. The state was able only to prove a case of theft against the appellant as there was no evidence linking him to the actual robbery of the Hilux.

[9.] On 21 February at 7 am, acting on further information from Ramseroop, Govender again accompanied some officers and Ramseroop to the latter's residence. There, Ramseroop removed the hidden metal box from the ceiling and handed it to them. This was the very box that had been taken from the post office during the robbery. Ramseroop was released later that day, after making a written statement to the police concerning these events.

[10.] To sum up, Ramseroop's evidence implicated the appellant in the thefts of the Hilux and Corolla. His evidence regarding the metal box linked the appellant to the Maidstone post office robbery described below. To the circumstances leading to the discovery of the Hilux and the metal box, which assumed critical importance before us, I will return.

[11.] The appellant denied involvement in any of the crimes. Regarding the Hilux, the appellant testified that he had merely been helping Mhlongo, who had since died, to facilitate a business deal with Ramseroop for the repair of the vehicle. He asserted that

Ramseroop had falsely implicated him in the crimes because the police had tortured him.

[12.] Mr Luke Krishna's eye-witness testimony regarding the events at the post office placed the appellant at the scene of the robbery. He had been employed at the post office at the time of the robbery. He attended an identification parade at the police station on 20 May 1998, three and a half months after the incident, where he identified the appellant, from a line-up of 11 persons, as one of two persons who had participated in the robbery. He testified that the appellant entered the post office with one other person who stood at the door. He himself was behind the counter. The appellant was well-spoken and was wearing a blue cap, jacket and pants. The appellant approached him and asked him for five stamps. He then produced a firearm and demanded money, which had been delivered to the post office for the payment of pensions. At this stage the appellant was facing him. Krishna then went to the back of the post office to fetch the money, which was in a metal box. He returned and handed the box containing the money to the appellant. The appellant asked for more money and Krishna returned with two other boxes, but these were empty. The appellant then pointed his firearm at Krishna's assistant Mr Yugan Reddy, who was also behind the counter, and ordered him to hand over the money that was in the drawer. Reddy complied by throwing the bundled money at the appellant. The appellant and his accomplice then left with the money. The incident lasted approximately five minutes.

[13.] The appellant confirmed that Krishna had identified him at the identification parade. But he denied that he had been one of the robbers. He claimed that Krishna was able to identify him at the parade only because he had seen him at the police station in the charge office on an earlier occasion. The learned magistrate rejected this claim, with good reason. The identification parade, however, had several unsatisfactory features; to mention a few: the appellant was denied the presence of his legal representative; Krishna's evidence whether the other persons in the parade were of similar build, height, age and appearance to the appellant was unsatisfactory; there is no evidence that the persons on the parade were similarly dressed and Krishna was not told that the suspect may not be present. There was no evidence that Krishna had made a prior description of the robbers, which bore any resemblance to the appellant. The state, without explanation, failed to lead any other evidence regarding the circumstances under which the identification parade was held. The parade's reliability was not tested and therefore had little evidential weight.<sup>3</sup> For as Van den Heever JA stated:<sup>4</sup>

<sup>3</sup> *S v Daba* 1996 (1) SACR 243 (E) 249d-e.

<sup>4</sup> *R v Masemang* 1950 (2) SA 488 (A) 493-494.



[W]here such identification rests upon the testimony of a single witness and the accused was identified at a parade which was admittedly conducted in a manner which did not guarantee the standard of fairness observed in the recognised procedure, but was calculated to prejudice the accused, such evidence, standing alone, can have little weight.

[14.] The learned magistrate and the court below were alive to the difficulty of relying only on Krishna's identification of the appellant. But they found that Ramseroop's testimony that the appellant had given him the metal box, which was proved to have been the very one taken during the robbery, constituted sufficient corroboration to link the appellant conclusively to the robbery.

[15.] With respect to the theft of the Corolla (count 3), counsel for the appellant urged us to find that Ramseroop's evidence was insufficient to establish the appellant's guilt. He advanced two reasons for his submission: first that Ramseroop, as an accomplice, had an interest to falsely implicate the appellant, and secondly, because the state had failed to call Ramseroop's wife, who was clearly a material witness regarding the circumstances under which the appellant had brought the vehicle to their home, to testify.

[16.] The fact that Ramseroop's wife did not testify does not mean that Ramseroop's evidence was inadequate to prove the case against the appellant on this count. When Ramseroop, before his arrest, spontaneously told Sergeant Govender that the appellant had brought the vehicle to his home, neither he nor the appellant were suspects. He had no reason to implicate the appellant at that stage. The appellant was well-known to him and had also provided him with an income from the vehicles which he had brought for repairs. The magistrate analysed the evidence carefully before concluding that the appellant was guilty on this count. I have no reason to reject her reasoning on this aspect. It follows that the appellant was correctly convicted on this count.

[17.] I return to the circumstances leading to the discovery of the Hilux and of the metal box. It is common cause that after Ramseroop was taken into custody on 19 February, the police at Tongaat assaulted him severely. The assaults included torture through the use of electric shock treatment. Ramseroop's uncontested evidence was that he received a 'terrible hiding' on the evening after he had been taken into custody. Thereafter assaults continued until the morning of the 21st when he took the police to his home to show them where he had hidden the metal box. Regrettably, the magistrate did not investigate the extent, frequency and duration of his unlawful treatment. Ramseroop's cursory cross-examination on this aspect was aimed only at establishing his unreliability as a witness, not whether the assaults and torture rendered his testimony inadmissible.

[18.] The learned magistrate and the court below found that the assault and torture did not render Ramseroop's testimony unreliable - a conclusion I think was correct. However, neither the magistrate

nor the court below was asked to consider the admissibility his evidence even though it is beyond dispute that the chain of events which resulted in the discovery of the Hilux and of the metal box was precipitated by his unlawful treatment.

[19.] In this court the parties were requested to address us on the admissibility of Ramseroop's evidence. The appellant submitted that the evidence relating to the discovery of the Hilux and the metal box must be excluded because it was obtained in violation of Ramseroop's right not to be tortured. Counsel for the state conceded that the evidence revealed that Ramseroop had been tortured but she made no submissions regarding the admissibility of his evidence.

[20.] It is necessary to record that Mr Zamani Mhlongo, who was called as a witness for the state, and Mr Sithembiso Philip Ngcobo, who gave evidence on behalf of the appellant, both testified that they had been tortured and assaulted as a result of which they made false statements to the police. Zamani was 16 at the time. His court testimony departed materially from the statement he had made to the police. This resulted in the Court declaring him a hostile witness. Ngcobo testified that the police applied electric shocks to his testicles. The magistrate found that their evidence could not be relied on because of their close relationship with the appellant.

[21.] Ramseroop's oral testimony four years after these events was, though given under statutory compulsion, manifestly not given under duress. In cross-examination he denied that he implicated the appellant only because of the 'terrible hiding' the police had given him. The question that faces us is whether his evidence relating to the discovery of the Hilux and of the metal box was nevertheless 'obtained' within the meaning of s 35(5) of the Constitution and must, for that reason, be excluded. The section reads as follows:

Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.

[22.] In the pre-constitutional era, applying the law of evidence as applied by the English courts, the courts generally admitted all evidence, irrespective of how obtained, if relevant.<sup>5</sup> The only qualification was that 'the judge always (had) a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against the accused'.<sup>6</sup> And where an accused was compelled to incriminate him or herself through a confession or otherwise the evidence was excluded. However, real evidence which was obtained by improper means was more readily admitted (and also because its admission was governed by statute).<sup>7</sup> The reason was that such

<sup>5</sup> *S v Pillay* 2004 (2) SACR 419 (SCA) para 6 of the judgment by Scott JA.

<sup>6</sup> This statement of Lord Goddard in *Kuruma v R* [1955] 1 All ER 236 239, was approved by Rumpff CJ in *S v Mushimba* 1977 (2) SA 829 (A).

evidence usually bore the hallmark of objective reality compared with narrative testimony that depends on the say-so of a witness. Real evidence is an object which, upon proper identification, becomes, of itself, evidence (such as a knife, firearm, document or photograph – or the metal box in this case).<sup>8</sup> Thus, where such evidence was discovered as result of an involuntary admission by an accused, it would be allowed because of the circumstantial guarantee of its reliability and relevance to guilt – the principal purpose of a criminal trial.<sup>9</sup> As a rule, evidence relating to the ‘fruit of the poisonous tree’ was not excluded.

[23.] There was however some resistance to this line of reasoning deriving from normative considerations. In *S v Sheehama* Grosskopf JA stated that it was a basic principle of our law that an accused cannot be coerced into making a self-incriminating statement. He thus held that s 218(2) of The Criminal Procedure Act 51 of 1977 did not authorise evidence of forced pointings-out even though it arguably did so.<sup>10</sup> And in *S v Khumalo*<sup>11</sup> Thirion J said that involuntary statements made by accused persons are inadmissible against them, not only because they are untrustworthy as evidence but ‘also, and perhaps mainly, because in a civilized society it is vital that persons in custody or charged with offences should not be subjected to ill-treatment or improper pressure in order to extract confessions’.<sup>12</sup> With the advent of the new constitutional order looming Van Heerden JA, in *S v January; Prokureur-Generaal, Natal v Khumalo*, confirmed this line of thinking when he observed that there has ‘in this century ... rightly been a marked shift in the justification for excluding ... involuntary confessions and admissions, and it is now firmly established in English law that an important reason is one of policy’.<sup>13</sup> In making this observation he was able to depart from the reasoning in earlier cases, referred to above, which had placed their emphasis only on the relevance and reliability of the evidence. He thus held that proof of an involuntary pointing out by an accused person is inadmissible even if something relevant to the charge is discovered as a result thereof.<sup>14</sup>

<sup>7</sup> See s 218 of the Criminal Procedure Act 51 of 1977 and its predecessors, s 274 of the Criminal Procedure and Evidence Act 31 of 1917 and s 245 of the Criminal Procedure Act 56 of 1955.

<sup>8</sup> *S v M* 2002 (2) SACR 411 para 31.

<sup>9</sup> *R v Samhandu* 1943 AD 608; *R v Duetsimi* 1950 (3) SA 674 (A).

<sup>10</sup> 1991(2) SA 860 (A); s 218(2) provides: ‘Evidence may be admitted at criminal proceedings that anything was pointed out by an accused appearing at such proceedings or that any fact or thing was discovered in consequence of information given by such accused, notwithstanding that such pointing out or information forms part of a confession or statement which by law is not admissible in evidence against such accused at such proceedings.’

<sup>11</sup> 1992 (SACR) 411 (N).

<sup>12</sup> Quoting Lord Hailsham in *Wong Kam-ming v The Queen* [1980] AC 247 (PC) 261.

<sup>13</sup> 1994 (2) SACR 801 (A) 807g-h.

[24.] Evidence of statements emanating from third parties, unless confirmed through oral testimony, was excluded as hearsay. And when those persons did testify, the question whether they had been ill-treated or improperly induced to make statements was relevant only to the weight of their evidence, not its admissibility. I am not aware of any case where evidence of a third party's statement was held inadmissible because it was illegally obtained.

[25.] I return to s 35(5) of the Constitution. In *S v Tandwa*<sup>15</sup> Cameron JA observed the clear and unmistakable departure from the pre-constitutional approach to the exclusion of improperly obtained in these terms:

The notable feature of the Constitution's specific exclusionary provision is that it does not provide for automatic exclusion of unconstitutionally obtained evidence. Evidence must be excluded only if it (a) renders the trial unfair; or (b) is otherwise detrimental to the administration of justice. This entails that admitting impugned evidence could damage the administration of justice in ways that would leave the fairness of the trial intact: but where admitting the evidence renders the trial itself unfair, the administration of justice is always damaged. Differently put, evidence must be excluded in all cases where its admission is detrimental to the administration of justice, including the sub-set of cases where it renders the trial unfair. The provision plainly envisages cases where evidence should be excluded for broad public policy reasons beyond fairness to the individual accused.

[26.] To those observations I would add: public policy, in this context, is concerned not only to ensure that the guilty are held accountable; it is also concerned with the propriety of the conduct of investigating and prosecutorial agencies in securing evidence against criminal suspects. It involves considering the nature of the violation and the impact that evidence obtained as a result thereof will have, not only on a particular case, but also on the integrity of the administration of justice in the long term.<sup>16</sup> Public policy therefore sets itself firmly against admitting evidence obtained in deliberate or flagrant violation of the Constitution. If on the other hand the conduct of the police is reasonable and justifiable, the evidence is less likely to be excluded – even if obtained through an infringement of the Constitution.

[27.] A plain reading of s 35(5) suggests that it requires the exclusion of evidence improperly obtained from any person, not only from an accused. There is, I think, no reason of principle or policy not to interpret the provision in this way. It follows that the evidence of a third party, such as an accomplice, may also be excluded, where the circumstances of the case warrant it. This is so even with real evidence. As far as I am aware, this is the first case since the advent of our constitutional order where the issue has pertinently arisen.

<sup>14</sup> See generally DT Zeffertt, AP Paizes and ASQ Skeen *The South African Law of Evidence* (2003) 500-505.

<sup>15</sup> [2007] SCA 34 (RSA) para 116.

<sup>16</sup> *R v Collins* [1987] 1 SCR 265 para 31.

[28.] I turn to how the evidence of torture should be approached in the light of the Constitution. On this matter the Constitution speaks unequivocally. Section 12 states that:

(1) Everyone has the right to freedom and security of the person, which includes the right - ... (c) to be free from all forms of violence from either public or private sources; (d) not to be tortured in any way; (e) not to be treated or punished in a cruel, inhuman or degrading way.

[29.] There can be no doubt that the police violated all these rights in the manner that they treated Ramseroop, and probably other witnesses, after his arrest. On the face of it, the evidence obtained as a result of these violations ought to be excluded because of its 'stain' on the administration of justice.<sup>17</sup> For present purposes it is necessary to deal only with the electric shock treatment that Ramseroop was subjected to.

[30.] The Convention Against Torture (CAT), which South Africa ratified on 10 December 1998, defines torture<sup>18</sup> to include:

[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession ... when such pain and suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or any other person acting in an official capacity ...

It is important to emphasise that the definition requires the act to be performed for the purpose of obtaining 'information or a confession'. This is the mischief at which the CAT is aimed.

[31.] The CAT prohibits torture in absolute terms and no derogation from it is permissible, even in the event of a public emergency. It is thus a peremptory norm of international law. Our Constitution follows suit and extends the non-derogation principle to include cruel, inhuman and degrading treatment.<sup>19</sup> The European Convention on Human Rights does likewise.<sup>20</sup> The prohibition against torture is therefore one of our most fundamental constitutional values. Having regard to this country's inauspicious pre-constitutional history, when the treatment of criminal suspects and other detainees often involved the use of torture, this is hardly surprising - for it is one of the most egregious of human rights violations. And it is a crime that the CAT requires all member states to investigate thoroughly and to ensure that perpetrators are severely punished.<sup>21</sup>

<sup>17</sup> *S v Tandwa* above para 120; *S v Pillay* 2004 (2) SACR 419 (SCA) paras 9 and 11 of the judgment of Scott JA.

<sup>18</sup> Art 1.

<sup>19</sup> S 37(5)(c).

<sup>20</sup> Arts 3 and 15.

<sup>21</sup> Art 4 of the CAT provides: '1. Each state party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to any act by any person which constitutes complicity or participation in torture. 2. Each party shall make these offences punishable by appropriate penalties which take into account their grave nature.'

[32.] In regard to the admissibility of evidence obtained as result of torture, article 15 of the CAT cannot be clearer. It requires that:

Each State shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.

The absolute prohibition on the use of torture in both our law and in international law therefore demands that 'any evidence' which is obtained as a result of torture must be excluded 'in any proceedings'.<sup>22</sup> As the House of Lords has recently stated, evidence obtained by torture is inadmissible, 'irrespective of where, or by whom, or on whose authority it is inflicted'.<sup>23</sup> The reason is because of its 'barbarism, illegality and inhumanity'.<sup>24</sup> In *People (at the suit of the A-G) v O'Brien*,<sup>25</sup> the Supreme Court of Ireland held that 'to countenance the use of evidence extracted or discovered by gross personal violence would ... involve the state in moral defilement'. Lord Hoffman, in *A v Secretary of State (No 2)* had no doubt that that the purpose of the exclusionary rule is to uphold the integrity of the administration of justice.<sup>26</sup>

[33.] I revert to the facts of this case. The Hilux and the metal box were real evidence critical to the state's case against the appellant on the robbery counts. Ordinarily, as I have mentioned, such evidence would not be excluded because it exists independently of any constitutional violation. But these discoveries were made as result of the police having tortured Ramseroop. There is no suggestion that the discoveries would have been made in any event. If they had the outcome of this case might have been different.

[34.] Ramseroop made his statement to the police immediately after the metal box was discovered at his home following his torture. That his subsequent testimony was given apparently voluntarily does not detract from the fact that the information contained in that statement pertaining to the Hilux and metal box was extracted through torture. It would have been apparent to him when he testified that, having been warned in terms of s 204 of the Act, any departure from his statement would have had serious consequences

<sup>22</sup> Although s 35(5) is concerned with the admissibility of evidence in criminal proceedings, the CAT's peremptory requirement that such evidence be excluded 'in any proceedings' is also applicable to our law. The absolute prohibition against torture in s 12 of the Constitution, which is not confined to criminal proceedings, also requires that the exclusionary rule be applied to 'any proceedings' in this country.

<sup>23</sup> *A v Secretary of State for the Home Department (No.2)* [2005] UKHL 71 para 51. This case involved the admissibility, before a Special Immigration Appeals Commission, of torture evidence acquired from a foreign intelligence agency without the complicity of British authorities.

<sup>24</sup> N Grief 'The exclusion of foreign torture evidence: A qualified victory for the rule of law' [2006] *EHRLR* issue 2 206.  
<sup>25</sup> [1965] IR 142 150.

<sup>26</sup> *A v Secretary of State for the Home Department (No.2)* [2005] UKHL 71 para 91.

for him. It is also apparent from his testimony that, even four years after his torture, its fearsome and traumatic effects were still with him. In my view, therefore, there is an inextricable link between his torture and the nature of the evidence that was tendered in court. The torture has stained the evidence irredeemably.

[35.] It is important to point out this. Although the information regarding the Corolla was probably also contained in Ramseroop's statement, this evidence was discovered independently – before any constitutional violation.<sup>27</sup> It was as Ramseroop testified, and Govender confirmed, volunteered by the former. This evidence was therefore not obtained improperly. And in argument before us there was no suggestion that it was. This is so even though the statement containing the information about the Corolla, in addition to information on the other counts, was induced by torture. The Corolla evidence thus remained untainted.

[36.] To admit Ramseroop's testimony regarding the Hilux and metal box would require us to shut our eyes to the manner in which the police obtained this information from him. More seriously, it is tantamount to involving the judicial process in 'moral defilement'. This 'would compromise the integrity of the judicial process (and) dishonour the administration of justice'.<sup>28</sup> In the long term, the admission of torture-induced evidence can only have a corrosive effect on the criminal justice system. The public interest, in my view, demands its exclusion, irrespective of whether such evidence has an impact on the fairness of the trial.

[37.] For all these reasons I consider Ramseroop's evidence relating to the Hilux and metal box to be inadmissible. Without this evidence the remaining evidence that the state presented is insufficient to secure convictions on count 2 (theft of the Hilux) and counts 4 and 5 (post office robbery).

[38.] What remains is only count 3 (theft of the Corolla). Turning to the appropriate sentence: the appellant was sentenced to five years' imprisonment. However, he spent 23 months in custody awaiting trial, which must be taken into account in deciding on an appropriate sentence. I consider four years on this count to be appropriate.

[39.] What has happened in this case is most regrettable. The appellant, who ought to have been convicted and appropriately punished for having committed serious crimes, will escape the full consequences of his criminal acts. The police officers who carried the responsibility of investigating these crimes have not only failed to investigate the case properly by not following elementary procedures relating to the conduct of the identification parade, but have also, by

<sup>27</sup> Ramseroop's statement is not part of the record.

<sup>28</sup> Per Lord Hoffman in *A v Secretary of State for the Home Department (No 2)* 2005 [UKHL] 71 para 87.

torturing Ramseroop and probably also Zamani Mhlongo and Sithembiso Ngcobo, themselves committed crimes of a most egregious kind. They have treated the law with contempt and must be held to account for their actions. I will accordingly request the registrar to ensure that this judgment reaches the following persons:

- The Minister for Safety and Security;
- The National Commissioner of the South African Police Service;
- The Executive Director of the Independent Complaints Directorate;
- The Chairperson of the Human Rights Commission;
- The National Director of Public Prosecutions.

[40.] In the result the following order is made:

- (i) The convictions and sentences on counts 2, 4 and 5 are set aside;
- (ii) The conviction on count 3 is confirmed;
- (iii) The sentence on count 3 is set aside and replaced with a sentence of four years' imprisonment.



# UGANDA

## Foundation for Human Rights Initiatives v Attorney-General

(2008) AHRLR 235 (UgCC 2008)

### *Foundation for Human Rights Initiatives v Attorney-General*

Constitutional Court, Kampala, constitutional petition 20 of 2006,  
26 March 2008

Judges: Mukasa-Kikonyogo, Okello, Mpagi-Bahigeine, Kitumba,  
Byamugisha

*Conformity with the Constitution of legislation dealing with  
detention before trial*

**Interpretation** (Constitution to be read as a whole, generous and  
purposive interpretation, 21, 22)

**Personal liberty and security** (discretion of court to grant bail,  
30, 31, 34, 36, 39, 43, 49; purpose of bail, 37, 38; protection of  
society from lawlessness, 42; right to appear before court, 48)

[1.] This petition is brought by a non governmental organisation (NGO) known as the Foundation for Human Rights Initiatives whose objectives include protection, promotion and observance of human rights. The petitioner is aggrieved by a number of provisions in the following various statutes:

- (a) Certain provisions of the Trial on Indictments Act (CAP 23)
- (b) The Magistrate's Courts Act (CAP 16)
- (c) The Uganda Peoples Defence Forces Act 7 of 2005 (UPDF) and
- (d) The Police Act (CAP 303)

[2.] The petitioner, basing itself on the facts stated below, is praying for six declarations also mentioned here below:

(a) That sections 14(2), 15(1), 15(2), 15(3) and 16 of the Trial on Indictments Act are inconsistent with articles 20, 23(1), 28(1) and 28(3) of the Constitution of the Republic of Uganda in so far as they impose restrictions, and limitations on the person's right to liberty, freedom of movement, the right to a fair and speedy trial and the presumption of innocence.

(b) That sections 75(2) and 76 of the Magistrate's Courts Act are inconsistent with articles 20, 23(1), 23(6), 28(1) and 28(3) of the Constitution of the Republic of Uganda in so far as they exclude certain offences from the grant of bail, thereby infringing on the constitutional right to liberty, the right to a fair and speedy trial, and the right to bail.

(c) That sections 219, 231 and 248 of the UPDF Act, which subject accused persons to lengthy periods of detention bail, are inconsistent with articles 20, 23(6), 28(1), and 28(3) of the Constitution of the Republic of Uganda and as such violate the inherent rights and freedoms of the individual which are guaranteed by the said Constitution.

(d) That section 25(2) of the Police Act which permits the police to detain a suspect for seven days without being charged in a court of law is inconsistent with article 23(4) of the Constitution and is an infringement of the right to liberty and the presumption of innocence.

[3.] The petitioner prays that this honourable Court be pleased to grant the following declarations that:

(a) Sections 14(2), 15(1), 15(2), 15(3) and 16 of the Trial on Indictments Act are inconsistent with articles 20, 23(6), 28(3) of the Constitution and as such are null and void.

(b) Sections 75(2) and 76 of the Magistrate's Courts Act are inconsistent with articles 20, 23(6), 28(1) and 28(3) of the Constitution and as such are null and void.

(c) Section 219, 231 and 248 of the UPDF Act are inconsistent with articles 20, 23(1), 23(6), 28(1) and 28(3) of the Constitution and as such are null and void.

(d) Section 25(2) of the Police Act is inconsistent with articles 20, 23(4), 23(6) and 28(1) of the Constitution and as such is null and void.

(e) The petitioner prays for costs of this petition.

[4.] The petition is supported by an affidavit sworn by Livingstone Ssewanyana, the Executive Director of the petitioner. To the petitioner the aforesaid provisions of the law do not only impose unreasonable restrictions on a person's rights to liberty, freedom of movement, right to a fair and speedy trial, presumption of innocence, right to bail but also violate the inherent human rights and freedoms of the individuals guaranteed by articles 20, 23 (1), 23(4), 23(6), 28(1) and 28(3) of the Constitution of Uganda 1995.

[5.] As the petition was brought in the public interest, the Attorney-General was sued as a statutory respondent. In his answer the Attorney-General denied the allegations in the petition and described it as misconceived. It reads, inter alia: 'Save what is herein specifically admitted, the respondent denies the contents of the petition as if the same were set forth the traversed seriatim.'

[6.] In reply to paragraph 4(a-d) of the petition, the respondent's position is as follows:

(i) Denies that sections 14(2), 15(1), 15(2), 15(3) and 16 of the Trial on Indictments Act are inconsistent with articles 20, 23(1), 23(6), 28(1) and 28(3) of the Constitution as the said provisions of the Trial on Indictments Act are both Constitutional and lawful.

(ii) Denies in response to paragraph 4(b) that sections 75(2) and 76 of the Magistrates Court's Act are inconsistent with articles 20, 23(1), 23(6) 28(1) and 28(3) of the Constitution as the said provisions are both constitutional and lawful.

(iii) Denies in response to paragraph 4(c) that sections 219, 231 and 248 of the UPDF Act are inconsistent with articles 20, 23(1), 23(6) and 28(3) of the Constitution as the said provisions are both constitutional and lawful.

(iv) Denies in response to paragraph 4(d) that section 25(2) of the Police Act is inconsistent with article 23(4) of the Constitution and is an infringement of the right to liberty and the presumption of innocence.

(3) In response to paragraph 6 of the petition the respondent avers that the petition is misconceived and that the petitioner is not entitled to any of the declarations sought.

The answer was supported by an affidavit sworn by Margaret Nabakooza, a Senior State Attorney in the Attorney-General's Chambers.

[7.] At the scheduling conferencing, the parties agreed upon the following four issues:

1. Whether sections 14(2), 15(1), 15(2), 15(3) and 16 of the Trial on Indictments Act are inconsistent with articles 20, 23(1), 23(6), 28(1) and 28(3) of the Constitution.
2. Whether sections 75(2) and 76 of the Magistrate's Court Act are inconsistent with articles 20, 23(1), 23(6), 28(1) and 28(3) of the Constitution.
3. Whether sections 219, 231 and 248 of the Uganda People's Defence Forces Act are inconsistent with articles 20, 23 (1), 23(6), 28(1) and 28 (3) of the Constitution.
4. Whether section 25(2) of the Police Act is inconsistent with article 23(4) of the Constitution.

[8.] At the hearing of this petition, the petitioner was represented by Mr Kakuru whilst Mr Oluka, Principal State Attorney, appeared for the Attorney-General.

[9.] In his submissions in reply, Mr Oluka conceded all the impugned provisions of the various Acts except section 14(2) of the Trial on Indictments Act and section 75(2) of the Magistrate's Courts Act. The aforesaid were the only contentious issues on which both learned counsel addressed the Court.

[10.] I will now proceed to evaluate the evidence adduced by the parties and to consider the submissions of their counsel.

## Issue 1

[11.] On issue 1, Mr Kakuru submitted that sections 14, 15(1), 15(2), 15(3) and 16 of the Trial on Indictments Act were inconsistent with articles 20, 23(6), 28(1) and 28(3) of the Constitution. They are both unconstitutional and unlawful. He asked Court to nullify them. As Mr Oluka had conceded to the other impugned sections, Mr Kakuru concentrated on sections 14 of Trial on Indictments Act and 75 of Magistrate's Courts Act.

Section 14(1) which reads as follows:

- (1) The High Court may at any stage in the proceedings release the accused person on bail, that is to say, on taking from him or her a recognisance consisting of a bond, with or without sureties, for such an amount as is reasonable in the circumstances of the case, to appear before the court on such a date at such a time as is named in the bond.
- (2) Notwithstanding subsection (1), in any case where a person has been released on bail, the court may, if it is of the opinion that for any

reason the amount of the bail be increased - (a) issue a warrant for the arrest of the person released on bail directing that he or she should be brought before it to execute a new bond for an increased amount; and (b) commit the person to prison if he or she fails to execute a new bond for an increased amount.

Section 75 of Magistrate's Courts Act reads:

*Release on bail*

(1) A magistrate's court before which a person appears or is brought charged with any offence other than the offences specified in subsection (2) may, at any stage in the proceedings, release the person on bail, on taking from him or her a recognisance consisting of a bond with or without sureties, for such an amount as is reasonable in the circumstances of the case to appear before the court, on such a date and at such a time as is named in the bond.

(2) The offences excluded from the grant of bail under subsection (1) are as follows (a) an offence triable only by the High Court; (b) an offence under the Penal Code Act relating to acts of terrorism; (c) an offence under the Penal Code Act relating to cattle rustling; (d) an offence under the Firearms Act punishable by a sentence of imprisonment of not less than ten years; (e) abuse of office contrary to section 87 of the Penal Code Act; (f) rape, contrary to section 123 of the Penal Code Act, and defilement contrary to sections 129 and 130 of the Penal Code Act; (g) embezzlement, contrary to section 268 of the Penal Code Act; (h) causing financial loss, contrary to section 269 of the Penal Code Act; (i) corruption, contrary to section 2 of the Prevention of Corruption Act; (j) bribery of a member of a public body, contrary to section 5 of the Prevention of Corruption Act; and (k) any other offence in respect of which a magistrate's court has no jurisdiction to grant bail.

(3) A chief magistrate may, in any case other than in the case of an offence specified in subsection (2), direct that any person to whom bail has been refused by a lower court within the area of his or her jurisdiction, be released on bail or that the amount required on any bail bond be reduced.

(4) The High Court may, in any case where an accused person is appearing before a magistrate's court - (a) where the case is not one mentioned in subsection (2), direct that any person to whom bail has been refused by the magistrate's court be released on bail or that the amount required for any bail bond be reduced; and (b) where the case is one mentioned in subsection (2), direct that the accused person be released on bail.

(5) Notwithstanding subsection (1), in any case where a person has been released on bail, the High Court may, if it is of the opinion that for any reason the amount of bail should be increased - (a) issue a warrant for the arrest of the person released on bail directing that he or she should be brought before it to execute a new bond for an increased amount; and (b) commit that person to prison if he or she fails to execute a new bond for an increased amount.

[12.] The other impugned statutory provisions 15(1) 15(2) 15(3) 16 Trial on Indictments Act, 76 of Magistrates Court Act, 25 Police Act and sections 219, 231 and 248 of UPDF read as follows:

Section 15(1) reads as follows:

*Refusal to grant bail*

(1) Notwithstanding section 14, the court may refuse to grant bail to a person accused of an offence specified in subsection (2) if he or she does not prove to the satisfaction of the court - (a) that exceptional circumstances exist justifying his or her release on bail; and (b) that he or she will not abscond when released on bail.

Section 15(2) reads as follows:

An offence referred to in subsection (1) is (a) an offence triable only by the High Court; (b) an offence under the Penal Code Act relating to acts of terrorism or cattle rustling; (c) an offence under the Firearms Act punishable by sentence of imprisonment of not less than ten years; (d) abuse of office contrary to section 87 of the Penal Code Act; (e) rape, contrary to section 123 of the Penal Code Act and defilement contrary to sections 129 and 130 of the Penal Code Act; (f) embezzlement, contrary to section 268 of the Penal Code Act; (g) causing financial loss, contrary to section 269 of the Penal Code Act; (h) corruption, contrary to section 2 of the prevention of corruption Act; (i) bribery of a member of a public body, contrary to section 5 of the Prevention of Corruption Act; and (j) any other offence in respect of which a magistrate's court has no jurisdiction to grant bail.

Section 15(3) reads as follows:

In this section, 'exceptional circumstances' means any of the following - (a) grave illness certified by a medical officer of the prison or other institution or place where the accused is detained as being incapable of adequate medical treatment while the accused is in custody; (b) a certificate of no objection signed by the Director of Public Prosecutions; or (c) the infancy or advanced age of the accused.

Section 16 reads as follows:

*Restriction on period of pretrial remand*

If an accused person has been remanded in custody before the commencement of his or her trial - (a) in respect of any offence punishable by death, for a continuous period exceeding four hundred and eighty days; or (b) in respect of any other offence, for a continuous period exceeding two hundred and forty days, the judge before whom he or she first appears after the expiration of the relevant period shall release him or her on bail on his or her own recognisance, notwithstanding that he or she is accused of an offence referred to in section 15(1), unless - (c) he or she has, prior to the expiration of that period, been committed to the High Court for trial; or (d) the judge is satisfied that it is for the protection of the public that he or she should not be released for custody.

Section 76 of Magistrate's Courts Act reads as follows:

*Restriction on period of pretrial remand.*

If an accused person has been remanded in custody before his or her trial commences - (a) in respect of any offence punishable by death, for a continuous period exceeding four hundred and eighty days; or (b) in respect of any other offence, for a continuous period exceeding two hundred and forty days, the magistrate before whom the accused person first appears after the expiration of the relevant period shall release him or her on bail on his or her own recognisance, notwithstanding that he or she is accused of an offence referred to in section 75(1), unless - (c) he or she has, prior to the expiration of that period, been committed to the High Court for trial; or (d) the magistrate is satisfied that it is expedient for the protection of the public that he or she should not be released from custody.

Section 25 of Police Act reads as follows:

*Disposal of a person arrested by a police officer*

(1) A police officer on arresting a suspect without a warrant shall produce the suspect so arrested before a magistrate's court within forty-eight hours unless earlier released on bond.

(2) Subsection (1) shall not apply to a person who is arrested in one police area and is not to be questioned within the area in which he or

she was arrested until he or she is transferred to the area where the offence was committed within seven days.

Sections 219 of Uganda Peoples Defence Forces Act reads as follows:

Subject to sections 231 and 248, a military court may grant bail to a person charged with a service offence on the same considerations that govern the grant of bail in civil courts.

Sections 231 of Uganda Peoples Defence Forces Act reads as follows:

In exceptional circumstances, and on such conditions as it may impose, the appellate court may grant bail pending appeal except in cases where the appellant has been sentenced to death or to a term of imprisonment exceeding five years.

Sections 248 of Uganda Peoples Defence Forces Act reads as follows:

In or during the exercise of its powers under subsection (1) of section, the General Court Martial - (a) may exercise any of the powers conferred on it as an appellate court by this Act; (b) may, pending the final determination of the case, release any convicted person on bail; except that - (i) bail shall not be granted to a person sentenced to death or to imprisonment exceeding five years; and (iii) If the convicted person is ultimately sentenced to imprisonment or detention, the time he or she has spent on bail shall be excluded in computing the period for which he or she is sentenced. (c) may, if it thinks fit, call for and receive from the summary trial authority or Unit Disciplinary Committee before which the case was heard, a report on any matter connected with the case; (d) shall not make any order to the prejudice of an accused person unless he or she has had an opportunity to be heard in his or her own defence.

[13.] It was contended by Mr Kakuru that the aforesaid provisions narrow, abridge and negate the right to bail as prescribed by article 23(6) of the Constitution in that they require an accused person to prove exceptional circumstances and to assure court that he or she will not abscond. As far as Mr Kakuru is concerned, article 23(6) *supra* does not give any discretion to the court. The right to apply for bail is fundamental and inherent under the Constitution. Article 20 reads as follows:

(1) Fundamental rights and freedoms of the individual are inherent and not granted by the State.

(2) The rights and freedoms of the individual and groups enshrined in this Chapter shall be respected, upheld and promoted by all organs and agencies of Government and by all persons.

[14.] With regard to section 75 of MCA (*supra*) Mr Kakuru's complaint was that it is wrong for the Magistrate's Courts Act to provide offences which are triable by the Magistrate's Court but not bailable by them. This provision, counsel argued, also contravenes article 23(6) of the Constitution (*supra*) in that it infringes and limits the accused's right to apply for bail. Mr Kakuru did not see the rationale behind it. If a court has jurisdiction to try an offence it should have jurisdiction to grant bail.

[15.] He also wondered why, if a magistrate court can remand an accused in cases triable by the High Court only, it not be given powers to grant bail to the accused in such cases. To Mr Kakuru there is no convincing reason for depriving magistrates of such powers to grant

bail. Counsel vehemently argued that fundamental human rights of the individual are inherent and not given by State.

[16.] In the premises, he prayed Court to nullify section 14(2) of Trial on Indictments Act, section 75 of the Magistrate's Courts Act and all the impugned provisions in the petition which are inconsistent with articles 20, 23(1), 23(6), 28(1) and 28(3) of the Constitution.

[17.] In reply, Mr Oluka did not agree with the submissions of Mr Kakuru on the interpretation of section 14(2) of Trial on Indictments Act. He submitted that the High Court is seized with powers to set conditions or order cancellation of bail. It has discretion to deny bail to an accused. Setting conditions for bail or cancellations does not violate the right to a fair trial and presumption of innocence envisaged under article 28(3) of the Constitution. To him, bail can be cancelled at any point in time.

[18.] On section 75 of Magistrate's Court Act, Mr Oluka conceded that, in appropriate circumstances, the Constitution should be given wide interpretation. However, it should not be interpreted to conflict with other parts of Constitution. Counsel pointed out that both the High Court and magistrate's courts are given powers under section 75 to consider grant of bail. He argued that, according to our jurisdiction each court is given specific jurisdiction; for example, capital offences are triable only by the High Court.

[19.] Further, counsel argued that there is no cause for alarm because there are guidelines for granting bail at different stages of the trial. He referred this Court to article 23 of the Constitution (*supra*) and prayed that the provisions of section 75 Magistrate's Court Act and section 14(2) of Trial on Indictments Act should be upheld as they are within the confines of the law.

[20.] I carefully listened and I have considered the addresses of both learned counsel on the constitutionality of section 14(2) Trial on Indictments Act and section 75 of Magistrate's Court Act and noted all the arguments, they advanced. I have also had a careful perusal of the affidavit evidence and legal arguments advanced during the scheduling conference as well as the relevant provisions of the law and authorities cited by the parties.

[21.] In matters involving interpretation of the Constitution or determination of the constitutionality of Acts of Parliament courts are guided by well settled principles. One of the cardinal principles in the interpretation of constitutional provisions and Acts of Parliament is that the entire Constitution must be read as an integrated whole and no one particular provision should destroy the other but sustain the other. See *Tinyefuza v Attorney-General*, general constitutional petition 1 of 1996. Another important principle is that all provisions concerning an issue should be considered together to give effect to the purpose of the instrument see *South*

*Dakola v North Carolina* 192 US 268, 1940 LED 448. Thirdly, the purpose and effect principle where the court considers the purpose and effect of an Act of Parliament to determine its constitutionality. See *The Queen v Big Drug Mark Ltd* (1996) LRC (Const), *Attorney-General v Abuki*, constitutional appeal 1 of 1998.

[22.] Following the Constitution and in particular that part which protects and entrenches fundamental rights and freedoms, must be given a generous and purposive interpretation. *Attorney-General v Modern Jobe* (1984) LRC 689, *Unity Dow v Attorney-General of Botswana* (1992) LRC 662.

[23.] With the above mentioned principles and others not mentioned in mind I will now proceed to consider not only sections 14(2) of the Trial Indictments Act and section 75 of Magistrate's Courts Act but all the issues agreed upon by the parties at the scheduling conferencing.

[24.] In my view, the petition before court is mainly challenging the constitutionality and legality of the restrictions and limitations imposed on grant of bail by the impugned provisions of the above mentioned Acts of Parliament, namely, TIA, MCA, UPDF and Police Act. The question for this Court to determine is whether they are inconsistent with articles, 20, 23(1), 28(1), 23(3) and 23(6) of the Constitution. The petitioner sees the right to apply for bail as a fundamental and inherent right not given by the state. To the petitioner bail is a question of liberty. The petition is, hence, seeking nullification of those provisions to the extent of inconsistency.

[25.] As conceded by the Principal State Attorney, Oluka, some of the above mentioned impugned provisions are unconstitutional and inconsistent with the Constitution in some aspects as we shall see later but others are not. From the outset I would like to point out that this Court has pronounced itself on several aspects of the interpretation and application of the relevant laws governing bail, mainly, article 26(6) of the Constitution but it seems there is still a lot to be done. It is, for example, the contention of Mr Kakuru that the court has no discretion to deny an accused person bail. As far as he is concerned it is a fundamental human right inherent in the individual and is automatic. It should, therefore, not be based on the impugned statutory provisions.

[26.] In the case of *Tumushabe v Attorney-General*, constitutional petition 6 of 2004, this Court ruled that:

The law that governs bail in Uganda is contained in article 23(6) (a) (b) and (c) of the Constitution. All other laws on bail in this country that are inconsistent with or which contravene this article are null and void to the extent of inconsistency. The Attorney-General of Uganda needs to take closer look at sections 75 and 76 of MCA and sections 15 and 16 of TIA. There may be urgent need to bring them into conformity with article 23(6) of the Constitution.

[27.] The above mentioned observation by this Court notwithstanding, there was still need for this Court to rule



unequivocally whether the bail provisions of the Trial on Indictments Act are still good law or not. This led to the pronouncements in constitutional ref 20 of 2005, Uganda (*DPP*) v *Col (RTD) Dr Kiiza Besigye*, when the DPP sought interpretation of article 23(6) (*supra*) to determine whether the court has discretion to deny an accused bail.

[28.] Before I proceed to examine the implications of this Court's ruling in Reference 20 of 2005, I consider it appropriate to reproduce the relevant provisions of the Constitution governing bail. They read as follows: '23(1) No person shall be deprived of personal liberty except in any of the following cases -'. Article 23(6) as amended by the Constitution (Amendment) Act 11, 2005 reads:

(6) where a person is arrested in respect of a criminal offence - (a) the person is entitled to apply to the court to be released on bail and the court may grant that person bail on such conditions as the court considers reasonable; (b) in the case of an offence which is triable by the High Court as well as by a subordinate court, if that person has been remanded in custody in respect of the offence for sixty days before trial, that person shall be released on bail on such conditions as the court considers reasonable; (c) in the case of an offence triable only by the High Court, if that person has been remanded in custody for one hundred and eighty days before the case is committed to the High court, that person shall be released on bail on such conditions as the court considers reasonable.

Article 28 which protects the right to a fair hearing states *inter alia*: '(3) Every person who is charged with a criminal offence shall – be presumed to be innocent until proved guilty or until that person has pleaded guilty.'

[29.] A careful perusal of the Court's ruling in the aforesaid reference reveals that, the Court gave the question of discretion under article 23(6) (*supra*) a thorough and exhaustive interpretation. In my view it left no stone unturned. I will reproduce some of the relevant portions of the ruling where I consider it appropriate.

[30.] Applying some of the above mentioned principles on constitutional interpretation this Court held as follows:

Under article 23(6)(a), the accused is entitled to apply for bail. The word 'entitled' creates a 'right' to apply for bail and not a right to be granted bail. The word may create discretion for the court to grant or not to grant bail. The context in which the word 'may' is used does not suggest otherwise.

Under article 23(6)(b) where the accused has been in custody for 60 days before trial for an offence triable by the High Court as well as a subordinate court, that person shall be released on bail on such conditions as the court considers reasonable. Here the court has no discretion. It has to grant bail because of the use of the phrase 'shall be released on bail', appearing therein. This is the opposite of the phrase 'may be released on bail' as appears in 23(6)(a) (*supra*). The word 'shall' is imperative or mandatory. It denotes obligation.

As regards article 23(6)(c), where the accused has been in custody for 180 days on an offence triable by the High Court only and has not been committed to the High Court for trial, that person shall be released on

bail on reasonable conditions. Like in 23(6)(b) the court has no discretion to refuse to grant bail to such a person.

However, in both article 23(6)(b) and (c) the court has discretion to determine the conditions of bail.

[31.] In my view, the aforesaid Court's ruling should have put the question of discretion to rest. I see no reason for resurrecting it. After such an exhaustive consideration of the subject there is nothing to persuade me to find that bail is automatic. Relying on the purposive and effect principle (*supra*) I reiterate this Court's holding that: 'The context of article 23(6)(a) confers discretion upon the court whether to grant bail or not to grant bail. Bail is not automatic' as it was contended by Mr. Kakuru.

[32.] Another scenario of which human rights lawyers in Uganda, including Mr Kakuru have been critical of is under article 23(6)(c) of the Constitution. This is where an accused person charged with offences triable only by the High Court but has not spent the statutory period of 180 days on remand is seeking release on bail. In this case, the court still, has discretion to grant or not to grant bail if the accused fails to show exceptional circumstances as provided by the Trial on Indictments (Amendments) Act 9 of 1998 which read as follows:

(a) grave illness certified by a medical officer of the prison or other institution or place where the accused is detained as being incapable of adequate medical treatment while the accused is in custody; (b) a certificate of no objection signed by the Director of Public Prosecution; or (c) the infancy or advanced age of the accused.

[33.] It is worthy noting that Act 9 of 1998 having been enacted three years after the 1995 of the Constitution, it must have been intended to operationalise article 23(6)(c) to provide for the applications seeking bail before the expiry of the statutory period as explained above.

[34.] Mr Kakuru's fears on the exercise of the court's discretion are unfounded because even section 15(1) of the Trial on Indictments Act left the court's discretion intact. The courts have clear guidelines as to how to exercise the discretion to grant or not to grant bail and the basis on which to be exercised.

[35.] On cancellation of bail under section 14(2) of the Trial on Indictments Act, complaint of Mr Kakuru is that the accused will not be condemned unheard as he suggested. When he or she is produced before court, he or she will be given opportunity to be heard. He or she would be required to show cause why the order sought for should not be granted. It is not correct, as suggested by Mr Kakuru, that all the impugned provisions mentioned in this petition have the effect of negating the right to apply for release on bail as prescribed by article 23(6)(a) of the Constitution. Clearly, the Court has a discretion to grant bail and impose reasonable conditions without contravening the Constitution.

[36.] With regard to Mr Kakuru's complaint about other restrictions on courts, in particular to require the accused to show that he will not abscond and proof of exceptional circumstances, in my view, the said requirements are justified. Besides they are not mandatory. Both High Court and subordinate courts are still free to exercise their discretion judicially and to impose reasonable conditions on the applicant. As was observed by this Court in constitutional reference 20 (*supra*) page 12:

While the seriousness of the offence and the possible penalty which could be meted out are considerations to be taken into account in deciding whether or not to grant bail, applicants must be presumed innocent until proved guilty or until that person has pleaded guilty. The court has to be satisfied that the applicant will appear for trial and would not abscond. The applicant should not be deprived of his/her freedom unreasonably and bail should not be refused merely as a punishment as this would conflict with the presumption of innocence. The court must consider and give the applicant the full benefit of his/her constitutional rights and freedoms by exercising its discretion judicially.

[37.] Further, it is not disputed that bail is an important judicial instrument to ensure individual liberty. However, the court has to address its mind to the objective of bail. It is equally an important judicial instrument to ensure the accused person's appearance to answer charge or charges against him or her.

[38.] The objective and effect of bail are well settled. The main reason for granting bail to any accused person is to ensure that he appears to stand trial without the necessity of being detained in custody in the meantime. We accept Mr Kakuru's submission that under article 28(3) of the Constitution, an accused person charged with a criminal offence is presumed innocent until proved guilty or pleads guilty. If an accused person is remanded in custody but subsequently acquitted may have suffered gross injustice. Be that as it may, bail is not automatic. Its effect is merely to release the accused from physical custody while he remains under the jurisdiction of the law and is bound to appear at the appointed place and time to answer the charge or charges against him.

[39.] The provisions of section 14(2) of the TIA and 75 MCA requiring the court to set conditions and the guidelines stated therein are hence justified. It is, therefore, relevant, unless the offence is minor to take into account, certain matters, like, the gravity of offence, nature of accusation, antecedents of the accused person, and whether he has a fixed abode within the court's jurisdiction.

[40.] The aforesaid requirements do not in anyway infringe on the accused's rights under articles 20, 23 and 28. Rights, be they fundamental rights or not, must be enjoyed within the confines of the law. Violation of the accused's rights does not occur simply because the accused is required to assure court that he will appear to answer the charges.

[41.] All that is required of the court is to impose reasonable conditions, acceptable and demonstrably justifiable in a free and democratic society as provided under article 43(2) of the Constitution.

[42.] Society must be protected from lawlessness. The court must guard against absconding because, there may be a danger of interfering with the evidence or witnesses. This Court has observed in constitutional ref 20 of 2005 (*supra*) as follows:

The needs of society to be protected from lawlessness and the considerations which flow from people being remanded in prison custody which adversely affects their welfare and that of their families and not least the effect on prison remand conditions if large numbers of unconvicted people are remanded in custody. In this respect various factors have to be born in mind such as the risk of absconding and interference with the course of justice. Where there is a substantial likelihood of the applicant failing to surrender for turn up for trial, bail may only be granted for less serious offences. The court must weigh the gravity of the offence and all the other factors of the case against the likelihood of the applicant absconding. Where facts come to light and it appears that there is substantial likelihood of the applicant offending while on bail, it would be inadvisable to grant bail to such a person.

[43.] In the premises I am unable to agree with Mr Kakuru that the requirement to establish exceptional circumstances under section 14, 15 contravene article 23(6), in that the provision merely provides guidance not direction. The guidelines are clearly stated when the court ‘may’ exercise a discretion to deny bail or not, and when they can impose conditions.

[44.] On this issue I find that sections 14(2), 15(1), 15(2) and 15(3) of TIA not consistent with articles, 20, 23(1), 23(6), 28(1) of the Constitution.

[45.] However, as it was conceded by Mr Oluka, section 16 of Trial Indictment Act is null and void to the extent of its inconsistency with article 23(6) (*supra*). In the premises the answer to issue 1 is partly in the negative and partly in affirmative.

## Issue 2

[46.] With regard to section 75(2) of the MCA, it is not correct to say, on the evidence before court, that it contravenes the provisions of article 23(6). The accused’s right to bail is not absolute. It has to be enjoyed within the confines of the law. There has to be a constitutional balance of everybody’s rights. Denial to grant bail by section 75(2) does not contradict the accused’s inherent right of innocence. I do not accept the argument that the limitation amounts to suggestion that, the accused is guilty of the offence he is charged with.

[47.] On section 76, it is to be noted that it predates the 1995 Constitution. In accordance with article 274 of the Constitution, section 76 may, be construed with modification and adoption to bring

it into conformity with the Constitution. It would, therefore, be null and void to the extent it contravenes the Constitution. The answer to issue 2 is also partly in the affirmative and partly negative.

#### **Issue 4**

[48.] For convenience I will next consider section 25(2) of the Police Act. I accept that it contravenes article 23(4) of the Constitution. It provides for a longer period before an accused is produced in court than the Constitution sets under article 23(4). It is, hence, null and void to that extent.

[49.] Lastly on issue 3, Mr Oluka rightly conceded that sections 219, 231 and 248 of the Uganda People's Defence Forces Act (UPDF) contravene articles 20, 23(1), 23(6), 28(1) and 28(3) of the Constitution. I accept that bail should not be refused mechanically simply because the prosecution wants such orders. Remanding an accused in custody is a judicial act. The court must in making such an order, address its judicial mind to it before depriving an accused person or suspect of his liberty. Conditions and restrictions imposed must be reasonable. I accept that the aforesaid impugned provisions of UPDF Act are inconsistent with articles 20, 23(1), 23(6), 28(1) and 28 (3) of the Constitution. They are null and void to the extent of inconsistency. Issue 3 must, therefore, succeed.

[50.] In the result, the petition would succeed in part with the following declarations:

- (1) It is hereby declared that section 16 of Trial on Indictments Act contravenes articles 23(6), 20 and 28 of Constitution and is null and void to the extent of inconsistency.
- (2) That section 76 of MCA is null and void to the extent of inconsistency with articles 20, 23(1), 23(6), 28(1) and 28(3) of the Constitution of the Republic of Uganda in so far as it infringes on the constitutional rights to liberty and speedy trial.
- (3) That sections 219, 231 and 248 of UPDF Act, which subject accused persons to lengthy periods of detention are inconsistent with articles 20, 23(6), 28(1) and 28(3) of the Constitution of the Republic of Uganda.
- (4) That section 25(2) of the Police Act is inconsistent with articles 20, 23(4), 23(6) and 28(1) of the Constitution and as such is null and void to the extent of inconsistency.

#### **Decision of the Court**

Since all the justices on the Coram have agreed with the above holdings and proposed declarations this petition succeeds in part with the above mentioned declarations. Since the petition was brought in public interest there will be no order as to costs.

# Mukasa and Another v Attorney-General

(2008) AHRLR 248 (UgHC 2008)

*Victor Juliet Mukasa and Yvonne Oyo v Attorney General*

High Court of Uganda at Kampala , Civil Division, Misc Cause No. 24/06, 22 November 2008

Judge: Arach Amoko

*Unlawful arrest, search and seizure*

**Evidence** (uncorroborated, 37)

**Property** (unlawful search and seizure, 39, 44)

**Personal liberty and security** (unlawful arrest, 39)

**Dignity** (sexual harassment, 41)

**Remedies** (compensation, 43)

[1.] The applicants brought this application by Notice of Motion under article 50 of the Constitution and rule 3 of (Fundamental Rights and Freedoms) (Enforcement Procedure) Rules for Orders of enforcement of their fundamental rights and freedoms under articles 27, 23(1) and 24 of the Constitution, allegedly breached by the respondent or its agents and damages for the said breach.

[2.] Details are set out in the affidavits sworn by both applicants in support of the application. It is deponed by the second applicant that she was a Kenyan student at Makerere University at the material time. She resided part time with her friend the first applicant at her home in Kireka, a Kampala suburb.

[3.] On 20 July 2005 at about 6.30 pm, she was alone at home when two men knocked at the door. She opened the nail clip and the door a bit to see who they were, but they pushed the door forcibly and aggressively and forced themselves inside.

[4.] In the process, one of the men later identified as the LC1, Chairman [of the Local Council of] Kireka (hereinafter referred to as ‘the Chairman’, for brevity) violently pushed her and cause her to fall on a mat. Once inside the house, the Chairman proceeded to pen and rummage through the bookrack and box and searched through documents and CD’s in the box; while both men shouted at her and manifested an aggressive posture towards her. When she asked for identification, one of the men told her that he was the LC1 Chairman.

[5.] The Chairman then seized a CD, some papers, and one or two booklets and a box of diskettes which he handed over to the other man. He then took a green folder. Then he ordered the second applicant to dress up and get out of the house. When she asked why he had taken her friend's documents, the second man shouted at her and ordered her not to question the Chairman. She was made to forcibly dress up and was taken from home. She was then forced along the road, with the LC1 Chairman aggressively pushing her along the way.

[6.] When they arrived at what she presumed was the Chairman's office, she was made to sit in the said office for an unknown period of time and during that time, when she kindly asked if she could be directed to the 'loo', her request was refused. As a result, she had to suffer gross pain forcing her to 'pee' on herself.

[7.] She was uncomfortable and humiliated having to sit on her own urine for a great length of time and being refused access to the toilet. After a while, a woman took pity on her and asked the Chairman to allow her to go to the toilet. When she was finally allowed to go to the toilet, she was roughly shoved to the toilet by an armed male local defence unit soldier in view of whom she was unable to relieve herself due to his presence and the trauma she was experiencing at that time.

[8.] When she returned from the toilet, the Chairman disgustedly pointed at her saying to a group of men and women, 'I found this creature in my area idle and disorderly'. After a while, the aforementioned LDU soldier was ordered by the Chairman to 'jerk' her by the waist so that she would not escape. The woman who had pleaded for her earlier on to be allowed to use the toilet tried to pacify the Chairman, but he refused to listen to her. She was thereafter physically man-handled and dragged to an unknown destination.

[9.] She was taken to Kireka police post, where the Chairman handed over the items he had taken from the first applicant's house and again referred to her as 'this creature'. The Officer in Charge asked her whether she is male or female. Despite her saying that she is female, the OC ordered her to undress and to confirm her sex. She was forcibly undressed in the full glaze of the OC Kireka. The OC then roughly proceeded to fondle her breasts. This was not only humiliating but also amounted to sexual harassment and indecent assault.

[10.] While at Kireka police post, the Chairman, the LDU soldiers and other persons jeered at her and ridiculed her and humiliated her. The LC1 chairman then said that he did not want people like her in his area, and menacingly threatened them with eviction. She asked for her lawyer as if she had committed any crime, but her request was

maliciously dismissed and laughed at. The OC then asked her what kind of job Ms Mukasa, the first applicant does. She replied that Ms Mukasa is a human rights activist and that the documents and the property confiscated were hers. The Chairman then demanded and took the keys to Ms Mukasa's home from her. One LDU soldier said she should spend the night at the police post, but the OC released her without writing or signing any document, a fact she questioned but to no avail. Instead the OC ordered her to return the following day with the first applicant.

[11.] The first applicant deposed that she was a tenant of rented premises at Kireka, a Kampala city suburb. The second applicant was her visitor. On 20 July 2005 at about 8 pm she returned home to find her house was padlocked from outside.

[12.] The second applicant was no where in sight. This was strange because she expected her visit or to be at home at that time and to lock the house from inside. Upon inquiry from the neighbours, they didn't know the second applicant's whereabouts. She began searching the local establishments in the area to find out if anyone had seen the second applicant. She then noticed that the Chairman was seated some distance away.

[13.] The Chairman shouted across the other people demanding rudely to talk to her immediately. She asked him kindly to wait a moment to enable her to talk to the second applicant first, but the Chairman shouted 'now'. At that point, she received a call from the second applicant who sounded very distressed and told her that she had been arrested and that the police were looking for her (Ms Mukasa). The second applicant pleaded with her saying 'don't go home please. They have arrested me and it is you that they want'.

[14.] The Chairman then rudely told her that he had arrested the first applicant. He ordered her to be at the police post at 10 am the following day. When she asked him the reason, he just shouted, 'I want you there'. When she inquired further about the reason why she was being ordered to go to the police station, the Chairman told her verbally that she was unlawfully accommodating someone at her house. He did not produce any paper stating any such thing when she insisted, the Chairman just shouted, 'you must'. When she told him that she would need to first consult her lawyers, the Chairman began shouting before everyone that she did not have manners. She was then advised by a human rights defender to leave the area.

[15.] The following day, she went to the police station accompanied by a lawyer. When she inquired whether there was any file opened with respect to the second applicant and whether any charges were pending against either of them and if so, what the charges were. The police said there were no pending charges and that she could have back her documents.



[16.] As she had not been inside her house since the time of the raid, she didn't know what had been taken from her house, but the second applicant immediately realised that there was a CD, a box of diskettes and some documents that were being withheld. The OC admitted that the CD was not there but denied that any other items were missing. He said 'the Chairman has taken the CD to town. I will give it back to you tomorrow'. He told her to return to the police station the next day.

[17.] The next day, Friday 22 July 2005, she went to the police station again, and was not given the CD. She was however concerned that perhaps other items would be taken so she went to her home for the first time since discovering that men had forced their way into it.

[18.] When she entered the house, she was dismayed to find that it had been ransacked. The stool was knocked over on its side and her property had been thrown around the house. Her official documents and papers from the book rack and box were scattered on the floor. There were also important documents, a CD and a box of diskettes that were indeed missing. The whole house was in disorder. Her heart sank to find her property invaded and her work ramped, destroyed and taken for no reason. The CD was later returned to her by the LC1 Chairman. The acts of the police, LDU's and the Chairman were high handed, illegal, humiliating and did not only cause them grief, injury and apprehension, but above all, these acts were a breach of several constitutional rights which are guaranteed by the Uganda Constitution which the Police, LC1 Chairman and LDU's are enjoined to protect and defend. They were acting in the usual course of their employment and the Attorney-General is therefore vicariously liable.

[19.] The actions were also gross violation of several international human rights instruments to which Uganda is a signatory. The breaches complained of are:

- (1) The right to privacy of the person, home and property guaranteed by article 27 of the Constitution (the forceful ingress by the LC1 Chairman of Kireka zone into the first applicant's house).
- (2) The right to personal liberty guaranteed under article 23(1) (arrest of the second applicant).
- (3) The right to protection from any form of torture, cruel or inhuman and degrading treatment guaranteed by article 24 (LC1 Chairman and the OC police).

Naturally, the respondent denied the allegations by the applicants. It relied on the affidavits by Ison Rose dated 24 May 2007 and John Lubega of 10 September 2007.

[20.] Ms Ison deponed that she was the officer in charge of Kireka police post at the material time, and she is therefore well versed with the circumstances and facts regarding the applicants' complaint. Neither herself nor any officer in Kireka police post was aware or involved in the alleged illegal search of the home of the first

applicant, the alleged seizure of property, arrest and alleged harassment of the second applicant at all.

[21.] According to her version, on that day, the Chairman came with the second applicant to Kireka police and the two were exchanging ‘hot’ words. Whereupon she took over the role of mediator to enable both parties to cool down so that she could get to the root of the fracas. She knows that the house of the second applicant was not searched at any material time as she was informed by the LC1 Chairman which information she believes to be true. Her information is to the effect that the second applicant and her colleague were actually found and picked from a bar near their home. The Chairman further told her that he had received several complaints from residents in the area about the unbecoming behaviour of the applicants and that the residents had threatened to lynch them, so he decided to refer them to police for further action. She told the Chairman to provide sufficient evidence from witnesses with regard to the alleged homosexuality before police could take action.

[22.] She also told the Chairman to leave the items he had removed from the second applicant at the bar with her for safe custody. She denied that the second applicant was humiliated, sexually harassed nor indecently assaulted by herself, any other police officer or LDU at Kireka police post as alleged. She also denied that any LDU officer was involved in the case since she would have been the one to authorise their involvement in any operation in her area of jurisdiction. She stated that she did not see any reason to detain the second applicant based on the facts presented by the Chairman and she did not open up a file or record any statements in respect of the matter. The next day, when the two applicants appeared before her in the presence of the Chairman, she returned all the property that the Chairman had deposited with her to the rightful owner, and it is not true that any property was detained by the her or any officer thereafter at Kireka police post as alleged by the first applicant. She further stated that she advised the Chairman to have the matter settled amicably in his area since she did not see any reason for the police to take over and investigate such a matter without evidence from witnesses. The allegations against herself, the police at Kireka police post and LDU’s are therefore untrue, unfounded, malicious and without basis.

[23.] Mr Lubega, the LC1 Chairman, also vehemently denied on his part that the second applicant was arrested from her house at Kireka as alleged. According to his version of the story, the truth of the matter is that the second applicant was arrested from a drinking bar where she was about to be lynched together with the first applicant by residents. He had received several complaints from the residents of his area of jurisdiction about the unbecoming behaviour of the applicants who were kissing in a public place. When he reached the

said bar owned by one Mayanja, he did witness for himself, the applicants kissing in public while the residents and children were looking at them. He proceeded to apprehend them to rescue them from the enraged and/or angry residents who wanted to lynch them. In the process he found them with several CDs, diskettes and documents titled 'Small Minority Uganda'.

[24.] The first applicant escaped, so he managed to take only the second applicant to Kireka police post where he handed her to the OC, one Ison Rose, together with the CDs, diskettes and documents in question. The following day, the applicants appeared at Kireka police post demanding for them, and the OC handed over the CDs, diskettes and other documents to the applicants in his presence. It is not true that he entered the first applicant's house, humiliated, sexually harassed and indecently assaulted the second applicant as alleged. It is also not true that he made her to sit in his office as she alleged. He took her directly to Kireka police post and not to his office as alleged.

[25.] By way of a rejoinder dated 11 June 2007, the second applicant described the contents of Mr Lubega's affidavit as untrue and put the respondent to strict proof thereof. She specifically averred that there was no exchange of hot words with the LC1 Chairman at all but that she was instead subdued after having been dragged by the waist to the police station under continual harassment by the LC1 Chairman who referred to her as 'this creature' and the police did not at anytime take over the role of mediator. The admission by the LC1 Chairman that the properties were 'police' with the respondent by the LC Chairman and retained overnight confirms the applicant's charge of illegal retention of property, as no records were kept by the police.

[26.] The first applicant also filed a rejoinder on 21 June 2007 which I find argumentative and therefore violates the law on affidavits. An affidavit is evidence, not arguments or submissions. After expunging the argumentative parts, I can only say that she basically re-stated her case in the rejoinder and attacked the respondent's evidence as untrue, and also put the respondent to stuck proof.

[27.] The LC1 Chairman was cross-examined during the hearing. He basically stuck to his story that he arrested the second applicant in the bar at Kireka where they were about to be lynched by residents for kissing in public, for their own protection.

[28.] The following issues were identified from the evidence adduced by both sides:

- (1) Whether there was unlawful interference with the applicant's privacy.
- (2) Whether there was unlawful arrest and detention of the second applicant and by who?

- (3) Whether there was unlawful search of the second applicant's premises.
- (4) Whether the second applicant was treated in a cruel, inhuman and disregarding manner.
- (5) Whether the first applicant's right to property was interfered with.
- (6) Remedies if any available to the applicants.

[29.] Mr Rwakafuzi, learned counsel for the applicants, invited court to answer all these issues in the affirmative and award his clients general damages of at least shs 10 million each. His argument was based on the principle that a person's dignity is guaranteed by the Constitution and should not be injured by anyone. That any injury to a person's dignity should be therefore condemned by the courts and the injured person should be compensated in damages. This application is basically about human dignity, which should be protected. Decided cases say that when a citizen says that his or her rights have been infringed by the state, then the state has the burden of proof to show that it was actually not true and that it was done in public interest. The state has not discharged that burden of proof because it has not denied that the LC1 Chairman was acting as an agent of the state.

[30.] Additionally, and in relation to the LC1 Chairman, Mr Rwakafunzi submitted that he was not a witness of truth. He stated in cross-examination that the applicants were in the bar giving gifts to the patrons. It is therefore inconceivable that in an atmosphere where people are receiving literature in a bar, from the applicants there would be people wanting to lynch them at the same time.

[31.] The applicants' case is that there was no bar incident at all. The bar incident is a figment of the Chairman's fertile imagination. He set it up so that he could justify his acts of torture against the innocent girls. There was no bar incident and no lynching because if it were true that there were so many people against the girls in the said bar, why should they continue to do what the Chairman alleges, namely kissing in public? Secondly if it were true that there was this bar incident and the second applicant was held by her hand by the Chairman and taken to police as stated by the Chairman, to the police, then the OC could not have deposed that they were exchanging hot words.

[32.] That would not be possible if the second applicant was being helped for her own safety. The true story is the one told by the applicants, that the second applicant was arrested by the LC1 Chairman while she slept in her room in Kireka, who forcibly took her to his office where she was denied toilet facilities and later escorted by a male person to the toilet, and eventually on taken to Kireka police post where she was undressed in the gaze of men and was mistreated by the LC1 Chairman and police in breach of her constitutional guarantees as alleged. The applicant's properties namely CDs and document were taken. There were no accompanying

witnesses. The six people he talked about were not there. There was no mob.

[33.] Ms Nabakooza, the learned Senior State Attorney who represented the Attorney-General, opposed the application relying on the affidavits in reply. Starting with the LC1 Chairman,. Ms Nabakooza submitted that the Chairman had been before the court. His evidence had remained firm and consistent even after cross-examination. It should be accepted as the truth of what transpired on that particular day.

[34.] The evidence of the OC police had also rebutted the applicant's case. The police who are her clients in this matter were not involved at all in alleged search of the first applicant's premises. The OC says that upon arrival at the station, she was a mediator. Her story is as was told by the LC Chairman. It is true that the applicant was about to be lynched. These statements are corroborated by the affidavit of the Chairman himself who also testified in Court. The OC said she needed more evidence before she could consider taking up the matter for further investigation and released second applicant and also returned all their documents and CDs. According to Ms Nabakooza, the police in their wisdom felt that the matter could be amicably settled in the area. The second applicant was not humiliated or sexually harassed as alleged or indecently assaulted by the police or LDU. The allegation against the police are therefore untrue, unfounded, malicious and without basis.

[35.] The LC1 Chairman stated that there were several complaints in the area. The residents threatened to lynch the applicants. He saw them kissing in a public place after being summoned by the village. It was his duty as the LC1 to prevent the public who were not comfortable with such acts from lynching the applicants. He told court that there have been lynching in his area before and he didn't want a repeat of the same, that is why he took the action he did to save the applicants from the crowd. There was therefore no breach of any rights as alleged because there was first of all no unlawful entry in any house by the Chairman as alleged or by any other person. Secondly, there was no torture by the servants of government or any other person. Thirdly, there was no incidence at all of any cruel inhuman or degrading treatment by the police or any other person as alleged. Fourthly, there was no search for homosexual tools or persons, undressing of the second applicant and ridicule at Kireka police station or any other place. The evidence adduced by the applicants is therefore insufficient, and the LC Chairman has rebutted it. They opted not cross examine the OC Kireka; so it should be presumed that her evidence is unchallenged. The suit should therefore be dismissed with costs.

[36.] In the unlikely event that it is found that the LC1 Chairman breached any right of the applicants, which is denied, Ms Nabakooza

submitted that, under the Local Government Act, (LGA) CAP 243 he is not a servant of government and the respondent is not vicariously liable. They should have sued him separately under section 6 of the LGA. The Attorney-General cannot carry another person's burden.

[37.] I have carefully perused the affidavits and listened to the submission by both counsel. I respectfully agree with Mr Rwakafuzi, that there was no bar incident at all. The bar incident is a figment of the LC1 Chairman's imagination calculated to mislead the court and to justify the shabby manner in which the said Chairman treated the applicants particularly the first applicant. He said that at that time, the applicants were in Mayanja's bar, kissing each other. People were crowded and were shouting saying, 'Chairman this time assist us, otherwise this time we are going to do something to them'. He arrested them because he wanted to save them from the mobs that wanted to lynch them. No other independent witness, who was part of the mob, was called to testify. Mr Mayanja in whose bar the incident allegedly occurred did not testify either. He did not even state the name of the bar in question. In the circumstances I find it extremely dangerous to rely on the uncorroborated evidence of the LC1 Chairman, who was in my view only bent on saving his skin on realising his predicament.

[38.] Secondly, the police officer said the Chairman and the second applicant arrived at the police post while exchanging hot words. Why would the second applicant exchange 'hot' words with a person who was saving her from being lynched by a mob? The true story is therefore as given by the applicants. The second applicant was arrested by LC1 Chairman while she was in the first applicant's house resting. He took her to the police post forcibly via his office where he denied her the use of the toilet. From there he took her to the police under escort of LDU's from where she was forcibly undressed and 'examined' and her breast fondled by the police OC to establish her sex.

[39.] All these actions clearly amounted to a breach of their constitutional guarantees stated earlier and a violation of international human rights instruments to which Uganda is a party. The first applicant's house was forcibly opened and unlawfully searched without a search warrant. The LC Chairman had no such power. Section 50 of the LGA which spells out the functions of LC's does not give an LC Chairman powers to arrest and search without a warrant. Mr Lubega said he was the Chairman Local Council 1 Zone C of Kireka Parish, Kira Town Council. His actions were accordingly unlawful. The section reads:

50. Functions of the chairperson of an administrative unit council.

The chairperson shall-

(a) At the country and parish level convene and preside at all meetings of the country or parish council; and in the absence of the chairperson, the vice chairperson shall perform those functions;

- (b) At the village level-
  - (i) be the political head;
  - (ii) preside at meetings of the council;
  - (iii) monitor the general administration of the area under his or her jurisdiction;
  - (iv) perform other functions that may be necessary for the better functioning of the council, or which may be incidental to the functions of the chairperson or imposed on the chairperson by the law.

[40.] However, section 6 of the LGA provides that:

- (1) Every local government shall be a body corporate with perpetual succession and a common seal, and may sue and be sued in its corporate name and may, subject to the provisions of the constitution, do enjoy or suffer anything that may be done, enjoyed or suffered by any body corporate.

The LC Chairman is clearly part of the lower local government administrative unit of the lower local government administrative unit namely Kira Town Council, which is capable of suing and being sued in its corporate name under the LGA. Consequently, the Attorney-General is not liable for the actions of the LC1 Chairman as rightly stated by Ms Nabakooza.

[41.] The Attorney-General is however liable for the actions of the police. The OC ordered the forceful undressing of the second applicant in public and fondled her breast. This is humiliating, and degrading and contravened article 24 of the Constitution which militates against torture, cruel, inhuman and degrading treatment. It also amounted to abuse of office by the said OC. This case as Mr Rwakafuzi rightly pointed out in his submission is, however, about abuse of the applicants' human rights and not abuse of office. It is also not about homosexuality. This judgment is therefore strictly on human rights. Article 24 of the Constitution reads as follows:

Respect for human dignity and protection from inhuman treatment

No person shall be subjected to any form of torture or cruel, inhuman or disregarding treatment or punishment.

[42.] As pointed out earlier, the actions of the stated agents also violated the provisions of a number of international human rights instruments to which Uganda is a party. These include:

- (i) The Universal Declaration of Human Rights particularly, article 1 which reads:

'All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood'. I presume 'brotherhood' includes 'sisterhood'.

- (ii) The Covenant on the Elimination of All forms of Discrimination Against Women (CEDAW), article 3 which reads:

Women are entitled to the equal enjoyment and protection of all human rights and fundamental freedoms in the political, economic, social, cultural, and civil or any other field. These rights include, *inter alia*:

- (a) The right to life;
- (b) The right to equality;
- (c) The right to liberty and security of person;

- (d) The right to equal protection under the law;
- (e) The right to be free from all forms of discrimination;
- (f) The right to the highest standard attainable of physical and mental health;
- (g) The right to just and favourable condition of work;
- (h) The right not to be subjected to torture, or other cruel, inhuman or degrading treatment or punishment.

[43.] Learned counsel proposed shs 10 million as a fair compensation for the humiliation, injury and trauma suffered by the second applicant at the words of state agents. I find that reasonable and I award it to the second applicant. In *Ronald Reagan Okumu and Others v Attorney-General* MA 63/02, Kania J awarded the applicants shs 10 million each for violation of their rights or personal liberty, and from torture, cruel inhuman and degrading treatment or punishment guaranteed under articles 23(1) and 24 of the Constitution. Here the award is in respect of violation of article 24 only in view of my earlier findings that the Attorney-General is not vicariously liable for the LC1 Chairman's atrocities.

[44.] In respect of the first applicant, the evidence of record shows that the police did not handle her documents properly. They gave the LC1 Chairman unlimited access to the said documents even after he had handed them over to police, and detained the said documents over night without any entry in their books in accordance with their laid down procedures. She is accordingly awarded three million shillings for violation of her rights to property contrary to article 27(2) of the Constitution which reads: 'No person shall be subjected to interference with the privacy of that person's home, correspondence, communication, or other property'.

[45.] The applicants shall also have the costs of the application.



# ZAMBIA

## Attorney-General v Clarke

(2008) AHRLR 259 (ZaSC 2008)

### *Attorney-General v Roy Clarke*

Supreme Court of Zambia at Lusaka, Appeal No 96A/2004, 27 March 2007 and 24 January 2008

Judges: Sakala, Lewanika, Chirwa, Mumba, Chitengi, Silombabs, Mushabati

*Review of deportation of long-term resident who had written a satirical article on Zambian political leaders*

**Expression** (right to criticise government, 28, 64; right to express unpopular, obnoxious, distasteful and wrong ideas, 65, 66; limitations, 67; cultural values, 88)

**Interpretation** (international standards, 69)

**Jurisdiction** (judiciary may consider lawfulness and reasonableness of the exercise of executive discretion, 72, 73, 83)

**Expulsion** (disproportionate, 84, 85)

### Chitengi JS

[1.] At the hearing of the appeal, the Deputy Chief Justice, Mr Justice Lewanika, was a member of the panel; but passed on before the judgment was ready. This judgment is therefore by majority.

[2.] This is an appeal, by the Attorney-General, against the decision of the High Court which nullified the deportation of the respondent by the Minister of Home Affairs, hereinafter referred to as the Minister, on the ground that the deportation violated the Constitution, section 26(2) of the Immigration and Deportation Act, and for procedural impropriety and being Wednesbury unreasonable.

[3.] The fact of this case, as revealed by the affidavits, can be briefly stated. The respondent, who gave his profession as a journalist is a British national, holding established resident status in Zambia. He contributes with the *Post News Papers Limited* under a column called the *Spectator*. On 1 January, 2004, the respondent submitted a satirical article entitled *Mfuwe*. As a result of this satirical article, the Permanent Secretary in the Ministry of Home Affairs, one Peter

Mumba, hereinafter referred to as the Permanent Secretary, issued a statement that he had recommended to the Minister that the respondent be deported. This statement appeared in the *Daily Mail* and the *Post Newspaper* of 5 January, 2004. On the same day, while addressing cadres of his party, the MMD, the Minister said that the respondent would not have more than twenty-four hours in the country. Curiously, a warrant for the deportation of the respondent had already been signed by the Minister on 3 January 2004.

[4.] The article, which the learned trial Judge found an overstretched satire, irritating and offending, and we think rightly so, was written in crude language tinged with the respondent's dislike for the President and the government and contained descriptions of the physical features of the characters the respondents was writing about and allegations of rigging of elections by the President and some ministers.

[5.] In the article attributed to him, the Permanent Secretary, said that the government intended to deport the respondent over his satirical writing in which he called the President and two minister's names. The Permanent Secretary also said that the article went beyond satire and comic. Further, the Permanent Secretary said that reference to some government leaders as *Muwelewele*, long legged giraffe, red-lipped, long fingered baboons and knocking knees was clearly an insult. The Permanent Secretary then referred to some matters, which, for the purpose of determining this appeal, it is not necessary for us to recite in detail. We only mention here that the Permanent Secretary pointed out that a Zambian at the Zambian High Commission in London was deported for referring to the British Government and some people as toothless baboons. In fact, the correct expression was toothless bull dog. According to the newspaper article, the Minister's reaction was that the article was in bad faith and that he would make his stand after looking at the article again. Subsequently, the Minister deported the respondent from Zambia.

[6.] On these facts, the respondent applied for the remedy of judicial review seeking the following reliefs:

- (1) An order of certiorari to remove into the High Court for the purpose of quashing the decision of the Minister of Home Affairs to deport him.
- (2) An order of mandamus to oblige the Minister of Home Affairs to reconsider the decision to deport the applicant (respondent).
- (3) A declaration that a decision to deport the applicant (respondent) is *ultra vires* article 20 of the Republican Constitution.
- (4) A declaration that the respondent (appellant) is obliged under the rules of natural justice to afford the applicant (respondent) an opportunity to be heard in person on the decision to deport him from the country.

[7.] The grounds for judicial review are stated as follows:

Irrationality/procedural impropriety, that:

(1) It is contended that the decision to deport the applicant (respondent) is irrational in the sense that the decision of the Minister of Home Affairs is so outrageous in its defiance of logic in so far as the nature of the article complained of is concerned that no sensible public officer who had applied his mind to the question to be decided could have arrived at it.

(2) It is contended that there was a duty to afford the applicant (respondent) a hearing before a decision to deport him was made. In this case, save statement in the press, the applicant (respondent) has not been communicated to, in order to afford him an opportunity to be heard before the decision is made.

(3) The decision of the Minister of Home Affairs has adversely affected the interests of the applicant (respondent). In the result, the Minister of Home Affairs has acted unfairly by making the decision without affording the applicant (respondent) a hearing on the matter in accordance with the rules of natural justice before the decision was made.

(4) At any rate, the decision to deport the applicant (respondent) on this set of facts is clearly *ultra vires* article 20 of the Republican Constitution. It cannot be reasonably supported in a democratic country such as Zambia.

[8.] The Minister filed an affidavit in opposition to the respondent's application for judicial review. In his affidavit, the Minister deposed that the article in question was not satire but in fact it was a direct insult on the government, its leaders and the people of Zambia. The Minister also deposed that he was not influenced by the Permanent Secretary, in making his determination in accordance with his statutory powers. Regarding the statement he made to the protesting MMD party members, the Minister said by that time he had already issued the warrant to deport the respondent. The Minister said that his opinion was that the respondent by his presence in Zambia is likely to be a danger to peace and good order. The Minister said that the respondent's reference to the people of Zambia as animals, monkeys, hippos etc has excited and encouraged hatred in Zambia and it is also a recipe for violence in the country. The Minister further deposed that in law, he is not obliged to give reasons for his decision to deport the respondent. Furthermore, the Minister deposed that under the Immigration and Deportation Act, he is not bound to hear the respondent before issuing a warrant of deportation. He said that, even if the respondent was entitled to be heard, the insulting statements are obvious and serious to render the discretion to quash the decision on account of the right to be heard not appropriate. The Minister denied that the respondent's right or any fundamental right as alleged or at all has been infringed. He said that there has been no illegality, irrationality and/or procedural impropriety in the decision making process.

[9.] The respondent replied to the affidavit in opposition saying the article was satire, which is a form of social or political criticism, which takes the form of metaphor or allegory as a vehicle of pointing out hypocrisy, pomposity and absurdity. He said a satire is a textual version of a cartoon; that the meaning of satire is not explicit and

largely depends on the interpretation put on it by the reader; that the lowest level of interpretation of satire is to take the metaphor literally and thereby overlook or misinterpret the deeper critical insights; that in view of this, the article did not insult, nor was it intended to insult the government or the citizens of Zambia; that the Minister in his affidavit says he was influenced to deport the respondent by the satirical article in question, that the article in question is humorous, albeit critical, and is not a recipe for violence in the country; that the decision to deport him was explicitly taken partly on grounds of his origin, nationality and race, and therefore in violation of the Constitution; that his presence in Zambia and the exercise of the freedom of expression is not a danger to the peace and good order in Zambia; that the administrative decision to deport him is calculated at imposing penal sanctions against him; that the decision to deport him on account of the satirical article he wrote is a clear violation of the right of expression and freedom of the press and that the article in question was published by the *Post Newspapers Limited* and the paper is entirely responsible and accountable for the publication. The respondent is an established resident and has chosen Zambia as his residence or place of abode.

[10.] On this evidence, the learned trial Judge found that the respondent was deported as a result of a satirical article of the first of January, 2004 which appeared in the *Post Newspaper*; that Mr M'membe, Managing Director Editor of the *Post Newspaper* published the article and nothing has been done to Mr M'membe the editor-in-chief and publisher; that satirical articles have appeared in the Zambian newspapers for decades, even the applicant (respondent) has written several articles of such a nature and that the article in question was an overstretched satire, irritating and offending.

[11.] After these findings, the learned trial Judge reviewed the law relating to judicial review as we know it. The learned trial Judge then considered the provisions of section 26(2) of the Immigration and Deportation Act Chapter 123 and held that the words 'in the opinion of the Minister' as used in the section mean that the Minister's action cannot be challenged on the merits; that the power is subjective. For reasons, which we cannot easily discern from the pleadings in this case, the learned trial Judge, citing foreign authorities, dealt with issues of equality before the law and held that the respondent had been singled out for negative individualised treatment; while the editor-in-chief and publisher has not been sanctioned.

[12.] After dealing with the concept of equality before the law, the learned trial Judge, again citing several foreign authorities, discussed the importance of freedom of the press and expression and held that the discretion to deport aliens should not be exercised in violation of the prescribed guarantees of equality and liberty. Further, the learned trial Judge, again, for reasons we cannot easily discern from

the record, said that if the authorities deport those aliens against whom they bear some prejudice or whose protected liberties they wish to curtail, such a deportation is discriminatory. The learned trial Judge was critical of the Zambian authorities' treatment of the respondent by deporting him for reasons forbidden by the Constitution, ie constriction of the freedom of expression and discriminating against him as an alien because of his origin and race. The learned trial Judge then discussed deportation and characterised it as a grave sanction and went into the negative effects of deportation, which, for the purposes of determining this appeal, it is not necessary for us to recite.

[13.] In respect of the respondent, the learned trial Judge said that the respondent's deportation will mean the respondent staying away from his wife, children and grand children who are Zambians, and who will be indirectly denied Zambian citizenship by forcing them to go and live with the respondent in England. We must observe here that we have searched the record of evidence and we find nothing to the effect that the respondent is married to a Zambian, has children and grand children in Zambia.

[14.] The learned trial Judge was of the opinion that the Minister having used his discretion under section 26(2) to deport the respondent because of the article the respondent published, that amounted to constricting a constitutional right. He said to discriminate against an alien is not acting fairly. The learned trial Judge, again after citing foreign authorities, talked about when national security may be acted upon and said that the philosophy behind section 26(2) is security of the state against those who are bent on destroying the country. But we must say here that the reasoning and the situations cited by the learned trial Judge are irrelevant to this case. The Minister was not talking about matters of state security properly so called, but about the likelihood of such articles as the respondent wrote leading to discord and possible violence in the country. The learned trial Judge then said that the Minister should have taken into consideration international human rights instruments to which Zambia is a signatory when deciding the deportation of the respondent, who, according to the learned trial Judge, has contributed 40 years of his life to the development of this country and has raised a family. It was the learned trial Judge's opinion that, the fact that an article irritates, offends or shocks the state does not mean that article 20(3) of the Constitution does not apply.

[15.] In conclusion, the learned trial Judge held that the respondent's rights to freedom of expression under article 20 of the Constitution and protection of the law under article 23 of the Constitution were contravened in relation to the respondent. The learned trial Judge said that there was procedural impropriety; that

the facts were remotely connected to section 26 (2), which was invoked by the Minister. He said that deportation in this case was unlawful and an excessive measure.

[16.] The learned trial Judge then expressed his personal opinions on the negative effects of deportation and talked about Zambian Christian values etc. We must say here that we disapprove of this kind of approach by a judge. A judge must decide the case on the evidence before him and must not devote part of his judgment to talking about himself or his personal views. In his views the learned trial Judge said that said officials should unlearn (whatever that may mean) the negativity of satire and the applicant (respondent) should learn the positivity of cultural accommodation and sensitivity.

[17.] Dissatisfied with this judgment, the appellant now appeals to this court. The appellant advanced four grounds of appeal. The first ground is that the learned Judge misdirected himself in determining that the powers of the Minister under section 26(2) of the Immigration and Deportation Act is confined to national security. The second ground of appeal is that the learned Judge erred in law that the respondent's constitutional rights, that his freedom of expression and the right not to be discriminated under article 20 and 23 of the Constitution were violated by the Minister invoking section 26(2) of the Immigration and Deportation Act. The third ground of appeal is that the learned Judge misdirected himself in law in determining that the Minister's decision to deport the respondent was not respectful of our Christian values as Christian nation. The fourth ground of appeal is that the learned Judge misdirected himself in law in determining that the respondent succeeded on all three grounds of illegality, procedural impropriety being *Wednesbury* unreasonableness and for violating the Constitution. Counsel filed detailed heads of argument which they augmented with oral submissions.

[18.] The argument on ground one is that the wording of section 26(2) is such that even matters which are not of national security per se can be a basis for deportation under section 26(2). It was argued that acts by aliens like engaging in immoral behaviour, which has the potential to destroy the fabric of social life and norms, or advocating nudism can fall under section 26(2). It was argued that the respondent fell into this category.

[19.] On the second ground of appeal it is argued that the judicial review application did not ask to declare the deportation under section 26(2) of the Immigration and Deportation Act as discriminatory and *ultra vires* article 23 of the Constitution. It was submitted that the grounds of *ultra vires* should, therefore, not have been entertained as it was caught by order 53/6/1 RSC. It was pointed out that even assuming that the learned trial Judge had the right to make a determination of discrimination under article 23(1) and infringement of the freedom of expression under article 20, the

finding the learned Judge came to was erroneous because freedom of expression is not limitless. Freedom of expression is subject to the constitutional provisions in article 20 and all other legislation including the Immigration and Deportation Act provisions which are reasonably justifiable in a democratic society. It was emphasised that the issue of discrimination did not arise because the undisputed evidence is that the respondent is an alien; that the respondent does not, therefore, stand on the same plane with non alien's for there to be discrimination. The case of *Wandsworth LBC v Michalok* (2002) 1 All ER 144 was cited on what amounts to discrimination. But in view of what we are going to say later; we do not find it necessary to give the facts of this case. Suffice it to say that the thrust of the judgment in that case is that for there to be discrimination, persons must be similarly circumstanced but given different treatment.

[20.] The submission on ground three is simply that the learned trial Judge was not invited to make a decision on the reasonableness or otherwise of the respondent's deportation with respect to our Christian values as a Christian nation.

[21.] The argument on ground four is that under section 26(2)(3) there is no right to be heard before deportation. In support of this statement the cases of *Shilling Bob Zinka v Attorney-General* (1990-1992) ZR 73 and *Mifiboshe Walulya v Attorney General* (1984) ZR 89 at 22 were cited.

[22.] Mr Sichinga, the learned Chief State Advocate, who appeared with Col Phiri, the learned State Advocate, made oral arguments on grounds one, three and four. The thrust of Mr Sichinga's oral submissions on grounds one and four, which he argued together, is that by determining that the power of the Minister under section 26(2) is only confined to national security, the learned trial Judge fell into error. It is Mr Sichinga's submission that section 26(2) is broad enough to cover any disturbance and acts of people engaged in immoral behaviour. He pointed out that there should not always be a crime for section 26(2) to come into operation. He said a person can be conducting his ordinary business but in that conduct he may upset the good order of the society. Mr Sichinga submitted that the article the respondent wrote was found by the Minister, in his subjective opinion, to be an insult to the government and its leaders. It was Mr Sichinga's submission that by finding that section 26(2) is confined to national security the learned trial Judge put the matter into the realm of section 26(2) which deals with matters of national interest. He said that in section 26(2) the intention of the legislature was to cater for circumstances where one has not necessarily committed an offence. He pointed out that there is no ambiguity in section 26(2) to suggest that it is confined to crime. Mr Sichinga then referred us to the *Independent Media Bill* case SCZ judgment 11 of 2007 (unreported) where we said that the court must give effect to the

literal meaning of words. For these reasons Mr Sichinga submitted that there was no illegality, irrationality and unreasonableness.

[23.] On ground three Mr Sichinga submitted that the declaration of Zambia as a Christian nation was nothing but a political declaration. He pointed out that the learned trial Judge was never invited or asked to base his decision on the respondent's deportation on the principles of our Christian nation. In any case, Mr Sichinga argued, the learned trial Judge ought to have given guidelines on what to do when there are compelling reasons to deport.

[24.] Col Phiri argued ground two. He submitted that the learned trial Judge erred when he held that the Minister violated the respondent's fundamental rights when he invoked section 26(2). He pointed out that the Minister has power to deport any person who, in his opinion, his presence in Zambia is a danger to peace or good order; he said these powers have been exercised in respect of national security and public order. Col Phiri submitted that freedom of expression is not limitless. He pointed out that the learned trial Judge found the article to be overstretched satire, irritating and offending. He said the words were insulting to the government, its leadership and the people of Zambia. He said that it is incumbent on all the citizens to accept the values of the society. He argued that the article was not acceptable in this society and that it is the duty of the Minister to maintain public order. Col Phiri ended by saying that the Minister's decision was firmly anchored on law which is required in a democratic society; that a balance must be struck between private interest and public interest/order. He said in this case public interest/order outweigh private interests. He urged us to allow the appeal.

[25.] Dr Matibini, learned counsel for the Respondent argued the grounds of appeal seriatim. Dr Matibini's written arguments on ground one are that then learned trial Judge did not confine the provisions of Immigration and Deportation Act section 26(2) to national security. He said the learned trial Judge properly directed himself when he said that the court was not concerned with the merits under section 26(2), but with whether it was lawful and reasonable to apply section 26(2) to the facts. Dr Matibini pointed out that the evidence is that the respondent was deported because of the satirical article entitled *Mfuwe*. He said the issue for determination is whether or not the learned trial Judge determined that the legislature had not (and could not constitutionally) have intended to confer upon the Minister the discretion to deport a person for writing an objectionable article. He submitted that the learned trial Judge was on firm ground when he said that 'the legislative objective under section 26(2) is not rationally connected to a satirical article.'

[26.] Citing the case of *R v Immigration Appeal ex Parte Khan* (1982) 2 All ER 420 as authority, Dr Matibini canvassed the proposition that



even where a threat was envisaged under section 26(2) and (3), sufficient reasons for the decision must be given by tribunals dealing with immigration matters for the decision to make it apparent to the parties directly or by inference that it had considered the point in issue between the parties and was further required to indicate the evidence for the decision. In that case, Lord Lane referring to the above proposition, said that ‘the basis of this proposition is that in the absence of reasons, it is impossible to determine whether or not there has been an error in law. Failure to give reasons therefore amounts to a denial of natural justice’.

[27.] With regard to national security interests, Dr Matibini submitted that there must be materials upon which the authorities can reasonably and proportionately come to the conclusion that the individual poses a threat to national security. As authority for this proposition Dr Matibini cited the case of *Secretary of State for Home Department v Rethman* (2002) 11 BHRC 413. He argued that what amounts to ‘peace’ and ‘good order’ is a matter of construction which falls within the jurisdiction or competence of the court. He argued that in this case; there is no factual basis for the conclusion that the respondent’s presence in Zambia or indeed his conduct in writing satirical article is a danger or likely to be a danger to peace and good order in Zambia. It was Dr Matibini’s submission that even if it was shown that the respondent’s article would have led to some people engage in violence, the deportation would still be unlawful because the Constitution protects freedom of expression even if the expression is likely or actually attracts a hostile and even violent reaction from listeners. He argued that a person who expresses himself peacefully can never be punished for the violent reaction or others. Dr Matibini then cited the cases of *Cohen v California* US 15 1971 and *Texas v Johnson* US 397 414 1989 to support the proposition that the reaction of other persons to the lawful conduct of the respondent is irrelevant.

[28.] Finally, on this ground Dr Matibini submitted that the learned trial Judge did not hold that section 26(2) is confined to matters of national security; that the concern of the trial Judge was whether it was lawful and reasonable to apply section 26(2) to the facts of this case. On ground two, Dr Matibini wrote long detailed arguments and cited several authorities including the Constitution of Zambia on the importance of freedom of expression and the need for persons holding public offices to expect criticism and for them to develop thick skins. However, in the view we take of these submissions we do not find it necessary to restate the arguments or recite the details of the authorities cited. Suffice it to say that we have given these submissions and authorities cited our careful consideration. This issue raised by Dr Matibini are moot. Even the appellant does not say anything in his arguments that suggests that freedom of expression and freedom of the press are not important in Zambia. Superior

courts in Zambia have emphasised the importance of freedom of expression and freedom of the press in many cases like *Sata v The Post Newspapers Limited* and Another 1992/HP/1385 and 1993/Hp/821 and the *Resident Doctors Association of Zambia and Others v the Attorney-General* (2003) ZR 88. In these cases, we have also said repeatedly, that citizens have the right to criticise their government and those holding public offices and that the latter must be tolerant to criticism.

[29.] Dr Matibini pointed out that in this case, the respondent was primarily engaged in satire, a form of social or political criticism which takes the form of metaphor allegory. In essence, it is the textual version of cartoons. He submitted the meaning of satire is not explicit and largely depends on the interpretation put upon it by the reader. He said the lowest level of interpretation of satire is to take the metaphor literally and thereby overlook or misinterpret the deeper critical insights. As to the standard to be applied in a case arising out of the written word, Dr Matibini referred to a passage in *Sata* case where Ngulube, CJ said, *inter alia*, that

the standard to be applied in a case arising out of written word is that of a reasonable reader, that is a literate reasonable person who can read the captions relate pictures to their context. Any meaning assigned by an out of context illiterate imagination would not qualify as the reasonable understanding of the judicially acceptable reasonable average person who ordinarily reads newspapers.

[30.] On the basis of these authorities, Dr Matibini submitted that the learned trial Judge was on firm ground when he held that though the article in question may be poor in taste and culturally insensitive, these considerations did not remove the constitutional protection from the article. It was Dr Matibini's submission that 'ideas' that 'offend' or 'disturb' the state are also protected by article 20 of the Constitution of Zambia

[31.] On the submission on behalf of the appellant that freedom of expression is not limitless and that in the subjective determination of the Minister; the article constituted a danger to peace and good order, Dr Matibini submitted that the learned trial Judge was on firm ground when he said that the basis of the claim of threat to the public order being a statement or expression, it implicates the constitutional protection of freedom of expression and it is for the court to determine whether the facts support justification under section 26(2). Dr Matibini submitted that in this case there is no probable and proximate relationship between section 26(2) and the article authored by the respondent. In any case, Dr Matibini argued, to criticise the government or its leaders (no matter how tastelessly expressed) cannot possibly constitute a 'threat to the public order'. He said the very purpose of the constitutional protection of the freedom of expression is to allow a variety of view points to contend in the market place of ideas for support. In this regard, Dr Matibini

cited the case of *De Jonge v State of Oregon* 299 US 353 1973 where the Federal Supreme Court of the United States said:

The right to support or criticise governments and politicians is fundamental to the democratic way of life and the freedom of speech and expression and is one which cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of civil and political institutions ...

[32.] Dr Matibini ended his submission on this ground by saying that expression of views which may be unpopular, obnoxious, distasteful or wrong, is nonetheless within the ambit of freedom of speech and expression, provided there is no advocacy of/or incitement to violence or other illegal conduct. Further, he submitted that stifling of the peaceful expression of legitimate dissent today may result inexorably in the catastrophic explosion of violence some other day.

[33.] In ground three, Dr Matibini ingeniously tried to justify the learned trial Judge's reliance on the Christian principles when deciding this case. But, as it was rightly pointed out by Col Phiri, no one asked the learned trial Judge to invoke the declaration of Zambia as Christian nation when determining this case. Indeed, the learned trial Judge said he was speaking for himself. We appreciate the force of Dr Matibini's submissions in support of the trial Judge's reliance on Christian declaration but we do not accept them because, as Dr Matibini himself rightly said, the Christian nation principles have no juridical value. We shall say no more of the Christian nation declaration.

[34.] The remainder of Dr Matibini's submissions on this ground deal with the sanctity of marriage and right to family fair treatment of aliens, matters which are not in dispute. The basis of these submissions is the finding by the learned trial Judge that the respondent has contributed 40 years of his life to the development of this country and has raised a family. The learned trial Judge said the Minister should have taken into account article 13 of the International Covenant on Civil and Political Rights to which Zambia is a signatory before deporting the respondent. Article 13 is against the deportation of aliens except in accordance with the law and except where compelling reasons of national security otherwise require and to be allowed to submit reasons against his deportation and to have his case reviewed by competent authority etc.

[35.] It was Dr Matibini's submission that article 13 requires that a potential deportee must be given an opportunity to be heard unless there are compelling reasons of national security. He said that in this case, it has not been demonstrated that there existed compelling reasons. Dr Matibini ended his submissions on this ground by stating that the learned trial Judge was on firm ground when he held that it was unlawful to deport the respondent when there were no compelling reasons of national security and because the deportation interfered with his family life.

[36.] Dr Matibini argued ground four under the heads of: 1. Illegality; 2 irrationality (Wednesbury unreasonableness); and 3. procedural impropriety.

[37.] On illegality, Dr Matibini submitted that while the fact that the Minister's power to deport any person from Zambia is incontrovertible, the decision to deport may be challenged if it is illegal. Citing de Smith *et al* on *Judicial Review of Administrative Action*, Fifth Edition (London Sweet and Maxwell (1995) 292 paras 6-001. Dr Matibini said that a decision is illegal if: '(1) It contravenes or exceeds the terms of power which authorises the making of the decision; or (2) it pursues an objective other than for which the power to make the decision was conferred.

[38.] Dr Matibini attacked the argument on behalf of the appellant that the Minister had under section 26(2) absolute discretion to determine what is and is not 'a danger to peace and public order' and the assertion by the Minister in his affidavit that he need not disclose how he arrived at the decision to deport the respondent and said that it was erroneous. Dr Matibini submitted that the learned trial Judge was on firm ground when he held that in conferring upon the Minister power to 'maintain and sustain public order', Parliament never intended to confer upon the Minister power to constrict a constitutional right or rights. Further, Dr Matibini submitted that the learned trial Judge was correct in construing narrowly the discretion of the Minister, at least in so far as the Minister asserted a right to exercise his discretion to deport the respondent on grounds of the article he had written.

[39.] Dr Matibini then compared 'absolute discretion' and 'unfettered discretion' and said that they were similar. He said that a claim of 'unfettered' discretion was rejected in the case of *Padfield v Minister of Agriculture Fisheries and Food*. (1968) AC 997. In that case it was held that whether the adjective 'unfettered' appeared in the Act or not, it can do nothing to fetter the control which the judiciary has over the executive, namely that in exercising their powers; the latter must act lawfully and that is a matter to be determined by looking at the Act and its scope and object in conferring a discretion upon the Minister rather than by use of adjectives.

[40.] Dr Matibini submitted that if unfettered discretion can be rejected where there is no written Constitution, then it is weaker here where there is a written constitutional right to free expression. He argued that the learned trial Judge was, therefore, right when on the facts of this case and in light of the provisions of article 20 of the Constitution, he narrowly construed the power of the Minister to deport the respondent.

[41.] In view of this, Dr Matibini submitted that the learned trial Judge was right to consider the ground of illegality although it was not set forth in the statement seeking judicial review. Dr Matibini then made submissions and cited authorities justifying the consideration of illegality although it was not set forth in the statement. However, on account of the view we hold about this ground of appeal, we do not intend to state these arguments and recite the authorities. We only say that we have given these submissions and authorities our careful consideration. Dr Matibini ended on this ground by saying that the appellant did not suffer prejudice because they had the opportunity to argue the issue of illegality; but elected not to do so in more than a cursory fashion.

[42.] On irrationality, Dr Matibini began by citing a passage from de Smith *et al* which state the court's approach when dealing with the exercise of power conferred on a person or body by Parliament. The passage reads:

The Court will of course generally defer the assessment of facts to the person or body whom Parliament has entrusted with the decision making powers. However, as with other administrative decision making, the authorities must confine themselves to the relevant facts, take into account all relevant considerations and not come to an irrational decision.

[43.] Dr Matibini also referred to a passage in the *Resident Doctors Association and Others v The Attorney-General* (2003) ZR 88 case where we said that there is need for the Court when interpreting provisions conferring fundamental rights to adopt an interpretation which does not negate the rights. In this regard Dr Matibini also cited the case of *R v Secretary of State for the Home Department ex parte Budgdaycay* [1987] AC 514 which expresses similar views and ends with the sentence:

The Court must be entitled to subject an administrative decision to the most rigorous examination to ensure that it is in no way flawed according to the gravity of the issue which the decision determines.

[44.] On administrative action which involves a right of free speech Dr Matibini cited the case of *R v Secretary of State for the Home Department ex Parte Brind* (1981) 1 AC 697 where it was stated that:

The Court was perfectly entitled to start from the premise that any restriction of the right to freedom of expression requires to be justified and that nothing less than an important competing public interest will be sufficient to justify it.

[45.] Further, Dr Matibini pointed to Lord Ackner's speech in the same case where he said that in the field which concerns a fundamental human right – namely that of free speech – close scrutiny must be given to the reasons provided as justification for the interference with the right. It was Dr Matibini's submission that applying the 'close scrutiny test' that is required where freedom of expression is concerned, the learned trial Judge was on firm ground when he held that the Minister could not reasonably have come to the

conclusion that there was a threat to 'peace' and 'good order' posed by the article of the respondent.

[46.] Dr Matibini then raised issues of alleged defamation of the government and cited authorities to show that it is not in the public interest that government organs, central or local, should sue for libel. We do not find these arguments much relevant to the decision of this appeal. In any case, the Minister did not say the respondent defamed the government and its leader but that the respondent insulted the government and its leaders. It is trite that an insult is not defamation.

[47.] On the assertion by the Minister that the article led to protests by certain members of the Movement for Multi Party Democracy which he said might turn violent, Dr Matibini submitted that as a matter of law it is not reasonable to hold a person who has expressed himself peacefully liable for the actual or (potential) violent reactions of those who disagree with him. As authority for this statement, Dr Matibini cited the case of *Redmond - Bate v Director of Public Prosecutions* (1999) 7 BHRC 375. In that case three Christian fundamentalist women peacefully, but in a provocative manner, preached the gospel and attracted a large hostile audience. They were arrested for breach of the peace. The conviction was overturned on appeal on the ground that the women could not be held liable for the unlawful reactions of others to their own lawful actions. In this regard, Dr Matibini submitted that the learned trial Judge was on firm ground when he held that the legislative objective under section 26(3) is not rationally connected to the satirical article.

[48.] On procedural impropriety, Dr Matibini submitted that those to be affected by an act or decision should be given an opportunity to be heard. In support of this statement Dr Matibini cited, *inter alia*, passages from de Smith *et al* on *Judicial Review of Administrative Action* and the case of *Zinka v The Attorney-General*. The passage in de Smith referred to states that: 'There is a presumption that procedural fairness is required whenever the exercise of a power adversely affects an individual's rights protected by common law or created by statute.' In the passage from *Zinka* we said, *inter alia*, that: principles of natural justice must be observed by, *inter alia*, all persons and bodies having the duty to act judicially except where their application is excluded expressly or by implication. We went on to say that 'in order to establish that a duty to act judicially applies to the performance of a particular function, it is now unnecessary to show that the function is analytically of a judicial nature'. Further, we said that, *prima facie*, a duty to act judicially will arise in the exercise of power to deprive a person of his livelihood or of his legal status where the status is not merely terminable at pleasure or to deprive a person of liberty, property rights or any other legitimate interests or expectations or to impose a penalty.

[49.] Dr Matibini also cited the case of *Amnesty International v Zambia* (2000) AHRLR 325 (ACHRPR 1999) involving *Steven William Banda and John Lyson Chinula* who were deported from Zambia to Malawi. In that case the African Commission of Human and People's Rights said that Chinula was entitled to have his case heard in the courts in Zambia. Dr Matibini submitted that when arguing that the Minister was not under an obligation to provide notice and an opportunity to be heard the appellant relied on the older cases of *R v Lemana Police Station Inspector ex Parte Venicoff* (1920) 3KB 22 and *R v Governor of Brixton Prison ex Parte Soblen* (1963) 2QB 243. It was Dr Matibini's submissions that these cases were decided at the time when the ability to exclude or expel aliens was seen as an 'act of state', 'incident of sovereign' and a matter of ministerial prerogative. He said these cases acknowledged only a limited ambit of judicial review. He submitted that with subsequent cases like *Ridge v Baldwin* (1964) AC 40 and *R v Commission of Racial Equality ex Parte Hillingdon LBC* (1982) AC 787 the position at law has changed and the right to be heard where the decision will adversely affect the rights of the person concerned has been established and that there is a duty to act fairly. Dr Matibini cited several other cases on the right to be heard. We have considered these cases, but we do not find it necessary to reproduce them because the principles they lay down are the same as those in the cases we have already stated. Dr Matibini submitted that in this case the respondent was entitled to be heard before his deportation. He said that the decision to deport the respondent without an opportunity to be heard was therefore, procedurally improper. Finally, Dr Matibini submitted that the learned trial Judge was on firm ground when he quashed the decision to deport the respondent.

[50.] In his oral submissions Dr Matibini again argued the grounds of appeal seriatim. The thrust of Dr Matibini's oral submissions on ground one is that while the Minister has power to deport, that power is not absolute; that Parliament never intended that the Minister could deport the respondent on the basis of the satirical article. He pointed out that there is no evidence to show that because of the satirical article, the presence or continued presence of the respondent in Zambia was a danger to peace and good order in Zambia.

[51.] On ground two Dr Matibini submitted that this ground essentially deals with the interplay between section 26(2) and article 20 of the Constitution. It was Dr Matibini's submission that the authorities cited show that in most jurisdictions courts have adopted interpretations that ensure that fundamental rights are enjoyed. Dr Matibini said it is also relevant to consider the date of the legislation when there was no Bill of Rights. This is not correct because the Zambian Constitution 1964 annex to the Zambia Order in Council 1964 had a Bill of Rights and Freedom of Expression appear in section 13.

The Immigration and Deportation Act under enquiry was enacted in 1977.

[52.] On ground three Dr Matibini conceded that the Christian nation declaration had no juridical value. He said the important issues are articles 7 and 18 of the African Charter respecting the right to family and right to be heard.

[53.] On ground four Dr Matibini submitted that the Minister's discretion under section 26 is not absolute and that it can be challenged if it is illegal. Further, he submitted that there is no rationale connection between the article and the deportation. Dr Matibini then repeated his arguments on procedural impropriety.

[54.] In reply, on grounds one, two and four, Mr Sichinga submitted that by referring to the Constitution; the learned trial Judge went beyond the confines of judicial review. He said in judicial review, there is no need to call evidence. He said that under the law, the Minister cannot disclose the reasons and the Minister is not obliged to give reasons. The issue is not satire. Mr Sichinga referred the Court to article 23(1)(4)(b) which deals with discrimination. Col. Phiri did not reply.

[55.] We have carefully considered the evidence that was before the learned trial Judge, the submissions of counsel, the authorities cited to us and the judgment appealed against. We shall deal with the grounds of appeal *seriatim*.

[56.] The first ground of appeal attacks that part of the learned trial Judge's judgment which says that the philosophy behind section 26(2) is security of the state against those that are bent on destroying the country. In arguing this ground, Mr Sichinga, the learned Chief State Advocate, submitted that the wording of section 26(2) is such that it covers even matters which are not of national security per se. He argued that acts by aliens like engaging in immoral behaviour which has potential to destroy the fabric of social life and norms or, advocating nudism can fall under section 26(2). It was Mr Sichinga's submission that the respondent could come under the above category of aliens. He argued that by confining the powers of the Minister under section 26(2) to national security only the learned trial Judge fell into error. He submitted that the Minister in his subjective opinion found the article in question to be an insult to the government and its leaders. Further, Mr Sichinga submitted that by confining the provisions of section 26(2) to national security the learned trial Judge put the matter in the realm of section 22(2) which deals with matters of national security. Finally, Mr Sichinga submitted that there is no ambiguity in section 26(2) to suggest that it is only confined to crimes. He urged us to give effect to the literal meaning in statutes as we said in the *Independent Media Bill* case.



[57.] Dr Matibini's submissions on this ground of appeal are that the learned trial Judge did not confine the provisions of section 26(2) to national security only but went on to deal with the lawfulness and reasonableness of invoking section 26(2) on the facts of this case.

[58.] We have considered the submissions on this ground of appeal. To put the issue in proper perspective, it is necessary to reproduce section 26(2). This section reads:

Any person who in the opinion of the Minister is by his presence or his conduct likely to be a danger to peace and good order in Zambia may be deported from Zambia pursuant to a warrant under the hand of the Minister.

[59.] On proper construction these provisions; as Mr Sichinga rightly submitted, are broad enough to catch any conduct which does not necessarily have to amount to national security. In the event, the reference by the learned trial Judge to national security was a misdirection. Indeed, Dr Matibini in his submission on ground one did not and quite properly, attempt to argue that section 26(2) is confined to national security. The thrust of Dr Matibini's submissions on this ground is on other matters which we shall deal with later in our judgment. To the extent that the learned trial Judge dealt with matters of national security when interpreting section 26(2) in the manner he did, this ground succeeds.

[60.] Ground two has two limbs. One limb deals with expression under article 20 of the Constitution. The other limb deals with protection from discrimination under article 23 of the Constitution. We propose to deal with the discrimination limb first. The submissions on this limb are that the judicial review application did not ask to declare the deportation of the respondent under section 26(2) as discriminatory and *ultra vires* under article 23 of the Constitution. That being the case, it is argued, the ground of discrimination should not have been entertained. It is argued that even assuming that the learned trial Judge had to determine the issue of discrimination under article 23, the conclusion the learned trial Judge came to was erroneous because the respondent does not stand on the same plane with non aliens for there to be discrimination.

[61] In his submissions Dr Matibini did not address the issue of discrimination and the need to plead it. In the case of *Anderson Kambela Mazoka and Others v Levy Patrick Mwanawasa and Others*, we emphasised the long standing principle that a party cannot rely on un-pleaded matters except where evidence on the un-pleaded matter has been adduced in evidence without objection from the opposing party. We said that in that event, although it does not amount to this court condoning parties leading evidence on un-pleaded matters, the court cannot exclude the evidence adduced and allowed without objection.

[62.] In this case, the matter was decided on affidavit evidence. Nothing was said in the affidavits touching on discrimination. Nor was discrimination mentioned in the statement and grounds for judicial review. Further, there was no *viva voce* evidence on discrimination. We cannot, therefore, say that matters of discrimination were adduced without objection, entitling us to consider them. In the event, it was a misdirection by the learned trial Judge to have taken into consideration discrimination when nullifying the deportation of the respondent. In view of what we have said above, we do not intend to go into an academic exercise of considering what would be the position if discrimination were pleaded.

[63.] On freedom of expression, the submissions are that the learned trial Judge's finding that the deportation violated the respondent's freedom of expression under article 20 of the Constitution was erroneous because freedom of expression is not limitless. That freedom of expression is subject to the provisions of article 20 of the Constitution itself and all other legislation including the Immigration and Deportation Act provisions of which are reasonably justified in a democratic society. Col Phiri in his oral submissions submitted that the Minister has power to deport any person who, in his opinion, his presence in Zambia is a danger to peace or good order. He said that these powers can be exercised in respect of national security and public order. He pointed out that the learned trial Judge found the article to be overstretched satire, irritating and offending. He submitted that the article was not acceptable in the society and it is the duty of the Minister to maintain public order; that a balance must be struck between private interest/order and public interest/order and that in this case public interest outweighed private interests.

[64.] The theme of Dr Matibini's submissions on this limb of freedom of expression is to emphasise the importance of freedom of expression and the need for people in public life and particularly politicians to be tolerant of criticism. As we have already said above, no one disputes the importance of freedom of expression in a democratic society. Indeed, the Constitution itself has enshrined the freedom of expression in article 20. And in this judgment, we re-affirm what we have said in the previous cases that freedom of expression is one of the strong attributes of a democratic society and that to the extent permitted by the Constitution itself, freedom of expression must be protected at all costs and that those who hold public offices must be prepared, to suffer, and be tolerant, of criticism.

[65.] Dr Matibini then raised issues of the probable and proximate relationship between the article complained of and section 26(2), issues which we think can be properly dealt with, and belong to, ground four. Finally, Dr Matibini submitted that the expression of ideas which may be unpopular, obnoxious, distasteful or wrong is

nonetheless within the ambit of freedom of expression as long as there is no advocacy of or incitement to violence or other illegal conduct.

[66.] We agree with Dr. Matibini's submissions. But the critical issue is whether the action taken by the Minister in itself amounted to violation of freedom of expression as protected by article 20 of the Constitution in so far as it relates to the respondent. According to the learned trial Judge, the violation of article 20 of the Constitution lies in the fact that the action taken by the Minister under section 26(2) constricts the respondent's freedom of expression under article 20 of the Constitution; that the powers conferred upon the Minister under section 26(2) were not intended for the Minister to constrict freedom of expression under article 20 of the Constitution. We do not agree with this reasoning because it was made in vacuum and with no regard to the provisions of article 20 of the Constitution itself. The appellant's case properly considered and evaluated is not that the respondent should not express himself at all; but that his expression went beyond the protection enshrined in article 20 of the Constitution. The affidavits on behalf of the respondent are clear on this issue. The Constitution itself is also clear. Article 20(3)(a) reads:

Nothing contained in or done under the authority or any law shall be held to be inconsistent with or in contravention of this Article to the extent that it is shown that the law in question make for provision:

that is reasonably required in the interests of defence, public safety, public order, public morality or public health; ...

And except so far as that provision or, the thing done under the authority thereof as the case may be, is shown not to be reasonably justifiable in a democratic society.

[67.] From these provisions it is clear, as Mr Sichinga and Col Phiri submitted, that the Constitution itself limits, or to use the learned trial Judge's language, constricts freedom of expression. Freedom of expression is not limitless. For the Minister to deport an alien on the belief that alien has exceeded the limits of freedom of expression does not itself amount to constricting the freedom of expression and, therefore, a violation of article 20 of the Constitution. In the result, we must hold that the learned trial Judge misdirected himself in law when he held that the Minister's action to deport the respondent violated article 20 of the Constitution in so far as it relates to the respondent. As Dr Matibini correctly pointed out in one of his submissions, Zambia is a constitutional democracy. Therefore, in our interpretation of our laws we should avoid romantic acceptance of all the theories on any issue, in this case, on the freedom of expression and freedom of the press, because doing so may lead to an interpretation that offends the Constitution itself. As framed, the learned trial Judge's judgment suggests that freedom of expression is limitless, which is contra the Constitution. The second limb of ground two having succeeded also, the entire ground two succeeds.

[68.] We have already disposed of the issue of Christian declaration. The only submissions by Dr Matibini we have consider now are those on the sanctity of marriage, right to family and fair treatment of aliens. As we have already said, these matters are not in dispute. The learned trial Judge said that when deporting the respondent, the Minister should have taken into consideration article 13 of the International Covenant on Civil and Political Rights to which Zambia is a signatory. Article 13 requires that a potential deportee must be given an opportunity to be heard unless there are compelling reasons of national security. It was Dr Matibini's submission that in this case, it has not been demonstrated that there existed compelling reasons. Dr Matibini ended his submissions on this ground by saying the learned trial Judge was on firm ground when he held that it was unlawful to deport the respondent when there is no compelling reasons of national security and because deportation interfered with his family life.

[69.] We have considered these submissions. We agree that in applying and construing our statutes we can take into consideration international instruments to which Zambia is a signatory. However, these international instruments are only of persuasive value unless they are domesticated in our laws. The provisions relating to deportation as contained in section 26(2) which we have reproduced above are clear. We cannot import in our interpretation of section 26(2) glosses and interpolations derived from article 13(1) aforesaid. Under section 26(2) long stay in Zambia and raising a family in Zambia by an alien does not legally immunise a foreigner from deportation. Further, for one to be deported under section 26(2), there need not necessarily be compelling reasons of national security when interpreting our laws. To the extent argued by Dr Matibini ground three also succeeds.

[70.] In support of ground four, Mr Sichinga submitted that under section 26(2) there is no right to be heard before deportation. As authority for this proposition Mr Sichinga cited the cases of *Zinka* and *Walulya*. He pointed out that the Minister in his subjective opinion found the article in question to be an insult to the government and its leaders. He submitted that there was no illegality, irrationality and unreasonableness in this case.

[71.] As we have already said, Dr Matibini argued ground four under the heads of illegality irrationality (Wednesbury unreasonableness) and procedural impropriety. On illegality, Dr Matibini submitted that it is erroneous to argue that the Minister had absolute discretion to determine what is and is not 'a danger to peace and public order' and that the Minister need not disclose how he arrived at the decision to deport the respondent. It was Dr Matibini's submission that the learned trial Judge was on firm ground when he held that the conferring upon the Ministers power to 'maintain and sustain public

order', Parliament never intended to confer upon the Ministers power to constrict a constitutional right or rights. Dr Matibini then compared 'absolute discretion' and 'unfettered discretion' which he said are similar. And citing the case of *Padfield* as authority, he advanced the proposition that even where there is unfettered discretion, that does not fetter the Judiciary to control the executive in the exercise of their powers to ensure that they act lawfully. Dr Matibini then said that if unfettered discretion can be rejected, where there is no written constitution, then it is weaker where there is no written constitutional right to free expression. For these reasons he argued that the learned trial Judge was correct to narrowly construe the powers of the Minister to deport the respondent. Dr Matibini then raised issues of illegality not being pleaded and made submissions and cited authorities to support the learned trial Judge's decision to deal with the issue of illegality. However, in the view we take of the issue of illegality, it is not necessary for us to rule on these issues.

[72.] We agree with Dr Matibini's submissions that even where the executive have discretion in the exercise of their powers, they are subject to the control of the judiciary to ensure that they are acting lawfully. As Lord Halsbury said in *Sharpe v Wakefield* (1891) AC 173.

When it is said that something is to be done within the discretion of the authorities, that something is to be done according to the rules of reason and justice, not according to the private opinion, according to law not humour. It is not to be arbitrary, vague or fanciful but legal and regular.

[73.] A discussion of the authorities cited by Dr Matibini and the ones we have cited sufficiently shows that there is nothing like unfettered discretion immune from judicial review. We want to emphasise that in a government under law, like ours, there can be no such thing as unreviewable discretion. But with respect to the case presently before us, we have no basis upon which we can rule that the Minister was guilty of illegality. As we have already said above, the mere fact that the Minister thought that the respondent, over-stepped the constitutionally permitted freedom of expression does not per se amount to constriction of the right to freedom of expression as enshrined in article 20 of the Constitution. As it was rightly submitted by Mr Sichinga and Col Phiri, and as we have already held, the Constitution itself does not grant limitless right to freedom of expression; the Constitution itself limits the right to freedom of expression. For these reasons, the illegality limb of ground four succeeds. The learned trial Judge misdirected himself in law when he found that there was illegality.

[74.] After illegality, we propose to deal with procedural impropriety. Mr Sichinga's submission is that under section 26(2) there is no right to be heard. Dr Matibini's submission on this issue is that those to be affected by an act or decision should be given an opportunity to be heard. In support of this proposition, Dr Matibini

cited de Smith on *Judicial Review of Administrative Action*, the case of *Zinka*, which Mr Sichinga also relied upon and the case of *Banda and Chinula*. On the argument that the Minister is not obliged to give notice and an opportunity to be heard, Dr Matibini submitted that that is old law decided in *R v Leman Police Station Inspector ex Parte Veniciff* and *R v Governor of Brixton Prison ex Parte Soblen* decided at a time when the ability to exclude and expel aliens was seen as an 'act of State', 'incident of sovereignty' and a matter of ministerial prerogative. It was Dr Matibini's submission that with the decision in subsequent cases like *Ridge v Baldwin* (1964) AC 60 and *R v Commission of Racial Equality ex Parte Hellington* LBC (1982) AC 787 the right to be heard where the decision will adversely affect the rights of the person concerned has been established and that there is a duty to act fairly. Dr Matibini submitted that in this case the respondent was entitled to be heard before being deported and failure to give the respondent an opportunity to be heard amounted to procedural impropriety.

To put the arguments and submissions on this limb of ground five into proper perspective, it is necessary to produce section 26(2) again. Section 26(2) reads:

Any person who in the opinion of the Minister by his presence or his conduct is likely to be a danger to peace and good order in Zambia may be deported from Zambia pursuant to a warrant under the hand of the Minister.

[75.] As Mr Sichinga submitted, these provisions do not provide statutory right for prior notice before deportation or the right to be heard. Dr Matibini citing the case of *Zinka* which Mr Sichinga also relied upon argued that the respondent should have been given an opportunity to be heard. Relevant to this limb of ground four is also the case of *Khan* which Dr Matibini cited when arguing ground one. In *Zinka*, quoting de Smith in his book at page 144, under the general heading 'The path of deviation' we said: 'Where no statutory provision is made for prior notice to be given, it can often be assumed that the omission was deliberate.'

[76.] But we held that where there is no express statutory provision to exclude the *audi alteram partem* rule and a power is exercised to impose penalties, or to deprive property rights or any other legitimate interests or expectations, then a rebuttable presumption arises as to the necessity to give prior notice and opportunity to be heard. We went on to say that the presumption equally arises where the revocation of a license causes deprivation of livelihood or serious precursory lives or is dependant on finding of misconduct. In the *Zinka* case, we were dealing with the interpretation of section 24 of Trades Licensing Act the wording of which, like section 26(2) did not provide for a prior notice to be given and an opportunity to be heard. In the *Zinka* case the appellant's license was revoked by the President.

[77.] In this case, we are not dealing with the revocation of the respondent's license. Therefore, what we said with respect to revocation of a license does not apply to this case. What applies to this case are imposition of penalties or depriving a person of his livelihood; legal status (not being terminable at pleasure, (personal liberty (not involving an illegal immigrant); property rights or any other legitimate interests or expectations.

[78.] In this case the Respondent is not a Zambian citizen but an established resident. The respondent cannot, like a Zambian, claim as of right to stay in Zambia forever. None of the situations we have just referred to above apply to him. The rebuttable presumption we discussed in *Zinka* does not, therefore, arise in relation to the respondent.

[79.] The case of *Khan* which deals specifically with immigration matters which Dr Matibini cited to us is clearly distinguishable because the fact of that case are totally different from the facts of this case. We need not even recite the facts of *Khan*. It is sufficient only to say that on the facts of *Khan* an opportunity to be heard was necessary.

[80.] In terms of section 26(2) and on authority we are satisfied that this case does not come within the ambit of *Zinka* case or *Khan* case. We are satisfied that the Minister was not obliged under section 26(2) to give the respondent prior notice and the opportunity to be heard before deporting him.

[81.] In view of what we have said, the cases dealing with treatment of aliens, which Dr Matibini cited, are not of any assistance to the respondent. This limb of ground four also succeeds. The learned trial Judge misdirected himself when he found that on the facts of this case there was procedural impropriety.

[82.] Lastly, we deal with irrationality. The thrust of Mr. Sichinga's submissions on this limb is that the Minister acted within the law and that the issue of illegality does not, therefore, arise. In arguing this limb of ground four, Dr Matibini referred us to a passage from *de Smith* and the cases of *Secretary of State for the Home Department ex Parte Budgdaycay* and *R v Secretary of State for the Home Department ex Parte Brind* which lay down the principle that an administrative decision can be interfered on ground of irrationality. In this case, Dr Matibini submitted, that the respondent's deportation was not rationally connected to the satirical article.

[83.] We have considered these submissions and we have looked at the satirical article. The respondent in his affidavit in reply explains to us what satire is. We know what satire is. The meaning the respondent wants to put on satire is not the critical issue in this appeal. The critical issue in this appeal is whether having regard to the article complained of, could any other reasonable authority come

to the conclusion that the respondent be deported. As de Smith says in the passage cited by Dr Matibini, the court will generally defer the assessment of facts to the person or body whom Parliament has entrusted with the decision-making powers. But as Lord Greene said in *Associated Provincial Pictures Houses Limited v Wednesbury Corporation* (1948) 1 KB: 'If a decision on competent matter is so unreasonable that no reasonable authority could ever have come to it, then the court can interfere' and as Lord Halsbury said in *Sharpe v Wakefield* a passage we have already referred to: 'When it is said that something is to be done within the discretion of the authorities, that something is to be done according to law not humour, is to be not arbitrary, vague or fanciful, but legal and regular.' We have reproduced these passages, to emphasise that for an administrative decision to escape interference by the court it must be one that any other reasonable authority can come to it.

[84.] We have looked at the satirical article in question. The characters in the article are animals. Both the Minister and the Permanent Secretary put literal meaning on the characters in the article and said the respondent had called government leaders animals. Of course, this was a misunderstanding of the article. Correct English usage clearly shows that the reference to the animals was metaphorical and not literal. In the article in the *Daily Mail* attributed to the Permanent Secretary and the Minister, the Permanent Secretary was annoyed and said the government would deport the respondent because the article, *inter alia*, referred to the government leaders as animals. The Minister said the article was in bad faith and that he would make his stand after looking at it again. We do not know what the reaction would have been if the correct meaning was put on the characters. In the article attributed to him, the Permanent Secretary said that one Zambian diplomat was deported for calling Britain a toothless bull dog. That is a wrong analogy. In the Zambian diplomat case, the matter was dealt with under diplomatic regime, while in this case, we are dealing with purely legal matters. What may amount to reason for a diplomat being asked to leave the host country does not necessarily amount to an infringement, which brings into play the law of the host country. The respondent is not a diplomat in Zambia.

[85.] The learned trial Judge said the article was an overstretched satire, irritating and offending. However, the learned trial Judge did not say what he found irritating and offending about the article. What we ourselves find irritating and offending are the reference to the concerned persons physical appearances in crude language. While some other action could have been taken against the respondent for the descriptions, and the crude language he used, we find the deportation on these facts to be disproportionate was too extreme an action. However, this judgment does not amount to granting a licence to the respondent or indeed any other misguided persons, like the



respondent, to write whatever they want to write. In a proper case the consequences can be serious.

[86.] From the details of the respondent as given by the learned trial Judge, it appears the respondent is an old man who has lived long in this country and married to a Zambian woman. But despite this long stay in Zambia and actually living and rearing a family with a Zambian woman, the respondent strikes us as eccentric old man, who does not, in the least, care about or reflect on, the effect of what he writes. The respondent is also an old man, who has insulated himself from the realities of the Zambian cultural environment and is impervious to the cultural values and norms of the Zambian people, who, according to the learned trial Judge, the respondent has lived for over forty years. The respondent, despite his old age also appears to have warped ideas of the freedom of expression.

[87.] The learned trial Judge was critical of the Zambian authorities action saying the Zambian authorities must unlearn the negativity of satire. The learned trial Judge also told the respondent to learn the positivity of cultural accommodation and sensitivity. It is clear that the learned trial Judge misunderstood the appellant's case. The appellants case is not that they are averse to satire. The appellant's case is that the article by the respondent went beyond what is comical. It was not enough for the learned trial Judge to say that the respondent should learn the positivity of cultural accommodation and sensitivity. It is not for the respondent to accommodate the cultural values and norms of the Zambian people. It is for the respondent to conform. The adage is that when you are in Rome do as the Romans do and not that the Romans should do as you the alien to Rome does.

[88.] In Zambia, one can criticise or poke fun at the head of state and government leaders or indeed elders but this must be done in felicitous language and not in the crude language the respondent used. We have no doubt that in every other country you cannot say and write things using words and expressions that are not in consonance with the cultural values and norms of the people of that country.

[89.] In resisting the deportation, the respondent has called in aid the constitutional right to freedom of expression. But on the facts we are satisfied that the respondent has no genuine belief and interest in the freedom of expression. Indeed, it is not without significance that when the Minister deported him, the respondent chose to put the blame on the Post News Papers Limited saying the Post News Papers Limited were entirely responsible and accountable for the publication. This is not the conduct of a person who genuinely believes in the freedom of expression and who is ready to suffer for its protection.

[90.] The learned trial Judge tacitly agreed with the respondent saying that no action had been taken against Mr Fred M'membe the publisher of the Post News Paper and that this amounted to discrimination in the application of the law. As we understand discrimination in relation to people, it means treating similarly circumstanced people differently. Mr Fred M'membe is a Zambian and we do not know under what law a national of Zambia can be deported from Zambia so that he gets the same treatment as the respondent who is not a national of this country.

[91.] The attempt by the respondent to bring Mr Fred M'membe in his problems clearly shows to us the malice and evil intentions of the respondent in writing the article. Why did the respondent contribute the article to the *Post Newspapers* if he did not want it to be published?

[92.] In this regard, we are constrained to comment here that the media must be careful with people like the respondent who have hidden agendas. It is not our intention to tell the media what to publish and what not to publish. That is entirely the right of the media. We appreciate the need and importance of a free media. This we have repeatedly said in our judgments. What we are saying here is that the media should be circumspect to avoid people with evil intentions destroying our cultural values and norms and our way of life, using evil intentions cloaked in the freedom of expression and freedom of the press, noble ideals which, we judges always strive to protect.

[93.] In his arguments on the other grounds Dr Matibini said that this is a defining case because it will show to posterity the extent to which they can enjoy their freedom of expression. In the same vein, we also want to say that in terms of cultural values and norms, to the extent we have endorsed them, this case is also a defining case because it will show posterity that Zambians are not ready to allow aliens to show disrespect to their cultural values and norms and disrupt their way of life.

[94.] At the expense of being repetitive, we have found that, on the facts of this case and the authorities we have cited, the deportation of the respondent was disproportionate and it is for this reason that we dismissed the appeal. And on the facts of this case, we do not see any reason why the government, by deportation, should make the respondent a martyr, when he has no greater cause or principle, which he is pursuing and entitling him to martyrdom. The respondent is not fighting for the noble cause of freedom of speech and press freedom in which, as his efforts to shift the responsibility for the article in question on Mr M'membe and *The Post* shows, he does not genuinely believe but for his personal survival using freedom of speech and press freedom as a shield. We make no order as to costs.