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The *African Human Rights Law Reports* include cases decided by the International Court of Justice, the0 United Nations human rights treaty bodies, the African Commission on Human and Peoples' Rights, the African Court on Human and Peoples' Rights, sub-regional courts in Africa and domestic judgments from different African countries. The *Reports* are a joint publication of the African Commission on Human and Peoples' Rights and the Centre for Human Rights, University of Pretoria, South Africa. PULP also publishes the French version of these *Reports, Recueil Africain des Décisions des Droits Humains*.

The *Reports,* as well as other material of relevance to human rights law in Africa, may be found on the website of the Centre for Human Rights at www.chr.up.ac.za. Hard copies of the *Reports* can be obtained from the Centre for Human Rights.

Editorial changes have been kept to a minimum, and are confined to changes that are required to ensure consistency in style (with regard to abbreviations, capitalisation, punctuation and quotes) and to avoid obvious errors related to presentation.

Cases from national courts that would be of interest to include in future issues of the *Reports* may be brought to the attention of the editors at:

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# 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, the African Court on Human and Peoples' Rights, sub-regional courts 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 |
| CCPR | International Covenant on Civil and Political Rights |
| ECOWAS | Economic Community of West African States |
| GhSC | Supreme Court, Ghana |
| HRC | United Nations Human Rights Committee |
| ICJ | International Court of Justice |
| KeHC | High Court, Kenya |
| NaSC | Supreme Court of Namibia |
| SADC | Southern African Development Community |
| UgCC | Constitutional Court of Uganda |
| ZaHC | High Court, Zambia |

# CASE LAW ON THE INTERNET

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

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

African Court on Human and Peoples' Rights
www.african-court.org

African Case Law Analyser
caselaw.ihrda.org

*Association des Cours Constitutionelles*
www.accpuf.org

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

Commonwealth Legal Information Institute
www.commonlii.org

Constitutional Court, South Africa
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Court of Appeal, Nigeria
www.courtofappeal.gov.ng

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www.interights.org

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www.nigeria-law.org/LawReporting.htm

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**(2010) AHRLR 3 (ICJ 2010)**

*Case concerning Ahmadou Sadio Diallo* (*Republic of Guinea v Democratic Republic of the Congo*)

Judgment of 30 November 2010

Arbitrary detention and deportation of long-term resident

**Evidence** (burden of proof dependent on nature of dispute, 54; state should show that it followed procedures provided for in law, 55)
**Expulsion** (due process of law, 65, 72-74; absence of reasoning, 72)
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**1.** On 28 December 1998, the government of the Republic of Guinea (hereinafter 'Guinea') filed in the Registry of the Court an application instituting proceedings against the Democratic Republic of the Congo (hereinafter the 'DRC', named Zaire between 1971 and 1997) in respect of a dispute concerning 'serious violations of international law' alleged to have been committed 'upon the person of a Guinean national'. The application consisted of two parts, each signed by Guinea's Minister for Foreign Affairs. The first part, entitled 'Application' (hereinafter the 'application (part one)', contained a succinct statement of the subject of the dispute, the basis of the Court's jurisdiction and the legal grounds relied on. The second part, entitled 'Memorial of the Republic of Guinea' (hereinafter the 'application (part two)'), set out the facts underlying the dispute, expanded on the legal grounds put forward by Guinea and stated Guinea's claims.

In the application (part one), Guinea maintained that:

> Mr Ahmadou Sadio Diallo, a businessman of Guinean nationality, was unjustly imprisoned by the authorities of the Democratic Republic of the Congo, after being resident in that state for thirty-two (32) years, despoiled of his sizable investments, businesses, movable and immovable property and bank accounts, and then expelled.

Guinea added:

> [t]his expulsion came at a time when Mr Ahmadou Sadio Diallo was pursuing recovery of substantial debts owed to his businesses by the state and by oil companies established in its territory and of which the state is a shareholder.

Mr Diallo's arrest, detention and expulsion constituted, *inter alia*, according to Guinea, violations of

> the principle that aliens should be treated in accordance with 'a minimum standard of civilisation', [of] the obligation to respect the freedom and property of aliens, [and of] the right of aliens accused of an offence to a fair trial on adversarial principles by an impartial court.

...

## B. The claim concerning the arrest, detention and expulsion measures taken against Mr Diallo in 1995-1996

### 1. The facts

**49.** Some of the facts relating to the arrest, detention and expulsion measures taken against Mr Diallo between October 1995 and January 1996 are acknowledged by both parties; others, in contrast, are in dispute.

**50.** The facts on which the parties are in agreement are as follows. An expulsion decree was issued against Mr.Diallo on 31 October 1995. This decree, signed by the Prime Minister of Zaire, stated that: '[the] presence and personal conduct [of Mr Diallo] have breached Zairean public order, especially in the economic, financial and monetary areas, and continue to do so'. On 5 November 1995, further to the above-mentioned decision and with a view to its implementation, Mr Diallo was arrested and placed in detention in the premises of the immigration service.On 10 January 1996, Mr Diallo was released.On 31 January 1996, Mr Diallo was expelled to Abidjan, on a flight from Kinshasa airport. He was served with a notice, drawn up that day, indicating that he was the subject of a '*refoulement* on account of unauthorised residence'.

**51.** However, the parties disagree markedly concerning, on the one hand, Mr Diallo's situation between 5 November 1995, when he was first arrested, and his release on 10 January 1996, and, on the other hand, his situation during the period between this latter date and his actual expulsion on 31 January 1996. As regards the first of these periods, Guinea maintains that Mr Diallo remained continuously in detention: he is thus said to have been detained for 66 consecutive days. In contrast, the DRC contends that Mr Diallo was released on 7 November 1995 — two days after his arrest — and placed under

surveillance. According to the DRC, having resumed his activities in breach of public order, he was rearrested on an unspecified date, but in any event not earlier than 2 January 1996. He is then said to have been released for a second time on 10 January 1996, because the immigration service could not find a flight leaving for Conakry within the eight-day legal time-limit following his latest arrest. During the first period in question, therefore, according to the DRC, Mr Diallo was only detained for two days in the first instance and subsequently for no longer than eight days.

With regard to the period from 10 January to 31 January 1996, Guinea maintains that Mr Diallo was rearrested on 14 January 1996, on the order of the Congolese Prime Minister for the purpose of effecting the expulsion decree, and kept in detention until he was deported from Kinshasa airport on 31 January, ie, for another 17 days. On the other hand, the DRC asserts that Mr Diallo remained at liberty from 10 January to 25 January 1996, on which date he was arrested prior to being expelled a few days later, on 31 January.

**52.** The parties also differ as to how Mr Diallo was treated during the periods when he was deprived of his liberty, although on this aspect of the dispute the disagreement relates less to the facts themselves than to their characterisation. According to Guinea, Mr Diallo was held in dire and difficult conditions; he was only able to receive food because of the visits from his next of kin; and he was subjected to death threats from the persons responsible for guarding him. The DRC contests this final point; for the rest, it maintains that the conditions of Mr Diallo's detention did not amount to inhuman and degrading treatment in breach of international law.

**53.** Faced with a disagreement between the parties as to the existence of the facts relevant to the decision of the case, the Court must first address the question of the burden of proof.

**54.** As a general rule, it is for the party which alleges a fact in support of its claims to prove the existence of that fact (see, most recently, the judgment delivered in the case concerning *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, judgment of 20 April 2010, para 162).However, it would be wrong to regard this rule, based on the *maxim onus probandi incumbi tactori*, as an absolute one, to be applied in all circumstances. The determination of the burden of proof is in reality dependent on the subject-matter and the nature of each dispute brought before the Court; it varies according to the type of facts which it is necessary to establish for the purposes of the decision of the case.

**55.** In particular, where, as in these proceedings, it is alleged that a person has not been afforded, by a public authority, certain procedural guarantees to which he was entitled, it cannot as a general rule be demanded of the applicant that it prove the negative

fact which it is asserting. A public authority is generally able to demonstrate that it has followed the appropriate procedures and applied the guarantees required by law — if such was the case — by producing documentary evidence of the actions that were carried out. However, it cannot be inferred in every case where the respondent is unable to prove the performance of a procedural obligation that it has disregarded it: that depends to a large extent on the precise nature of the obligation in question; some obligations normally imply that written documents are drawn up, while others do not. The time which has elapsed since the events must also be taken into account.

**56.** It is for the Court to evaluate all the evidence produced by the two parties and duly subjected to adversarial scrutiny, with a view to forming its conclusions. In short, when it comes to establishing facts such as those which are at issue in the present case, neither party is alone in bearing the burden of proof.

**57.** It is on the basis of the considerations set out above that the Court will now pronounce on the facts which remain in dispute between the parties.

**58.** The Court is not convinced by the DRC's allegation that Mr Diallo was released as early as 7 November 1995 and then only rearrested at the beginning of January 1996, before being freed again on 10 January. The Court's assessment is based on the following reasons.There are two documents in the case file which prove that Mr Diallo was imprisoned on 5 November 1995 and freed again on 10 January 1996: these are the committal note (*billet d'écrou)* bearing the first of these two dates and the release document (*billet de mise en liberté*) which bears the second. If it were true, as the DRC claims, that between these two dates Mr Diallo was released for the first time and then rearrested, it is hardly comprehensible that the respondent has been unable to produce any administrative documents or any other piece of evidence — to establish the reality of those events. It is true that on 30 November 1995 — a date when Mr Diallo was at liberty according to the DRC's version of the facts, whereas according to Guinea's allegations, he was in prison — he wrote a letter to the Zairean Prime Minister and Minister of Finance transmitting to them the files concerning the debts claimed by his companies, in which he makes no reference to his detention. But the existence of this correspondence far from proves, contrary to the assertions of the DRC, that Mr Diallo was at liberty on that date. It is a fact that, during the periods when he was deprived of his liberty, Mr Diallo was largely able to communicate with the outside world, and that he was not prevented from engaging in written correspondence.The letter of 30 November 1995 is therefore in no way conclusive.

**59.** Accordingly, the Court concludes that Mr Diallo remained in continuous detention for 66 days, from 5 November 1995 to 10 January 1996.

**60.** On the other hand, the Court does not accept the applicant's assertion that Mr Diallo was rearrested on 14 January 1996 and remained in detention until he was expelled on 31 January.This claim, which is contested by the respondent, is not supported by any evidence at all; the Court also observes that, in the written proceedings, Guinea stated the date of this alleged arrest to be 17 and not 14 January. The Court therefore cannot regard the second period of detention claimed by the applicant, lasting 17 days, as having been established. However, since the DRC has acknowledged that Mr Diallo was detained, at the latest, on 25 January 1996, the Court will take it as established that he was in detention between 25 and 31 January 1996.

**61.** Nor can the Court accept the allegations of death threats said to have been made against Mr Diallo by his guards, in the absence of any evidence in support of these allegations.

**62.** As regards the question of compliance of the authorities of the DRC with their obligations under article 36(1)(b)of the Vienna Convention on Consular Relations, the relevant facts will be examined at a later stage, when the Court deals with that question (see paragraphs 90-97 below).

## 2. Consideration of the facts in the light of the applicable international law

**63.** Guinea maintains that the circumstances in which Mr Diallo was arrested, detained and expelled in 1995-1996 constitute in several respects a breach by the DRC of its international obligations. First, the expulsion of Mr Diallo is said to have breached article 13 of the International Covenant on Civil and Political Rights (hereinafter the 'Covenant') of 16 December 1966, to which Guinea and the DRC became parties on 24 April 1978 and 1 February 1977 respectively, as well as article 12(4) of the African Charter on Human and Peoples' Rights (hereinafter the 'African Charter') of 27 June 1981, which entered into force for Guinea on 21 October 1986, and for the DRC on 28 October 1987. Second, Mr Diallo's arrest and detention are said to have violated article 9(1) and (2), of the Covenant, and article 6 of the African Charter. Third, Mr Diallo is said to have suffered conditions in detention comparable to forms of inhuman or degrading treatment that are prohibited by international law. Fourth and last, Mr Diallo is said not to have been informed, when he was arrested, of his right to request consular assistance from his country, in violation of article 36(1)(b) of the Vienna Convention on Consular Relations of 24 April 1963, which entered into force for Guinea on 30 July 1988 and

for the DRC on 14 August 1976. The Court will examine in turn whether each of these assertions is well-founded.

### (a) The alleged violation of article 13 of the Covenant and article 12(4) of the African Charter

**64.** Article 13 of the Covenant reads as follows:

> An alien lawfully in the territory of a state party to the present Covenant maybe expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

Likewise, 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.'

**65.** It follows from the terms of the two provisions cited above that the expulsion of an alien lawfully in the territory of a state which is a party to these instruments can only be compatible with the international obligations of that state if it is decided in accordance with 'the law', in other words the domestic law applicable in that respect. Compliance with international law is to some extent dependent here on compliance with internal law. However, it is clear that while 'accordance with law' as thus defined is a necessary condition for compliance with the above-mentioned provisions, it is not the sufficient condition. First, the applicable domestic law must itself be compatible with the other requirements of the Covenant and the African Charter; second, an expulsion must not be arbitrary in nature, since protection against arbitrary treatment lies at the heart of the rights guaranteed by the international norms protecting human rights, in particular those set out in the two treaties applicable in this case.

**66.** The interpretation above is fully corroborated by the jurisprudence of the Human Rights Committee established by the Covenant to ensure compliance with that instrument by the states parties (see for example, in this respect, *Maroufidouv Sweden*, No 58/1979, para 9(3); Human Rights Committee, General Comment 15: The position of aliens under the Covenant). Since it was created, the Human Rights Committee has built up a considerable body of interpretative case law, in particular through its findings in response to the individual communications which may be submitted to it in respect of states parties to the first Optional Protocol, and in the form of its 'General Comments'. Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise

the application of that treaty. The point here is to achieve the necessary clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the states obliged to comply with treaty obligations are entitled.

**67.** Likewise, when the Court is called upon, as in these proceedings, to apply a regional instrument for the protection of human rights, it must take due account of the interpretation of that instrument adopted by the independent bodies which have been specifically created, if such has been the case, to monitor the sound application of the treaty in question. In the present case, the interpretation given above of article 12(4) of the African Charter is consonant with the case law of the African Commission on Human and Peoples' Rights established by article 30 of the said Charter (see, for example, *Good v Republic of Botswana*, No 313/05 [(2010) AHRLR 43 (ACHPR 2010)], para 204; *World Organization against Torture and International Association of Democratic Lawyers, International Commission of Jurists, Inter-African Union for Human Rights v Rwanda*, No 27/89, 46/91, 49/91, 99/93 [(2000) AHRLR 252 (ACHPR 1996) 27]).

**68.** The Court also notes that the interpretation by the European Court of Human Rights and the Inter-American Court of Human Rights, respectively, of article 1 of Protocol 7 to the (European) Convention for the Protection of Human Rights and Fundamental Freedoms and article 22(6) of the American Convention on Human Rights — the said provisions being close in substance to those of the Covenant and the African Charter which the Court is applying in the present case — is consistent with what has been found in respect of the latter provisions in paragraph 65 above.

**69.** According to Guinea, the decision to expel Mr Diallo first breached article 13 of the Covenant and article 12(4) of the African Charter because it was not taken in accordance with Congolese domestic law, for three reasons: it should have been signed by the President of the Republic and not by the Prime Minister; it should have been preceded by consultation of the National Immigration Board; and it should have indicated the grounds for the expulsion, which it failed to do.

**70.** The Court is not convinced by the first of these arguments. It is true that article 15 of the Zairean Legislative Order of 12 September 1983 concerning immigration control, in the version in force at the time, conferred on the President of the Republic, and not the Prime Minister, the power to expel an alien. However, the DRC explains that since the entry into force of the Constitutional Act of 9 April 1994, the powers conferred by particular legislative provisions on the President of the Republic are deemed to have been transferred to the Prime Minister — even though such provisions have not been formally

amended — under article 80(2) of the new Constitution, which provides that 'the Prime Minister shall exercise regulatory power by means of decrees deliberated upon in the Council of Ministers'. The Court recalls that it is for each state, in the first instance, to interpret its own domestic law. The Court does not, in principle, have the power to substitute its own interpretation for that of the national authorities, especially when that interpretation is given by the highest national courts (see, for this latter case, *Serbian Loans*, judgment No 14, 1929, PCIJ, Series A, No 20, p 46 and *Brazilian Loans*, judgment No 15, 1929, PCIJ, Series A, No 21, p 124). Exceptionally, where a state puts forward a manifestly incorrect interpretation of its domestic law, particularly for the purpose of gaining an advantage in a pending case, it is for the Court to adopt what it finds to be the proper interpretation.

**71.** That is not the situation here. The DRC's interpretation of its Constitution, from which it follows that article 80(2) produces certain effects on the laws already in force on the date when that Constitution was adopted, does not seem manifestly incorrect. It has not been contested that this interpretation corresponded, at the time in question, to the general practice of the constitutional authorities. The DRC has included in the case file, in this connection, a number of other expulsion decrees issued at the same time and all signed by the Prime Minister. Consequently, although it would be possible in theory to discuss the validity of that interpretation, it is certainly not for the Court to adopt a different interpretation of Congolese domestic law for the purposes of the decision of this case. It therefore cannot be concluded that the decree expelling Mr Diallo was not issued 'in accordance with law' by virtue of the fact that it was signed by the Prime Minister.

**72.** However, the Court is of the opinion that this decree did not comply with the provisions of Congolese law for two other reasons. First, it was not preceded by consultation of the National Immigration Board, whose opinion is required by article 16 of the above-mentioned Legislative Order concerning immigration control before any expulsion measure is taken against an alien holding a residence permit. The DRC has not contested either that Mr Diallo's situation placed him within the scope of this provision, or that consultation of the Board was neglected. This omission is confirmed by the absence in the decree of a citation mentioning the Board's opinion, whereas all the other expulsion decrees included in the case file specifically cite such an opinion, in accordance with article 16 of the Legislative Order, moreover, which concludes by stipulating that the decision 'shall mention the fact that the Board was consulted'.

Second, the expulsion decree should have been 'reasoned' pursuant to article 15 of the 1983 Legislative Order; in other words, it should have indicated the grounds for the decision taken. The fact is that the

general, stereotyped reasoning included in the decree cannot in any way be regarded as meeting the requirements of the legislation. The decree confines itself to stating that the 'presence and conduct [of Mr Diallo] have breached Zairean public order, especially in the economic, financial and monetary areas, and continue to do so'. The first part of this sentence simply paraphrases the legal basis for any expulsion measure according to Congolese law, since article 15 of the 1983 Legislative Order permits the expulsion of any alien 'who, by his presence or conduct, breaches or threatens to breach the peace or public order'. As for the second part, while it represents an addition, this is so vague that it is impossible to know on the basis of which activities the presence of Mr Diallo was deemed to be a threat to public order (in the same sense, *mutatis mutandis*, see *Certain Questions of Mutual Assistance in Criminal Matters* (*Djibouti v France*), judgment, ICJ Reports 2008, p 231, para 152). The formulation used by the author of the decree therefore amounts to an absence of reasoning for the expulsion measure.

**73.** The Court thus concludes that in two important respects, concerning procedural guarantees conferred on aliens by Congolese law and aimed at protecting the persons in question against the risk of arbitrary treatment, the expulsion of Mr Diallo was not decided 'in accordance with law'. Consequently, regardless of whether that expulsion was justified on the merits, a question to which the Court will return later in this judgment, the disputed measure violated article 13 of the Covenant and article 12(4) of the African Charter.

**74.** Furthermore, the Court considers that Guinea is justified in contending that the right afforded by article 13 to an alien who is subject to an expulsion measure to 'submit the reasons against his expulsion and to have his case reviewed by ... the competent authority' was not respected in the case of Mr Diallo. It is indeed certain that, neither before the expulsion decree was signed on 31 October 1995, nor subsequently but before the said decree was implemented on 31 January 1996, was Mr Diallo allowed to submit his defence to a competent authority in order to have his arguments taken into consideration and a decision made on the appropriate response to be given to them. It is true, as the DRC has pointed out, that article 13 of the Covenant provides for an exception to the right of an alien to submit his reasons where 'compelling reasons of national security' require otherwise. The respondent maintains that this was precisely the case here. However, it has not provided the Court with any tangible information that might establish the existence of such 'compelling reasons'. In principle, it is doubtless for the national authorities to consider the reasons of public order that may justify the adoption of one police measure or another. But when this involves setting aside an important procedural guarantee provided for by an international treaty, it cannot simply be left in the hands of the state in question to determine the circumstances which,

exceptionally, allow that guarantee to be set aside. It is for the state to demonstrate that the 'compelling reasons' required by the Covenant existed, or at the very least could reasonably have been concluded to have existed, taking account of the circumstances which surrounded the expulsion measure. In the present case, no such demonstration has been provided by the respondent. On these grounds too, the Court concludes that article 13 of the Covenant was violated in respect of the circumstances in which Mr Diallo was expelled.

### (b) The alleged violation of article 9(1) and (2) of the Covenant and article 6 of the African Charter

**75.** Article 9(1) and (2) of the Covenant provides that:

> (1) Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
>
> (2) Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

Article 6 of the African Charter provides that:

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

**76.** According to Guinea, the above-mentioned provisions were violated when Mr Diallo was arrested and detained in 1995-1996 for the purpose of implementing the expulsion decree, for a number of reasons. First, the deprivations of liberty which he suffered did not take place 'in accordance with such procedure as [is] established by law' within the meaning of article 9(1) of the Covenant, or on the basis of 'conditions previously laid down by law' within the meaning of article 6 of the African Charter. Second, they were 'arbitrary' within the meaning of these provisions. Third, Mr Diallo was not informed, at the time of his arrests, of the reasons for those arrests, nor was he informed of the charges against him, which constituted a violation of article 9(2) of the Covenant. The Court will examine in turn whether each of these assertions is well-founded.

**77.** First of all, it is necessary to make a general remark. The provisions of article 9(1) and (2) of the Covenant, and those of article 6 of the African Charter, apply in principle to any form of arrest or detention decided upon and carried out by a public authority, whatever its legal basis and the objective being pursued (see in this respect, with regard to the Covenant, the Human Rights Committee's General Comment 8 of 30 June 1982 concerning the right to liberty and security of person (Human Rights Committee, CCPR General Comment 8: Article 9 (Right to Liberty and Security of Person))). The scope of these provisions is not, therefore, confined to criminal

proceedings; they also apply, in principle, to measures which deprive individuals of their liberty that are taken in the context of an administrative procedure, such as those which may be necessary in order to effect the forcible removal of an alien from the national territory. In this latter case, it is of little importance whether the measure in question is characterised by domestic law as an 'expulsion' or a 'refoulement'. The position is only different as regards the requirement in article 9(2) of the Covenant that the arrested person be 'informed of any charges' against him, a requirement which is only meaningful in the context of criminal proceedings.

**78.** The Court now turns to the first of Guinea's three allegations, namely, that Mr Diallo's arrest and detention were not in accordance with the requirements of the law of the DRC. It should first be noted that Mr Diallo's arrest on 5 November 1995 and his detention until 10 January 1996 (see paragraph 58 above) were for the purpose of enabling the expulsion decree issued against him on 31 October 1995 to be effected. The second arrest, on 25 January 1996 at the latest, was also for the purpose of implementing that decree: the mention of a 'refoulement' on account of 'illegal residence' in the notice served on Mr Diallo on 31January 1996, the day when he was actually expelled, was clearly erroneous, as the DRC acknowledges.

**79.** Article 15 of the Legislative Order of 12 September 1983 concerning immigration control, as in force at the time of Mr Diallo's arrest and detention, provided that an alien 'who is likely to evade implementation' of an expulsion measure may be imprisoned for an initial period of 48 hours, which may be 'extended by 48 hours at a time, but shall not exceed eight days'. The Court finds that Mr Diallo's arrest and detention were not in accordance with these provisions. There is no evidence that the authorities of the DRC sought to determine whether Mr Diallo was 'likely to evade implementation' of the expulsion decree and, therefore, whether it was necessary to detain him. The fact that he made no attempt to evade expulsion after he was released on 10 January 1996 suggests that there was no need for his detention. The overall length of time for which he was detained — 66 days following his initial arrest and at least six more days following the second arrest — greatly exceeded the maximum period permitted by article 15. In addition, the DRC has produced no evidence to show that the detention was reviewed every 48 hours, as required by that provision.

**80.** The Court further finds, in response to the second allegation set out above (see paragraph 76 above), that Mr Diallo's arrest and detention were arbitrary within the meaning of article 9(1) of the Covenant and article 6 of the African Charter.

**81.** Admittedly, in principle an arrest or detention aimed at effecting an expulsion decision taken by the competent authority

cannot be characterised as 'arbitrary' within the meaning of the above-mentioned provisions, even if the lawfulness of the expulsion decision might be open to question. Consequently, the fact that the decree of 31 October 1995 was not issued, in some respects, 'in accordance with law', as the Court has noted above in relation to article 13 of the Covenant and article 12(4) of the African Charter, is not sufficient to render the arrest and detention aimed at implementing that decree 'arbitrary' within the meaning of article 9(1) of the Covenant and article 6 of the African Charter.

**82.** However, account should be taken here of the number and seriousness of the irregularities tainting Mr Diallo's detentions. As noted above, he was held for a particularly long time and it would appear that the authorities made no attempt to ascertain whether his detention was necessary. Moreover, the Court can but find not only that the decree itself was not reasoned in a sufficiently precise way, as was pointed out above (see paragraph 70), but that throughout the proceedings, the DRC has never been able to provide grounds which might constitute a convincing basis for Mr Diallo's expulsion. Allegations of 'corruption' and other offences have been made against Mr Diallo, but no concrete evidence has been presented to the Court to support these claims. These accusations did not give rise to any proceedings before the courts or, *a fortiori*, to any conviction. Furthermore, it is difficult not to discern a link between Mr Diallo's expulsion and the fact that he had attempted to recover debts which he believed were owed to his companies by amongst others, the Zairean state or companies in which the state holds a substantial portion of the capital, bringing cases for this purpose before the civil courts. Under these circumstances, the arrest and detention aimed at allowing such an expulsion measure, one without any defensible basis, to be effected can only be characterised as arbitrary within the meaning of article 9(1) of the Covenant and article 6 of the African Charter.

**83.** Finally, the Court turns to the allegation relating to article 9(2) of the Covenant. For the reasons discussed above (see paragraph 77), Guinea cannot effectively argue that at the time of each of his arrests (in November 1995 and January 1996), Mr Diallo was not informed of the 'charges against him', as the applicant contends is required by article 9(2) of the Covenant. This particular provision of article 9 is applicable only when a person is arrested in the context of criminal proceedings; that was not the case for Mr Diallo.

**84.** On the other hand, Guinea is justified in arguing that Mr Diallo's right to be 'informed, at the time of arrest, of the reasons for his arrest' — a right guaranteed in all cases, irrespective of the grounds for the arrest — was breached. The DRC has failed to produce a single document or any other form of evidence to prove that Mr Diallo was notified of the expulsion decree at the time of his arrest

on 5 November 1995,or that he was in some way informed, at that time, of the reason for his arrest. Although the expulsion decree itself did not give specific reasons, as pointed out above (see paragraph 72), the notification of this decree at the time of Mr Diallo's arrest would have informed him sufficiently of the reasons for that arrest for the purposes of article 9(2) since it would have indicated to Mr Diallo that he had been arrested for the purpose of an expulsion procedure and would have allowed him, if necessary, to take the appropriate steps to challenge the lawfulness of the decree. However, no information of this kind was provided to him; the DRC, which should be in a position to prove the date on which Mr Diallo was notified of the decree, has presented no evidence to that effect.

**85.** The same applies to Mr Diallo's arrest in January 1996. On that date, it has also not been established that Mr Diallo was informed that he was being forcibly removed from Congolese territory in execution of an expulsion decree. Moreover, on the day when he was actually expelled, he was given the incorrect information that he was the subject of a '*refoulement*' on account of his 'illegal residence' (see paragraph 50 above). This being so, the requirement for him to be informed, laid down by article 9(2) of the Covenant, was not complied with on that occasion either.

### (c) The alleged violation of the prohibition on subjecting a detainee to mistreatment

**86.** Guinea maintains that Mr Diallo was subjected to mistreatment during his detention, because of the particularly tough conditions thereof, because he was deprived of his right to communicate with his lawyers and with the Guinean embassy, and because he received death threats from the guards.

**87.** The applicant invokes in this connection article 10(1) of the Covenant, according to which '[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.' Article 7 of the Covenant, providing that '[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment', and article 5 of the African Charter, stating that '[e]very individual shall have the right to the respect of the dignity inherent in a human being', are also pertinent in this area.There is no doubt, moreover, that the prohibition of inhuman and degrading treatment is among the rules of general international law which are binding on states in all circumstances, even apart from any treaty commitments.

**88.** The Court notes, however, that Guinea has failed to demonstrate convincingly that Mr Diallo was subjected to such treatment during his detention. There is no evidence to substantiate the allegation that he received death threats. It seems that Mr Diallo was able to communicate with his relatives and his lawyers without

any great difficulty and, even if this had not been the case, such constraints would not *per se* have constituted treatment prohibited by article 10(1) of the Covenant and by general international law. The question of Mr Diallo's communications with the Guinean authorities is distinct from that of compliance with the provisions currently under examination and will be addressed under the next heading, in relation to article 36(1)(b) of the Vienna Convention on Consular Relations. Finally, that Mr Diallo was fed thanks to the provisions his relatives brought to his place of detention — which the DRC does not contest — is insufficient in itself to prove mistreatment, since access by the relatives to the individual deprived of his liberty was not hindered.

**89.** In conclusion, the Court finds that it has not been demonstrated that Mr Diallo was subjected to treatment prohibited by article 10(1) of the Covenant.

### (d) The alleged violation of the provisions of article 36(1)(b) of the Vienna Convention on Consular Relations

**90.** Article 36(1)(b) of the Vienna Convention on Consular Relations provides that:

> [I]f he so requests, the competent authorities of the receiving state shall, without delay, inform the consular post of the sending state if, within its consular district, a national of that state is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph.

**91.** These provisions, as is clear from their very wording, are applicable to any deprivation of liberty of whatever kind, even outside the context of pursuing perpetrators of criminal offences. They therefore apply in the present case, which the DRC does not contest.

**92.** According to Guinea, these provisions were violated when Mr Diallo was arrested in November 1995 and January 1996, because he was not informed 'without delay' at those times of his right to seek assistance from the consular authorities of his country.

**93.** At no point in the written proceedings or the first round of oral argument did the DRC contest the accuracy of Guinea's allegations in this respect; it did not attempt to establish, or even claim, that the information called for by the last sentence of the quoted provision was supplied to Mr Diallo, or that it was supplied 'without delay', as the text requires.

The respondent replied to the applicant's allegation with two arguments: that Guinea had failed to prove that Mr Diallo requested the Congolese authorities to notify the Guinean consular post without delay of his situation; and that the Guinean ambassador in Kinshasa

was aware of Mr Diallo's arrest and detention, as evidenced by the steps he took on his behalf.

**94.** It was only in replying to a question put by a judge during the hearing of 26 April 2010 that the DRC asserted for the first time that it had 'orally informed Mr Diallo immediately after his detention of the possibility of seeking consular assistance from his state' (written reply by the DRC handed in to the Registry on 27 April 2010 and confirmed orally at the hearing of 29 April, during the second round of oral argument).

**95.** The Court notes that the two arguments put forward by the DRC before the second round of oral pleadings lack any relevance. It is for the authorities of the state which proceeded with the arrest to inform on their own initiative the arrested person of his right to ask for his consulate to be notified; the fact that the person did not make such a request not only fails to justify non-compliance with the obligation to inform which is incumbent on the arresting state, but could also be explained in some cases precisely by the fact that the person had not been informed of his rights in that respect (*Avena and Other Mexican Nationals* (*Mexico v United States of America*), judgment, ICJ Reports 2004 (I), p 46, para 76). Moreover, the fact that the consular authorities of the national state of the arrested person have learned of the arrest through other channels does not remove any violation that may have been committed of the obligation to inform that person of his rights 'without delay'.

**96.** As for the DRC's assertion, made in the conditions described above, that Mr Diallo was 'orally informed' of his rights upon his arrest, the Court can but note that it was made very late in the proceedings, whereas the point was at issue from the beginning, and that there is not the slightest piece of evidence to corroborate it. The Court is therefore unable to give it any credit.

**97.** Consequently, the Court finds that there was a violation by the DRC of article 36(1)(b) of the Vienna Convention on Consular Relations.

...

## IV. REPARATION

**160.** Having concluded that the Democratic Republic of the Congo has breached its obligations under articles 9 and 13 of the International Covenant on Civil and Political Rights, articles 6 and 12 of the African Charter on Human and Peoples' Rights, and article 36(1)(b) of the Vienna Convention on Consular Relations (see paragraphs 73, 74, 85 and 97 above), it is for the Court now to determine, in light of Guinea's final submissions, what consequences flow from these internationally wrongful acts giving rise to the DRC's international responsibility.

**161.** The Court recalls that 'reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed' (*Factory at Chorzów*, merits, judgment No 13, 1928, PCIJ, Series A, No 17, p 47). Where this is not possible, reparation may take 'the form of compensation or satisfaction, or even both' (*Pulp Mills on the River Uruguay* (*Argentina v Uruguay*), judgment of 20 April 2010, para 273). In the light of the circumstances of the case, in particular the fundamental character of the human rights obligations breached and Guinea's claim for reparation in the form of compensation, the Court is of the opinion that, in addition to a judicial finding of the violations, reparation due to Guinea for the injury suffered by Mr Diallo must take the form of compensation.

**162.** In this respect, Guinea requested in its final submissions that the Court defer its judgment on the amount of compensation, in order for the parties to reach an agreed settlement on that matter. Should the parties be unable to do so 'within a period of six months following [the] delivery of the [present] judgment', Guinea also requested the Court to authorise it to submit an assessment of the amount of compensation due to it, in order for the Court to decide on this issue 'in a subsequent phase of the proceedings' (see paragraph 14 above).

**163.** The Court is of the opinion that the parties should indeed engage in negotiation in order to agree on the amount of compensation to be paid by the DRC to Guinea for the injury flowing from the wrongful detentions and expulsion of Mr Diallo in 1995-1996, including the resulting loss of his personal belongings.

**164.** In light of the fact that the application instituting proceedings in the present case was filed in December 1998, the Court considers that the sound administration of justice requires that those proceedings soon be brought to a final conclusion, and thus that the period for negotiating an agreement on compensation should be limited. Therefore, failing agreement between the parties within six months following the delivery of the present judgment on the amount of compensation to be paid by the DRC, the matter shall be settled by the Court in a subsequent phase of the proceedings. Having been sufficiently informed of the facts of the present case, the Court finds that a single exchange of written pleadings by the parties would then be sufficient in order for it to decide on the amount of compensation.

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# UNITED NATIONS HUMAN RIGHTS TREATY BODIES

# SOUTH AFRICA

## McCallum v South Africa

**(2010) AHRLR 21 (HRC 2010)**

Communication 1818/2008, *Bradley McCallum (represented by counsel, Egon Aristidie Oswald) v South Africa*

Decided at 100th session, 23 October 2010, CCPR/C/100/D/1818/2008

Failure to investigate alleged assault of prisoner and provide adequate medical attention

**Cruel, inhuman or degrading treatment** (failure to investigate alleged ill-treatment in detention, 6.4, 6.7; *incommunicado* detention, 6.5; failure to provide HIV test requested by sexually assaulted inmate, 6.6; delay in providing medical examination, 6.8)

**1.** The author of the communication, dated 7 July 2008, is Mr Bradley McCallum, born on 18 April 1979. He is currently held at the St Albans Correctional Facility of the Eastern Cape. He claims to be a victim of violations by South Africa[1] of articles 7 and 10, alone and read in conjunction with article 2, paragraph 3, of the Covenant. The author is represented by counsel, Mr Egon Aristidie Oswald.

### The facts as presented by the author

**2.1** The author is a detainee at the St Albans Maximum Correctional Facility in Port Elizabeth, Province of Eastern Cape. On 15 July 2005, a cleaner of Section C of the correctional facility informed the author and the other inmates of cell No C2 that a fellow inmate had stabbed Warder N in the section's dining hall and that the warder passed away. On the same day, warders of Section B assaulted inmates in that section.

**2.2** On 17 July 2005, the author, together with the other inmates of his cell, were ordered to leave their cell while being insulted by Warder P. When the author inquired about the reason, the warder hit him with a baton on his upper left arm and left side of his head. A second warder, M, intervened and forcibly removed the author's

[1] The Covenant and the Optional Protocol entered into force for South Africa on 10 December 1998 and on 28 August 2002, respectively.

shirt. In the corridor, Warder M kicked the author from behind causing him to fall on the ground. The warder then requested that the author remove his pants and forced him on the ground, which caused a dislocation of his jaw and his front teeth. In the corridor, there were about 40 to 50 warders in uniform. The author recognised five of them. They beat inmates indiscriminately and demanded that they strip naked and lie on the wet floor of the corridor. Warder P requested that the inmates lie in a line with their faces in the inner part of the anus of the inmate lying in front of them.

**2.3** Around 60 to 70 inmates were lying naked on the floor of the wet corridor building a chain of human bodies. Inmates who looked up were beaten with batons and kicked. Around 20 female warders were present and walked over the inmates, kicking them into their genitals and making mocking remarks about their private parts. Thereafter, the inmates were sprayed with water, beaten by the warders with batons, shock boards, broomsticks, pool cues and pickaxe handles. They were also ordered to remove their knives from their anus.[2] As a result of the shock and fear, inmates urinated and defecated on themselves and on those linked to them in the human chain.

**2.4** At some point, Warder P approached the author and while insulting him, he inserted a baton into the author's anus. When the author tried to crawl away, the warder stepped on his back forcing him to lie down on the floor. The author still experiences flashbacks of what he felt like rape. Meanwhile, some of the warders went into the cells and took some of the inmate's belongings. Thereafter, the inmates were ordered to return to their cells. This however created chaos, as the floor was wet with water, urine, feces and blood and some inmates fell over each other.

**2.5** Injured inmates were not allowed to see a doctor until September 2005. Prisoners resorted to treating their wounds themselves with ashes as disinfectant and sand to stop the bleeding. The author was able to obtain medical attention only in late September 2005.[3] The prison doctor, however, did not administer any treatment on him, as he considered the author's complaints to be of 'internal' nature and therefore not covered by his duties.[4] The author requested HIV testing for fear of having contracted the virus from other inmates' bodily fluids on 17 July 2005. However, he was unable to obtain it. HIV is widespread in South African prisons.[5] In October

2 According to the author, it is not unusual for inmates to hide a knife in their anus.

3 According to the medical history on file, on 31 August 2005, the author went to the hospital in the morning, however, there is no mention of the nature of the consultation.

4 According to information provided by the author, unofficial protocol dictates that medical treatment is not administered to inmates in respect of 'internal' matters.

5 See concluding observations by the Committee against Torture, CAT/C/ZAF/CO/1, para 22.

2005, the author received treatment for his dislocated jaw and loose teeth.[6] Between March and November 2006, the author's teeth were extracted one by one, adversely affecting his diet and health. On 3 April 2008, the author requested that the prison authorities provide him with a teeth prosthesis, without however receiving any answer to his request.

**2.6** After the assault, the correctional facility was locked down and, as a result, the author was denied contact with his family and counsel for about a month. His telephone and exercise privileges were also taken away. Thereafter, he was allowed visits of five to ten minutes at a time.

**2.7** On 20 November 2006, the author's counsel requested HIV testing for the author and the other victims. He wrote to the Head of the Correctional Facility, the Minister of Correctional Services, the National and Provincial Commissioner in the Department of Correctional Services and the State Attorney. On 13 December 2006, the Office of the State Attorney replied that the Department of Correctional Services, denied all allegations of torture and ill-treatment raised by the author and the other alleged victims and that it had no objection to HIV testing provided that the inmates gave their written consent and advice on the payment of the test. The author wrote back to the State Attorney invoking sections 27 and 35 of the Constitution[7] on the right to have access to health care and

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6 Complaint about teeth and jaw injuries reported on 11 October 2005 according to the medical history on file.

7 27. Health care, food, water and social security
(1)Everyone has the right to have access to health care services, including reproductive health care; sufficient food and water; and social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
(2)The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
(3)No one may be refused emergency medical treatment.
35. Arrested, detained and accused persons
[…]
(2)Everyone who is detained, including every sentenced prisoner, has the right
(a)to be informed promptly of the reason for being detained;
(b)to choose, and to consult with, a legal practitioner, and to be informed of this right promptly;
(c) to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
(d)to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released;
(e)to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment; and
(f)to communicate with, and be visited by, that person's
(i) spouse or partner;
(ii)next of kin;

emergency medical treatment for persons deprived of their liberty. Despite several exchanges of correspondence, the State Attorney has not provided any response on the author's allegations of torture, nor has he responded to the author's request for free HIV testing. He simply indicated that he awaited instructions from the Department of Correctional Services. During the examination of the state party's initial report before the Committee against Torture on 15 November 2006, a member of the state party's delegation acknowledged that 'on the date of the murder in St Albans Maximum Correctional Facility, the officials were overcome with the situation and assaults took place'. On 18 February 2008, the author requested the Office of the Inspecting Judge to disclose its findings with respect to the assault. Despite several reminders, he has received no information.

**2.8** Shortly after the incident, the author lodged a complaint to the prison authorities, which was however not accepted. During August/ September 2005, the Office of the Inspecting Judge visited the prison and noted the author's and other inmates' grievances. In September 2005, an inspector of the South African Police Service recorded the author's statement, in which he complained of the treatment he had received. The inspector promised to open an investigation; however, the author has no knowledge of any such investigation into the matter.

**2.9** In May 2006, the author was made aware of a legal representative, who was prepared to assist victims of torture. Up until then, the author had been unable to secure legal representation. On 12 May 2006, the author lodged a civil suit to demand compensation for the damages suffered. The author made a plea of exception to the state party's plea (Minister of Correctional Services) on the basis that their plea amounted to bare denial of liability. The Magistrate Court, however, upheld the state's plea, which denies the author's allegations of torture, inhuman and degrading treatment or punishment occurred on 17 July 2005. Furthermore, the state invoked section 3 of Act 40 of 2002 on the Institution of Legal Proceedings against certain Organs of State, according to which the plaintiff (the author) was obliged to serve the defendant, as an organ of the state, with written notice within six months of the alleged cause of action and the facts on which state's liability arose. The author withdrew his action and re-instituted proceedings in the High Court. However, he argues that his civil action may fail in the High Court, as he did not comply with the six months rule above-mentioned.

(iii)chosen religious counsellor; and
(iv)chosen medical practitioner.

## The complaint

**3.1** The author submits that his exposure to severe beatings and other ill-treatment during his detention at the St Albans Maximum Correctional Facility, his exposure to inhuman and degrading conditions of detention, the failure to properly investigate his allegations of ill-treatment and holding him *incommunicado* for a month after the assault amounts to a violation of article 7.

**3.2** In particular, he claims that he was subjected to severe beatings with batons and shock shields while lying naked on the wet floor of the corridor and to rape with a baton forced into his anus. The physical abuse was such that it resulted in dislocation of his jaw and irreversible damage to his teeth, to the point that they had to be removed. Furthermore, he was raped with a baton, forced to strip naked, endure remarks about his private parts and required to insert his nose into the anal cavity of a fellow prisoner. Being forced to lie in urine, feces and blood was done deliberately to make him fear of an infection with the HIV virus. The subsequent denial by the authorities for HIV testing exacerbated the author's trauma. The author argues that these facts amount to torture and constitute a violation of article 7, of the Covenant.[8]

**3.3** Furthermore, the author submits that he was kept *incommunicado* after the event and his privileges to telephone communication, exercise and his rights to access medical care, legal representation and family visits were denied for one month. He submits that this also breached article 7.

**3.4** The author cites the Committee's jurisprudence, according to which for punishment to be degrading, the humiliation or debasement involved must exceed a particular level and must, in any event, entail other elements beyond the mere fact of deprivation of liberty.[9] The author submits that the conditions of detention went far beyond those inherent in the deprivation of liberty and therefore amounted to a breach of article 7.

**3.5** With regard to his conditions of detention, the author recalls the Committee's numerous statements according to which the Standard Minimum Rules for the Treatment of Prisoners are effectively incorporated in article 10. He claims that the overcrowding in St Albans Maximum Correctional Facility amounts to a violation of article 10, insofar as, instead of one prisoner per cell pursuant to rule 9 of the Standard Minimum Rules for the Treatment of Prisoners, the author was incarcerated in a cell of 60 to 70 inmates. Some of his cellmates had to share beds, and the author was exposed

[8] The author submits that he requests the Committee to make a specific finding that his treatment amounted to torture under article 7, as opposed to making a general finding of a violation of article 7 which would not specify which limb of that article was violated.

[9] See communication 265/1987, *Vuolanne* v *Finland*, views adopted on 7 April 1989.

to a lack of privacy and he did not have access to adequate sanitary facilities. He further submits that the overpopulation in the prison amounted to 300 percent, which is confirmed in a report by the Portfolio Committee of the Department of Correctional Services. Moreover, contrary to rules 10 to 21, of the Standard Minimum Rules for the Treatment of Prisoners, adequate bedding, clothing, food and hygiene facilities were not supplied and, contrary to rules 22 to 26, adequate medical care was not provided.

**3.6** The author further submits that the state party has failed to properly investigate his claims of ill-treatment and to provide him with a remedy. He recalls the Committee's General Comment 20,[10] according to which complaints invoking article 7 must be investigated promptly and impartially by competent authorities so as to make the remedy effective. The state party's failure therefore amounts to a violation of the author's rights under articles 7 and 10 read in conjunction with article 2, paragraph 3.

**3.7** With regard to the exhaustion of domestic remedies, the author claims that the South African Police failed to properly investigate his case, that the Prosecuting Authority failed to prosecute the matter and that no disciplinary action has been taken against the perpetrators by the Department of Correctional Services. The author further submits that the state party has enacted legislation requesting that applicants in civil suits against the state institute proceedings within six months, when the normal deadline is three years. Therefore, his civil suit is likely to fail, due to his difficulties in corroborating physical, psychological and medical evidence, to his indigence, which negatively impacts on the quality of his legal representation, and to the six month time limitation for the notification of civil suits against the state.

## State party's failure to cooperate

**4.** On 16 October 2008, 7 July 2009, 15 December 2009, 6 May 2010 and 18 August 2010, the state party was requested to submit to the Committee information on the admissibility and merits of the communication. The Committee notes that this information has not been received. The Committee regrets the state party's failure to provide any information with regard to the admissibility or the substance of the author's claims. It recalls that it is implicit in article 4, paragraph 2, of the Optional Protocol that states parties examine in good faith all allegations brought against them, and that they make available to the Committee all information at their disposal. In the absence of a reply from the state party, due weight must be given to the author's allegations, to the extent that they are substantiated.

[10] See General Comment 20, article 7, A/47/40(SUPP), paragraph 14.

## Issues and proceedings before the Committee

### Consideration of admissibility

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

**5.2** As required under article 5, paragraph 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.

**5.3** In light of the author's complaints to the prison administration, the police the Office of the Inspecting Judge, the Magistrate Court and the High Court, which, it would appear, not to have been investigated and the absence of any observations from the state party, the Committee considers that the provisions of article 5, paragraph 2(b), of the Optional Protocol do not preclude the admissibility of the communication.

**5.4** Having found no impediment to the admissibility of the author's claims under articles 7 and 10 alone and read in conjunction with article 2, paragraph 3, of the Covenant, the Committee proceeds to their examination on the merits.

### Consideration of merits

**6.1** The Human Rights Committee has considered the present communication in the light of all the information made available to it, as required under article 5, paragraph 1, of the Optional Protocol. It notes that the state party has not addressed the author's allegations. In the circumstances, due weight must be given to such allegations to the extent that they have been sufficiently substantiated.

**6.2** The Committee notes the author's claim that, on 17 July 2005, warders of the St Alban Correctional Facility beat him with batons and shock shields while he was lying naked on the wet floor of the prison corridor, and that, as a consequence, he suffered from several physical injuries, such as a dislocated jaw, irreversible damage to his teeth and wounds on his left arm and left side of his head. The Committee further notes the author's allegation that he experiences flashbacks of the rape with a baton, that he has endured ugly remarks about his private parts, that he was required to insert his nose into the anal cavity of a fellow prisoner, and forced to lie in urine, feces and blood coupled with the fear of contracting HIV. It also notes the author's allegation that following the incident, he was held *incommunicado* for one month and was deprived of access to a physician, lawyer or his family. The Committee also notes the

author's allegation that his conditions of detention went beyond those inherent in the deprivation of liberty, including that he was held in a cell of 60 to 70 inmates, that he lacked privacy, did not have access to adequate sanitary facilities, bedding, clothing, food, as well as medical care, and that the prison's overpopulation amounted to 300 percent. To support his claim, the author provides a copy of his medical history, press clippings about the incident of 17 July 2005 and an outline of his cell.

**6.3** The Committee further notes the author's allegation that his claims have not been investigated and that he has therefore been deprived of an effective remedy. In support of his allegation, the author has provided copies of letters, confirmations of fax messages and various reminders submitted to the authorities requesting the investigation of the incident of 17 July 2005, as well as free HIV testing. The Committee further notes that the author commenced a civil suit against the Department of Correctional Services in the Magistrate Court, which he decided to withdraw and to re-institute in the High Court. It also notes the author's argument that his civil action is unlikely to be successful due to his difficulties in obtaining evidence, his inability to afford proper representation and the fact that the six month time limitation for the notification of a complaint against a state organ has already elapsed.

**6.4** The Committee notes the author's detailed description of the incident of 17 July 2005, during which he was allegedly subjected to ill-treatment, as well as his identification by name of five warders who allegedly participated in the incident. It also notes the author's medical history and press clippings on the incident of 17 July 2005. The Committee observes that in the present case the arguments provided by the author necessitated at the very minimum an independent investigation of the potential involvement of the state party's warders in the author's ill-treatment. The Committee considers, therefore, that the author's allegations not having been addressed by the state party warrant the finding that there has been a violation of article 7 of the Covenant.[11]

**6.5** Regarding the author's claim that the St Alban's Correctional Facility was locked down after the incident of 17 July 2005 and that he was held *incommunicado* for a month without access to a physician, a lawyer or his family, the Committee recalls its General Comment 20 (1992) on the prohibition of torture or cruel, inhuman or degrading treatment or punishment, which recommends that states parties should make provisions against *incommunicado* detention[12] and notes that the total isolation of a detained or imprisoned person

[11] See communication 962/2001, *Mulezi* v *Democratic Republic of the Congo*, views adopted on 8 July 2004, para 5.4.

[12] *Official Records of the General Assembly, Forty-seventh Session, Supplement No 40* (A/47/40), annex VI, sect A para 11.

may amount to an act prohibited by article 7. In view of this observation, the Committee finds an additional violation of article 7 of the Covenant.

**6.6** With regard to the author's complaint that despite several requests to various authorities he was not tested for HIV, which he feared to have contracted as a result of the incident of 17 July 2005, the Committee finds that the prevalence of HIV in South African prisons, as attested by the Committee against Torture in its concluding observations of the state party's initial report,[13] which had been brought to the Committee's attention by the author, as well as the particular circumstances of the incident of 17 July 2005 warrants the finding of a violation of article 7, of the Covenant.

**6.7** The Committee notes the content of the complaints submitted by the author to different authorities, such as the prison administration, the police, the Office of the Inspecting Judge, the Magistrate Court and the High Court, none of which, it would appear, have been investigated. The Committee recalls its General Comment 20 (1992) on the prohibition of torture or cruel, inhuman or degrading treatment or punishment[14] and General Comment 31 (2004) on the subject of the General Legal Obligation on States Parties to the Covenant,[15] as well as its constant jurisprudence,[16] according to which complaints alleging a violation of article 7 must be investigated promptly, thoroughly and impartially by competent authorities and appropriate action must be taken against those found guilty. In the present circumstances and in the absence of any explanation from the state party, due weight must be given to the author's allegations. Accordingly, the Committee concludes that the facts before it constitute a violation of article 7 read in conjunction with article 2, paragraph 3, of the Covenant.

**6.8** With regard to the author's complaint alleging a denial to access to medical care after the author's ill-treatment on 17 July 2005, the Committee notes the information in the author's medical history, according to which he was taken to the prison hospital on 31 August 2005. The Committee reiterates that persons deprived of their liberty may not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty, and that they must

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13 CAT/C/ZAF/CO/1, para 22.

14 *Official Records of the General Assembly, Forty-seventh Session, Supplement No 40* (A/47/40), annex VI, sect A para 14.

15 General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, CCPR/C/21/Rev. 1/Add. 13 (2004), para 18.

16 See for example communication 1436/2005, *Sathasivam/Saraswathi* v *Sri Lanka*, views adopted on 8 July 2008, para 6.4; communication 1589/2007, *Gapirjanov* v *Uzbekistan*, views adopted on 18 March 2010, para 8.3; communication 1096/2002, *Kurbanov* v *Tajikistan*, views adopted on 6 November 2003, para 7.4; communication 322/1988, *Rodriguez* v *Uruguay*, views adopted on 19 July 1994, para 12.3.

be treated in accordance with, *inter alia*, the United Nations Standard Minimum Rules for the Treatment of Prisoners.[17] The Committee reiterates that it is the state party's obligation to provide for the security and well-being of persons deprived of their liberty.[18] It observes that despite the author's request to see a doctor immediately after the incident of 17 July 2005, according to the medical record before the Committee, he received his first medical attention only on 31 August 2005. The Committee considers that the delay between the author's request for medical examination and the prison authorities response is such that it amounts to a violation of the author's rights under article 10, paragraph 1, of the Covenant.

**7.** The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of the rights of Mr McCallum under article 7 alone and read in conjunction with article 2, paragraph 3, and article 10, paragraph 1, of the Covenant.

**8.** In accordance with article 2, paragraph 3(a), of the Covenant, the state party is under an obligation to provide the author with an effective remedy, including a thorough and effective investigation of the author's claims falling under article 7, prosecution of those responsible and full reparation, including adequate compensation. As long as the author is in prison, he should be treated with humanity and with respect for the inherent dignity of the human person and should benefit from appropriate health care. The state party is also under an obligation to prevent similar violations in the future.

**9.** Bearing in mind that, by becoming a party to the Optional Protocol, the state party has recognised the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, that state party has undertaken to ensure all individuals within its territory or subject to its jurisdiction the rights recognised in the Covenant and to provide an effective and enforceable remedy in case a violation has been established. The Committee wishes to receive from the state party, within 180 days, information about the

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17 General Comment 21, on article 10, A/47/40(SUPP), paras. 3 and 5; Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977; see also for example communication 1134/2002, *Fongum Gorji-Dinka v Cameroon*, views adopted on 17 March 2005, para 5.2, communication 1173/2003, *Benhadj* v. *Algeria*, views adopted on 20 July 2007, para 8.5.

18 See communication 907/2000, *Siragev* v *Uzbekistan*, views adopted on 1 November 2005, para 6.2; and communication 889/1999, *Zheikov* v *Russian Federation*, views adopted on 17 March 2006, para 7.2; communication 1284/2004, *Turaeva* v *Uzbekistan*, views adopted on 20 October 2009, para 9.2.

measures taken to give effect to the Committee's views. The state party is also requested to publish the Committee's views.

# ZAMBIA

## Mwamba v Zambia

### (2010) AHRLR 32 (HRC 2010)

Communication 1520/2006, *Munguwambuto Kabwe Peter Mwamba v Zambia*

Decided at 98th session, 10 March 2010, CCPR/C/98/D/1520/2006

Death penalty after unfair trial and undue delay of hearing of appeal

**Evidence** (failure of state to respond to allegations, 6.2)
**Life** (death penalty, mandatory, 6.3; appeal, 6.6)
**Cruel, inhuman or degrading treatment** (conditions of detention, 6.4)
**Fair trial** (presumption of innocence, news coverage, 6.5)

**1.** The author of the communication is Mr Munguwambuto Kabwe Peter Mwamba, a Zambian national, born in 1956, who is currently on death row waiting for his case to be reviewed on appeal by the Supreme Court of Zambia. He claims to be a victim of violations by the state party of the International Covenant on Civil and Political Rights. Although he does not invoke any articles of the Covenant, his communication appears to raise issues under article 6; article 7; article 10, paragraph 1; and article 14 of the Covenant. He is not represented by counsel.

### The facts as presented by the author

**2.1** On 24 March 1999, the author, who was a high ranking police officer (superintendent) at the time, was arrested, and detained on suspicion of having murdered the driver of a van carrying 40 tons of copper cathodes and of having stolen the cathodes. He was charged with murder, attempted murder and aggravated robbery. He was taken to the Police Service Headquarters, where he was placed in handcuffs and shackles and subjected to torture and ill-treatment, including an assault by the victim's son with the acquiescence of police officers. He was then transferred to the Chongwe Police Station, where he was secretly detained, in handcuffs and shackles and without food and water for three days.

**2.2** On 28 March 1999, he was sent to the Kabwata Police Station, where he was detained in a cell covered with urine and excrement. He remained in pre-trial detention until his trial on 1 September 1999. He states that on this date the judge also determined the lawfulness of his detention. The police officers investigating the murder and robbery repeatedly asserted through the media that he was the offender. While the author was in detention police officers threatened to kill him, as a result of which the author gave a false confession. However, this confession was not relied upon by the prosecution. The author was also informed by his nephew, who was a paramilitary officer, that there were plans to kill him in the bush. With the help of his lawyer and the officer-in-charge of the prison in which he was detained, he managed to avoid being murdered. This issue was not brought up at trial by the author for fear that the officers in question might seek revenge on the author's nephew.

**2.3** On 1 September 1999, the author's trial began. He was represented by counsel, who was hired privately. On 8 August 2001, he was convicted by the High Court of Zambia of murder and attempted murder and was sentenced to death by hanging, which is a mandatory sentence. He was acquitted on the aggravated robbery charge due to the negligence of the police officers involved, who failed to take any action against third parties who were found in possession of the stolen items. These third parties were neither charged nor summoned to testify during the author's trial, because they bribed the police officers in question to prevent their prosecution. As the three offences were committed at the same time, the judge should also have acquitted him on the two other charges (murder and attempted murder).

**2.4** The author did not have a fair trial. The court was neither independent nor impartial, and the judge and the state prosecutor were bribed. There was no equality between the parties in the proceedings, as the comments and the submissions made by his lawyer were ignored by the judge. Defence witnesses, as well as his lawyer, were intimidated and beaten by police officers. A request by the state prosecution, which was granted by the judge, to exclude the third parties, who were found with the stolen goods, from testifying in Court is a miscarriage of justice. The author's lawyer did not have time to examine a report by the ballistic expert and prepare his defence, as the false report was only produced in Court during the trial. The police officers and the judges involved in his case are corrupt. The Inspector of Police orchestrated his conviction, as the author had previously attempted to have him removed for corruption.[1] In addition, some police officers were bribed to produce false evidence and testimonies, and the judges involved were

[1] The author provides the names of all of the officers involved.

strongly influenced by the repeated declarations made by the police in the media during the investigation.

**2.5** On 22 August 2001, the author lodged an appeal before the Supreme Court. He is still awaiting review of his case. There are 170 convicts in the same prison all awaiting their appeal, which takes between two and fifteen years. The conditions on death row are inhuman and amount to sleeping in a dirty public toilet: cells are 3 by 3 metres; they accommodate several prisoners and have no toilet facilities, so they must avail of small tins to relieve themselves; TB, malaria and HIV/AIDS, are all prevalent in the prison.

**2.6** The author wrote five times to the Chief Justice requesting information on the status of his appeal and asking him to consider a retrial before the High Court during which the third parties found in possession of the stolen goods could testify. In a response from the Chief Justice, he was informed that his appeal had been delayed due to missing transcripts from his hearing, which at that point had been found, and that his appeal would take place soon.[2] The author believes that the transcripts have and/or will be altered, and informs the Committee that his wife was recently informed by public officials that his sentence would be confirmed due to the fact that he has lodged several complaints, including complaints of corruption on the part of the judge and the police officers who dealt with his case.

## The complaint

**3.1** The author claims that the treatment which he was subjected to in pre-trial detention amounts to physical and psychological torture, or to cruel, inhuman or degrading treatment or punishment (paragraphs 2(1) and 2(2)). He also claims that the conditions of detention on death row, the stress and depression he has developed since his detention there, the fear that he might die from TB, malaria or HIV/AIDS, all of which he claims are prevalent in the prison, as well as the fact that he has been waiting for, by now, over 8 years to have his case reviewed, amount to torture, or to cruel, inhuman or degrading treatment or punishment (paragraph 2(5)). He also claims that the method of execution by hanging constitutes cruel, inhuman or degrading treatment. All of these claims appear to raise issues under article 10 and/or article 7 of the Covenant.

**3.2** The author claims that he did not have a fair trial for the reasons set out in paragraph 2(4) above. In addition, he claims that his presumption of innocence (article 14, paragraph 2) was not respected by the police authorities, demonstrated by their declaration through the media that he was guilty. According to the author, the articles in the newspapers, describing him as a criminal, influenced the Court in its decision to convict him.

2 Cf the reply by the state party.

**3.3** The author complains that his rights were violated as a result of being compelled by the police to testify against himself under the threat of murder (article 14, paragraph 3(g)).

**3.4** The author claims that the death sentence imposed upon him is mandatory for the crime of murder, which appears to raise issues under article 6 of the Covenant.

**3.5** Finally, the author claims that he was denied the right to have his conviction and sentence reviewed by a higher tribunal since his appeal has been deliberately delayed for 5 years (at the time of submission of his initial communication), which appears to raise issues under article 14, paragraph 3(g) and 5, of the Covenant. In addition, until such time as it is heard, and in the event that it does not succeed, he is not in a position to seek pardon or commutation of his sentence (article 6, paragraph 4).

## State party's observations

**4.** On 9 February 2007, the state party informed the Committee that this case had yet not been heard by the Supreme Court due to 'technical reasons' and provided a copy of a letter from the Director of Public Prosecutions, dated 2 February 2007, indicating that the appeal had not been heard as 'the record of proceedings has not been typed' but that 'the Master of the Supreme Court had indicated (to the Director of Public Prosecutions) that the Court would advise on progress towards the case being heard in the next few weeks.' Despite reminders to the state party on 24 July 2007, 23 June 2008, and 2 March 2009, to provide its submission on admissibility and merits no further information has been received from the state party.

## Issues and proceedings before the Committee

## Consideration of admissibility

**5.1** Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant. The Committee has ascertained, as required under article 5, paragraph 2(a), of the Optional Protocol, that the matter is not being examined under another procedure of international investigation or settlement.

**5.2** The Committee notes the state party's only submission on this case in 2007, more than five years since the appeal was filed, that the long delay has been merely due to the failure to have the record of proceedings typed. At the time of consideration of this communication, over eight years after the author's conviction, the author is still waiting for his appeal hearing and remains on death row. The state party has provided no further explanation for this delay. Thus, the Committee considers that the delay in the disposal

of the author's appeal amounts to an unreasonably prolonged delay within the meaning of article 5, paragraph 2(b), of the Optional Protocol and therefore declares the communication admissible.

**5.3** The Committee notes that the author's allegations in paragraph 2(4) largely relate to the evaluation of facts and evidence by the state party's courts, which appear to raise issues under article 14 of the Covenant. The Committee refers to its jurisprudence[3] and reiterates that it is generally for the courts of states parties to the Covenant to evaluate facts and evidence in a particular case, unless it can be ascertained that it was clearly arbitrary or amounted to a denial of justice. The material before the Committee does not sufficiently reveal that the conduct of the trial suffered from any such defects. Accordingly, the author has not substantiated these allegations for the purposes of admissibility and these claims are thus considered inadmissible pursuant to article 2 of the Optional Protocol.

**5.4** As to the claim that the author was compelled to confess guilt, the Committee notes that the author himself states that this confession was not relied upon by the prosecution. Thus, the Committee also considers this issue inadmissible for non-substantiation, pursuant to article 2 of the Optional Protocol.

**5.5** The Committee finds that the other claims relating to: the imposition of the death penalty and associated issues; the author's conditions of detention; his right to be presumed innocent until proven guilty; and right to review without delay have all been substantiated for the purposes of admissibility.

## Consideration of the merits

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

**6.2** The Committee notes that the state party's only response to date to the author's allegations is that the appeal has not yet taken place 'due to technical reasons' and it has provided no arguments on the substance of the author's claims. It reaffirms that the burden of proof cannot 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. It is implicit in article 4, paragraph 2 of the Optional Protocol that the state party has the duty to investigate in good faith all allegations of violations of the

[3] See for example: Communication 541/1993, *Errol Simms v Jamaica*, inadmissibility decision adopted on 3 April 1995 and *PK v Canada*, inadmissibility decision of 20 March 2007; communication 1188/2003, *Riedl-Riedenstein et al v Germany*; 886/1999, *Bondarenko v Belarus*; 1138/2002, *Arenz et al v Germany*, admissibility decision. General Comment 32 on article 14.

Covenant made against it and its representatives and to furnish to the Committee the information available to it. In the light of the failure of the state party to cooperate with the Committee on the matter before it, due weight must be given to the author's allegations, to the extent that they have been substantiated.

**6.3** The Committee notes that the author was convicted of murder and attempted murder, on the basis of which he received a mandatory death sentence. The state party does not contest that the death sentence is mandatory for the offences of which he was convicted. The Committee recalls its jurisprudence that the automatic and mandatory imposition of the death penalty constitutes an arbitrary deprivation of life, in violation of article 6, paragraph 1, of the Covenant, in circumstances where the death penalty is imposed without any possibility of taking into account the defendant's personal circumstances or the circumstances of the particular offence.[4] The Committee finds that the imposition of the death penalty itself, in the circumstances, violated the author's right under article 6, paragraph 1, of the Covenant. In light of the finding that the death penalty imposed on the author is in violation of article 6, the Committee considers that it is not necessary to examine issues regarding the method of execution.

**6.4** The Committee notes that the state party has not contested the information provided by the author on his deplorable conditions of pre-trial detention and current detention on death row, including the claims that he was initially detained secretly, assaulted, handcuffed and shackled, denied food and water for three days and is currently incarcerated in a small and filthy cell without adequate toilet facilities. The Committee recalls that persons deprived of their liberty may not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty; they must be treated in accordance with, *inter alia*, the Standard Minimum Rules for the Treatment of Prisoners.[5] It considers, as it has repeatedly found in respect of similar substantiated claims,[6] that the author's conditions of detention, as described, violate his right to be treated with humanity and with respect for the inherent dignity of the human person, and are therefore contrary to article 10, paragraph 1. In the light of this finding in respect of article 10, a provision of the Covenant dealing specifically with the situation of persons deprived

4 See for example: Communication 806/1998, *Thompson v St Vincent and the Grenadines*, views adopted on 18 October 2000; 845/1998, *Kennedy v Trinidad and Tobago*, views adopted on 26 March 2002; and 1077/2002, *Carpo v The Philippines*, views adopted on 28 March 2003.

5 General Comment 21 on article 10, paras 3 and 5; 1134/2002, *Fongum Gorji-Dinka v Cameroon*, views adopted on 17 March 2005, para 5.2.

6 See for example: Communication 908/2000, *Xavier Evans v Trinidad and Tobago*, views adopted on 21 March 2003; 1173/2003, *Abdelhamid Benhadj v Algeria*, views adopted on 20 July 2007.

of their liberty and encompassing for such persons the elements set out generally in article 7, it is not necessary to separately consider any possible claims arising under article 7 in this regard.[7] For these reasons, the Committee finds that the state party has violated article 10, paragraph 1, of the Covenant.

**6.5** As to the claim that the author's right to be presumed innocent until proven guilty was eroded by the police officers announcements in the media that he was culpable, the Committee recalls its jurisprudence as reflected in its General Comment 32,[8] according to which 'the presumption of innocence, which is fundamental to the protection of human rights, imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle'. The same General Comment, as well as the Committee's jurisprudence,[9] refers to the duty of all public authorities to refrain from prejudging the outcome of a trial, including by abstaining from making public statements affirming the guilt of the accused. The media should avoid news coverage undermining the presumption of innocence. Given the author's claims that such public statements were made against the author and the state party's failure to dispute these claims, the Committee considers that the state party has violated article 14, paragraph 2 of the Covenant in this regard.

**6.6** The Committee recalls its jurisprudence[10] as reflected in its General Comment 32[11] that the rights contained in article 14, paragraphs 3(c), and 5, read together, confer a right to review of a decision at trial without delay and that the right of appeal is of particular importance in death penalty cases. It notes that nearly six years after conviction, the only reply by the state party to the Committee is that the failure to hear the author's appeal was due to technical reasons, *viz* the failure to have the record of proceedings typed. Given the fact that the author's appeal has still not been heard, now over eight years since his conviction, at the time of examination of the present communication, which remains uncontested by the state party, the Committee considers that the delay in the instant case violates the author's right to review without

7 Communication 818/1998, *Sextus v Trinidad and Tobago*, views adopted on 16 July 2001.

8 General Comment 32 on article 14.

9 See for example: Communication 770/1997, *Gridin v Russian Federation*, views adopted on 20 July 2000.

10 See for example: Communication 390/1990, *Lubuto v Zambia*, views adopted on 31 October 1995; 523/1992, *Neptune v Trinidad and Tobago*, views adopted on 16 July 1996; 614/95, *Sam Thomas v Jamaica*, views adopted on 31 March 1999; 702/1996, *Clifford McLawrence v Jamaica*, views adopted on 18 July 1997; and 588/1994, *Johnson v Jamaica*, views adopted on 22 March 1996.

11 General Comment 32 [90] on article 14.

delay and consequently finds a violation of article 14, paragraphs 3(c), and 5 of the Covenant. In light of the finding that the author's right to a review has been unduly delayed, the Committee considers that it is not necessary to address the author's claim relating to his inability to apply for a pardon or commutation of his sentence.

**6.7** The Committee recalls that the imposition of a sentence of death 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.[12] In the present case, the author's death sentence was imposed, in violation of the right to a fair trial, as guaranteed by article 14 of the Covenant, and therefore also in violation of article 6 of the Covenant.

**6.8** The Committee considers that the author's claim that his detention on death row, where he has been waiting for over eight years for the hearing of his appeal at the time of consideration of his communication, has affected his physical and mental health raises, issues under article 7. In this regard, it notes the author's description of the conditions of detention in paragraph 2(5) above. It reiterates its jurisprudence[13] that to impose a death sentence on a person after an unfair trial is to subject that person wrongfully to the fear that he will be executed. In circumstances where there is a real possibility that the sentence will be enforced, that fear must give rise to considerable anguish. Such anguish cannot be dissociated from the unfairness of the proceedings underlying the sentence. Indeed, as the Committee has previously observed,[14] the imposition of any death sentence that cannot be justified under article 6 would automatically entail a violation of article 7.[15] The Committee therefore concludes that the imposition of the death sentence on the author after the conclusion of proceedings which did not meet the requirements of article 14 of the Covenant amounts to inhuman treatment, in violation of article 7.

**7.** The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the state party has violated article 6, paragraph 1 due to the mandatory nature of the death penalty; article 10, paragraph 1; article 14, paragraph 2;

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12 See for example: Communication 719/1996, *Conroy Levy v Jamaica*, views adopted on 3 November 1998; 730/1996, *Clarence Marshall v Jamaica*, views adopted on 3 November 1998; and 1096/2002, *Kurbanov v Tajikitsan*, views adopted on 6 November 2003.

13 See for example: Communication 1421/2005, *Francisco Juan Larrañaga v the Philippines*, views adopted on 24 July 2006. European Court of Human Rights, *Őcalan v Turkey*, application 46221/99, 12 May 2005, paras 167-175.

14 See for example: Communication 588/1994, *Errol Johnson v Jamaica*, views adopted on 22 March 1996.

15 See for example: Communication 1421/2005, *Francisco Juan Larrañaga v the Philippines*, views adopted on 24 July 2006.

article 14, paragraph 3(c); article 14, paragraph 5; article 6, as the death penalty was passed in violation of the right to a fair trial; and article 7 for the inhuman treatment caused by the failure to meet the fair trial guarantees of the International Covenant on Civil and Political Rights.

**8.** In accordance with article 2, paragraph 3(a), of the Covenant, the state party is under an obligation to provide the author with an effective remedy, which should include a review of his conviction with the guarantees enshrined in the Covenant, as well as adequate reparation, including compensation. The state party is under an obligation to avoid similar violations in the future.

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

# AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

# BOTSWANA

## Good v Botswana

### (2010) AHRLR 43 (ACHPR 2010)

Communication 313/05, *Kenneth Good v Botswana*

Decided at the 47th ordinary session, May 2010

Deportation without judicial oversight of long term resident because of expression of political opinion

**Fair trial** (right to be heard, access to court, 170; jurisdiction of court ousted, 174, 181; absolute right, 176; right to be provided with reasons, 194-196)
**Expulsion** (evidence of security threat, 178, 208; due process of law, 179, 181, 206)
**Personal liberty and security** (arbitrary detention, 178)
**Evidence** (failure of state party to respond to allegations, 197, 201)
**Expression** (public figures must accept a higher degree of criticism than others, 199, 200)
**Family** (expulsion/deportation, 214, 215)
**Equality, non-discrimination** (discrimination on the grounds of political opinion, 224-226)

### Summary of facts

**1.** The complaint is submitted by Interights, Anton Katz and Max du Plessis (complainants) on behalf of Mr Kenneth Good (victim), against the Republic of Botswana (respondent state).

**2.** The complaint states that Mr Kenneth Good, an Australian national, teaching at the University of Botswana, had his employment terminated after his expulsion from Botswana on 31 May 2005.

**3.** It is submitted that in February 2005, in his capacity as Professor of Political Studies at the University of Botswana, the victim co-authored an article concerning presidential succession in Botswana. The article criticised the government, and concluded that Botswana is a poor example of African presidential succession.

**4.** The complainants submit that, on 18 February 2005, the President of Botswana, exercising the powers vested in him by section

7(f) of the Botswana Immigration Act, decided to declare the victim an undesirable inhabitant of, or visitor to, Botswana. The victim was not given reasons for this decision, nor was he given any opportunity to contest it.

**5.** On 7 March 2005, the victim launched a constitutional challenge in the Botswana High Court. On 31 May 2005, the High Court dismissed the application ruling that section 7(f) of the Botswana Immigration Act relates to what the president considers to be in the best interest of Botswana, and sections 11(6) and 36 of the same Act make the president's declaration unassailable on the merits.

**6.** On 31 May 2005, the victim was deported from Botswana to South Africa.

**7.** On 7 June 2005, the victim filed a notice and grounds of appeal in the Court of Appeal of the Republic of Botswana. On 27 July 2005, the Court of Appeal delivered a judgment dismissing the victim's appeal. The Court of Appeal held that the president, in making such declarations, is empowered to act in what he considers to be the best interest of the country, without judicial oversight.

**8.** The complainants submit that the Court of Appeal is the highest judicial authority in Botswana. No further right of appeal or challenge lies from the decision of this court.

## The complaint

**9.** The complainants allege that the respondent state has violated articles 1, 2, 7(1)(a), 9, 12(4), and 18 of the African Charter on Human and Peoples' Rights.

## The procedure

**10.** The communication was received at the Secretariat of the African Commission on 24 November 2005.

**11.** During the 38th ordinary session held from 21 November to 5 December 2006, the African Commission was seized of the communication.

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

**13.** On 13 March 2006, the Secretariat of the African Commission received written submissions on admissibility from the complainants.

**14.** By *note verbale* dated 5 April 2006, the Secretariat forwarded a copy of the complainants' submission on admissibility to the

respondent state and reminded the latter to submit its arguments on the same.

**15.** On 18 April 2006, the Secretariat received an e-mail from one of the lawyers of the alleged victim requesting to be invited to make oral submission at the 39th ordinary session.

**16.** On 6 May 2006, the Secretariat received the submission on admissibility from the respondent state.

**17.** On 10 May 2006, the Secretariat of the African Commission received a letter from the Centre for Human Rights of the University of Pretoria submitting an *amicus curiae* brief.

**18.** On 20 May 2006, the Secretariat received further submission on admissibility from the respondent state.

**19.** At its 39th ordinary session, the African Commission considered the communication and decided to defer it to its 40th ordinary session.

**20.** By *note verbale* and by letter dated 14 July 2006, the Secretariat notified both parties of the decision of the Commission and informed them that they can make further submission on admissibility if they so wished.

**21.** On 3 October 2006, the Secretariat received a fax from the complainants forwarding a copy of a letter of appeal addressed by the victim to the President of the Republic of Botswana, and the response of the senior private secretary to the President.

**22.** On 4 October 2006, the Secretariat received the complainants' response to the respondent state's further submission on admissibility.

**23.** On 7 November 2006, the Secretariat received a letter from the respondent state requesting the Commission to purge the complainants' additional submissions from the record because the state was not invited to make additional submission.

**24.** At its 40th ordinary session held in Banjul, the Gambia, from 15 to 29 November 2006, both parties were given audience before the Commission and the state requested to receive copy of the letter sent to the complainants inviting further arguments, and to be given time to respond to the additional submissions made by the complainants.

**25.** The Commission decided to defer consideration of the communication to its 41st ordinary session and instructed the Secretariat to forward a copy of the above letter to the respondent state.

**26.** By *note verbale* dated 12 February 2007, the Secretariat forwarded the above letter to the respondent state and requested the latter to submit its observation on the same.

**27.** On 25 April 2007, the Secretariat received the response of the respondent state on the complainants' further submissions.

**28.** By *note verbale* dated 30 April 2007, the Secretariat acknowledged receipt of the respondent state's response.

**29.** At its 41st ordinary session, the African Commission considered the communication and decided to declare it admissible.

**30.** By *note verbale* of 20 June 2007 and letter of the same date, both parties were notified of the Commission's decision.

**31**. On 2 October 2007 and 10 October 2007, the Secretariat received the complainants' and respondent state's submissions on the merits, respectively.

**32.** By *note verbale* of 22 October 2007 and letter of the same date, the Secretariat acknowledged receipt of the complainants' and respondent state's submissions on the merits and forwarded each other's submission to the other party.

**33.** At the 42nd ordinary session the Secretariat received the complainants' response to the respondent state's submissions on the merits.

**34.** During the same 42nd ordinary session, the respondent state raised a preliminary objection on the procedure of the Commission and the Commission decided to defer the communication to allow the Secretariat prepare a decision on the preliminary objection.

**35.** By *note verbale* of 19 December 2007 and letter of the same date, the Secretariat informed both parties of the Commission's decision.

**36.** At its 44th ordinary session, the Commission dismissed the respondent state's preliminary objections and requested that both parties submit within three months, their responses to the submissions of the other party.

**37.** By *note verbale* of 5 January 2009 and letter of the same date, both parties were informed of the Commission's decision and requested to make further submissions on the merits within three months.

**38.** On 3 February 2009, the respondent state requested for a month extension of time to make further submissions on the merits.

**39.** By *note verbale* of 9 February 2009, the Secretariat granted the extension of time requested by the respondent state.

**40.** By letter of 10 February 2009, the complainant was informed of the extension of time granted to the respondent state.

**41.** By a *note verbale* dated 27 March 2009, the Secretariat invited the respondent state to forward its further submissions on the merits.

**42.** On 7 November 2009, the respondent state made a complaint regarding the procedures followed by the Secretariat in inviting the parties to make further submissions on the merits.

**43.** On 8 April 2009, the respondent state made further submissions objecting against the Commission's approach and application of the procedure laid down in rule 119(2)(3) of Rules of Procedure and requested the Commission to review its ruling.

**44.** By *note verbale* dated 14 April 2009, the Secretariat notified the respondent state of the Commission's decision to take a decision on the merits during its 45th ordinary session and further invited the state to make its submissions no later than 30 April 2009.

**45.** By a *note verbale* of 16 April 2009, the Secretariat informed the respondent state that the latter's concerns and issues will be tabled before the commission during its 45th ordinary session.

**46.** By a letter and *note verbale* of 7 December 2009, the complainants and respondent state were informed of the commission's decision to defer consideration of the communication to its 47th ordinary session.

## The law: admissibility

### Complainants' submissions

**47.** The complainants submit that the requirements set in article 56 of the African Charter have been satisfied, as the author of the communication has been identified and relevant details of the communication have been provided to the Commission, including details of those individuals and organisations representing the victim. According to the complainants, the communication is compatible with the Constitutive Act of the African Union and with the African Charter. The communication is presented in a polite and respectful language, and is based on information provided by the victim and on court documents, not on media reports. The complainants state that the present communication has not been submitted to any other international human rights body for investigation or settlement.

**48.** The complainants claim that on 7 March 2005, the victim launched an application challenging the constitutionality of the Botswana Immigration Act. The application, which challenged the President's decision to expel him from Botswana, was dismissed by the High Court of Botswana in a unanimous judgment. They submit that the High Court in its judgment found that the President's declaration under section 7(f) of the Immigration Act relates to what the President considers to be in the best interests of Botswana and sections 11(6) and 36 of the same Act make the President's declaration unassailable on the merits.

**49.** The complainants submit further that on 7 June 2005, the victim filed a notice and grounds of appeal to the Court of Appeal, in which he sought an order setting aside both the judgment appealed against and the decision of the President of 18 February 2005. On 27 July 2005, the Court of Appeal delivered a judgment dismissing the victim's appeal. The Court of Appeal held that the President in making such declarations is empowered to act in what he considers to be the best interests of the country, without judicial oversight and that the parliament which decreed that the President's decisions are not subject to disclosure did not act *ultra vires* in doing so.

**50.** The complainants aver that both courts found that the president, in making his declaration that the victim was an 'undesirable inhabitant or visitor to Botswana', is empowered to act in what he considers to be the best interests of the country, without judicial oversight. The courts ruled that in terms of the Act, the President's decisions are not subject to disclosure or challenge in a court of law and he did not act *ultra vires*.

**51.** The complainants submit that the Court of Appeal is the highest judicial authority in Botswana and no further right of appeal or challenge lies from the decision of this court.

**52.** As a result of the above, the complainants argue that all domestic remedies available in the respondent state have been exhausted for the purpose of article 56(5). They also submit that the communication is brought before the Commission within three months of having exhausted such domestic remedies, pursuant to article 56(6).

## Respondent state's submissions

**53.** In its submissions, the respondent state challenges the Commission's existence and its competence to hear the case. Regarding the existence of the Commission, the respondent state submits that the Commission was established within the Organisation of African Unity (OAU) and that the OAU ceased to exist in July 2001, and no provision was made for the continuance of the work of the commission in the Constitutive Act of the African Union (AU) that took over from the OAU.

**54.** The state further submits that article 5 of the Constitutive Act, which lists the AU Organs, does not mention the African Commission, and that the AU did not make use of the capacity vested in it under article 9(1)(d) of the Constitutive Act to establish any other organ to bring the Commission back to existence. The respondent state therefore concludes that the Commission has ceased to exist along with the OAU.

**55.** However, the respondent state does not challenge the existence of the African Charter, which it considers a mere

instrument of noble ideals which unfortunately is devoid of any operational structures.

**56.** With respect to the Commission's competence *ratione materiae* (subject matter of the communication), the respondent state holds that the communication concerns immigration matters which are not part of the mandate of the Commission spelled out in article 45 of the Charter. The state submits further that in terms of article 13 of the Constitutive Act, it is the Executive Council which is responsible for immigration matters.

**57.** The respondent state argues that in case the Commission finds itself to be in existence and to have jurisdiction over the matter, the communication should notwithstanding be declared inadmissible for non-compliance with article 56 of the African Charter.

**58**. It is the state's view that the communication is not compatible with the African Charter. It submits that not all the elements of the communication have been disclosed to the state, placing the latter 'in an untenable position where it does not know the exact nature of the complaint against it', and that therefore the communication is irregular and/or non-compliant with rule 104(e) as read with article 56(2) of the African Charter.

**59.** The respondent state also states that article 23(1) of the African Charter recognises peoples' rights to national and international peace and security, and that article 12(2) allows states parties to restrict the right to freedom of movement by means of law for the 'protection of national security, law and order'. The state holds that the interpretation of these provisions is that 'states must be left alone and allowed to deal with matters of peace and national security'. The respondent state submits that the matter before the Commission involves national security and that the Commission has no competence over it.

**60.** The respondent state further submits that the decision to expel the victim was taken by the President in accordance with the law as required under article 12(4) of the African Charter.

**61.** The respondent state argues that the victim's expulsion was confirmed by the courts and that the state has the obligation under article 26 of the Charter to guarantee the independence of the judiciary and cannot interfere with their rulings.

**62.** The respondent state also states that the victim's appeal to courts in Botswana was dismissed with costs, which he has not yet paid, and that by instituting proceedings before the Commission he is just trying to escape his obligation in Botswana. The state concludes that the communication is frivolous and vexatious, and that it should be rejected and held inadmissible.

**63.** The respondent state further submits that the victim did not avail himself of the possibility offered to him to resort to the President to review the decision expelling him. It is therefore the state's submission that local remedies have not been exhausted.

**64.** For all the aforementioned reasons, the respondent state prays the Commission to declare the communication inadmissible.

## Response of the complainants to the respondent state's submission on admissibility

**65.** The complainants submit that the fact that the OAU ceased to exist does not affect the existence of the Commission, and that the latter continues to exist *de facto* and *de jure*. *De facto*, the work of the Commission was not hindered or suspended as a result of the coming into force of the AU Constitutive Act: it continued considering communications; holding sessions; undertaking visits to states parties, including the respondent state, which continues to collaborate with it. *De jure*, the AU Assembly, by its decision, ruled that the Commission 'shall henceforth operate within the framework of the African Union' (Ass./AU/Dec.1 (1)).

**66.** The complainants argue that the African Charter established the Commission and the fact that the African Charter is still in force, as the respondent state did acknowledge, is tantamount to recognising the existence of the African Commission.

**67.** With respect to the disclosure of documents to the state, the complainants argue that the communication is not based on media reports but on the information provided by the victim and on court documents, and that only two judgments have been enclosed because they are the only ones relevant at the particular stage of the proceedings and from the point of view of exhaustion of domestic remedies.

**68.** The complainants also challenge the argument of the respondent state that the Commission does not have jurisdiction over immigration matters. They submit that that article 45(2) mandates the Commission to protect human rights generally, without leaving out the rights of immigrants or people facing deportation, noting that article 12 of the Charter makes clear reference to migration.

**69.** The complainants finally submit that the other points of the state's submission relate to the merits and should not be considered at this stage of the procedure, adding that the communication meets all the admissibility requirements and should be declared admissible.

## Respondent state's reaction to the complainant's response to its submissions

**70.** In an oral submission during the 40th ordinary session of the Commission, and by letter dated 22 March 2007, the respondent state submitted that the additional submission on admissibility by the complainants should be purged from the record of proceedings because the invitation to make additional submission was a misuse of the procedure under rule 119 of the Commission's rules of procedure. It is the respondent state's view that no reason was given for inviting the complainants to submit and that the letter was signed by a Finance and Administration Officer (FAO), who is not a member of the Commission, and in inviting the complainants to submit, the FAO unlawfully participated in the deliberations or decisions of the Commission.

**71.** The respondent state goes on to reiterate its statement that the Commission is an emanation of the Charter, which established it to work within the OAU. The dissolution of the OAU, the state submits, deprived the Commission of the legitimacy and authority as mechanism for the settling of disputes. According to the respondent state, in the absence of an amendment to article 30 of the African Charter to enable the Commission to operate within the AU, and without an AU decision integrating the Commission as an organ of the AU, the African Commission lacks legal basis to continue performing its mandate under the African Charter.

## Decision of the Commission on the respondent state's challenge of its existence and competence

**72.** Considering that the respondent state contests the existence of the African Commission and its jurisdiction to hear the matter complained of, the Commission will deal with those two points before dealing with the admissibility of the communication.

**73.** Regarding the existence of the Commission, the respondent state submits that the Commission was established within the OAU, and that the OAU ceased to exist in July 2001 and no provision was made for the continuance of the work of the Commission in the Constitutive Act of the African Union that took over from the OAU.

**74.** According to the respondent state, article 5 of the Constitutive Act, which lists the AU organs, does not mention the African Commission, and the AU did not make use of the capacity vested in it under article 9(1)(d) of the Constitutive Act to establish any other organ to bring the Commission back to existence. The respondent state therefore concludes that the Commission has ceased to exist along with the OAU.

**75.** In terms of article 30 of the African Charter, 'An African Commission on Human and Peoples' Rights, shall be established within

the Organisation of African Unity to promote human and peoples' rights and ensure their protection in Africa'. It is the Commission's view that having been established by the African Charter, the termination of a treaty other than the Charter cannot affect its existence.

**76.** The Commission would like to emphasise that although it was established by the African Charter and not a direct emanation of the OAU Charter, it was operating within the framework of the OAU, the latter being the main political organisation on the continent. As an organisation working within the framework of the OAU, the Commission relied on the OAU for its funding and its staffing,[1] and for the execution of its decisions against members states found to be in violation of the Charter.[2] With the coming into force of the Constitutive Act, all the assets and liabilities of the OAU and all matters relating thereto, including relevant institutions established within the OAU, were devolved to the AU.[3] That is why, the heads of state and government of the AU, at their first ordinary session held in Durban, South Africa, from 8 to 10 July 2002, accepted to take over the obligations the OAU used to bear *vis-à-vis* the African Commission. In its decision on the interim period, the assembly of the African Union decided that 'the African Commission on Human and Peoples' Rights and the African Committee of Experts on Rights and Welfare of the Child shall henceforth operate within the framework of the African Union'.[4]

**77.** As a matter of fact, the AU assumed towards the Commission the same obligations as previously borne by the OAU. The AU appoints the 11 members of the Commission, provides staff to the Secretariat, funds the day-to-day work of the Commission, and adopts the reports submitted by the Commission. Moreover, member states of the AU (which are also states parties to the African Charter), including the respondent state, continue to cooperate with the African Commission, by submitting their reports under article 62 of the Charter, by hosting sessions and missions of the Commission, and by actively participating in the communication procedures when complaints are brought against them before the Commission.

**78.** The Commission takes note of the fact that, although it challenges the existence of the Commission as a monitoring body, the respondent state does not contest the existence of the Charter itself. The Commission observes that, unlike some other international human rights systems where the substantive rights and their monitoring bodies are dealt within two complementary but different instruments, in the African system, the same instrument, the African

1 African Charter on Human and Peoples' Rights arts 41 & 44.
2 African Charter art 58.
3 Constitutive Act of the African Union, adopted on 11 July 2000, art 33(1).
4 Decision on the interim period, Ass/AU/Dec.1 (I), para 2(xi).

Charter, makes provisions for substantive rights and organises their monitoring mechanism.[5] Under the Charter, therefore, states parties are not given the option of recognising the substantive rights without accepting the jurisdiction of the African Commission, which was established to promote and protect those rights.

**79.** The Commission concludes that the termination of the OAU Charter and subsequent dissolution of the OAU does not affect its existence. The Commission is still in existence and performs its activities within the framework of the AU.

**80.** Regarding the jurisdiction of the Commission over immigration matters, the Commission is of the view that there is no provision in the African Charter or in the Constitutive Act excluding the jurisdiction of the African Commission over such matters. The jurisdiction of the Commission is founded by article 45 of the African Charter which reads: 'The functions of the Commission shall be [to]: (2) Ensure the protection of human and peoples' rights under conditions laid down by the present Charter'.

**81.** This provision should be read together with the relevant substantive provisions of the Charter to find out whether, under its protection mandate, the Commission has jurisdiction over a given matter.

**82.** Regarding specifically immigration matters, article 12 of the Charter states that:

> (1) Every individual shall have the right to freedom of movement and residence within the borders of a state provided he abides by the law.
>
> (2) Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality.
>
> (3) Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the law of those countries and international conventions.
>
> (4) 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.
>
> (5) The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups.

**83.** It appears from the provision of article 45(2), read together with article 12, that the Commission has jurisdiction when some human rights related to immigration are involved. The mandate of the Commission in that case is to make sure that, immigration policies and practices do not infringe upon those rights. Hence, the Commission finds that it has jurisdiction over immigration matters.

[5] Part 1 of the African Charter is dedicated to 'Rights and duties' and part 2 to 'Measures of safeguard'.

**84.** The Commission is of the view that the competence given to it over immigration matters under articles 45(2) and 12 of the Charter, does not overlap with the mandate of the Executive Council, under article 13(1)(j) of the Constitutive Act, over the same matters because the two bodies do not perform the same kind of activity. While the Commission is an international quasi-judicial institution established to promote and protect the rights enshrined in the African Charter, the Executive Council is a political organ, which coordinate[s] and take[s] decisions on policies in areas of common interest to the member states [of the African Union], including nationality, residency and immigration matters.[6]

**85.** Having dealt with the preliminary objections raised by the respondent state regarding the existence and jurisdiction of the Commission, the latter will now proceed to make a determination on the admissibility or otherwise of this communication.

## The Commission's analysis on admissibility

**86.** The admissibility of communications submitted before the African Commission in accordance with article 55 is governed by the requirements of article 56 of the African Charter. In terms of article 56:

> Communications relating to human and peoples' rights referred to in article 55 received by the Commission, shall be considered if they:
>
> (1) Indicate their authors even if the latter requests anonymity;
>
> (2) Are compatible with the Charter of the Organisation of African Unity or with the present Charter;
>
> (3) Are not written in disparaging or insulting language directed against the state concerned and its institutions or to the Organisation of African Unity;
>
> (4) Are not based exclusively on news disseminated through the mass media;
>
> (5) Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
>
> (6) Are submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized with the matter; and
>
> (7) Do not deal with cases which have been settled by those states involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organisation of African Unity or the provisions of the present Charter.

**87.** The African Commission is of the view that this communication establishes a *prima facie* violation of the provisions of the African Charter, and is compatible with both the Constitutive Act of the African Union and the African Charter. The African Commission also does not believe that there has been any use of a disparaging or insulting language against the government of the Republic of Botswana or any of its institutions or the African Union.

[6] Art 13(1)(j) of the Constitutive Act of the African Union (the Commission's emphasis).

**88.** Regarding the disclosure of documents, the Commission finds that the documents submitted by the complainants in support of the claim sufficiently prove that the communication is not based on fiction or on news disseminated by the mass media. The Commission concurs, therefore, that the condition of article 56(4) has been met. The Commission also notes that all the documents submitted by the complainants have been disclosed to the respondent state.

**89.** The Commission recalls its established jurisprudence whereby the exhaustion of local remedies referred to in article 56(5) 'entails remedy sought from the courts of a judicial nature'.[7] Such a judicial remedy shall be effective and shall not be subordinated to the discretionary power of public authorities.[8] The Commission has also affirmed on several occasions that it is not necessary, for the sake of meeting the condition of article 56(5), to seek remedies from a source which does not operate impartially and have no obligation to decide according to legal principles.[9]

**90**. In the present communication, the victim challenged the decision expelling him from Botswana before the domestic courts. His application before the High Court of Botswana was dismissed, as was a further appeal that he filed with the Court of Appeal, the highest judicial authority in Botswana. The Commission finds therefore that all local remedies have been exhausted. The Commission is of the view that the presidential review referred to by the respondent state is not of a judicial nature and is subject to the discretionary power of the president, the very authority that ordered the expulsion of the victim. The Commission considers that such a remedy is not effective and the victim is not obliged to utilise it.

**91.** The Commission further finds that the other arguments[10] submitted by the state against the admissibility of the communication are based on substantive rights protected under the Charter, including the rights, the violation of which is complained of by the applicant, to such an extent that dealing with them at this stage of the procedure would be pushing the Commission to jump the gun to consider the communication on the merits. The Commission therefore will not pronounce on them but would rather deal with them at the appropriate stage.

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7 Communication 221/98, *Cudjoe v Ghana* [(2000) AHRLR 127 (ACHPR 1999)] para 14.

8 Communication 48/90, 50/91, 52/91, 89/93, *Amnesty International and Others v Sudan* [(2000) AHRLR 297 (ACHPR 1999)]; para 31.

9 Communication 87/93, *The Constitutional Rights Project (In respect of Lekwot and Others) v Nigeria* [(2000) AHRLR 183 (ACHPR 1995)], para 8.

10 Particularly the arguments raised by the respondent state regarding the fact that the president made the decision in accordance with art 12(4) of the Charter and that the expulsion order was confirmed by Botswana High Court and Court of Appeal and hence the state has the obligation not to interfere with the independence of the judiciary under art 26 of the Charter, are arguments that go into the merits of the case.

**92.** From the above submissions, this Commission is of the view that the present communication sufficiently complies with the requirements under article 56, relating to the admissibility of communications before the African Commission and thus decides to declare the communication admissible.

## The merits respondent state's preliminary objection to the commission's procedure

**93.** At the 42nd ordinary session of the Commission, the respondent state raised a preliminary objection regarding the Commission's procedure in the handling of complaints/communications. The main thrust of the state's objection is that the Commission's procedure relating to the handling of communications was not followed with regards to the present communication. According to the state, rule 119 of the Commission's Rules of Procedure was not respected, and as a result, both parties to the communication, the respondent state and the complainants, made submissions to the Commission at almost the same time, making it difficult to respond to issues raised by either party.

**94.** The respondent state submits that the Commission had asked both parties to submit their arguments on the merits, giving both parties the same deadline. Both parties sent their arguments to the Secretariat of the Commission at almost the same time, and the Commission then forwarded the submissions of either party to the other for comments, if any.

**95.** The respondent state contends that this procedure deprives it from properly addressing the issues raised by the complainants as it was not availed a copy of the complainants' submission prior to the respondent state making its own submission. In the words of the respondent state 'it prejudices Botswana greatly in that the applicant has effectively been afforded an undue opportunity to strengthen his case, to the extent that the submissions filed by him raise very many new matters of fact and law which our arguments, as is to be expected, do not deal with'. The respondent state concluded that the complainants' supplementary submissions on the merits be purged off the record.

**96.** Referring to rule 119 of the African Commission's Rules of Procedure, the state maintains that it was supposed to have submitted first and the complainants given the opportunity to reply within a time fixed by the Commission, in accordance with rule 119(3).

**97.** The Commission will thus, first deal with the preliminary issue raised by the respondent state before proceeding to make a determination on the merits of the communication.

## African Commission's decision on the preliminary objection

**98.** In the present communication, after declaring the case admissible at the Commission's 41st ordinary session, the Secretariat, by *note verbale* of 20 June 2007, and letter of the same date, informed both parties and requested them to submit their arguments on the merits within three months from the date of notification. On 5 October 2007, the Secretariat received the complainants' submissions on the merits of the communication. On 12 October 2007, the Secretariat received the respondent state's submissions on the merits. On 22 October 2007, the Secretariat forwarded the submissions of the respondent state to the complainants, and the complainants to the respondent state.

**99**. The purpose of requiring parties to make submissions to the Commission is so that they appreciate the concerns of each other and try to address them as best as they can. That is why the Commission adopted Rules of Procedure governing, among other things, the receipt and consideration of communications.

**100.** Rule 119 of the Commission's Rules of Procedure seek to guide the Commission regarding the procedure to adopt after a communication has been declared admissible. In terms of rule 119(1) 'if the Commission decides that a communication is admissible its decision and text of the relevant documents shall as soon as possible, be submitted to the state party concerned. The author of the communication shall also be informed of the Commission's decision'. Rule 119(2) provides further that the state party shall within the ensuing three months, submit in writing to the Commission, measures it was able to take to remedy the situation.

**101.** From the above two paragraphs of rule 119, it is the view of the Commission that when a communication is declared admissible, both parties must be notified of the decision. While the African Charter obliges the Commission to submit its decisions and other relevant texts relating to its decision on admissibility to the state party, it simply requires the Commission to inform the author of the communication. This presupposes that the respondent state is the one that is expected to make submissions on the 'merits', to, in the words of the Charter, provide explanations or statements elucidating the issue under consideration and indicating, if possible, measures it was able to take to remedy the situation.

**102.** This interpretation is supported when one turns to rule 119(3) which provides that 'all explanations or statements submitted by a state party pursuant to the present rule shall be communicated to the author of the communication, who may submit in writing additional information and observations within a time limit fixed by the Commission.'

**103.** It is clear from the above, that after declaring a communication admissible, both parties are informed of the decision, but the respondent state is further requested to make submissions on the matter being considered. After the state would have submitted, then the submission is availed to the author of the communication for his/her comments. The respondent state seems to be satisfied that the *note verbale* of 20 June inviting it to make submissions on the merits 'was the correct step'.

**104.** However, the respondent state contends that if the complainants were also invited to make submissions on the merits that was a defective step and clearly the Commission will be guilty of breaking its own procedural rules.

**105.** The procedure of letting one party submit first and inviting the other to respond will give both parties the opportunity to address the issues or concerns of the other. This exchange of submissions between the state and the author of the communication can continue until the Commission is satisfied that it has had enough information to make a decision on the matter.

**106.** The African Commission thus concurs with the respondent state that when parties are asked to submit at the same time, it does not give both of them the opportunity to respond to issues that are raised by the other party.

**107.** This notwithstanding, the practice of the Commission is clear. Where it receives submissions from one party, it sends the same to the other party for their comments. Thus, even if the parties make submissions at the same time, the other party is not prejudiced in any way because they are still given an opportunity to respond to the submissions before the Commission can make a determination. This was the situation with respect to the present communication.

**108.** The Secretariat received the state's submissions on 12 October 2007 and sent same to the complainants on 22 October 2007. Thus, the respondent state was sent the complainant's submissions and the complainants were sent the state's submissions, and both parties were entitled to send comments, if any.

**109.** Thus, even though rule 119 was not followed to the letter, the respondent state has not indicated how it was prejudiced by this lapse, to the advantage of the complainants. The respondent state has been given an equal opportunity to respond to the submissions of the complainants just as the complainants have been given an opportunity to respond to the state's submissions.

**110.** The Commission accordingly takes note of the fact that rule 119 of its Rules of Procedure was not followed to the letter, and undertakes to ensure that it is complied with in the future. It holds that since the respondent state has been given time to respond to the complainants' submission, its argument that the complainants'

submissions on the matter be purged from the record cannot stand. The African Commission accordingly requests both parties to submit their responses, within three months, on the arguments made by either party.

## Submissions on the merits complainants' submissions on the merits

**111.** The complainants allege that the existence and application of the Botswana Immigration Act has violated articles 1, 2, 7(1)(a), 9, 12(4) and 18 of the African Charter.

## Alleged violation of article 1

**112.** With respect to the alleged violation of article 1 of the African Charter, complainants submit that the Charter was adopted and acceded to voluntarily by African states and that once ratified, states parties to the Charter are legally bound by its provisions, adding that states wishing not to be bound ought to have refrained from ratifying.

**113.** The complainants refer to article 31 of the Vienna Convention on the Law of Treaties which states that 'a treaty shall be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. The complainants also make reference to *Legal Resources Foundation v Zambia*[11] where the Commission stated that the African Charter must be interpreted holistically and all clauses must reinforce each other. The African Charter must also be interpreted, in light of international norms and consistently with the approach of the other regional and international human rights bodies.

**114.** The complainants assert that the fact that the African Charter has not been incorporated into Botswana domestic law may preclude persons in Botswana from relying on the provisions of the Charter before local courts but does not affect recourse to the Commission under the African Charter. States are bound by their ratification of the African Charter whether monist or dualist and even where it revokes the domestic effect of the Charter.[12] Consequently, they argue, all the provisions of the African Charter addressed below indicate the respondent state's failure to respect the African Charter and to ensure its full implementation in violation of article 1 of the same.

**115.** The complainants allege that the victim was deprived by law from accessing information relating to the reasons for his being declared a threat to national security, which in turn denied judicial

[11] Communication 211/98, *Legal Resources Foundation v Zambia* [(2001) AHRLR 84 (ACHPR 2001)] para 70.

[12] Communication 129/94, *Civil Liberties Organization v Nigeria* [(2000) AHRLR 188 (ACHPR 1995)] paras 12 & 16.

authorities the right to review the president's decisions. Together, these denials, according to the complainants, amount to a clear violation of the right to appeal to competent judicial organs, a situation that affects the right to be heard. In this regard, they contend that the right to be heard entails the right to challenge in a court of law, decisions that affect the individual's fundamental rights.[13]

**116**. Depending on sections 7(f), 11(6) and 36 of the Botswana Immigration Act the complainants aver that the courts that determined the victim's application and appeal prior to and following his expulsion, found that he had no right to any information regarding the president's decision, and that the courts had no power to question the reason for his expulsion and that there was no legal limit to the unfettered discretion of the president.

**117.** According to the complainants, the victim was not afforded any meaningful opportunity to challenge his expulsion either by way of hearing before the expulsion order was made, or by way of appeal after the order was made. He was not provided with the reasons for his expulsion and was accordingly not afforded an opportunity to challenge those reasons or provide evidence which might contradict them. He was neither given any remedy in respect of the violations of his rights. These decisions and the underlying provisions of sections 11(6) and 36 of the Immigration Act, according to the complainants, are inconsistent with basic principles of due process enshrined in article 7 of the African Charter.

**118.** The complainants aver that any decision passed 'in accordance with the law' as provided under article 12(4) of the African Charter should fulfil the following three requirements: one, it should be provided in a clear and accessible law to offer predictability and to guard against arbitrariness; two, it must be made by a court or an administrative authority on the basis of a law affording protection against arbitrary expulsion through the establishment of corresponding procedural guarantees.[14] In relation with this they refer to the Commission's decision in *Modise v Botswana*[15] where the Commission stated that in accordance with law requires not only strict conformity with national law, but also with the principles of the African Charter and other international norms. Third, he contends that the procedural guarantees under article 12(4) enshrine the right to meaningful judicial oversight of administrative decisions.

**119.** With regard to the issue of national security, the complainants submit that while the victim's case raises no genuine issue of

[13] Communications 147/97 & 149/96, *Jawara v The Gambia* para 74; communication 151/96 — *Civil Liberties Organization v Nigeria* para 17.

[14] Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (1993) 226.

[15] Communication 97/93, *Modise v Botswana* (2000) para 83.

'national security', it is noted that, even where such legitimate concerns do arise, they do not provide a basis to set aside the rights protected in the African Charter. They argue that while legitimate security concerns can be taken into account in interpreting the African Charter, they cannot erode the essence of the rights protected, including the right protected under article 12(4). The complainants refer to *Commission Nationale des Droits de l'Homme et des Libertés v Chad*[16] where the Commission stated that the African Charter does not allow states parties to derogate from their treaty obligations even during emergency situations. They also refer to *Amnesty International v Zambia*[17] where the Commission found a violation of article 12(4) where the national court did not consider Zambia's obligations under the African Charter and failed to rule on the ground that the complainant was likely to endanger peace and good order in Zambia. According to the Commission, there was no judicial inquiry on the basis in law and in terms of administrative justice for relying on this 'opinion' of the Minister of Home Affairs for the action taken.

**120.** The complainants contend that the President did not give reasons for the victim's deportation, neither did he explain or justify his decision and considerations of national security. The President, according to the complainants, applied a law which afforded him an apparently limitless power to make a declaration which has the effect of causing an individual to become a prohibited immigrant. This power is attended by a blanket denial of information as to the basis for its exercise. A law of this breadth and potentially all-encompassing scope, the complainants argue, lacks the clarity and precision required of 'law'. They further state that its terms and the lack of procedural oversight render it a recipe for arbitrariness, as demonstrated by the current case.

**121**. The High Court and Court of Appeal, the complainants submit, both supported the view that this exercise of presidential power is not subject to any judicial review based on sections 7(f), 11(6) and 36 of the Act. Accordingly, 'national security' issues such as terrorist attacks globally do not bear even the remotest relation to the victim's case and this is a clear example of arbitrariness disguised as national security, and of national security being invoked in an attempt to preclude all scrutiny and to circumvent the respondent state's human rights obligations.

**122.** The complainants therefore claim that articles 7(1) and 12(4) of the Charter were violated by denying the victim the opportunity to

[16] Communication 74/92, *Commission Nationale des Droits de l'Homme et des Libertés v Chad* [(2000) AHRLR 66 (ACHPR 1995)] para 21.

[17] Communication 212/98, *Amnesty International v Zambia* [(2000) AHRLR 325 (ACHPR 1999)] para 33.

be heard in respect of the decision to expel him, either prior to or after his expulsion.

## Alleged violation of article 9

**123.** The complainants submit that the comments of the victim in the article 'Presidential succession in Botswana: no model for Africa', were opinions expressed in the course of his functions as Professor of Political Science at the University of Botswana, that these comments were academic in nature and related to the functions of government in a democratic society. Such critique, they argue, was an inherent aspect of the exercise of the victim's functions as an academic in the field, who was not only entitled but effectively compelled by his discipline to be prepared, where appropriate, to write critically about government issues. As political speech, related to his academic functions, it was speech deserving of protection in line with the norms of an open and democratic society, any restriction of which could only be justified in the most exceptional circumstances.

**124.** The complainants further submit that although considerable emphasis has been placed by the respondent state on national security as a justification for restricting the victim's rights, his expulsion was patently not related to any national security threat but to the suppression of political analysis and criticism. They submit that the measured academic papers of the victim did not contain ideas that incited violence, or amount to hate speech that may have necessitated some restriction of his freedom of expression. According to the complainants, the measures were clearly aimed at preventing the victim or others like him, from expressing critical political views and/or were punitive in nature and that his expulsion did not pursue any legitimate aim.

**125.** The complainants aver that the complete absence of any reasons given to the victim, the Court or thus far the Commission, also makes it impossible to conduct a necessity and proportionality analysis of measures adopted, and leads inevitably to the conclusion that the interference cannot be justified within the law.

**126.** They also allege that the respondent state has failed to show the nature of the alleged national security threat posed, or to proffer arguments as to why the deportation could be justified as proportionate in severity and intensity to the publication of an academic paper. Had there been any such security issue, such that the curtailment of freedom of speech may have pursued a legitimate aim, the complainants submit, there would have been an alternative, less onerous and more proportionate means of protecting those interests. The deportation can, according to them, in such circumstances, never be justified as necessary or proportionate.

**127.** The complainants further submit that section 36(2) of the Botswana Immigration Act[18] prevented the victim from receiving information as to the grounds on which he was declared a prohibited immigrant or visitor to Botswana. The denial of such information, according to them, violated his right to receive information, in particular the reasons underpinning his expulsion which directly contradicts the requirements of article 9(1).

## Alleged violation of article 18

**128.** The complainants submit with respect to article 18 that the expulsion of the victim has a drastic impact on the victim's family life and daughter, as the family home in Botswana was his only home established for 15 years. He was forced to separate from his daughter Clara, then 17 year old minor, who was not in a position to follow him given the critical stage of her studies. This separation, according to the complainants, gravely affected her as she was very close to her father, who obviously could not return to visit her.

**129.** By reiterating Botswana's obligation to protect the family, the complainants argue that any interference with the right to family can only be justified by a complete absence of any real pressing social need to expel the victim from Botswana, and the respondent state has not shown that the victim's expulsion could be justified by a pressing need to protect public order or national security.

**130.** The complainants recall that the victim had been a law abiding resident for 15 years and had played an important role in bringing up his daughter. Despite this fact, there is no indication that the impact of the expulsion order on him or his daughter and their family life was in any way taken into account, still less minimised, by authorities when they deported him. On the contrary, the respondent state denied him an opportunity to finalise arrangements for his daughter before being expelled, as he was arrested immediately after the High Court's decision and expelled later that day. The hasty way of his deportation, in the circumstances of the case, according to the complainant, amounted to a gratuitous interference with his right to family life.

## Alleged violation of article 2

**131.** The complainants claim that the crux of the case lies in the fact that the victim held and expressed political views that were critical of the political establishment in the respondent state, and specifically of presidential succession. They submit that had it not been for the nature of his political opinions, his rights under the Charter would not have been violated, adding that his political views

[18] This provision reads: 'No person affected by any such decision shall have the right to demand any information as to the grounds of such decision nor shall any such information be disclosed in any court.'

singled him out for discriminatory treatment at the hands of the authorities.

**132.** They aver that the victim did not hold a position where he had access to sensitive material of potentially damaging nature to national security and he was not required to adopt a politically neutral position as perhaps a civil servant may have been, and even in such cases, it has been held that such differential treatment is generally not acceptable.[19]

**133.** The complainants in conclusion urge the Commission to adopt strict scrutiny of discrimination on the grounds of political opinion, given that pluralism and diversity are fundamental ingredients of any democratic society. They further urge the Commission to demand very weighty reasons to be given to justify different treatment on the basis of political opinion, by taking into consideration that no reasons have been provided by the respondent state in this matter.

**134.** The Commission notes that the arguments raised in the *amicus curiae* brief submitted by the Centre for Human Rights of the University of Pretoria are already reflected in the submissions of the complainants.

## Respondent state's submissions on the merits

**135.** The respondent state submits that the victim at no stage during the proceedings at the High Court of Botswana or before the African Commission alleged bad faith on the part of the government of Botswana, but merely attacks the process by which he was declared a prohibited immigrant.

**136.** The state contends that the essence of the complainants' argument is the failure of the government of Botswana to abide by its treaty obligations, which taken to its logical end, implies bad faith on the part of the government. Though not disputing the commitment of the Charter to human rights, the respondent state contends that this does not imply a blanket application of the principle of *pacta sunt servanda* under international law as provided in article 26 of the Vienna Convention of the Law of Treaties which provides that every treaty in force is binding upon the parties to it and must be performed by them in good faith.

**137.** According to the respondent state, the exception to this principle is that no automatic duty attaches to parties, more specifically Botswana, to carry out all the provisions of the Charter. They aver that when states concluding an agreement do not have in mind the creation of legal obligations, but aim only to declare some common intent, the principle of *pacta sunt servanda* does not apply.

[19] Concluding observations on Germany (1997), UN doc CCPR/C/79Add.73, para 17.

**138.** In support of its argument, the respondent state submits that a close scrutiny of paragraphs 3, 4 and 10 of the preamble to the African Charter reveal that parties did not intend creating legal obligations in drawing up the Charter.

**139.** The respondent state further states that Botswana is a sovereign state guided by principles of democracy and has since independence striven to protect, maintain and promote human rights values, a reflection of which is mirrored in section 3 of its Constitution. It argues further that the Charter has no force of law in Botswana as its provisions do not form part of the domestic law until they are passed into law by Parliament. According the respondent state, as a sovereign state it is up to Botswana as well as other parties to the African Charter, to determine the nature of its domestication policy. In doing so, it submits, Botswana is guided by attitudes of its citizens to the quality of fundamental rights and freedoms as contained in section 3 of the Constitution which they are not dissatisfied with.

**140.** The respondent state further contends that for the legislative, executive and judicial organs of a state party, a treaty is infrequently assessed in the hierarchy of legal norms applicable in the domestic legal order and as a consequence, treaties are sometimes deemed inapplicable if they conflict with the constitutional provisions of a state. Thus, in Botswana, treaties do not confer enforceable rights on individuals until passed into law by Parliament. However, they may be used as an aid to construction of laws including the Constitution.

**141.** Accordingly, the respondent state submits that it does not automatically follow that a party to a treaty which fails to observe its provisions acts in bad faith. The respondent state rejects the proposition that the government of Botswana acted in bad faith in respect of the present communication for the following reasons:

**142.** First, the right to life, liberty, fair and expeditious trial and the freedom of conscience are provided for in sections 4 to 16 of the constitution of Botswana. The state argues that the advent of the African Charter neither added nor subtracted from the existing legal arrangements in Botswana with respect to the fundamental rights and freedoms the complainants' claim Botswana has failed to domesticate. The state further states that these fundamental rights and freedoms are indistinguishable from the articles allegedly violated by Botswana under the Charter and that the victim has benefited from these provisions for the 15 uninterrupted years during which he was present in Botswana.

**143.** Second, the state submits that the victim's conduct as evident by the court papers precludes him from seriously alleging bad faith. The court papers, the respondent state submits, indicate that one leg of the victim's legal challenge sought a declaration that his rights

under sections 3, 5, 7, 11 and 12 of the Constitution of Botswana had been contravened as a consequence of his being declared a prohibited immigrant. Accordingly, the state submits that if the victim in so doing recognises, that the aforementioned sections do confer on him these rights and freedoms, then he is being disingenuous by asserting in the same breath that the Botswana government failed to give effect to the same fundamental rights and freedoms he claims does not exist.

**144.** Third, the respondent state submits that while the victim indicated before the courts in Botswana that he does not allege bad faith on the part of the government of Botswana in declaring him a prohibited immigrant, but merely queries the process by which the decision was reached, by invoking articles 1, 2, 7, 9,12, 15 and 18 of the African Charter and alleging that Botswana is bound to observe and apply these provisions, the complainants place on him (the victim) the burden of proving that Botswana had acted in bad faith by failing to observe these provisions, which it has failed to discharge satisfactorily.

**145.** With respect to alleged violations of article 12(4), the respondent state contends that the requirement that the expulsion of non-nationals from the territory of a state party must be done according to law refers to the domestic law of Botswana. In support of this assertion, the state explains that the Botswana Immigration Act of 1966 came into effect on the same day as the Constitution, ie on 30 September 1966, an indication, the state contends, that the framers of the Constitution had knowledge of the provisions of the Act. The evidence of this awareness lies in the fact that section 14(1) of the Constitution provides for freedom of persons within Botswana to move freely, enter and reside, as well as immunity from expulsion from Botswana.

**146.** The respondent state adds that section 14(3) provides that nothing done under the authority of any law, that is to say, the domestic law of Botswana, shall be held to be inconsistent or in contravention of the provisions to the extent that such law makes provision for the imposition of restrictions of freedom of movement on any person who is not a citizen of Botswana. Thus, the state asserts that 'authority of the law', in the present circumstance, refers to the Botswana Immigration Act and that therefore, the 'protection of law' referred to in section 3 of the Constitution, is subject to such limitations contained in the domestic law of Botswana which is not inconsistent with article 12(4) of the Charter.

**147.** These, the respondent state claims, are those limitations that are necessary in the public interest as well as those contained in section 11(6) and 36 of the Immigration Act. According to the state, public interest includes the peace and stability of the country and the

well-being of the people, and national security means the security of the people of Botswana.

**148**. The state submits that the preclusion of a right of appeal inevitably requires the need to debate the information and grounds upon which the president formed his decision to declare a person a prohibited immigrant, implies that such information and grounds are not to be disclosed. The consequent prohibition of courts from inquiring into the adequacy of those grounds also implies a non-disclosure of those grounds. According to the state, it is not in the public interest to disclose the grounds or information for declaring a person a prohibited immigrant, more so, where the President's decision is based on national security or is made in the national interest and that his reason for such decisions should neither be open to public disclosure nor subject to scrutiny by courts.

**149.** In support of its position the respondent state cites the United Kingdom as an example of a country in the so-called civilised world supporting the ouster of jurisdiction of courts on immigration issues. They refer to two decisions of the English courts to this effect, viz: *R (Farrakhan) v Secretary of State for Home Department*[20] and *Secretary of State for Home Department v Rehman*,[21] which according to state, support the position that decisions on issues of national security should be entrusted to the executive and not the judiciary.

**150.** The state concludes by stating that executive action under section 7(f) of the Botswana Immigration Act rests in the president who is elected by voters and that the Botswana parliament has enacted that information and grounds upon which the President has taken a decision are protected from disclosure.

## Complainant's response to the respondent state's submissions on the merits

**151.** The complainants submit in response to the state's submission that it is misplaced for the state to focus on bad faith as a criteria for determining a state party's compliance with the African Charter. According to the complainants, what is in issue for determination by the Commission, is whether Botswana has fulfilled its international obligations, not whether it acted in bad faith.

**152.** The complainants state that the government of Botswana ratified the Charter on 17 July 1986 and by doing so, unreservedly agreed to implement its provisions and since then, it has taken no action to relieve itself of any of its obligations under the Charter either by withdrawal from it or by entering reservations. Quoting the decision of the Commission in *International Pen (on behalf of Saro-*

[20] [2002] 4 ALL ER 289.
[21] [2002] 1 ALL ER 122.

*Wiwa) v Nigeria*[22] the complainants add that any state which did not wish to abide by the provisions of the Charter ought to have refrained from ratifying it.

**153.** The fact that Botswana as a dualist country is yet to incorporate the Charter into its domestic law, according to the complainants, may preclude persons within Botswana from relying on it in domestic courts but does not affect their right to recourse to the Commission under the African Charter. A state, whether dualist or monist, according to the complainants, is bound by the ratification of the Charter even where it revokes the domestic effect of the Charter.[23]

**154.** Contrary to the respondent state's claim that the rule of law is based on fundamental rights and freedoms as set out in its Constitution and that treaties are sometimes deemed inapplicable if they conflict with constitutional provisions of the state, the complainants assert that principles of international law dictates that the respondent state cannot invoke the provisions of its domestic law as justification for its failure to perform a treaty obligation.[24] Accordingly, the complainants aver that what the Commission needs to consider is not whether the Charter is applicable in Botswana, but whether the rights enshrined in the Charter are respected domestically ie whether law and practice in Botswana conform to the obligations under the Charter. The responsibility of the Commission is to examine the compatibility of a state law and practice with the Charter.[25]

**155.** The complainants argue that limitations to the victim's right to fair trial, whereby he was prevented from hearing before the expulsion order or appealing the expulsion order, is an inappropriate attempt to circumvent the rule of law and protection of fair trial rights. They submit that critical academic comments on matters of the political governance of a state are an essential element of, and not a threat to democracy and security. The complainants add that even if the case did in fact raise national security issues, the respondent state's assertion that executive decisions about national security are outside the scope of domestic or regional judicial review lacks support in the African regional human rights system. They contend further that although legitimate security concerns ought to be taken into account in interpreting the Charter, it must not erode

22 Communications 137/94, 139/94, 154/96 and 161/97, *International PEN and Others (on behalf of Saro-Wiwa) v Nigeria* [(2000) AHRLR 212 (ACHPR 1998)] para 116.

23 Communication 129/94, *Civil Liberties Organization v Nigeria* [(2000) AHRLR 188 (ACHPR 1995) para 12 & 16.

24 Art 27 of the Vienna Convention on the Law of Treaties 1969 states that 'A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'. This rule is without prejudice to art 46.

25 Communication 211/98, *Legal Resource Foundation v Zambia* [(2001) AHRLR 84 (ACHPR 2001)] para 68.

the essence of the rights protected by the Charter including article 12(4). They further state that the jurisprudence of the Commission has been to the effect that the rights contained in the Charter are non-derogable, thus even threat of war, international or national, political instability or any other kind of emergency, cannot be invoked to justify any derogation from the right to fair trial.[26]

**156.** The complainants submit that the state selectively and wrongly relies on decisions of the English courts in support of its assertion that national security matters are not decisions for the courts, adding that subsequent decisions to those cited by the respondent state, for example *A(FC) & Others v Secretary of State*[27] and *Secretary of State for Home Department v JJ and FC and Others*[28] have found that the British government's response to national security issues, especially its response to terrorism amounted to a violation of human rights. They add that contrary to the conclusions drawn by the respondent state that the judiciary must turn a blind eye to executive decisions on national security issues, these recent cases of the British House of Lords, emphasise the increased importance of the courts in such instances. They cite the decision of the Supreme Court of Canada in *Charkaoui v Canada*[29] where it was held that the principle of fundamental justice cannot be reduced to the point where they cease to provide the protection of due process. Therefore, they assert that while domestic law and practice may vary from state to state, the respondent state's arguments as to the practice of national courts cannot withstand scrutiny.

**157.** With regards the respondent state's contention that the refusal to disclose the grounds relating to the desirability of a person's presence on national security grounds is based on the public interest, the complainants submit that were the present case based on genuine national security issues, there are several measures which could have been taken to guarantee the right to fair hearing without necessarily precluding all judicial oversight. The complainants argue that less intrusive measures as private sessions, provisions of a 'judicial peep', redaction, limited access as a means of protecting sensitive information and evidence are often used, and could have been used by the government of Botswana in the instant case.

**158.** By refusing to consider the basis of the President's decision and invoking national security as a ground for non-disclosure of information, which led to the victim's expulsion, the complainants aver that the government unlawfully divested the courts of any role in the judicial process.

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26 *Amnesty International v Zambia*, para 33.
27 [2004] UKHL 56, paras 42, 80.
28 [2007] UKHL 45 paras 27,105.
29 [2007] 1 SCR 350.

**159.** The complainants conclude by stating that national security may not be used to shield state action from the necessary scrutiny and accountability. Whilst conceding that extreme security measures may be necessary in extra ordinary circumstances, the test of determining whether such measures are warranted must be subject to meaningful judicial oversight to protect the fundamental right of due process of the individual concerned and the rule of law.

## The Commission's decision on the merits

**160.** In this communication the African Commission is called upon to determine whether the expulsion of the victim by the respondent state following the president's invocation of the powers invested in him in a domestic legislation the Botswana Immigration Act is a violation of the victim's rights guaranteed under the African Charter, in particular, the rights guaranteed under articles 1, 2, 7(1)(a), 9, 12(4) and 18 as alleged by the complainants. The Commission will accordingly proceed to analyse each of the articles of the Charter alleged by the complainants to have been violated by the state.

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

**161.** The complainants submit that the decision of the president to expel the victim from the country relying on sections 7(f), 11(6) and 36(a) of the Botswana Immigration Act, and the decisions of both the High Court and the Court of Appeal that the President's action was not subject to review violated the basic principles of due process of law enshrined under article 7 of the African Charter, in particular article 7(1)(a).

**162.** Article 7(1)(a) of the Charter provides that:

> 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.

**163**. In terms of article 7(1)(a) anyone who feels that his or her rights have been violated is entitled to take the case before appropriate national organs, including the courts. In doing so the position or status of the victim or that of the alleged perpetrator is of no relevance. That is to say, any person whose rights have been violated, including by persons acting in their official capacity, should have an effective remedy by a competent judicial organ, and the right to have ones cause heard is to be enjoyed without discrimination of any kind.

**164.** States parties to the African Charter thus have the duty to ensure that judicial bodies are accessible to everyone within their territory and jurisdiction, without distinction of any kind, such as discrimination based on race, colour, disability, ethnic origin, sex, gender, language, religion, political or other opinion, national or

social origin, property, birth, economic or other status. Thus, non-nationals are entitled to the enjoyment of this right just as do nationals.

**165.** In *Zimbabwe Lawyers for Human Rights and Associated Newspapers of Zimbabwe v Republic of Zimbabwe*[30] the Commission held that the right to have one's cause heard also requires that the matter has been brought before a tribunal with the competent jurisdiction to hear the case. A tribunal which is competent in law to hear a case has been given that power by law: it has jurisdiction over the subject matter and the person.[31]

**166.** In the present communication, the victim has not been convicted by a court of law, but has been expelled from the respondent state by an order of an executive organ — the president of the republic — relying on a domestic legislation which gives him powers to declare a person as a prohibited immigrant without giving any reason.

**167.** In terms of sections 7(f) of the Botswana Immigration Act 'any person who, in consequence of information received from any source deemed by the President to be reliable, is declared by the President to be an undesirable inhabitant of or visitor to Botswana, shall be a prohibited immigrant.' Section 11(6) of the same Act provides further that: 'No appeal shall lie against any notice that the person is a prohibited immigrant by reason of any declaration by the President under section 7(f) and no court shall question the adequacy of the grounds for any such declaration', and section 36(a) provides that 'no person shall have the right to be heard before or after a decision is made by the president in relation to that person under this Act. (b) No person affected by any such decision shall have the right to demand any information as to the grounds of such decision nor shall any such information be disclosed in any court.'

**168.** Further to the expulsion order, the victim took his case to the Botswana High Court and the Court of Appeal. Both courts rejected his application on the ground that sections 16(6) and 36(a) of the Botswana Immigration Act prevent them from reviewing the decision of the president.

**169**. Can it be argued that the victim's right to have his cause heard by a competent national organ was violated?

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30 Communication 284/2003, [(2009) AHRLR 235 (ACHPR 2009)]; see also communication 294/2004, *Zimbabwe Lawyers for Human Rights and the Institute for Human Rights and Development (on behalf of Meldrum) v Zimbabwe* [(2009) AHRLR 268 (ACHPR 2009)] paras 103 - 108; and 279/03, 296/05, *Sudan Human Rights Organisation and Another v Sudan* [(2009) AHRLR 153 (ACHPR 2009)] paras 180-185.

31 Id, para 173.

**170.** The right to be heard requires that the complainant has unfettered access to a tribunal of competent jurisdiction to hear his case. It also requires that the matter be brought before a tribunal with the competent jurisdiction to hear the case. A tribunal which is competent in law to hear a case has been given that power by law: it has jurisdiction over the subject matter and the person. Where authorities put obstacles on the way which prevent victims from accessing the competent tribunals or which oust the jurisdiction of judicial organs to hear alleged violations of human rights, they would be denying victims of human rights violations the right to have their causes heard.

**171.** In *Rencontre Africaine pour la Défense des Droits de l'Homme v Zambia*,[32] the African Commission held that the mass expulsions, particularly following arrest and subsequent detentions, denied victims the opportunity to establish the legality of their expulsions in the courts. Similarly, in *Zimbabwe Human Rights NGO Forum v Zimbabwe*,[33] the African Commission noted that the protection afforded by article 7 is not limited to the protection of the rights of arrested and detained persons but encompasses the right of every individual to access the relevant judicial bodies competent to have their causes heard and be granted adequate relief. The Commission added that '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.'

**172.** To borrow from the Inter-American human rights system, the American Declaration of the Rights and Duties of Man[34] provides in article XVIII that every person has the right to resort to the courts to ensure respect for [their] legal rights, and to have access to a simple, brief procedure whereby the courts will protect him or her from acts of the authority that violate any fundamental constitutional rights.

**173.** In the present communication, the victim was not prevented from accessing the courts. As a matter of fact both the High Court and the Court of Appeal of the respondent state heard his case but ruled that the Botswana Immigration Act, in particular, sections 11(6) and 36(a) thereto, does not allow the courts to review the decision of the president. In other words, the Act ousts the jurisdiction of the Courts to entertain the matter.

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32 *Rencontre Africaine pour la Défense des Droits de l'Homme v Zambia* [(2000) AHRLR 32 (ACHPR 1996)].

33 Communication 245/2002, *Zimbabwe Human Rights NGO Forum v Zimbabwe* [(2006) AHRLR 128 (ACHPR 2005)].

34 American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), reprinted inBasic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992).

**174.** This Commission is of the view that an ouster clause, be it through a military decree or an Act of parliament has the same effect of preventing national judicial organs from entertaining alleged human rights violations, thus denying victims of human rights abuses the right to have their causes heard. In *Constitutional Rights Project v Nigeria*,[35] the Commission held that while punishments decreed as the culmination of a carefully conducted criminal procedure do not necessarily constitute violations of [the Charter], to foreclose any avenue of appeal to competent national organs clearly violates article 7(1)(a) of the African Charter, and increases the risk that even severe violations may go unredressed.

**175.** The respondent state argues that the limitations under sections 11(6) and 36 of the Immigration Act are necessary in the public interest, and public interest, according to the state, includes ensuring peace, stability and the well-being of the Botswana people and the country's national security. The state concludes that it would therefore not be in the public interest to disclose or debate before a court of law the information and grounds upon which the president formed his decision. Accordingly, the reasons for the President's decision should neither be open to public disclosure nor be the subject of scrutiny by the courts.

**176.** Can a victim's right to have his cause heard be limited or derogated upon for public interest? The answer to this is no. The right to a fair trial, which includes the right to have one's cause heard, to be informed of reasons and to seek appropriate remedy, is an absolute right that cannot be derogated from in any circumstance.[36] This position is reiterated by the Commission in its 'principles and guidelines on the right to fair trial and legal assistance in Africa' where it has made it very clear that no circumstances whatsoever, not even cases of public emergency, justify any derogations from the right to fair trial.[37]

**177.** In *Amnesty International v Zambia*[38] where the complainant, among others, was deported from Zambia because he was considered by the authorities to be a danger to peace and good order and was denied access to courts, the Commission held that the Zambian government by denying the complainant of the right to appeal his deportation order has deprived him of a right to fair hearing which contravenes article 7(1)(a) of the Charter and international human rights laws.

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35 Communication 87/93, *Constitutional Rights Project v Nigeria* [(2000) AHRLR 183 (ACHPR 1995)].

36 African Commission on Human and Peoples' Rights (ACHPR) Principles and Guidelines on the Rights to Fair Trail and Legal Assistance in Africa (DOC/OS(XXX)247).

37 Id, R.

38 *Amnesty International v Zambia*, para 61.

**178.** Where a government has reason to believe that a citizen or a non-national legally within its territory poses a threat to national security, it should bring evidence before the courts against the person. Not doing so may lead to the possibility of abuse where individuals can be detained or expelled on mere suspicion of being security threats.

**179.** In *Constitutional Rights Project v Nigeria*,[39] the Commission stated that 'while [it] is sympathetic to genuine attempts to maintain public peace, it must note that all too often extreme measures to curtail rights simply create greater unrest. It is dangerous for the protection of human rights for the executive branch of the government to operate without such checks as the judiciary can usually perform'. This is especially true with respect to the present communication where there is a law which gives too broad power to the executive and prohibits courts from checking the use of such broad powers. The Commission in its decisions has time and again stressed on the need of judicial oversight over executive decisions particularly on issues of deportation. For instance, the Commission has found a violation of article 7(1) of the Charter when the Rwandan government expelled refugees in Rwanda without giving them the opportunity to be heard by the national judicial authorities.[40]

**180.** In the present communication, after the order from the president to expel the victim, the latter challenged the said order in the High Court and Court of Appeal. Both courts declined to examine the merits of the case citing sections 11(6) and 36(a) of the Botswana Immigration Act which prohibits them from doing so. The refusal of the courts to review the President's decision foreclosed any avenue available to the victim to seek remedy. Thus, while the victim was able to access judicial organs to have his cause heard, the ouster of the jurisdiction of the organs made that access illusory as the organs have been prevented by law from entertaining the victim's grievance. It therefore means that as far as the victim's case is concerned, there is no competent national judicial organ within the respondent state, as a tribunal which is competent in law to hear a case that has been given that power by law and has jurisdiction over the subject matter and the person. In the present case, the High Court and the Court of Appeal have not been given that power and consequently do not have jurisdiction over the subject matter.

**181.** The Commission is of the view that sections 11(6) and 36(a) of the Botswana Immigration Act which prohibit a review of the president's decision absolves all judicial organs of competence in the matter thus depriving victims whose rights are threatened or actually

[39] Communication 143/95, 150/96, *Constitutional Rights Project and Another v Nigeria* [(2000) AHRLR 235 (ACHPR 1999)] para 33.

[40] Communication 27/89, 46/91, 49/91, 99/93, *Organization Mondiale Contrela Torture and Others v Rwanda* [(2000) AHRLR 282 (ACHPR 1996)] para 35.

violated by the president's decision from being heard by the judicial organs to protect their rights. This kind of arrangement does not only violate article 7(1)(a) of the African Charter but also threatens the independence of the judiciary guaranteed under article 26.

## Alleged violation of article 9

**182.** The complainants allege violation of article 9 of the African Charter arguing that the comments expressed by the victim in the article he published, that is, 'Presidential succession in Botswana: No model for Africa', were opinions expressed in the course of his functions as Professor of Political Science at the University of Botswana, and these comments were academic in nature and related to the functions of government in a democratic society. They submit that such critique was an inherent aspect of the exercise of his functions as an academic in the field, who was not only entitled but effectively compelled by his discipline to be prepared, where appropriate, to write critically about government issues. As political speech, related to his academic functions, it was speech deserving of particular protection in line with the legal authorities referred to above, and restriction of which could only be justified in the most exceptional circumstances. The complainants submit that the expulsion of the victim was not based on security concerns but rather to suppress his political analysis and criticism. The complainants aver further that the complete absence of any reasons given to the victim, the Court or – thus far – the Commission, also makes it impossible to conduct a necessity and proportionality analysis of measures adopted, and leads inevitably to the conclusion that the interference cannot be justified within the law.

**183.** The complainants also submits that section 36(a) of the Botswana Immigration Act[41] prevented the victim from receiving information as to the grounds on which he was declared a prohibited immigrant or visitor to Botswana. The denial of such information according to the complainants violates the right to receive information which contravenes the requirements of article 9(1).

**184.** The respondent state in its submissions did not address the alleged violation of article 9.

**185.** The Commission will accordingly proceed to analyse the submission of the complainants to ascertain whether article 9 of the Charter has indeed been violated.

**186**. Article 9 of the African Charter states that:
(1) Every individual shall have the right to receive information.

[41] This provision reads: 'No person affected by any such decision shall have the right to demand any information as to the grounds of such decision nor shall any such information be disclosed in any court.'

(2) Every individual shall have the right to express and disseminate his opinions within the law. Thus, under this provision there are two rights protected: the right to information and freedom of expression; and the complainants allege the violation of both rights.

**187.** The right to information, which also forms part of freedom expression, is a widely recognised right in international and regional human rights law. Article 19 of Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) protect freedom of expression and hence the right to information. In these two instruments freedom of expression is defined to include one's right to hold opinions, to seek, receive and impart information and ideas without interference or restrictions of any kind through any media. The same approach is adopted by the three major regional human rights instruments.[42]

**188.** So, there seems to be an international consensus among states on the content of the right to freedom of expression. This consensus similarly extends to the need to restrict the right to freedom of expression to protect the rights or reputation of others, for national security, public order, health or morals. Freedom of expression is not therefore an absolute right, it may be restricted for the reasons mentioned above but such restrictions should be necessary and have to be clearly provided by law. The Commission made it clear in its Declaration of Principles on Freedom of Expression in Africa that any restrictions on freedom of expression shall be provided by law, serve a legitimate interest and be necessary in a democratic society.[43]

**189.** Though in the African Charter the grounds of limitation to freedom of expression are not expressly provided as in the other international and regional human rights treaties, the phrase 'within the law' under article 9(2) provides a leeway to cautiously fit in legitimate and justifiable individual, collective and national interests as grounds of limitation. In *Malawi African Association and Others v Mauritania,*[44] the Commission stated that 'the expression "within the law" must be interpreted in reference to international norms' which, among others, can provide grounds of limitation on freedom of expression.

**190.** It should as well be noted that the only legitimate reasons for limitations of the rights and freedoms recognised in the African Charter are found in article 27(2), that is, that the rights of the Charter 'shall be exercised with due regard to the rights of others,

[42] See art 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), art 9 of the African Charter on Human and Peoples' Rights (ACHPR) and art 13 of the American Convention on Human Rights.

[43] African Commission on Human and Peoples' Rights (ACHPR), Declaration of Principles on Freedom of Expression in Africa (2002).

[44] Communication 54/91, 61/91, 98/93, 164/97, 210/98, *Malawi African Association and Others v Mauritania* [(2000) AHRLR 194 (ACRPR 2000)] para 102.

collective security, morality and common interest'.[45] Hence it can be said that national security or public interest are recognised as justifiable grounds to limit freedom of expression under the African Charter.

**191.** In the present communication, could it be said that by expelling the victim for allegedly publishing an academic article critical of the government, and by refusing to give reasons for his expulsion violate article 9 of the Charter? Freedom of expression under the Charter has two main arms — the right to receive information and the right to express and disseminate opinion. The complainants submit that the state has violated both arms.

**192.** With respect to the first arm, the complainants argue that section 36(a) of the Botswana Immigration Act deprived the victim from getting the information and/or reasons on the grounds on which he was expelled from the country, and deny courts of the power to seek such information on his case. Section 36(a) of the Act states that '[n]o person affected by any such decision shall have the right to demand any information as to the grounds of such decision nor shall any such information be disclosed in any court'. The respondent state argues that the non-disclosure of such information or reason before courts or any other organ is necessary in order not to endanger the national security of the country.

**193.** The information referred to under section 36(a) of the Act is what the victim was seeking to be able to prepare his defence and seek appropriate remedy in court to protect his rights. Without such information the victim would be working on mere speculation. It is because of that speculation that the victim sought the intervention of the courts to review the decision of the president and seek reasons for his expulsion. Unfortunately, for the victim, section 36(a) also prohibits the disclosure of such information in any court.

**194.** The right to receive information, especially where that information is relevant in a trial for the vindication of a right, cannot be withheld for any reason. Withholding such information from a victim could compromise court proceedings and put at risk the right of the victim. In a criminal trial, the right to receive information is as important as the right to be informed of the reasons of one's arrest and detention within a reasonable period of time. The information as well as the reasons are necessary to enable the accused prepare their defence. It makes a mockery of justice and the rule of law for a person legally admitted to a country to all of a sudden be told to leave against his will and he/she is not given reasons for the expulsion.

**195.** The right to be informed of the reasons of the actions taken against anyone is recognised universally. It forms part of the right to

[45] Communication 140/94,141/94, 145/95, *Constitutional Rights Project and Other v Nigeria* [(2000) AHRLR 227 (ACHPR 1999)] para 41.

fair trial and as such is one of the rights which have been distinctly categorised by the Commission as a right that cannot be derogated from at any time and whatsoever the circumstances might be.[46] This in effect means even if there is a state of emergency in a country that threatens the security of a nation, a person's right to be informed of the charges, in this case, the grounds of his expulsion, cannot be suspended/derogated from. This notion is reaffirmed in the Johannesburg Principles on National Security, Freedom of Expression and Access to Information which states that '[a]ny person accused of a security-related crime involving expression or information is entitled to all of the rule of law protections that are part of international law including, but not limited to the right to be promptly informed of the charges and supporting evidences against him/her'.[47] In *Amnesty International v Zambia*[48] the Commission held that the fact that the complainants were not provided with any reasons for their deportation order except the general allegation that their presence in the Zambia was likely 'to endanger peace and good order' means that the right to receive information as guaranteed under article 9(1) of the Charter was denied to them.

**196.** In the present communication, the victim was refused information regarding the reasons for his expulsion, and attempts to get this information through the courts also proved futile. The African Commission is of the view that section 36(a) of the Botswana Immigration Act is incompatible with article 9(1) of the African Charter, and the inability of the victim to receive the information sought because of the restrictions under the Act resulted in a violation of his right under article 9(1) of the Charter.

**197.** The second arm of article 9 of the African Charter deals with the right to express and disseminate one's opinion. The complainants claim that the scholarly article of the victim entitled 'Presidential succession in Botswana: No model for Africa' is the main reason for his expulsion. This, the complainants allege, is a violation of the victim's right to freedom of expression in general and political and academic freedom in particular. The respondent state made no submissions on this particular assertion by the complainants. As a result, the Commission will analyse the allegation of the complainants based on the information at its disposal.

**198.** The African Commission underscored the place of political expression in freedom of expression in *Amnesty International v Zambia*[49] when it stated that freedom of expression is a fundamental human right, essential to an individual personal development,

46 ACHPR, Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa, C(b)(iii) & R.

47 The Johannesburg Principles on National Security, Freedom of Expression and Access to Information (1996) principle 20.

48 *Amnesty International v Zambia*, para 41.

49 *Amnesty International v Zambia*, para 54

political consciousness and participation in the public affairs of a country. The European Court of Human Rights has similarly stressed the importance of freedom of expression and further indicated the degree of tolerance expected for the respect and protection of this right. In *Handyside v the United Kingdom*, the Court opined that freedom of expression

> constitutes one of the essential foundations of such a (democratic) society, one of the basic working conditions for its progress and for the development of every man. It is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the state or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'.[50]

**199.** A higher degree of tolerance is expected when it is a political speech and an even higher threshold is required when it is directed towards the government and government officials. In this regard the European Court has held that politicians may be subject to stronger public criticisms than private citizens.[51] The African Commission has also indicated in its Declaration of Principles on Freedom of Expression in Africa that 'public figures shall be required to tolerate a greater degree of criticism'.[52]

**200.** In the opinion of the Commission the article that was published by the victim is a purely academic work which criticises the political system, particularly presidential succession in Botswana. There is nothing in the article that has the potential to cause instability, unrest or any kind of violence in the country. It is not defamatory, disparaging or inflammatory. The opinions and views expressed in the article are just critical comments that are expected from an academician of the field; but even if the government, for one reason or another, considers the comments to be offensive, they are the type that can and should be tolerated. In an open and democratic society like Botswana, dissenting views must be allowed to flourish, even if they emanate from non-nationals.

**201.** The lack of any tangible response from the state on how the article poses a threat to the state or government leaves the Commission with no choice but to concur with the complainants that the said article posed no national security threat and the action of the respondent state was unnecessary, disproportionate and incompatible with the practices of democratic societies, international human rights norms and the African Charter in particular. The expulsion of a non-national legally resident in a country, for simply expressing their views, especially within the course of their profession, is a flagrant violation of article 9(2) of the Charter.

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50 (5493/72) [1976] EHRC 5 (7 December 1976) para 49.

51 *Lingens v Austria* (9815/82) (8 July 1986) para 28 and *Oberschlick v Austria* (11662/85) [1991] ECHR 30 (23 may 1991).

52 ACHPR, Declaration of Principles on Freedom of Expression (2002) XII(1).

## Alleged violation of article 12(4)

**202.** The complainants submit that the expulsion of the victim constitutes a violation of article 12(4) of the African Charter. Article 12(4) 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'. According to the complainants, the victim was legally resident in the respondent state and the manner in which he was expelled does not meet the standards set in the Charter. The respondent state on the other hand defends its actions by stating that the expulsion of the victim was done 'in accordance with the law' as required under article 12(4). According to the respondent state the phrase 'in accordance with the law' in article 12(4) means in accordance with the domestic law of Botswana and according to section 14(3) of the Constitution of Botswana nothing done under the authority of any law, that is, the domestic law of Botswana, shall be held to be inconsistent with or in contravention of the section, to the extent that such law makes provision for the imposition of restriction on freedom of movement (which according to the state, includes freedom from expulsion from the country) of any person who is not a citizen of Botswana.

**203**. The respondent state further argues that the authority of the law refers to the Botswana Immigration Act and the 'protection of the law' as it appears in section 3[53] and is subject to such limitations as contained in the domestic law of Botswana which is thus not inconsistent with article 12(4) of the Charter.

**204.** In addressing this issue the first point that has to be dwelled on is, what does the phrase 'in accordance with the law' under article 12(4) of the Charter refers to? It refers to the domestic laws of states parties to the African Charter. Under this provision each and every state party has the power to expel non-nationals who are legally admitted into their territory. However, in doing so the Charter imposes an obligation on states parties to have laws which regulate such matters and expects them to follow it strictly. This contributes

[53] Sec 3 of the Botswana Constitution provides that: 'Whereas every person in Botswana is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his her race, place of origin, political opinions, colour, creed or sex, but subject to the respect for the rights and freedoms of others and for the public interest to each and all of the following, namely:
(a) life, liberty, security of the person and the protection of the law;
(b) freedom of conscience, of expression and of assembly and association; and
(c) protection for the privacy of his or her home and other property and from deprivation of property without compensation; the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to those limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.'

towards making the process predictable and also helps to avoid abuse of power.

**205.** Botswana accordingly has a law in place which regulates immigration matters including the deportation of non-nationals who are legally admitted into its territory. To this extent therefore Botswana has met its obligations under article 12(4) of the Charter. But the mere existence of the law by itself is not sufficient; the law has to be in line with not only the other provisions of the Charter but also other international human rights agreements to which Botswana is a party. In other words, Botswana has the obligation to make sure that the law (in this case the Botswana Immigration Act) does not violate the rights and freedoms protected under the African Charter or any other international instrument to which Botswana is a signatory.

**206.** In this regard, the Commission in *Modise v Botswana*[54] ruled that 'while the decision as to who is permitted to remain in a country is a function of the competent authorities of that country, this decision should always be made according to careful and just legal procedures, and with due regard to the acceptable international norms and standards'. International human rights norms and standards require states to provide non-nationals with the necessary forum to exercise their right to be heard before deporting them. In line with this requirement the African Commission in *Union Inter Africaine des Droits de l'Homme and Others v Angola*[55] recognised the challenges that are faced by African countries that might push them to resort to extreme measures like deportation in order to protect their nationals and economies from non-nationals. The Commission however stated that, whatever the circumstances might be such measures should not be taken at the expense of human rights. The Commission further stated that it is unacceptable to deport individuals without giving them the possibility to plead their case before the competent national courts as this is contrary to the spirit and letter of the Charter and international law.

**207.** In the same vein, the Commission in *Rencontre Africaine pour la Défense des Droits de l'Homme v Zambia*[56] ruled the deportation of individuals including their arbitrary detention and deprivation of the right to be heard a flagrant violation of the Charter.

**208.** Similarly, in the present case, the deportation of the victim without being provided with a chance to be heard is justifiable neither on the basis of domestic laws nor with the pretext of national security.

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54 *Modise v Botswana,* para 84.

55 Communication 159/96, *Union Inter Africaine des Droits de l'Homme and Others v Angola* [(2000) AHRLR 18 (ACHPR 1997)] paras 16 & 20.

56 *Rencontre Africaine pour la Défense des Droits de l'Homme v Zambia*, para 31.

**209.** Based on the above analysis the Commission is of the view that the existence and application of sections 11(6) and 36 of the Botswana Immigration Act has violated articles 7(1) and 12(4) of the African Charter.

## Alleged violation of article 18

**210.** The complainants state that the expulsion of the victim had a drastic impact on his family life and daughter as the family home in Botswana was his only home established for 15 years. He was forced to separate from his daughter Clara, then 17 years old, who was not in a position to follow him given the critical stage of her studies. This separation, he submits, gravely affected her as she was very close to her father, who obviously could not return to visit her. They submit further that the victim was denied an opportunity to finalise arrangements for his daughter before being expelled, as he was arrested immediately after the High Court's decision and expelled later that day. The hasty way of his deportation, in the circumstances of the case, the complainants conclude amounted to a gratuitous interference with his right to family life.

**211.** In its submission, the respondent state does not address this allegations made by the complainants.

**212.** Article 18 of the African Charter provides that:

> (1) The family shall be the natural unit of society. It shall be protected by the state which shall take care of its physical health and moral.
>
> (2) The state shall have the duty to assist the family which is the custodian of morals and traditional values recognised by the community.

**213.** Article 18 of the Charter imposes a positive obligation on the state towards the family. The state has the obligation to assist the family towards meeting its needs and interests and to protect the same institution from abuse of any kind by its own officials and organs and by third parties. In exercising the positive obligations, the state exercises a negative obligation which is to refrain from violating the rights and interests of the family.

**214.** In the present communication, the sudden deportation of the victim with no justification, knowing fully that he will be separated from his minor daughter who was living with him runs counter to the protection states are required to give to the family under article 18. There is nothing to justify the deportation, there is nothing to show that the respondent state took measures to provide a safety net to the daughter after the deportation of the victim, and the hasty manner in which the deportation was carried out means adequate arrangements could not be made for the victim's daughter. The victim was given only 56 hours to make his own arrangements for his departure. For a person who has legally stayed in the country for 15 years, 56 hours is clearly inadequate to make sufficient family

arrangements, especially for a female minor who has no other relative in the country.

**215.** This attitude of ignoring the interest of the family during the deportation process was condemned by the Commission in *Modise v Botswana*[57] where the Commission found a violation of article 18(1) of the Charter as the deportation order deprived the complainant of his family, and his family, of his support. In *Amnesty International v Zambia*,[58] the Commission held that the forcible deportation of political activists and expulsion of foreigners was in violation of the duties to protect and assist the family, as it forcibly broke up the family unit.

**216**. Based on the above, the Commission is of the view that the deportation order and the way it was executed violated article 18(1) and (2) of the Charter.

## Alleged violation of article 2

**217.** The complainants claim that the victim was expelled simply because he held and expressed political views that were critical of the political establishment in the respondent state, and specifically of presidential succession. They submit that but for the nature of his political opinions, his rights under the Charter would not have been violated, insisting that it is his political views that singled him out for discriminatory treatment at the hands of the authorities. The complainants urge the Commission to adopt strict scrutiny of discrimination on the grounds of political opinion, given that pluralism and diversity are fundamental ingredients of any democratic society.

**218.** Article 2 of the African Charter provides that 'every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status'.

**219.** The principle of non-discrimination is a fundamental principle in international human rights law. All international and regional human rights instruments and almost all countries' constitutions contain provisions prohibiting discrimination. The principle of non-discrimination guarantees that those in the same circumstances are dealt with equally in law and practice.

**220.** The test to establish whether there has been discrimination has been well settled. A violation of the principle of non-discrimination arises if:

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57 *Modise v Botswana*, para 93.
58 *Amnesty International v Zambia*, paras 58 – 59.

(a) equal cases are treated in a different manner;

(b) a difference in treatment does not have an objective and reasonable justification; and

(c) if there is no proportionality between the aim sought and the means employed.

These requirements have been expressly set out by international human rights supervisory bodies, including the European Court of Human Rights,[59] the Inter-American Court of Human Rights[60] and the Human Rights Committee.[61]

**221.** In the present communication, the complainants claim that the victim was singled out for expulsion simply because of his political opinion. The Commission has reaffirmed the protection extended under the Charter to the principle of non-discrimination particularly on the basis of political opinion in *Amnesty International v Zambia*[62] where it held that article 2 imposes 'an obligation on the government to secure the right protected in the African Charter to all persons within its jurisdiction irrespective of political or any other opinion'. This was reiterated in the Commission's decision in *Rencontre Africaine pour la Défense des Droits de l'Homme* v Zambia.[63]

**222.** Thus, discrimination on the bases of political opinion, on which the allegations of the complainants is based, is one prohibited ground of discrimination under the Charter. The complainants claim that the political views of the victim, which were critical of the political establishment in the respondent state, singled him out for discriminatory treatment at the hands of the authorities.

**223.** To determine whether the way the victim was treated by Botswana authorities was discriminatory or not, the allegation has to be weighed against the three tests set above: Was there equal treatment? If not, was the differential treatment justifiable? Was the aim of the difference in treatment proportionate to the aim sought and means employed? These three benchmarks are cumulative requirements and hence the non-compliance with any of the three requirements makes a treatment discriminatory.

**224.** Here it should be reiterated that difference in political opinion and to be able to express it openly without fear of any kind is one of the pillars of democracy and hence should be protected and should not form the basis for different treatment. In the present case had the victim not expressed a political opinion which criticised the government, he would not have been deported from the country. Had

59 *Marckx v Belgium* (6833/74) [1979] ECHR 2 (13 June 1979).

60 Proposed Amendments to the Naturalisation Provisions of the Constitution of Costa Rica, Advisory Opinion Oc-4/84, January 19, 1984, Inter-Am. Ct. H.R. (Ser. A) No. 4 (1984) para 57.

61 General Comment 18, Non-Discrimination CCPR (1989) para 13.

62 *Amnesty International v Zambia*, para 52.

63 *Rencontre Africaine pour la Défense des Droits de l'Homme v Zambia*, paras 21 & 22.

he written an article which supports presidential succession in Botswana, he would not have been subjected to the treatment he received from the authorities and courts. Therefore, it could be concluded that the only reason why the victim was expelled was because he had a different political opinion on the way presidential succession should take place in Botswana. Apparently he is treated differently from people who support the way presidential succession is taking place in Botswana. Therefore, it is the view of the Commission that the victim was treated differently because of his political opinion.

**225.** Was there any justification for the respondent state in treating the victim differently? National security seems to be the only response that is given by the state. The Commission subscribes to the principle of justifiable and positive discrimination, including different treatment of persons for national security reasons. However, in the present communication, the state has not demonstrated how the action of the victim became a national security threat and how his action could be a threat. If the aim sought cannot be identified and justified, as it seems to be the case in the present communication, then it means that the means employed was not proportional.

**226.** The Commission therefore concludes that the action of the respondent state violated the principle of non-discrimination under article 2 of the African Charter.

## Alleged violation of article 1

**227.** Article 1 of the African Charter requires member states to recognise the rights, duties and freedoms enshrined in the Charter and to take legislative or other measures to give effect to them.

**228.** The complainants submit that the violation of the Charter illustrates the respondent state's failure to respect the Charter and to ensure its full implementation. The respondent state on its part contests this interpretation and submits that the Charter does not impose any binding duty on states parties thereto, as the drafters of the Charter did not intend it to be a binding document; and the Charter has no force of law in Botswana and its provisions do not form part of the domestic law of Botswana until they are passed into law by parliament.

**229.** The African Charter is a legally binding agreement signed and ratified by 53 African states, and this makes it a treaty as defined under international law, and thus it is regulated by the rules of international law.[64] According to the rules of international law, a state can express its consent to be bound by a treaty by ratification.

[64] See the 1969 Vienna Convention on the Law of Treaties.

Consent to be bound here means agreeing (committing oneself) to respect, protect and fulfil the provisions of a treaty.

**230.** Article 2(1)(b) of the Vienna Convention on the Law of Treaties reads: Ratification, acceptance, approval and accession mean in each case the international act so named whereby a state establishes on the international plane its consent to be bound by a treaty.[65] Ratification is therefore a formal commitment in addition to the signature, normally required by multilateral treaties. This is an action by a state, normally conducted once necessary domestic legislation or executive action has been completed. This can also be the case in a situation whereby the state endorses a preceding signature and signifies its intention to comply with the specific provisions and obligations of the treaty. In the period between signature and ratification, a state is provided with an opportunity to reconsider its obligations under the treaty concerned. After ratification a state is formally bound by the substantive provisions of the treaty. At the AU, ratification is completed by a formal exchange or deposit of the treaty with the chairperson of the African Union Commission, and in case of the UN, with the Secretary-General of the UN.

**231.** A state is also allowed under international law to make reservations not to be bound with one or more provisions of a treaty unless the reservation is prohibited by the treaty or the treaty specifically prohibits the reservation that is intended to be made by the state or the reservation goes against the very purpose and object of the treaty.[66]

**232.** The respondent state is one of the few African countries which have shown its commitment to the Charter by ratifying it in 1986. In ratifying the Charter the respondent state did not and has still not made reservations of any kind. Therefore, it has the obligation to respect, protect and fulfil all the provisions of the Charter without any exceptions. During ratification, if its intention was not to be bound by the Charter as a whole then it should have refrained from ratifying the Charter or it should have withdrawn following the proper procedures. Or if it wanted not to be bound by certain provisions of the Charter it should have formally made its reservations during ratification. But in the absence of any of these the legal presumption is that it is bound by the Charter and hence is expected to comply with the provisions of the same.

**233.** In *International Pen and Others v Nigeria*[67] the African Commission restated this point when it observed that 'the African Charter was drafted and acceded to voluntarily by African states wishing to ensure the respect of human rights on this continent. Once ratified, states parties to the Charter are legally bound to its

65 *Ibid.*
66 *Ibid.*
67 *International Pen and Others v Nigeria* (1998) para 116.

provisions. A state not wishing to abide by the Africa Charter might have refrained from ratification'. The Commission is of the opinion that Botswana is no exception to this rule and hence it is bound by the provisions of the African Charter. The state's argument that the drafters of the Charter did not intend the latter to be a binding document cannot stand, because had African leaders not intended the Charter to be legally binding, they could have adopted a declaration which under international law is generally not a legally binding document.

**234.** The respondent state makes reference to certain paragraphs of the preamble of the Charter to support its argument that the Charter was not meant to be binding. In the first place, it should be noted that preambles are generally not considered as a substantive part of legal texts and by no means can be given the same weight as the provisions of a Charter. If the need arises to interpret such it should be done in light of the object and purpose of the treaty. The Commission has also stressed the point that the Charter should be interpreted as a coherent whole with each provision being interpreted in light of other provisions.[68] It would be wrong therefore to single out the preamble of the Charter and try to give the meaning it was never intended to have in the Charter as a whole.

**235.** Therefore, the Commission finds that the Charter is a binding document and Botswana, as a state party thereto, has an obligation to comply with its provisions.

**236.** The respondent state also argues that the Charter has no force of law in Botswana as the later is a dualist state.

**237.** The fact that a state is monist or dualist cannot be used as an excuse for not complying with its treaty obligations. On the question of when or whether international human rights instruments should be implemented at domestic level, there has for a long time been raging debates in the application of international laws within domestic context. Of the two theories on when international law should apply, Botswana subscribes to the common law view that international law is only part of domestic law where it has been specifically incorporated. In civil law jurisdictions, the adoption theory is that international law is automatically part of domestic law, except where it is in conflict with domestic law.

**238.** However, the current thinking on the common law theory is that both international customary law and treaty law can be applied by state courts where there is no conflict with existing state law, even in the absence of implementing legislation. Principle 7 of the Bangalore Principles on the Domestic Application of International Human Rights Norms states that

[68] *Legal Resource Foundation v Zambia*, para 70.

> it is within the proper nature of the judicial process and well established functions for national Courts to have regard to international obligations which a country undertakes — whether or not they have been incorporated into domestic law for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or the common law.[69]

**239.** That principle, amongst others, has been reaffirmed, amplified, reinforced and confirmed in various other international fora as reflecting the universality of human rights inherent in men and women. In *Sarah Longwe v International Hotels*, Justice Musumali of the Zambian High Court stated that

> ratification of such (instruments) by a nation state without reservations is a clear testimony of the willingness by the state to be bound by the provisions of such (instruments). Since there is that willingness, if an issue comes before this court which would not be covered by local legislation but would be covered by such international (instrument), I would take judicial notice of that treaty convention in my resolution of the dispute.[70]

**240.** It is also a well-established principle in international law that a state cannot invoke its domestic laws to avoid its international obligations.[71] In *Legal Resource Foundation v Zambia*[72] the Commission reiterated this point when it held that 'international treaties which are not part of domestic law and which may not be directly enforceable in the national courts nonetheless impose obligations on state parties'.

**241.** The Commission was established to make sure that the acts of the executive, legislative and judicial branches of states parties are compatible with the provisions of the Charter. Therefore, the fact that the provisions of the Charter are not domesticated into the laws of Botswana does not bar the Commission from assessing the compatibility of Botswana laws and executive actions with the provisions of the charter.

**242.** In *Jawara v The Gambia*[73] the Commission was categorical when it stated that if a state party fails to recognise the provisions of the African Charter, there is no doubt that it is in violation of article 1 of the same. Article 1 of the African Charter thus imposes a general obligation on all states parties to recognise the rights enshrined therein and requires them to adopt measures to give effect to those rights. As such, any finding of violation of those rights constitutes violation of article 1.

**243.** The Commission however has no power to rule on the constitutionality or otherwise of the laws, executive actions or

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69 Bangalore Principles on the Domestic Application of International Human Rights Norms, Judicial Colloquium held from 24 – 26 February 1988, Bangalore, India, principle 7.

70 *Sara H Longwe v International Hotels (Zambia)* 1993 4 LRC 221.

71 Art 27 of Vienna Convention on the Law of Treaties.

72 *Legal Resources Foundation v Zambia*, para 60.

73 *Jawara v The Gambia*, para 46.

judicial decisions of states parties and thus is not going to make any pronouncement on the constitutionality of the provisions of the Botswana Immigration Act or any of the actions of the authorities.

## Decision of the Commission

**244.** For the above reasons, the Commission finds that Botswana has violated articles 1, 2, 7(1)(a), 9, 12(4) and 18(1) & (2) of the African Charter.

**245.** The Commission recommends:
(i) That the respondent state provides adequate compensation to the victim for the loss and cost he has incurred as a result of the violations. The compensation should include but not be limited to remuneration and benefits he lost as a result of his expulsion, and legal costs he incurred during litigation in domestic courts and before the African Commission. The manner and mode of payment of compensation shall be made in accordance with the pertinent laws of the respondent state; and
(ii) The respondent state should take steps to ensure that sections 7(f), 11(6) and 36 of the Botswana Immigration Act and its practices conform to international human rights standards, in particular, the African Charter.

# MAURITANIA

## Interights and Another v Mauritania

### (2010) AHRLR 90 (ACHPR 2010)

Communication 373/06 (formerly 242/01), *Interights and Association mauritanienne des droits de l'homme v Mauritania*

Decided at 8th extraordinary session, March 2010, 28th Activity Report

Failure of the Commission to consider issues raised by the complainant in decision on the merits

**Review** (review of decision when new or compelling element, 11; failure of Commission to pronounce itself on issue raised by complainant, 20, 33, 38)
**Property** (confiscation, 45)

### Decision on complainants' request for review

**1.** On 1 September 200[4], the Secretariat of the African Commission received from the complainants, a request to review the Commission's decision on the merits of communication 242/2001, *Interights, Institute for Human Rights and Development in Africa* and *Association mauritanienne des droits de l'homme v Islamic Republic of Mauritania*, adopted at the African Commission's 35th ordinary session, held in Banjul, The Gambia in May 200[4], [(2004) AHRLR 87 (ACHPR 2004)].

**2.** The request was considered at the 36th ordinary session of the Commission held in Dakar, Senegal, from 23 November to 7 December 2006, and the Commission decided to bring the request to the attention of the respondent state for the latter's comments. In spite of numerous reminders the Commission has not received any response from the respondent state. The Commission will therefore proceed to take a decision on the complainants' request, in spite of the fact that the state has not responded.

**3.** In the request, the complainants raised two issues: the first issue relates to the decision of the African Commission being *infra petita,* and the second issue relates to the fact that the decision of the Commission 'did not represent the required guarantees of impartiality'.

**4.** Regarding the first issue, the complainants argue that having found the respondent state in violation of certain provisions of the African Charter, the African Commission failed to address itself to the prayers of the complainants, so as to restore the victim to his rights. According to the complainants, this failure to pronounce on the prayers renders the Commission's decision *infra petita*.

**5.** On the question of impartiality, the complainants submit that the principles of natural justice were not respected. They claim that one of the members of the African Commission, a national of the respondent state, took part in the deliberations that arrived at the final decision on the communication. According to the complainants, this is against rule 109 of the Rules of Procedure of the African Commission, which forbids members of the Commission from participating in the deliberation of a communication when they have a 'personal interest' or have 'participated in whatever capacity in the adoption of whatever decision relating to the case referred to by the communication'.

**6.** To consider this request, the African Commission has to address two preliminary issues:

- Whether or not it is competent to review its own decision; and
- Under what circumstances its decision should be reviewed?

## On the competence of the Commission

**7**. Neither the African Charter nor the Commission's own Rules of Procedure provide for a review of the African Commission's decision on the merits. Provision is made within the Commission's Rules of Procedure only for the review of a decision on admissibility, and even then, only in a situation where a communication has been declared inadmissible.[1]

**8.** This notwithstanding, the African Commission can draw inspiration from the practices of similar regional and international bodies to determine whether it can review its own decision. In *Purohit and Moore v The Gambia*[2] the Commission was confronted with a similar request and it invoked articles 60 and 61 of the African Charter, and adopted the principles and practices of other international tribunals with similar mandate. In that communication, the Commission was persuaded by the practices of the International Court of Justice (ICJ), whereby article 61(1) of the ICJ statute requires that, 'an application for revision of a judgment may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the court and also to the party claiming review, always provided that such ignorance was not due to negligence'.[3]

1 See rule 118(2).
2 Communication 241/2001.
3 Statute of the International Court of Justice. See www.icj-cij.org/documents.

**9.** The African Commission further adopts the ICJ's reasoning that an application for revision must be made within a certain period of time.[4]

**10.** Therefore, like all tribunals, domestic and international, judicial and quasi-judicial, the African Commission has the competence to review its decision on the merits, especially where it is evident that the application for review has introduced a new or compelling issue which, had the Commission had knowledge of, would have impacted on the decision; or where the Commission has inadvertently failed to take into account certain facts during the consideration of the case.

**11.** In other words, the Commission can review its own decision when it is apparent that the application introduces a new or compelling element, the failure to consider which would be an affront to fairness, justice and good conscience.

**12.** After determining that it is competent to review its own decision and the circumstances under which it can review its own decisions, the African Commission will now examine whether the application of the complainants meet the African Commission's requirements for a review of its decision, that is, whether the application introduces a new or compelling element.

**13.** In the present communication, the complainants have seized the Commission on two main issues:

(a) allegation that the decision of the Commission was *infra petita*; and

(b) allegation of partiality.

**14.** Can the Commission consider these two issues to be new or compelling to warrant a review of its decision?

**15.** While the two issues raised by the complainants do not raise any new element relating to the substance of the communication that they submitted, they certainly are compelling enough to warrant a review.

## On the question that the decision is *infra petita*

**16.** The complainants in their application for review are not raising new facts. They have also not introduced evidence that was not brought to the attention of the African Commission during the consideration of the communication on the merits. Rather they are asking the Commission to pronounce itself on each of the prayers they made when the communication was submitted to the Commission.

[4] It should be noted that the ICJ has held that the application should be submitted 'at latest within six months of the discovery of the new fact' and 'no application for revision may be made after the lapse of ten years from the date of the judgment.' See ICJ Statute art 61(4), (5).

**17.** The complainants, in the communication, had requested the Commission that should the latter find the state in violation of any of the provisions of the African Charter, it should:

- urge the state to restore all rights of the UFD/EN and instruct it to restore all confiscated properties;
- request the Mauritanian authorities to harmonise national legislation in accordance with the relevant provisions of the African Charter pertaining to fair trial and freedom of association and expression;
- ask the Mauritanian government to take necessary measures to ensure that such violations against political parties not be repeated;
- call on the state to put an end to such infractions; and
- request the Mauritanian government to inform the Commission of any measures it takes to address the breaches elaborated in the communication.

**18.** In its decision, the African Commission held with respect to the allegations made against the state that 'the dissolution of *UFD/Ere Nouvelle* political party by the respondent state was not proportionate to the nature of the breaches and offences committed by the political party and is therefore in violation of the provisions of article 10(1) of the African Charter'. The Commission did not pronounce itself on any of the prayers made by the complainants.

**19.** Does the fact that the Commission did not address the prayers of the complainants make its decision *infra petita*? Put differently, could the Commission's decision not to pronounce on the prayers made by the complainants be considered *infra petita*?.

## What is an *infra petita* decision?

**20.** The term *infra petita* is a Latin expression sometimes used to describe a situation where the court has failed to pronounce itself on one of the main claims of a petition. In terms of article 190(2)(c) of the Swiss Federal Statute on Private International Law (PILA), an arbitral award or remedy can be set aside if the tribunal has adjudicated beyond the relief sought (*ultra-petita*) or granted relief different than what was sought (*extra-petita*) or failed to adjudicate certain claims raised by the complainant (*infra-petita*).

**21.** To fully appreciate whether the Commission's decision was *infra petita*, there is need to differentiate between an 'allegation' or 'claim' and a 'prayer' or 'remedy'.

**22.** An allegation is a claim by a party in a pleading, which the party intends to prove in a court of law. According to the Black's Law Dictionary, an allegation is an assertion, claim, declaration or statement of a party to an action, made in a pleading, setting out what he expects to prove. Allegations thus remain assertions without proof, until they can be proved. Generally, in a civil complaint, as is the present case, the plaintiff (in this case, the complainants) must

carry the burden of proof and the burden of persuasion in order to prove their allegation.

**23.** In the present communication, the complainants allege or claim that the respondent state has violated certain provisions of the Charter, which allegation/claim they want to prove before the Commission. Simply put, an allegation or a claim is a legal action to obtain a remedy, or the enforcement of a right against another party. It is a legal statement made to alert the accused of the legal implications.

**24.** A remedy on the other hand is an action taken by a court of law to enforce a right, impose a penalty, or make some other court order in order to resolve a dispute. According to the Black's Law Dictionary, a remedy is the means by which a right is enforced or the violation of a right is prevented, redressed or compensated.

**25.** In the communication under consideration, the complainants allege/claim that the respondent state has violated articles 1, 2, 7(1), 9(1), 10(1), 13(1) and 14 of the African Charter, dealing with the state's obligations under the Charter, freedom from discrimination, the right to have one's cause heard, freedom of expression, freedom of association, the right to participate in government and the right to property. These, in the opinion of the Commission, are the complainants' allegations/claims put before the Commission, which the complainants want to prove had been violated by the respondent state and which they required the Commission to pronounce itself on, based on the interpretation of the African Charter.

**26.** Apart from making these allegations, the complainants also called upon the Commission that, should it find that they (the complainants) have proven the allegations, it should adopt certain measures to reinstate the victim to his rights, including, urging the respondent state to restore all rights of the UFD/EN and instruct it to restore all confiscated properties; requesting the Mauritanian authorities to harmonise national legislation in accordance with the relevant provisions of the African Charter pertaining to fair trial and freedom of association and expression; the Mauritanian government to take necessary measures to ensure that such violation against political parties not repeat itself; call on the state to put an end to further violations; and requests the Mauritanian government to inform the Commission of measures it has taken to address the breaches elaborated in the communication. In the opinion of the Commission, the above requests represent the remedies sought by the complainants.

**27.** There is thus a clear distinction between an allegation/claim and a remedy/prayer. In the present communication, the complainants are not disputing the fact that the Commission addressed the allegations. They are rather arguing that the

Commission, having considered the allegations and found a violation, did not provide them with the remedies they requested.

**28.** Naturally, when a petitioner brings a complaint before a tribunal, he/she expects the tribunal to make a determination as to his/her rights vis-à-vis the other party (in this case the state). There is a legitimate expectation on the part of the petitioner that where the tribunal (in this case, the African Commission) finds that a state has violated the rights of the petitioner, he/she would be provided with remedies so as to restore his/her rights; that the state would be cautioned to take measures to ensure that the act that resulted in the violation does not repeat itself; and the tribunal could make any other decision it deems necessary in the particular circumstance. These are legitimate expectations from the complainants.

**29.** The right to a remedy for a violation has been firmly established under international law. This principle is provided in article 63(1) of the American Convention on Human Rights which provides that 'if the [Inter-American Court] finds that there has been a violation of a right or freedom protected by the Convention, the court shall rule that the injured party be ensured enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party'. In applying this provision, the Inter-American Court held in *Yakye Axa v Paraguay*[5] that, 'any violation of an international obligation that has caused damage entails the duty to provide appropriate reparations'.

**30.** In the present communication, the Commission found that 'the dissolution of UFD/*Ere nouvelle* political party by the respondent state was not proportional to the nature of the breaches and offences committed by the political party and is therefore in violation of the provisions of article 10(1) of the African Charter'. It made no further determination, either by way of restoring the victim to his rights or proposing what the state should do to prevent a recurrence of the violation.

**31.** Does the fact that the Commission, after concluding that there was a violation of the Charter but failing to provide the remedies requested by the complainants, renders its decision *infra petita*?

**32.** To answer this question, the Commission will have to analyse the decision to examine the claims made by the complainants and the extent to which the Commission addressed them.

**33.** A tribunal will not be considered to have omitted to pronounce itself on a claim if it can be deduced from the judgment that the claim was implicitly rejected, or on the contrary, that the tribunal

5 *Case of Yakye Axa Indigenous Community v Paraguay*, judgment of 17 June 2005, Series C No 125.

implicitly admitted it. It is usually the case for example, where a petition contains main, as well as, subsidiary claims.

**34.** In the present communication, the allegation/claim of the complainants before the Commission is clear — that by its action, the respondent state has violated articles 1, 2, 7(1), 9(2), 10(1), 13(1) and 14 of the Charter. These are mere allegations/claims which the complainants have to prove before the Commission. At the same time, the remedies the complainants requested were also clear (see para 17 above).

**35.** After analysing the submissions made by both the complainants and the state, the Commission held with respect of the complainants allegations/claims that article 7(1) as alleged has not been violated (see Commissioner's arguments from paras 43 – 47 of the decision); that articles 9(2), and 13(1) as alleged have equally not been violated; but that article 10(1) has indeed been violated as alleged (see paras 76 – 85 of the decision).

**36.** In its analysis of the complainants allegations/claims, the Commission failed to address three allegations/claims, that is, the alleged violation of articles 1, 2 and 14, dealing with the state obligations under the Charter, non-discrimination and the right to property, respectively.

**37.** While it is important for the Commission to provide remedies to a victim whenever it finds that the state has infringed the victim's right, failing to do so does not render the Commission's decision *infra petita*, if it can be deduced from the decision that all the allegations mentioned in the communication have been addressed by the Commission.

**38.** From the analysis above, it is evident that that the Commission failed to pronounce itself on all the allegations made by the complainants, in particular, it failed to pronounce itself on the alleged violation of articles 1, 2 and 14, the latter being a principal allegation. To the extent that the Commission did not address all the allegations, the decision of the Commission is *infra petita*.

**39.** Having established that the decision is *infra petita,* can the Commission supplement its decision?

**40.** It is perfectly legal for a tribunal that has forgotten to decide on a claim (*infra petita*) to supplement its decision without affecting the *res judicata* character of the other claims decided upon. This procedure excludes recourse to a higher court and can be undertaken *suo moto* or on the request of one of the parties. The Commission will therefore proceed to pronounce on the alleged violation of articles 1, 2 and 14 of the Charter.

## Alleged violation of article 2

**40.** The complainants allege that there the respondent state has violated article 2 of the African Charter. 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 any status.

**41.** The complainants do not demonstrate how the respondent state discriminated against the victim, and as such the Commission cannot hold that the state violated article 2 of the Charter.

## Alleged violation of article 14

**42.** The complainants alleged that the state confiscated the property of the political party in violation of article 14 of the Charter which provides that '[t]he 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 in accordance with the provisions of appropriate laws'.

**43.** The right to property is a traditional fundamental right in democratic and liberal societies. It is guaranteed in international human rights instruments as well as national constitutions, and has been established by the jurisprudence of the African Commission.[6] The role of the state is to respect and protect this right against any form of encroachment, and to regulate the exercise of this right in order for it to be accessible to everyone, taking public interest into due consideration.

**44.** The right to property encompasses two main principles. The first one is of a general nature. It provides for the principle of ownership and peaceful enjoyment of property. The second principle provides for the possibility, and conditions of deprivation of the right to property. Article 14 of the Charter recognises that states are in certain circumstances entitled, among other things, to control the use of property in accordance with the public or general interest, by enforcing such laws as they deem necessary for the purpose.

**45.** However, in the situation described by the present communication, the state has not demonstrated that the property of the complainant was confiscated for public interest or in accordance with any established law. The confiscation was done arbitrarily in a manner that violates article 14 of the African Charter.

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6 See communications 71/92, *Rencontre Africaine pour la Défense des Droits de l'Homme v Zambia* [(2000) AHRLR 321 (ACHPR 1996)], 292/2004, *Institute for Human Rights and Development in Africa v Angola* [(2008) AHRLR 43 (ACHPR 2008)], and 159/1996, *Union Interafricaine des Droits de l'Homme and Others v Angola* [(2000) AHRLR 18 (ACHPR 1999)].

## Alleged violation of article 1

**46.** The African Commission concludes further that article 1 of the African Charter imposes a general obligation on all states parties to recognise the rights enshrined therein, and requires them to adopt measures to give effect to those rights. As such any finding of violation of those rights constitutes a violation of article 1.

## On the question of partiality

**47.** On the question relating to the participation of a member of the Commission who is a national of the respondent state, the Commission would like to reiterate that its rule 109(1) requires that no member shall take part in the consideration of a communication:

- If s/he has any personal interest in the case, or
- If he/she has participated, in any capacity in the adoption of any decision relating to the case which is the subject of the communication.

**48.** Rule 109(2) further empowers the Commission to rule on the applicability of rule 109(1) where it is called to do so.

**49.** In the opinion of the African Commission 'take part' under rule 109(1) of its Rules of Procedure means contributing in the deliberations of a subject matter. While it is recommended that a Commissioner who recuses him/herself leaves the hall during deliberations, a Commissioner who recuses him/herself but chooses to sit in the hall cannot be considered to have taken part in the deliberations. In terms of article 31, the members are independent experts of the highest reputation, known for their high morality, integrity, impartiality and serve in their personal capacity. It is thus expected that members of the Commission live up to the standards befitting their position.

**50.** It is not necessarily the case that a member of the Commission from a country against which a complaint has been lodged would have an interest in that particular case. However, it is important to take into consideration the public perception or adopt the principle of a reasonable person in the consideration of a Communication. Would the public or a reasonable man believe that a member of the Commission would 'take part' in the deliberation of a communication concerning his country and take a neutral decision?

**51.** The African Commission adheres strictly to the natural justice principle of *nemo judex in sua causa:* 'no man is permitted to be a judge in his own cause'. This principle is very critical in the administration of justice, for justice must not only be done, but must be seen to be done.

**52.** The use of the word 'shall' in rule 109 implies that the Commission would not compromise in the implementation of this principle. In the complainants' submissions, they quoted paragraphs 2 and 17 of the final communiqué of the 35th ordinary session of the

African Commission to buttress their argument that a Commissioner, a national from the respondent state, took part during deliberations of the communication in question.

**53.** In terms of rule 106 of the Commission's Rules of Procedure, communications are examined in private session and the complainants could not have been privy to what transpired during the examination of the communication in question.

**54.** The African Commission's records indicate that the Commissioner in question did not take part in the deliberations of the present communication.

**55.** The burden of proving that he did rests with the complainants. Under such circumstances, and relying on the presumption of regularity, it is presumed that the Commission complied with its procedures under rule 109.

**56.** In terms of the presumption of regularity, there is a favourable presumption that all what the Commission does in the normal course of its duty is regular and valid. This evidentiary principle which has its historical roots in the presumption against misconduct of public officials, presupposes that every individual in his or her private and official capacity, does his or her duty, until the contrary is proved. In other words, it will be presumed that government officials (in this case, the members of the Commission) have discharged their duty rightly and in good faith, unless the circumstances of the case provide adequate proof to the contrary

**57.** To overturn this presumption, the party that seeks to challenge the presumption, and in this case, alleges that the Commission did not comply with its rules, bears the burden of proof.

**58.** The Commission noted in this instance that the fact that the name of the Commissioner, a national of the respondent state, appeared in the final communiqué of the Commission does not signify that the latter took part in the proceedings regarding the communication in question, in violation of rule 109. The complainants therefore have the burden to prove that the spirit and object of 109 have been breached. The only evidence that the complainants adduced was the reference to the second paragraph of the final communiqué of the 35th ordinary session of the Commission which indicated that the commissioner was one of the members that attended that session.

**59.** In terms of the Commission's practice, the final communiqué lists the names of the members who attend a particular session. The communiqué however does not indicate which members took part in the deliberations of which any particular agenda item. In this case, the name of the Commissioner in question, like the names of all the other members who attended the session, was indicated in the final communiqué of the session. This does not however mean that he took

part in the deliberations with respect to the communication in question.

**60.** Admittedly, the complainants could have been misled by the final communiqué to assume that all the members who attended the session also took part in deliberations on all the agenda items, especially as the Final Communiqué did not indicate whether or not any member recused themselves on any particular item.

**61.** The African Commission is very strict in its application of its Rules of Procedure, and in particular, rules 109, and with respect to the said rule, its application is not limited to the consideration of communications, but extends to all items considered by the Commission.

**62.** The Commission is therefore of the view that the complainants have not fully discharged their burden of proof, and to state that the commissioner, a national of the respondent state did not take part in the consideration of the communication in question, and his participation at the session is not proof that he participated in the deliberation related to this communication.

## Decision of the African Commission

**63.** In view of the above, the Commission finds that:

(i) The decision on the merits of communication 242/2001 — *Interights, Institute for Human Rights and Development in Africa, and Association mauritanienne des droits de l'homme v Islamic Republic of Mauritania* is *infra petita*, to the extent that it did not address itself to the allegation of violations of articles 1, 2 and 14 of the African Charter;

(ii) The respondent state did not violate article 2 of the African Charter;

(iii) The respondent state violated articles 1 and 14 of the African Charter;

(iv) the complainants have not discharged their burden of proof with respect to the allegation of partiality, and relying on the presumption of regularity, concludes that the Commission acted correctly and in good faith.

**64.** The African Commission recommends that:
(i) The respondent state should pay adequate compensation to the victim for the
(ii) The respondent state should take steps to ensure that its law on freedom of association, in particular the establishment and functioning of political parties, is in conformity with the provisions of the Charter;

(iii) The respondent state should inform the African Commission on measures adopted to implement these recommendations within 180 days of receipt of this decision.

# NIGERIA

## Socio-Economic Rights and Accountability Project (SERAP) v Nigeria

**(2010) AHRLR 102 (ACHPR 2010)**

Communication 338/07, *Socio-Economic Rights and Accountability Project (SERAP) v the Federal Republic of Nigeria*

Decided at 48th ordinary session, November 2010, 29th Activity Report

**Admissibility** (failure to exhaust local remedies, 61-66)

### Summary of the complaint

**1.** On 14 February 2007, the Secretariat of the African Commission on Human and Peoples' Rights (the Secretariat) received the present communication from the complainant, Socio-Economic Rights and Accountability Project (SERAP), on behalf of the people of Awori Community in Abule Egba in Lagos state, Nigeria, against the Federal Republic of Nigeria (the respondent state or Nigeria).[1]

**2.** The complainant alleges that the respondent state violated the rights of the people of Awori community, following a pipeline explosion in Abule Egba on 26 December 2006, which resulted in loss of lives, physical and permanent injuries, destruction of properties, environmental degradation, and other human rights violations.

**3.** The complainant alleges that, for months, the respondent state failed to deal with the issue of fuel scarcity in the country, repair damaged pipelines, and inspect these incidents. According to the complainant, this led to young men and women scooping fuel from damaged pipelines in order to sell and make a living.

**4.** Furthermore, the complainant alleges that after the explosion, the fire department was ill-equipped to deal with the fire as they reportedly had no water or equipment.

**5.** The complainant alleges that about 700 lives were lost including women and children in the aftermath of the pipeline explosion. Furthermore, it submits that, the environment has not

[1] Nigeria ratified the African Charter on Human and Peoples' Rights on 22 July 1983, and is therefore a state party.

been properly disinfected since the explosion, which could cause an epidemic to the remaining residents of the area.

**6.** The complainant alleges that there has been environmental degradation, and potential pollution of water, as a result of the explosion, which may amount to health problems in the long run.

**7.** According to the complainant, the injured have also not been adequately treated of their injuries and that some of them have died while in the hospital.

**8.** The complainant further alleges that the leaders of the Abule Egba community reported the matter to the Nigerian authorities and they were ignored.

**9.** The complainant alleges that due to the above-mentioned facts, the rights of the people of Awori Community, which are guaranteed under the African Charter on Human and Peoples' Rights (the African Charter), have been violated by the respondent state.

## Articles alleged to have been violated

**10.** The complainant alleges that the actions and omissions of the respondent state resulted in violations of articles 2, 4, 5, 14, 16, 20 and 24 of the African Charter.

## Procedure

**11.** The present communication was received by the Secretariat on 14 February 2007.

**12.** The Secretariat acknowledged receipt of the communication to the complainant by letter ACHPR/LPROT/COMM/CB/338/07/NIG/RE of 21 February 2007, in which the complainant was informed that the communication would be scheduled for seizure by the African Commission for Human and Peoples' Rights (the African Commission or the Commission) at its 41st ordinary session held from16 to 30 May 2007, in Accra, Ghana.

**13.** At its 41st ordinary session, held from 16 to 30 May 2007, in Accra, Ghana, the African Commission considered the communication and decided to be seized thereof.

**14.** By letter of 13 June 2007 and *note verbale* of 15 June 2007, the Secretariat notified the parties of its decision on seizure and requested them to submit their arguments on the admissibility of the communication within three months.

**15**. At its 42nd ordinary session, held from 15 to 28 November 2007, in Brazzaville, Republic of Congo, the African Commission received a submission from the respondent state and the complainant was notified accordingly on 19 December 2007.

**16**. By *note verbale* of 19 December 2007 and by letter of the same date, both parties were notified of the African Commission's decision at its 42nd ordinary session. The complainant was given a three months period to submit its arguments on admissibility.

**17**. The African Commission decided to defer consideration of the communication to the 43rd ordinary session to allow the complainant to submit its arguments on admissibility.

**18.** By *note verbale*, of 17 October 2008, the African Commission informed the respondent state of its intention to take a decision on the admissibility of the communication during its 44th ordinary session, in November 2008.

**19.** By letter, dated 22 October 2008, the African Commission informed the complainant that, during its 43rd ordinary session, held from 7 to 22 May 2008, in Ezulwini, the Kingdom of Swaziland, it considered the present communication and decided to defer its decision on admissibility to its 44th ordinary session to allow the complainant to submit its arguments on admissibility.

**20.** By letter, of 11 December 2008, the African Commission informed the complainant that its decision on admissibility was deferred during the 44th ordinary session, held from 10 to 24 November 2008 in Abuja, Federal Republic of Nigeria, to allow the complainant to submit its arguments on admissibility within a period of three months.

**21.** By letter and *note verbale*, of 4 June 2009, the African Commission informed both parties that at its 45th ordinary session held from 13 to 27 May 2009 in Banjul, The Gambia, the African Commission decided to defer further consideration of the communication to allow the complainant to make its submissions on admissibility within a period of two months.

**22.** By letter of 15 March 2009, the Secretariat acknowledged receipt of the complainant's submission on admissibility on the same day and forwarded the same to the respondent state by *note verbale* dated the same day.

**23.** By letter and *note verbale*, of 14 December 2009, the African Commission informed both parties that at its 46th ordinary session held from 11 to 25 November 2009, in Banjul, The Gambia, the Commission considered the communication and decided to defer it to its 47th ordinary session to allow its Secretariat time to prepare a draft decision.

**24.** By letter and *note verbale*, of 25 June 2010, the African Commission informed both parties that at its 47th ordinary session held from 12 to 26 May 2010, in Banjul, The Gambia, the Commission considered the communication and decided to defer the

consideration of admissibility to its 48th ordinary session in November 2010 to allow the Secretariat time to prepare a draft decision.

## The law on admissibility

## The complainant's submissions on admissibility

**25.** The complainant submits that the present communication satisfies all the requirements of admissibility as contained under article 56 of the African Charter.

**26.** The complainant submits that it complies with article 56(1) of the African Charter, because the author of the communication is identified. It declares that SERAP is the author of the present communication, on behalf of several victims of the Awori community affected by the pipeline explosion.

**27.** The complainant also submits that it complies with article 56(2) of the African Charter, as the present communication reveals a *prima facie* violation of the African Charter.

**28.** Concerning article 56(3) of the African Charter, the complainant submits that the present communication complies with the requirement under the said sub-article because it is written and presented in a professional and respectful language.

**29.** The complainant further submits that the present communication fulfils the requirement in article 56(4) of the African Charter because according to the complainant, it relies on first-hand information from the victims, including testimonies from those directly affected by the pipeline explosion.

**30.** With respect to article 56(5) of the African Charter, the complainant submits that the present communication 'constitutes a compelling exception to the requirement of exhaustion of local remedies' and requests the African Commission to wave this requirement as portrayed in its jurisprudence. It submits that there is no adequate or effective domestic remedies that exist to address the violations alleged in the present communication.

**31.** The complainant also submits that, although the Nigerian government is well aware of the human rights violations that the country is subject to, it has not fully or effectively addressed the violations in the present communication, and that these violations are still on-going.

**32.** It further submits that even though the respondent state has incorporated the African Charter into its national laws, Nigerian courts have ruled that its application in the country is subject to the Nigerian Constitution, which is the supreme law of the land.

**33.** The complainant bases its request to waive the requirement of article 56(5) of the African Charter on several decisions of the African Commission.[2]

**34.** The complainant also submits that the Nigerian legal system lacks availability and effectiveness, because it is not accessible to the poor and the marginalised community.

**35.** Furthermore, the complainant submits that, the burden shifts to the respondent state to submit evidence proving the availability, the accessibility, and the effectiveness of local remedies to redress the violations in the current communication.

**36.** With respect to article 56(6) of the African Charter, the complainant avers that the present communication was filed within days of the pipeline explosion.

**37.** Regarding article 56(7) of the African Charter, the complainant avers that the present communication is not being considered by another international or regional mechanism, nor has it been previously settled by any of them.

## The respondent state's submissions on admissibility

**38.** In its submission on admissibility, the respondent state urged the African Commission to strike out the communication as it is an abuse of the process of the Commission. It submits that the present communication should not be admissible for the non-fulfilment of article 56(4), (5) and (6) of the Charter.

**39**. According to the respondent state, the complaint does not fulfil the requirement of article 56(5) of the African Charter related to the exhaustion of local remedies. It submits that 'the incident complained of is envisaged and effectively covered by local legislation providing for local remedies'.

**40.** It further submits that the complainant did not attempt any form of utilisation of such local remedies, which are available and accessible, before submitting a communication about the incident to the African Commission.

**41.** To substantiate its submission, the respondent state submits that, the domestic law of tort; section 11(5) of Oil Pipelines Act LFN 2004, provides several remedies for the victims in case of pipeline explosions.

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2 Communication 147/95 and 149/96, *Jawara v The Gambia* [(2000) AHRLR 107 (ACHPR 2000)]; 54/91, 61/91, 98/93, 164-196/97, 210/98, *Malawi Africa Association and Others v Mauritania* [(2000) AHRLR 194 (ACHPR 2000)], 25/89, 47/90, 56/91, 100/93 *World Organisation Against Torture and Others v Zaire* [(2000) AHRLR 74 (ACHPR 1995)]; 71/92, *Rencontre Africaine pour la Défense des Droits de l'Homme v Zambia* [(2000) AHRLR 321 (ACHPR 1996)].

**42.** Furthermore, the respondent state submits that, under sections 33, 35, 36, 42 and 46 of the Nigerian Constitution, victims have the 'unfettered right of action'. It adds that, section 46 of the Nigerian Constitution expressly mandates the state to provide them with legal representation.

## The African Commission's analysis on admissibility

**43.** In order for a communication to be admissible before the African Commission, they have to fulfil all the seven requirements of article 56 of the African Charter. The African Commission has affirmed in its jurisprudence that those requirements are cumulative, meaning that, if any one of them is absent, the communication will be declared inadmissible.[3]

**44**. In the present communication, the complainant submits that they have complied with six of the seven requirements enumerated in article 56 of the African Charter. The complainant requests the African Commission to waive the requirement under article 56(5) of the African Charter that is related to the exhaustion of local remedies due to the lack of adequate or effective domestic remedies that exist to address the violations alleged in the communication.

**45.** In its submission on admissibility, the respondent state, however, noted that the present communication should not be admissible because of the non-fulfilment of article 56(4), (5) and (6) of the African Charter. The respondent state nonetheless only submitted arguments relating to the non-exhaustion of local remedies requirement, that is, article 56(5) of the African Charter.

**46.** Notwithstanding the fact that the only article the respondent state contends to is article 56(5) of the African Charter, the African Commission will still proceed to analyse all the seven requirements under article 56 of the African Charter to ensure that they have been duly complied with by the complainant.

**47.** Article 56(1) of the African Charter provides that communications should be admissible if it 'indicates their authors even if the latter requests anonymity'. This communication is filed by SERAP — a registered human rights NGO based in Lagos, Nigeria. The author of the communication has not requested anonymity. The complainant has thus fulfilled the requirement set in article 56(1) of the African Charter.

**48.** Article 56(2) of the African Charter provides that communications should be 'compatible with the Charter of the Organisation of African Unity or with the present Charter.' The

[3] See communication 284/03, *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v Republic of Zimbabwe* [(2009) AHRLR 233 (ACHPR 2009)] para 81; communication 299/05, *Anuak Justice Council v Ethiopia* [(2006) AHRLR 97 (ACHPR 1996)] para 44.

present communication complies with this requirement because it invokes the violation of articles 2, 4, 5, 14, 16, 20 and 24 of the African Charter, thus it shows a *prima facie* violation of the African Charter.

**49.** Article 56(3) of the African Charter provides that in order for communications to be admissible, they should 'not [be] written in disparaging or insulting language directed against the state concerned and its institutions or the Organisation of African Unity.' The present communication has not shown any evidence of disparaging language and therefore fulfils the requirement under article 56(3) of the African Charter.

**50**. Article 56(4) of the African Charter provides that communications should not be 'based exclusively on news disseminated through the mass media.' The present communication is submitted based mainly on primary information gathered by the complainant from victims of the pipeline explosion, and thus fulfils the requirement of article 56(4) of the African Charter.

**51.** Article 56(5) of the African Charter provides that communications should be sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged.

**52.** The complainant argues that, there is no adequate or effective domestic remedy that exists in Nigeria to address the violations alleged. It argues that the African Charter has not been accorded recognition and supremacy in the Nigerian legal system.

**53.** The complainant referred the African Commission to its decision in *Jawara v The Gambia* where the African Commission held that local remedies must be available, effective and sufficient; meaning that it can be pursued without impediment, offers a prospect of success, and is capable of redressing the complaint.

**54.** The complainant avers that the respondent state is aware of the violations and did not remedy the situation. They argue that, given the scale of the human rights violations involved, the large number of victims, and the inaccessibility of the Nigerian legal system to the poor and the marginalised, local remedies could not be exhausted.

**55.** The complainant, basing its arguments on *World Organisation Against Torture and Others v Zaire* where the African Commission decided that it is not expected from the complainants to wait for an 'unduly prolonged' procedure of local remedies.

**56.** The complainant submits that given the scale of the human rights violations in the present communication, and the large number

of the victims involved, local remedies are unavailable, ineffective and insufficient.[4]

**57.** The respondent state on the other hand, contends that the complainant did not use the available national legislation to remedy the violations alleged before bringing the complaint to the African Commission, and thus has not fulfilled the requirement of article 56(5) of the African Charter.

**58.** In the view of the African Commission, the purpose of the requirement of exhaustion of local remedies under article 56(5) of the African Charter is based on the principle that 'the respondent state must first have an opportunity to redress by its own means within the framework of its own domestic legal system, the wrong alleged to have been done to the individual.'[5] The African Commission has also stated that this well established rule in international law conforms to the principle that international law does not replace national law, and international mechanisms do not replace national judicial institutions.[6]

**59.** The jurisprudence of the African Commission, in determining compliance with this requirement, laid down '[t]hree major criteria, that is: the local remedy must be available, effective and sufficient.'[7] Nevertheless, for the local remedy to fulfil these criteria, the African Commission elaborates in *Jawara v The Gambia:* '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.'[8]

**60.** The complainant submits that there are no adequate or effective domestic remedies to address the violations, and the respondent state on the other hand, provides a specific legislation that it claims is available.

**61**. According to the respondent state, section 11(5) of Oil Pipelines Act LFN 2004 of the domestic law of tort provides several remedies for pipeline explosions. In reading the said law, the African Commission is of the view that section 11(5) indeed creates a civil liability on the person who owns or is in charge of an oil pipeline. According to the law, the latter would be liable to pay compensation to anyone who suffers physical or economic injury as a result of a

4 The complainant referenced as well to *Malawi Africa Association and Others v Mauritania.*

5 *Rencontre Africaine pour la Défense des Droits de l'Homme v Zambia.*

6 *Anuak Justice Council v Ethiopia* para 48.

7 Communication 300/05, *Socio Economic Rights and Accountability Project v Nigeria* [(2008) AHRLR 108 (ACHPR 2008)] para 45.

8 *Jawara v The Gambia* para 32.

break or leak in his pipelines.[9] The complainant did not adduce any evidence in their submission that it has attempted to use this legislation to redress the violations for compensation to the victims of the pipeline explosion.

**62.** Furthermore, the case of *World Organisation Against Torture and others v Zaire*, which the complainant based their argument upon for waiver of the requirement of article 56(5) of the African Charter, cannot be applied in the current communication because the complainant did not provide evidence for this general statement, nor any precedent which show that section 11(5) of Oil Pipelines Act LFN 2004 is proved to be an unduly prolonged avenue, nor have they attempted to take their case before a court of law.

**63.** The African Commission is of the view that the initial burden is on the complainant to prove that they have met the requirement set-out in article 56(5) of the African Charter. Thereafter the burden shifts to the respondent state if it contests the allegations of the former, declaring that there is further available and effective remedy.

**64.** In the current communication, the respondent state provides in its submission that section 11(5) of Oil Pipelines Act LFN 2004 is an available and effective remedy for the victims of the pipeline explosion, which, as indicated above, the complainant failed to refute or prove otherwise.

**65.** In *Anuak Justice Council v Ethiopia* the African Commission declared the communication inadmissible because the complainant did not provide evidence to their claim about why they could not exhaust local remedies. The African Commission said in its decision that:

> Apart from casting aspersions on the effectiveness of local remedies, the complainant has not provided concrete evidence or demonstrated sufficiently that these apprehensions are founded and may constitute a barrier to it attempting local remedies. In the view of this Commission, the complainant is simply casting doubts about the effectiveness of the

[9] Sec 11(5) of Oil Pipelines Act LFN 2004: 'The holder of a licence shall pay compensation:
(a) to any person whose land or interest in land (whether or not it is land respect of which the licence has been granted) is injuriously affected by the exercise of the rights conferred by the licence, for any such injurious affection not otherwise made good; and
(b) to any person suffering damage by reason of any neglect on the part of the holder or his agents, servants or workmen to protect, maintain or repair any work structure or thing executed under the licence, for any such damage not otherwise made good; and
(c) to any person suffering damage (other than on account of his own default or on account of the malicious act of a third person) as a consequence of any breakage of or leakage from the pipeline or an ancillary installation, for any such damage not otherwise made good. If the amount of such compensation is not agreed between any such person and the holder, it shall be fixed by a court in accordance with Part iv of this Act.'

> domestic remedies. This Commission is of the view that it is incumbent on every complainant to take all necessary steps to exhaust, or at least attempt the exhaustion of, local remedies. It is not enough for the complainant to cast aspersion on the ability of the domestic remedies of the state due to isolated or past incidences. The African Commission can therefore not declare the communication admissible based on this argument. If a remedy has the slightest likelihood to be effective, the applicant must pursue it. Arguing that local remedies are not likely to be successful, without trying to avail oneself of them, will simply not sway this Commission.[10]

**66.** In the present communication, the African Commission is of the opinion that the complainant only made generalised statements about the unavailability of local remedies in the respondent state, without attempting to exhaust them. Accordingly, as was the situation in the *Anuak Justice Council v Ethiopia* case, the African Commission concludes that the complainant in the present communication has not exhausted local remedies.

**67.** A waiver of the requirement of article 56(5) of the African Charter according to the African Commission's jurisprudence[11] is not automatic, except in cases of serious and massive violations of human rights.

**68.** Based on the above analyses, the African Commission is of the view that the communication has not fulfilled the requirement set by article 56(5) of the African Charter.

**69.** Article 56(6) of the African Charter stipulates that communications should be 'submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized with the matter'. The complainant avers that the communication has been submitted in a timely manner, from the date of the alleged violation, which is not contested by the respondent state, thus the requirement under article 56(6) of the African Charter has been duly complied with.

**70.** Article 56(7) of the African Charter stipulates that communications should 'not deal with cases which have been settled by those states involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organisation of African Unity or the provisions of the present Charter.' The complainant avers that the communication is not being considered by another international or regional mechanism, nor has it been previously settled by one, which is not contested by the respondent state, thus the requirement under article 56(7) of the African Charter has been duly complied with.

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10 *Anuak Justice Council v Ethiopia* para 58

11 Also see communication 201/97, *Egyptian Organisation for Human Rights v Egypt* [(2000) AHRLR 90 (ACHPR 2000)]; 307/05, *Chinhamo v Zimbabwe* [(2007) AHRLR 96 (ACHPR 2007)]; 308/05, *Majuru v Zimbabwe* [(2008) AHRLR 146 (ACHPR 2008)].

## Decision of the African Commission on admissibility

**71.** In view of the above, the African Commission on Human and Peoples' Rights decides:

(i) To declare the communication Inadmissible with respect to article 56(5) of the African Charter;

(ii) To give notice of this decision to the parties;

(iii) To publish this decision in its report on communications.

# TANZANIA

## Sangonet v Tanzania

### (2010) AHRLR 113 (ACHPR 2010)

Communication 333/06, *Southern Africa Human Rights NGO Network and Others v Tanzania*

Decided at 47th ordinary session, May 2010, 28th Activity Report

Submission of case to Commission 11 years after exhaustion of local remedies

**Admissibility** (submission of complaint within reasonable time, 76)

### Summary of facts

**1.** The Secretariat of the African Commission on Human and Peoples' Rights, (the Secretariat) received a communication on 17 November 2006 from the Southern Africa Human Rights NGO Network-Tanzania and its member organisations (the complainants).[1]

**2.** The communication is submitted against the United Republic of Tanzania (hereafter referred to as the respondent state), state party[2] to the African Charter on Human and Peoples' Rights (the African Charter). The communication is submitted under article 55 of the African Charter.

**3.** The complainants submit that on 22 June 1994, the High Court of Tanzania rendered a decision in the case of *R v Mbushuu alias Dominic Mnyaroje and Kalai Sangula,* (the Mbushuu case) where it found that the death penalty in Tanzania is unconstitutional on the grounds that the way the sentence is executed (by hanging) violates the right to dignity of a person as protected under article 13(6)(d) of the Constitution of the United Republic of Tanzania and constitutes

[1] The members of the Organisations of Sangonet are: the Legal and Human Rights Centre, the Women's Legal Aid Centre, DOLASED, Women in Law and Development in Africa, the Centre for Human Rights Promotion, the National Organization for Legal Assistance, the Youth Partnership Countrywide and the Children Education Society Aid Centre, DOLASED, Women in Law and Development in Africa, the Centre for Human Rights Promotion, the National Organization for Legal Assistance, the Youth Partnership Countrywide and the Children Education Society.

[2] Ratified on 18 February 1984.

an inherently cruel, inhuman and degrading treatment outlawed by article 13(6)(e) of the same.

**4.** As a result of the above reasoning, Hon Justice Mwalusa sentenced the accused persons (*Mbushuu alias Dominic Mnyaroje and Kalai Sangula)* to life imprisonment instead of the compulsory capital punishment for the crime of murder.

**5.** The complainants further submit that the Tanzanian government appealed the decision of the High Court before the Court of Appeal. They state that on 30 January 1995, the Hon Justices of the Court of Appeal: Makame, Ramadhan and Lubuva overturned the High Court decision rendered by Justice Mwalusa and found that the death penalty is constitutional because it is saved by claw back clauses provided in the Tanzanian Constitution.

**6.** The Court of Appeal held that the death penalty is permissible under international human rights instruments, has effective deterrence effect, is accepted by the public, is economically cheaper to execute than to serve a life imprisonment and is compatible with the constitutions and practices of other states parties to the African Charter. The court further held that in the event of a conflict between domestic law and international law, the domestic law prevails.

**7.** The complainants refuted each of the grounds of the decision rendered by the Court of Appeal on 30 January 1995.

## Article alleged to have been violated

**8**. The complainants allege that the decision of the Tanzanian Court of Appeal is a violation of article 4 of the African Charter.

## Prayers

**9.** The complainants request the African Commission to declare that the Court of Appeal's decision violates article 4 of the African Charter and that the circumstances of death penalty executions in Tanzania by hanging violates other relevant articles and other international norms against torture recognised by the African Commission.

## Procedure

**10.** The complaint, dated 17 November 2006, was received at the Secretariat on 25 November 2006.

**11.** During the 40th ordinary session of the African Commission held in Banjul, The Gambia, from 15 to 29 November 2006, the African Commission considered the communication and decided to be seized of it.

**12.** By *note verbale* ACHPR/LPROT/COMM/333/2006/RWE dated 21 December 2006, the Secretariat informed the respondent state of this decision and requested it to provide, within three months from the date of notification, its submissions on the admissibility of the communication.

**13.** By letter ACHPR/LPROT/COMM/333/2006/RWE dated 21 December 2006, the Secretariat also informed the complainants of this decision and requested it to forward its submissions on the admissibility of the communication within three months.

**14.** On 8 May 2007, the Secretariat received a *note verbale* CHD 87/738/01/04 forwarding submissions on admissibility from the respondent state.

**15.** By *note verbale* ACHPR/LPROT/COMM/333/2006/SN dated 18 July 2007, the Secretariat acknowledged receipt of the respondent state's submissions on admissibility and informed the latter of its decision during the 41st ordinary session to defer its decision on admissibility of the case in order to study the respondent state's submissions on admissibility.

**16.** By letter ACHPR/LPROT/COMM/333/2006/SN dated 16 July 2007, the Secretariat transmitted the respondent state's submissions on admissibility to the complainants and informed the latter of the African Commission's decision during the 41st ordinary session to defer its decision on admissibility in order to study the respondent state's submissions.

**17.** By letter ACHPR/LPROT/COMM/333/06/TZ, dated 11 December 2008, both parties were informed by the Secretariat that the African Commission deferred its decision on admissibility to its 45th ordinary session in order to allow both parties submit additional arguments on admissibility.

**18.** During the 45th ordinary session of the African Commission, the communication was deferred to the 46th ordinary session.

**19.** On 5 March 2009**,** the respondent state submitted additional arguments on admissibility.

**20.** By *note verbale* ACHPR/COMM/333/06/TZ/0.2/148.09, dated 18 March 2009**,** the Secretariat acknowledged receipt of the respondent state's additional submissions**.**

**21**. By letter ACHPR/COMM/333/06/TZ/0.1/147.09, dated 18 March 2009, the Secretariat forwarded the respondent state's additional submissions on admissibility to the complainants, and requested the latter to submit their additional submissions on admissibility.

**22.** By letter ACHPR/COMM/333/06/TZ/0.2/864.09 dated 5 November 2009, the Secretariat sent a reminder to the complainant

requesting for its additional submissions on admissibility, including clarifications on specific issues such as the delay in bringing the matter to the African Commission.

**23.** By letter ACHPR/COMM/333/06/TZ/0.3/938.09 dated 3 December 2010, the Secretariat informed the complainants of the African Commission's decision to defer the decision on the admissibility of the communication during its 46th ordinary session to the 47th ordinary session, pending additional information that was requested.

## The law

### Admissibility

### Submissions on admissibility

### Complainant's submissions on admissibility

**24.** The complainants submit that they have fulfilled all the requirements under article 56 of the Charter, including the fact that all domestic legal remedies have been exhausted. They indicate that the Tanzanian Court of Appeal is the highest and final court in the country.

**25.** The complainants further submit that the case has neither been heard nor decided by any other international or regional body, and call on the African Commission to act on the complaint with urgency because death penalty convicts or persons awaiting trial on crimes punishable by compulsory death penalty in the country may be subjected to suffer death by hanging.

### Respondent state's submissions on admissibility

**26.** The respondent state indicates in its submissions that the list containing the names of the other members who are joint authors of the communication was not communicated to them.

**27.** The respondent state affirms that the Court of Appeal is the highest court of the land, adding that this court did find that the death penalty is provided for by article 30(2)(c) of the Constitution and that it is not a claw back clause.

**28.** The state further asserts that the 14th constitutional amendment (the Amendment) expunged some of the so called 'claw back' clauses, and that this amendment did not oust the legislative powers of the national assembly to enact laws. It also states that the amendment did not oust the powers of the court to interpret the constitution and other enactments of the national assembly by virtue of the rules of interpretation. According to the respondent state therefore, the amendment did not in any way render the judgment of

the of the Court of Appeal outdated, adding that article 30 gives room for the court to interpret laws of the land as it did.

**29.** The respondent state submits that the death penalty is still a lawful punishment in Tanzania, and that the decision of the Court of Appeal will continue to be respected because it is the highest court in the land. It adds that, even though the state party is bound by international instruments it has ratified, domestic laws will still prevail to serve specific situations.

## Complainants' additional submissions on admissibility

**30.** In their additional submissions on admissibility, the complainants reiterate the fact that they have fulfilled all the requirements under article 56 of the African Charter.

**31.** The complainants submit that article 56(1) has been fulfilled because a signed copy of the list of the authors was attached to the complaint brought before the African Commission.

**32.** They further submit that the requirement under article 56(2) has also been met because the Court of Appeals' decision of 30 January 1995 constitutes a violation of article 4 of the African Charter.

**33.** With respect to article 56(3), the complainants submit that it has been met because the communication is not written in an insulting language.

**34.** They state that the communication is in line with article 56(4) because it is not based exclusively on news disseminated through the mass media, but rather on court judgments and on the past and present jurisprudence on the death penalty.

**35.** The complainants state further that the requirement under article 56(5) has been complied with, because they have exhausted all local remedies. They elaborate on this by explaining that they took the matter to the Appeal Court of Tanzania, which is the highest court in the land, before bringing it to the African Commission.

**36.** The complainants further state that they have fulfilled article 56(6) of the African Charter because the communication was brought to the African Commission within a reasonable period of time, after the Court of Appeal's decision on the case.

**37.** Finally, the complainants aver that the communication is in line with article 56(7) because it has not been submitted to any other international body for settlement.

## Respondent state's additional submissions on admissibility

**38.** The respondent state made additional submissions on admissibility addressing the requirements in article 56(2), 56(5) and 56(6) of the African Charter.

**39.** The respondent state refutes the complainants' submission that they have fulfilled article 56(2) of the African Charter. According to the respondent state, the complainants have not demonstrated the extent to which the communication is in conformity with the provisions of the African Charter.

**40.** They state that, apart from citing article 4 which deals with the right to life, they have not indicated any other provisions in relation to torture which is the basis of their communication. In the absence of specific provisions related to torture, the respondent state submits that the communication is 'wild, vague, and hence incompatible with the provisions of the Charter and it violates article 56(2)'.

**41.** With regard to article 56(5), the respondent state disputes the fact that local remedies have been exhausted. It submits that the accused persons in the *Mbushuu* case were charged and convicted of murder, and sentenced to life imprisonment instead of death in the High Court, pursuant to the provisions of section 196 and 198 of the Penal Code Cap 16 of the laws of Tanzania.

**42.** The respondent state submits further that the appellant in the *Mbushuu* case, that is, the state, appealed to the Court of Appeal of Tanzania, through Criminal Appeal no 142 of 1994, and the Court of Appeal ruled on a death sentence, instead of life imprisonment, arguing that death sentence is constitutional.

**43.** Furthermore, the respondent state submits that the complainants did not exhaust local remedies available under article 30(4) of the Constitution of Tanzania and section 4 of the Basic Rights and Duties Act.[3]

[3] Article 30(4) of the Constitution of the United Republic of Tanzania provides that: 'Subject to the other provisions of this constitution, the High Court shall have original jurisdiction to hear and determine any matter brought before it pursuant to this article; and the state authority may enact legislation for the purposes of:
(a) regulating procedure for instituting proceedings pursuant to this article;
(b) specifying the powers of the High Court in relation to the hearing of proceedings instituted pursuant to this article;
(c) ensuring the effective exercise of the powers of the High Court, the preservation and enforcement of the rights, freedoms and duties in accordance with this Constitution.'
Section 4 of the Basic Rights and Duties Act, provides for the right to apply to the High Court for redress. It stipulates that: 'If any person alleges that any of the provisions of sections 12 to 29 of the Constitution has been, is being or is likely to be contravened in relation to him, he may, without prejudice to any other action with respect to the same matter that is lawfully available, apply to the High Court for redress.'

**44.** In contending the complainants' fulfilment of article 56(6), the respondent state submits that this communication is based on the *Mbushuu* case decided fifteen years ago, adding that the complainants have not made any efforts to exhaust local remedies since then.

**45.** In its final observations, the respondent state requests that the communication be found inadmissible by the African Commission based on the aforementioned grounds.

## Analysis of the African Commission on admissibility

**46.** This communication is submitted pursuant to article 55 of the African Charter which allows the African Commission to receive and consider communications, other than from states parties. Article 56 of the African Charter provides that the admissibility of communications submitted pursuant to article 55 is subject to seven conditions which must all be met.

**47.** In the communication before the African Commission, the complainants aver that they have complied with all the requirements under article 56. However, the state disagrees, arguing that, the complainants have not complied with article 56(2), 56(5) and 56(6).

**48.** The African Commission will now proceed to determine whether these sub-articles under article 56 raised by the respondent state have indeed not been complied with. Nevertheless, the Commission would also analyse compliance with the, other sub-articles of article 56 that are not in contention.

**49.** In terms of article 56(1) of the Charter, 'communications should indicate their authors, even if the latter requests anonymity.' In the communication before the African Commission, the respondent state submits that it was disadvantaged by not seeing the list of the other members who are the joint authors of the communication. It is important to note that the complainants did attach a list of the joint authors of the communication in annexure 1of the complaint to the attention of the African Commission, which was forwarded to the respondent state. The communication in the opinion of the African Commission thus clearly shows the name of the authors. In this regard, the requirement of article 56(1) has been fulfilled.

**50.** Article 56(2) requires that, 'The communication be compatible with either the African Charter or the Constitutive Act of the OAU (now the Constitutive Act of the AU).' This sub-article is subject to scrutiny because the respondent state raised an objection to it. The state argues that the complainants have only cited article 4 of the African Charter which deals with the right to life, and that they have not indicated any other provisions in relation to torture which is the basis of their communication. It goes further to describe the

communication as 'wild, vague and hence not compatible with the provisions of the Charter'.

**51.** This Commission notes that, one of its primary considerations under article 56(2) is whether there has been *prima facie* violation of human rights guaranteed by the African Charter. Furthermore, as was its position in *Mouvement des Refugiés Mauritaniens au Sénégal v Senegal*,[4] the Commission is only concerned with whether there is preliminary proof that a violation occurred. Therefore, in principle, it is not mandatory for the complainant to mention specific provisions of the African Charter that have been violated.

**52.** In the communication before the African Commission, the complainants have alleged violation of article 4 of the African Charter, meaning they have alleged the violation of a right by the respondent state. The determination whether other rights have been violated or the extent to which they have been violated is not relevant because such an analysis is required only at the merits stage. Based on this, the African Commission finds that article 56(2) has been fulfilled.

**53.** Article 56(3) requires that, communications are not written in disparaging or insulting language directed against the state concerned and its institutions or to the African Union. According to this Commission, looking at the alleged facts of this communication, there is no evidence of insulting or disparaging language. Thus, article 56(3) is complied with.

**54.** Article 56(4) requires that, the communication should not be based exclusively on news disseminated through the mass media.This communication has not portrayed any indication of information coming from the media before this Commission. The complainants' submissions have been supported by court judgments, national laws and reports on which the complainants relied. In this regard, the African Commission holds that article 56(4) has been duly complied with.

**55.** Article 56(5) requires that, communications be sent to the Commission only after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged.It has become an established principle in international law that a state should be given the opportunity to redress an alleged wrong within the framework of its own domestic legal system before it is dealt with at the international level.[5] This requirement safeguards the role of domestic courts to decide the matter before it is brought to any international adjudication body.

4 Communication 162/97 [(2000) AHRLR 287 (ACHPR 1997)].

5 AA Cancado Trinidade *The application of the rule of exhaustion of local remedies in international law* (1983) 1.

**56.** The respondent state in this communication is of the view that the complainants have not complied with this requirement. It argues that the accused persons in the *Mbushuu* case were charged and convicted of murder, and sentenced to life imprisonment instead of death pursuant to the provisions of section 196 and 198 of the Penal Code Cap 16 of the Laws of Tanzania.

**57.** It further argues that the complainants did not exhaust local remedies available under article 30(4) of the Constitution of Tanzania and section 4 of the Basic Rights and Duties Act.

**58.** According to this Commission, the argument by the respondent state that the complainants have not exhausted local remedies because the accused persons in the *Mbushuu* case were charged and convicted of murder, and sentenced to life imprisonment in the High Court, instead of death pursuant to the provisions of section 196 and 198 of the Penal Code Cap 16 of the Laws of Tanzania, cannot be sustained because the premise of exhausting local remedies according to the practice and purpose of article 56(5) only requires that judicial domestic avenues should be exploited before a communication is brought to the Commission. In the present communication, there is evidence that the matter was considered and decided upon by the highest court in the respondent state prior to its submission to this Commission.

**59.** This Commission also notes that, the ruling on life imprisonment in the *Mbushuu* case was made in the High Court on the ground that the death penalty in Tanzania is unconstitutional. The appellant not being satisfied with the decision of the High Court, appealed to the Court of Appeal which found that the death penalty is constitutional because it is saved by claw back clauses provided in the Tanzanian constitution. In this regard therefore, the complainants in the present communication brought the matter before the Commission after the Court of Appeal had pronounced on the death penalty.

**60.** Concerning the argument that the complainants have not exhausted local remedies because they did not avail themselves to the remedies provided by article 30(4) of the Constitution of Tanzania, as well as the Basic Rights and Duties Act, it is imperative for the African Commission to verify the content of these laws to determine whether remedies provided therein are sufficient and effective remedies.

**61.** Article 30(4) of the Constitution of the United Republic of Tanzania:[6]

> Subject to the other provisions of this constitution, the High Court shall have original jurisdiction to hear and determine any matter brought

[6] The Constitution of Tanzania is available at http://www.lrct.or.tz/documents/REPUBLIC.pdf.

> before it pursuant to this article; and the state authority may enact legislation for the purposes of: (a) regulating procedure for instituting proceedings pursuant to this article; (b) specifying the powers of the High Court in relation to the hearing of proceedings instituted pursuant to this article; (c) ensuring the effective exercise of the powers of the High Court, the preservation and enforcement of the rights, freedoms and duties in accordance with this constitution.

**62.** On the other hand, section 4 of the Basic Rights and Duties Act,[7] provides for the right to apply to the High Court for redress. It stipulates that:

> If any person alleges that any of the provisions of sections 12 to 29 of the Constitution has been, is being or is likely to be contravened in relation to him, he may, without prejudice to any other action with respect to the same matter that is lawfully available, apply to the High Court for redress.

**63.** Looking at the content of both article 30(4) of the Tanzanian Constitution and section 4 of the Basic Rights and Duties Act, they are all geared towards the option of bringing matters to the High Court for redress. This option was exploited because the matter was considered by the High Court before later referred to the Court of Appeal.

**64.** Furthermore, the 'remedies' referred to in article 56(5) include all judicial remedies that are easily accessible for justice. The Commission in *Interights and Others v Mauritania*,[8] declared:

> The fact remains that the generally accepted meaning of local remedies, which must be exhausted prior to any communication/ complaint procedure before the African Commission, are ordinary remedies of common law that exist in jurisdictions and normally accessible to people seeking justice.[9]

**65.** In this regard, what is important to the African Commission in determining whether local remedies were exhausted is whether judicial remedies indeed exists, and if so, whether they were explored by the complainants. On this ground, the respondent state's reliance on the provisions of article 30(4) of the Constitution of Tanzania and section 4 of the Act is not enough to conclude that the complainants did not exhaust local remedies.

**66.** Based on the above reasoning, this Commission holds that local remedies have been exhausted by the complainants in compliance with article 56(5) of the African Charter.

**67.** Article 56(6) of the Charter states 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 asserts that the complainants have not

7 The Basic Rights and Duties Enforcement Act (Cap 3 R.E. 2002), available at http://www.lrct.or.tz/documents/DUTIES.pdf.

8 Communication 242/2001 [(2004) AHRLR 87 (ACHPR 2004)].

9 Para 27.

complied with this requirement because this matter was decided fifteen years ago.

**68.** The African Charter does not specifically state what it means by 'reasonable time', as opposed to article 46(1)(b) of the American Convention on Human Rights (the American Convention), which provides for a six months period.[10] In the absence of this specification, the Commission has always ruled based on the contexts and characteristics of each case.

**69.** In *Majuru v Zimbabwe*,[11] for instance**,** the communication was submitted to the African Commission after the complainant allegedly fled the respondent state without approaching the courts therein. As reasons for delay, he argued without substantiating that he had been undergoing psychotherapy while in South Africa. He further indicated that he did not have the financial means to bring the case before the Commission, and that he was afraid for the safety of members of his family.

**70.** In the above communication, the African Commission held that the communication was not submitted within a reasonable time period envisaged in article 56(6) because the arguments advanced by the complainant as impediments for his late submission of the complaint do not appear convincing. It added that, 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.[12]

**71.** Similarly, in *Darfur Relief and Documentation Centre v Republic of Sudan,*[13] the African Commission held that a period of 29 months (2 years and 5 months) between the time when the High Court dismissed the matter and when the communication was submitted to the African Commission is unreasonable, particularly because the complainants did not give any compelling reason to explain the delay. It stated that, where there is a good and compelling reason why a complainant does not submit his complaint to the Commission for consideration, the Commission has a responsibility, for the sake of fairness and justice, to give such a complainant an opportunity to be heard. In the present case, there is no sufficient reason given as to why the communication could not be submitted within a reasonable period.[14]

**72.** However, in *Chinhamo v Zimbabwe*,[15] the communication was submitted to the African Commission ten months after the

10 See also article 26 of the European Convention on Human Rights.
11 Communication 308/2005 [(2008) AHRLR 146 (ACHPR 2008)].
12 Para 110.
13 Communication 310/2005 [(2009) AHRLR 193 (ACHPR 2009)].
14 78 and 79.
15 Communication 307/2005 [(2007) AHRLR 96 (ACHPR 2007)].

complainant allegedly fled from his country. Due to the circumstances in this case, the Commission decided that the communication complied with article 56(6), stating that:

> The complainant is not residing in the respondent state and needed time to settle in the new destination, before bringing his complaint to the Commission. Even if the Commission were to adopt the practice of other regional bodies to consider six months as the reasonable period to submit complaints, given the circumstance in which the complainant finds himself, that is, in another country, it would be prudent, for the sake of fairness and justice, to consider a ten months period as reasonable.[16]

**73.** As portrayed in the facts of the communication before this Commission, the judgment of the Court of Appeal was delivered on 30 January 1995, and the communication was brought to the Commission on 17 November 2006. Even though the state indicates that the complainants took fifteen years before bringing the matter to the African Commission, according to the latter's calculation, it took the complainants exactly eleven years. The question of whether eleven years falls within the meaning of reasonable time would have to be assessed by this Commission.

**74.** The Commission underscores the fact that, in the submissions of the complainants, there is no substantiation as to why it took them so long to bring the matter to the Commission after exhausting local remedies. It is the opinion of this Commission that, delays such as this could be prompted by different circumstances, including attempts to request for presidential clemency and awaiting response or judicial reviews.

**75.** This Commission notes that it requested the complainants to provide additional information to explain the delay, and no response was provided.

**76.** In the absence of any explanation whatsoever from the complainants regarding the long period of time that it took before the matter was brought to the African Commission, the latter observes that, given the nature of the present communication, there has been an unreasonable delay. In view of this, it holds that the communication was not submitted within a reasonable period of time and therefore does not comply with article 56(6) of the African Charter.

**77.** Article 56(7) states that, the Commission does not deal with cases which have been settled by those states involved in accordance with the principles of the Charter of the United Nations, or the Charter of the OAU or the provisions of the present Charter.There is no evidence in this communication that would prompt the Commission to believe that the matter has been settled by any international body. Moreover, this sub-article has not raised any contention on the part of the respondent state. Accordingly, the

[16] Paras 88 and 89.

African Commission holds that the requirement under article 56(7) has been duly fulfilled.

## Decision of the African Commission

78. In view of the foregoing, the African Commission decides:
(a) That this communication does not comply with article 56(6) of the African Charter, and therefore declares it inadmissible;
(b) To transmit its decision to the parties in accordance with rule 119(1) of its Rules of Procedure;
(c) To publish this decision in its 28th Activity Report.

# ZIMBABWE

## Article 19 and Others v Zimbabwe

**(2010) AHRLR 126 (ACHPR 2010)**

Communication 305/05, *Article 19 and Others v Zimbabwe*

Decided at 48th ordinary session, November 2010

Submission of case to the Commission two years after exhausting local remedies

**Admissibility** (submission of complaint within reasonable time, 95-97)

### Summary of the complaint

**1.** The complaint is filed by Article 19, the Media Institute of Southern Africa (MISA) of Zimbabwe, the Institute for Human Rights and Development in Africa, Gerry Jackson and Michael Auret Jr (herein after referred to as the complainants) against the Republic of Zimbabwe (the respondent state) in accordance with article 55 of the African Charter on Human and Peoples' Rights (the Charter).

**2.** The complainants aver that Capital Radio Private Limited (CRPL) is a private company incorporated in the respondent state seeking to provide broadcasting services within Zimbabwe. They submit that despite repeated efforts, CRPL still cannot broadcast in Zimbabwe due to legal restrictions and political opposition that allows the state broadcaster to enjoy broadcasting monopoly.

**3.** It is further alleged that on 22 September 2000, the Supreme Court of Zimbabwe ruled, in a matter in which CRPL challenged the constitutionality of this monopoly, that section 27 of the Broadcasting Act was unconstitutional on the grounds that it was inconsistent with section 20(1) of the Constitution of Zimbabwe which guarantees the right of freedom of expression. The Supreme Court also struck down sections 14(1) and 14(2) of the Radio-communication Service Act (RSA) on the same ground, and expressly pronounced that CRPL was legally entitled to broadcast in Zimbabwe and in accordance with the law can import any broadcasting equipment into Zimbabwe.

**4.** The complainants aver that on 25 September 2000, the respondent state publicly responded to the ruling of the Supreme

Court by stating that the public broadcaster would continue its broadcasting monopoly and that a new legislation would be enacted to regulate the broadcasting sector.[1] The minister of state for information and publicity (the minister) is said to have publicly announced that CRPL would not be permitted to broadcast.[2]

**5.** Despite the statements by the respondent state and the minister in particular, CRPL proceeded to exercise its newly recognised right to broadcast. It imported broadcasting equipment into Zimbabwe and began broadcasting a test signal on 28 September 2000 from an office in East Gate shopping centre Harare.

**6**. However, the directors of CRPL quickly realised that the location was not ideal for broadcasting and thus, on the following day, 29 September, CRPL, relocated to alternative broadcasting premises at the Monomotapa Crowe Plaza Hotel and set up a broadcasting studio in one of the offices there.

**7.** A music signal was set up on a broadcasting loop while the scope of the coverage was tested and it was determined what additional equipment was required for an improved signal.

**8.** Following the commencement of CRPL's broadcast, the respondent state is reported to have stated a number of times in the media that CRPL was operating illegally and referred to CRPL as a 'pirate radio station'.[3]

**9.** On 1 October 2000, the minister of state for information stated in a Zimbabwe Broadcasting Corporation (ZBC) telecast that he would be 'taking appropriate action' against CRPL.

**10.** On 3 October 2000, an article appeared in *The Herald* newspaper which indicated that the Inspector Division of the Posts and Telecommunications Corporation (PTC) considered that CRPL's broadcasting service may be in breach of sections 12 and 13 of the Radio-Communications Service Act (RSA).[4]

**11.** Following this, on 4 October 2000, CRPL applied to the High Court for an order declaring that the RSA does not apply to CRPL's broadcast service and to restrain the respondent state and police

1 Media Rights Agenda, Media Right Monitor, November 2000 No 5(11) p 22 available at: http://mediarightsagenda.org. See also International Freedom of Expression Exchange (IFEX), 'State broadcaster to continue with monopoly' 25 September 2000http://www.ifex.org/en/content/view/full/11575, submitted by the Media Institute of Southern Africa (MISA).

2 IFEX Update 'Court orders return of confiscated equipment' 6 October 2000 http://www.ifex.org/en/content/view/full/11680 submitted by the Committee to Protect Journalists (CPJ).

3 See *The Herald* 'Move to Crackdown on Broadcasting Site of Pirate Radio Stations' 3 October 2000.

4 *Ibid*.

from interfering with its broadcasting on the alleged violation of the RSA.[5]

**12.** On the same day, the minister made an application to the High Court seeking an interdict prohibiting CRPL from broadcasting on the basis that it was contravening sections 12 and 13 of the RSA. A search warrant was also issued by a magistrate on 4 October 2000 permitting the assistant police commissioner to search CRPL's broadcasting premises and all related premises, and to seize its broadcasting equipment.[6]

**13.** The police sought to exercise the search warrant that day, arriving at CRPL's broadcasting premises that afternoon. Upon the arrival of the police, CRPL made an urgent *ex parte* application to the High Court seeking a stay of execution of the search warrant.

**14.** The High Court heard the application immediately and granted the stay of execution, holding that the search warrant was invalid for a number of reasons.[7] In particular, the court declared that there was no possibility of CRPL breaching sections 12 and 13 of the RSA as these provisions did not apply to CRPL and, in any case, these provisions were no longer enforceable since the Supreme Court had ruled that sections 12 and 13 of the RSA were secondary operative provisions to give effect to sections 14(1) and 14(2).

**15.** The stay of execution of the search warrant was valid until 4:30pm of 5 October 2000. CRPL's lawyers at the Monomotapa Plaza reminded the police of the existence of the High Court order prohibiting the execution of the search warrant. In the evening of 5 October, the police raided CRPL's broadcasting studio and seized its broadcasting equipment. This brought CRPL's broadcasting to an end.

**16.** The police also surrounded the homes of the directors of CRPL on 4 October 2000 in order to execute the search warrant. On the advice of their lawyer, the CRPL directors went into hiding at this point. The directors' homes continued to be surrounded and monitored for a number of days. The police camped outside Mr Auret's family home for a week and executed their search warrant on Ms Jackson's home during the week following 4 October.

**17.** Finally, in the afternoon of 4 October 2000, an emergency temporary legislation was enacted under the Presidential Powers (Emergency Regulations) Act.[8] The regulations introduced a broadcast regulatory regime imposing a requirement to obtain a broadcast license and designating the minister of state for information as the licensing authority. The regulations further

5 Brooks certificate of urgency and Auret's founding affidavit (Annex A6 & A7).
6 Search warrant (Annex A8).
7 Court transcript of ex-parte application (Annex A9).
8 Presidential Powers (Temporary Provisions) Broadcasting Regulations 2000 (the regulations).

provided that broadcasting licenses would only be granted in response to a call for a license application made by the minister.

**18.** The regulations were not gazetted, and so did not become legally enforceable, until 5 October 2000.

**19**. After the raid on the CRPL's broadcasting premises, the respondent state held a press conference on 5 October 2000, where they displayed the broadcasting equipment confiscated from the CRPL.[9] At this press conference, the minister of Information stated that CRPL did not qualify for a broadcasting license under the regulations.[10]

**20**. On 5 October 2000, the High Court ordered the police to return the confiscated equipment, which had been unlawfully seized. In addition to this order, Gwaunza J made a declaration confirming that sections 12 and 13 of the RSA had no application to CRPL's functioning or broadcasting. The declaration also stated that CRPL should desist from broadcasting for ten days in order that its site and equipment (once returned) could be inspected and that CRPL should be granted a frequency.[11]

**21.** On 6 October 2000, CRPL's lawyer Mr Antony Brookes went to CRPL's broadcasting premises to oversee the return of the confiscated equipment by the police. Under the regulations it was now an offence to possess a 'signal transmitting station', that is, a station which is used for the purpose of transmitting a broadcast service. Accordingly, Mr Brookes stated to the police that CRPL would be taking possession of everything except CRPL's transmitter unit, as they were legally entitled to under the regulations.[12] Despite this, the police proceeded to confiscate all the equipment.[13] CRPL continued to be liable for the hire charges on the equipment at the monthly charge of ZM$158,730.00 (approximately US$2,886.00 at the time).[14]

**22.** On or about 16 October 2000, the High Court held the assistant commissioner of police in contempt of court for the raid on the evening of 4 October.[15] Neither the assistant police commissioner nor the police commissioner denied that the stay of execution of the search warrant had been defied.

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9 IFEX Update 6 October 2000, see also BBC News 'Radio shut down defended' 5 October 2000.

10 *Ibid*.

11 Gwaunza J Order (Annex (A10)).

12 Affidavit of Mr Antony Brooks dated 8 November 2000.

13 *The Herald* 'Police return Capital Radio equipment then seize it again' 7 October 2000.

14 Affidavit of Geraldine Jackson dated 8 November 2000.

15 *Capitol Radio (Private) Limited v Minister of Information & Others* (3): In re Ndlovu 2000 (2) ZLR 289 (H).

**23.** On 3 November 2000, CRPL's lawyers wrote a letter of demand to the police commissioner seeking the return of the equipment, except the transmitter unit, which had been seized on 6 October 2000 and indicating that if this equipment was not returned, court proceedings would be initiated.[16] No response to the letter of demand was received.

**24.** On 8 November 2000, CRPL applied to the High Court for the return of the equipment seized on 6 October 2000, apart from the transmitter unit. The High Court ruled in CRPL's favour and ordered the return of the equipment within two days.[17]

**25.** CRPL was not allocated a frequency or granted a broadcasting license. No broadcasting licenses were issued during the six month life span of the regulations, thus keeping in place the state broadcast monopoly which had been ruled unconstitutional by the Supreme Court.

**26.** Upon the expiry of the regulations in April 2001, the respondent state enacted the Broadcasting Services Act 2001 (the Act), carrying over many of the provisions from the regulations. The parliamentary legal committee issued two reports — one regarding the regulations[18] and the other regarding the bill[19] — both of which declared several provisions of the regulations and the bill to be unconstitutional. The speaker of parliament dismissed the report on the bill on a technicality and the bill was passed without amendment.[20]

**27.** CRPL then initiated proceedings in the Supreme Court to challenge the constitutionality of the Broadcasting Services Act. Accordingly, in June 2001, CRPL applied to the Supreme Court to rule that key operative provisions of the Act were unconstitutional on the basis of being inconsistent with section 20(1) of the Zimbabwean Constitution, guaranteeing the right of freedom of expression.

**28**. There was a significant delay in hearing the matter In the interim, the Broadcasting Authority of Zimbabwe (BAZ), which was established by the Act, made a call for satellite television license applications in 2002, although formally this fell within the minister's ambit, not that of the BAZ. Four license applications were received but all were rejected.[21] This was the first ever call for license applications under the Regulations or the Act.

16 Letter of demand.
17 Court Order from Gwaunza J November 2000.
18 Regulations Report.
19 Bill Report.
20 IFEX Update, 'Broadcasting Services Bill passed into law' April 2001.
21 IFEX Update 'Information Minister rejects applications for satellite broadcasting licenses' 12 July 2002.

**29.** The Supreme Court handed down its judgment on 19 September 2003, ruling that the majority of the contested provisions were either constitutional or that CRPL did not have standing to challenge them.[22] The court held four of the seventeen challenged provisions to be unconstitutional.

**30.** At the time of the Supreme Court's judgment, the Zimbabwean government enacted the Broadcasting Services Amendment Act 2003 (Amendment Act). The Amendment Act repealed section 6 of the Act (which designated the Minister as the broadcast licensing authority). The Amendment Act did not, however, repeal any of the other provisions which the Supreme Court had ruled were unconstitutional.

**31.** A second call for applications, this time for both radio and television, was made in March 2004. This would have been the first ever opportunity for CRPL or other aspirant radio broadcasters to apply for a license. Once again, all of the applications were denied.[23] It was announced in May 2005 that Munhumutape African Broadcasting Corporation (MABC) was short listed by the BAZ for further consideration for a license but in August 2005 the BAZ denied MABC's application.[24]

**32**. In September 2004, the Zimbabwean government enacted subordinate legislation outlining the schedule of broadcast license fees for broadcasting licenses.[25] These license fees were prohibitively expensive given the increasingly difficult economic situation in Zimbabwe and hence constituted a further barrier to the feasibility of private broadcasting in Zimbabwe. The license fee for a 10-year national commercial radio broadcasting license was set at ZM$ 672 million (approximately US$ 159,620 at the time) coupled with a ZM$ 5 million (US$ 1,187) non-refundable application fee, and a frequency fee of ZM$ 800,000 (US$ 190) per month. For a 10-year national commercial television license, the fee was ZM$ 840 million (US$ 199,525), along with the application fee. For a local commercial radio license, the fee was ZM$ 14 million (US$ 3,325).

**33.** By the time this communication was filed before the Commission no private broadcasting license have been granted in Zimbabwe, leaving in place the state broadcasting monopoly.

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22 *Capitol Radio (Private) Limited v the Broadcasting Authority of Zimbabwe*, the Minister of State for Information and Publicity and the Attorney General of Zimbabwe. Judgment No SC 128/02 (Capitol Radio). Judgment was handed down on 19 September 2003.

23 US Department of State Bureau of Democracy, Human Rights and Labour, Country Report Zimbabwe 2004, section 2a.

24 Zimbabwe Independent 'MABC denied license' 16 September 2005.

25 Broadcasting Services (Licensing and Content) Regulations 2004, Statutory Instrument 185 of 2004.

## Articles alleged to have been violated

**34.** The complainants allege violation of articles 1, 2 and 9 of the African Charter.[26]

## Procedure

**35.** The complaint dated 18 August 2005 was received at the Secretariat of the African Commission on Human and Peoples' Rights (the Secretariat) on 19 August 2005.

**36.** The Secretariat acknowledged receipt of the same on 22 August 2005.

**37.** An amended version of the complaint, dated 6 October 2005, was received by the Secretariat on 11 October 2005. On 11 October 2005, the Secretariat wrote to the complainants acknowledging receipt thereof.

**38.** 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 thereof.

**39.** On 15 December 2005, the Secretariat notified the respondent state of this decision and requested it to forward its written submissions on the admissibility of the matter.

**40.** On 30 January 2006, a similar notice was sent to the complainants also requesting them to forward their written submission on the admissibility of the matter.

**41.** On 25 April 2006, the Secretariat received the written submissions of the complainants on admissibility.

**42.** At its 39th ordinary session, the African Commission considered the communication and decided to defer it to its 40th ordinary session pending the respondent state's submission on admissibility. The parties were notified accordingly.

**43.** At its 40th ordinary session, the African Commission considered the communication and deferred its decision thereof to the next session. The complainant sent in further submissions on the communication and the respondent state also made its submissions during the said session.

**44.** At its 41st ordinary session, the communication was further deferred to the 42nd ordinary session for a decision on admissibility and the parties were accordingly informed of the decision by a *note verbale* and letter dated 8 July 2007.

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[26] The complainants also aver that the provisions of art 9 of the African Charter should be read in light of the African Commission's Declaration of Principles on Freedom of Expression in Africa (Declaration), with principles I, II, III, V, VII and XVI having particular bearing on this communication.

**45.** During the inter-session, the Secretariat on examining the respondent state's submission on admissibility discovered that they had sent submissions on the merits instead of submissions on admissibility as requested.

**46.** By *note verbale* ACHPR/LPROT/COMM/305/ZIM/TN, dated 6 September 2007, the Secretariat informed the respondent state of this and asked the later to make submissions on admissibility by 30 September 2007. The Secretariat also informed the respondent state that if it wishes the African Commission to proceed on the merits of the case, this should be indicated by the state.

**47.** During the 42nd ordinary session held from 15 – 28 November 2007 in Brazzaville, Republic of Congo, the Commission considered the communication and decided to defer the decision on admissibility to the 43rd ordinary session.

**48.** The parties were informed of the decision of the Commission by a *note verbale* and letter dated 19 December 2007.

**49.** At its 43rd, 44th and 45th ordinary sessions the Commission considered the communication and deferred its decision on admissibility as the respondent state did not submit its arguments on admissibility.

**50**. By *note verbale* and letter dated 3 June 2009 the Secretariat informed the parties of the deferment of the Commission's decision on admissibility to its 46th ordinary session and further notified the respondent state of the former's decision to proceed to decide on the communication if it fails to submit its arguments on admissibility.

**51.** On 19 August 2009 the Secretariat received the respondent state's submission on admissibility of the communication.

**52.** During its 46th ordinary session the Commission considered the communication and deferred its decision to the 47th ordinary session to enable the Secretariat prepare a draft decision on admissibility.

**53.** During its 47th ordinary session held in Banjul, The Gambia, from 12 to 26 May 2010, the African Commission decided to defer its decision on admissibility to its 48th ordinary session.

**54**. In *note verbale* and letter dated 16 June 2010 the respondent state and the complainants respectively were informed of the above decision of the African Commission.

## The law on admissibility

## Complainants' submission on admissibility

**55.** The complainants submit that they have met all the admissibility requirements under article 56 of the African Charter. They submit that the communication complies with article 56(1) as

the authors of the communication are listed as Article 19, Gerry Jackson, Michael Auret Jr, Media Institute of Southern Africa and the Institute for Human Rights and Development in Africa.

**56.** Regarding article 56(2) of the Charter, the complainants submit that the communication alleges violation by the respondent state of articles 1, 2 and 9 of the Charter. They submit that the respondent state has violated article 1 of the Charter by failing to adopt measures to give effect to its obligations under article 9 of the Charter and this has the effect of denying the rights enshrined in this provision. They also argue that the specific actions of the respondent state, particularly the minister's official statement that CRPL would never be granted a license because of its predominately white ownership, discriminated against CRPL, thereby constituting a violation of article 2 of the Charter. They therefore submit that these allegations establish a *prima facie* violation of the Charter and thus compatible with article 56(2).

**57.** Regarding article 56(3) of the Charter, the complainants aver that the communication is written in a manner that is neither disparaging nor insulting to either the respondent state or the Organization of African Unity (now the African Union).

**58.** With respect to article 56(4) the complainants submit that the communication is supported by first-hand experience of two of the complainants, court rulings and other pertinent documents, which are annexed to the communication.

**59.** Concerning article 56(5) of the Charter, the complainants submit that the Supreme Court handed down its judgment on 19 September 2003, ruling that most of the impugned provisions it was challenging were either constitutional or that CRPL as a prospective broadcaster, lacked standing to challenge them. According to the complainants, in respect of the provisions ruled constitutional (which constituted a number of the key operative provisions of the broadcast regulatory regime), it is well established that when the highest appellate court of a respondent state has pronounced on an issue in contention, it is settled that the remedy is exhausted.[27]

**60.** According to the complainants, the Supreme Court ruled that four out of the seventeen provisions were unconstitutional.[28] This

[27] See for example A Cancado Trinidade *The application of the rule of exhaustion of local remedies in international law: Its rationale in the international protection of individual rights* (1983) 58.

[28] The Supreme Court of Zimbabwe ruled that secs 6, 9(1), (2) & (3) were unconstitutional. Sec 6 designate the Minister as the licensing authority; sec 9(1) restricts one national broadcasting license to each radio and television; sec 9(2) restricts only one signal carrier license to be issued other than to public broadcaster; and sec 9(3) prohibits a person holding both a broadcasting license and signal carrier license.

limited ruling of unconstitutionality would not, in their view, even if fully implemented, provide an effective solution to the violations of the Charter as it would not remedy the systematic Charter violations which are inherent in the broadcast regulatory regime as a whole. The complainants believe that the predominant effect of the broadcast regulatory regime at present is to keep in place the state broadcasting monopoly, which, as a result of the Act, has continued uninterrupted by the Supreme Court's ruling.

**61.** Furthermore, they aver that the Amendment Act largely ignored the Supreme Court's ruling on unconstitutionality and no further legislation has been enacted to implement these rulings. Accordingly, the complainants argue, the limited remedy provided by the Supreme Court was rendered ineffective.

**62.** It is submitted that the Amendment Act responds to only one of the rulings of unconstitutionality of the Supreme Court judgment, but even such minor compliance with the Supreme Court's judgment fails to address the fundamental issue of the minister's ability to exert significant influence over the licensing process and the broadcast regulatory regime. The complainants are of the view that a broadcast licensing process which is not independent of government control is inconsistent with the right to freedom of expression, an argument which remains unaffected by both the Supreme Court's ruling and the Amendment Act.

**63.** The complainants allege that by allocating formal regulatory responsibility to the BAZ and at the same time reserving significant powers of intervention and direction to the minister, the Amendment Act fails to address the primary arguments put forward both at the Zimbabwean Supreme Court and in the present communication.

**64.** In conclusion, the complainants contend that by pursuing to completion the Supreme Court proceedings, CRPL has exhausted available domestic remedies.

**65.** Concerning the admissibility requirement under article 56(6) of the Charter, the complainants submit that the communication was filed before the Commission in August 2005, but September 2003, the date on which the Supreme Court rendered its judgment, should not be taken as the correct point for purposes of exhaustion of local remedies, because according to the complainants, it was reasonable to wait and see how the Supreme Court judgment would be implemented and whether any broadcasting license would be issued.

**66.** According to the complainants, this is supported by the fact that a call for application for satellite television broadcasting licenses had been made in 2002, although all four applicants were in fact rejected. Furthermore, a call for national radio and television broadcasting license applications as well as local commercial radio licenses was made some months after the Supreme Court judgment,

in March 2004, and the period for submitting radio license applications was extended until January 2005. In May 2005, they submit, the BAZ announced that of the five applicants, only one had been short-listed. In August 2005, it was announced that even this applicant, MABC, would not be given a license.

**67.** Following the denial of all the applications after the March 2004 call, this made it clear that the authorities were not implementing even the very flawed broadcasting regime set out in the act in good faith, the complainants' claim that they decided to file the communication with the Commission.

**68.** The complainants also submit that this communication has not been submitted to any other international body in accordance with article 56(7) of the Charter.

**69.** For these reasons, the complainants submit that the complaint satisfies each of the requirements for admissibility.

## Respondent state's submission on admissibility

**70.** The respondent state contends that non-compliance with even a single requirement under article 56 of the Charter renders a communication inadmissible, and that article 56(5) on exhaustion of local remedies has not been complied with by the complainants.

**71.** The state avers that the record shows that CRPL approached the Supreme Court in 2000 in the case *CRPL v Ministry of information, Posts and Telecommunications* SC99/2000 and was successful in having section 27 of the Broadcasting Act and sections 14(1) and 14(2) of the Radio Communications Services Act declared unconstitutional.

**72.** In the same year, the state submits, CRPL was granted an order by the High Court of Zimbabwe to have its confiscated property returned to it, which was accordingly returned. The respondent state further submits that CPRL was ordered not to carry out broadcasting services until properly licensed and in order for the license to be issued and the air waves allocated; CPRL was required by the court order to submit its equipment and site for inspection. The latter was not done, and hence, the state argues, CRPL itself has contributed to the failure to comply with the full court order and that CRPL has not satisfied this requirement to date.

**73.** The respondent state submits that in 2002 CRPL approached the Supreme Court, which as provided by the national law is the first court of instance in matters relating to constitutional cases or matters relating to the Bill of Rights. The court considered the application on the merits and declared that sections 6, 9(1), (2) & (3) were unconstitutional, and declared sections 8(1), (2) and (5), 11(4), 12(1)(f), 12(2), 12(3), 15, 16 and 22(2) constitutional. The sections that were declared unconstitutional, according to the respondent state, were repealed or amended to be in conformity with the

Constitution. This record of proceedings, the respondent state argues, shows that CRPL was never without a remedy.

**74.** The respondent state claims that having declared some sections of the RSA unconstitutional, and the state having amended those provisions accordingly, its broadcasting monopoly was removed and CRPL could have taken that opportunity, but the latter failed to apply for a license on both the first and the second calls made in 2002 and 2004 respectively. Previously, the respondent state alleges, other aggrieved parties in similar circumstances sought relief from the High Court and were granted licenses as in *Retrofit v Minister of Information, Posts and Telecommunications*.

**75.** The respondent state avers that if CRPL had applied for and was not granted the license then it should have taken the matter to court as the remedy has been proven not only to be available but effective.

**76.** With respect to article 56(6) of the Charter the respondent state submits that even if the Commission were to find that local remedies were exhausted, the communication was submitted after an unduly prolonged period of time as it was filed with the Commission after more than two years.

## Commission's analysis on admissibility

**77.** Article 56 of the Charter provides for seven requirements on the basis of which the admissibility or otherwise of communications is determined. Accordingly, the Commission proceeds to assessing the submissions of both parties against the requirements under the said provision.

**78.** Although the respondent state challenges the admissibility of the present communication only on two grounds, that is article 56(5) and (6) of the Charter, the Commission finds it necessary to analyse the admissibility of the communication against all the seven requirements under article 56 of the Charter.

**79.** Article 56(1) requires communications to indicate the authors even if the latter wants to remain anonymous. With respect to this requirement, the complainants have indicated their names as: Article 19, Gerry Jackson, Michael Auret Jr, Media Institute of Southern Africa and the Institute for Human Rights and Development in Africa together with their contact addresses. The respondent state has not raised any objection on this issue. Accordingly, since the communication clearly lists the names and contact details of the complainants (authors), the Commission holds that the communication meets the requirement under article 56(1) of the Charter.

**80.** The second admissibility requirement provided under article 56(2) states that communications should be compatible with the

Constitutive Act of the African Union (AU) or with the African Charter. The complainants submit that the respondent state has violated articles 1, 2 and 9 of the Charter. They have also briefly narrated the series of events and acts that they allege have caused the violation of those provisions of the Charter. The respondent state however does not challenge the admissibility of this communication on this ground. The Commission is of the view that the facts described in this communication reveal a *prima facie* violation of the Charter, and the communication is brought by persons within the jurisdiction of a state party to the Charter. Based on the above, the Commission is satisfied that the requirement under article 56(2) has been met.

**81.** Article 56(3) provides that for a communication to be admissible it must not be written in a language which is insulting or disparaging to the AU or the respondent state or its institutions. The complainants contend that the communication is written in a manner that is neither disparaging nor insulting to either the respondent state or the OAU (present AU). The respondent state is again silent on this claim which is taken as acceptance. Having studied the communication, the Commission does not find it disparaging in any way. The Commission therefore concurs with the complainants that the communication complies with article 56(3) of the Charter.

**82.** Article 56(4) of the Charter requires communications not to be based exclusively on news disseminated by the media. The complainants submit with respect to this requirement that the communication is based on personal experiences and testimonies of two of the complainants and the rulings and proceedings of the High Court and Supreme Court of Zimbabwe. They have also attached the relevant acts, parliamentary legal committee report and numerous reports of NGOs. This claim is not contested by the respondent state. Thus, the Commission is of the view that this complaint is not solely based on news disseminated by the media and hence complies with article 56(4) of the Charter.

**83.** Article 56(5) requires that communications should be brought to the Commission after exhausting all local remedies, if any, unless it can be shown that the procedure of exhausting local remedies have been unduly prolonged. The complainants submit that CRPL challenged the constitutionality of seventeen provisions of the Broadcasting Services Act 2001, and the Supreme Court in its 19 September 2003 judgment ruled that four out of the seventeen provisions of the Act were unconstitutional, and the rest were found to be constitutional or that CRPL, as a prospective broadcaster, lacked standing to challenge them.

**84.** The Supreme Court is the court of original and final jurisdiction on matters relating to the constitutionality of laws and the bill of rights. No appeal lies from the decision of the Supreme Court. Thus, having approached the Supreme Court of the respondent state the

complainants are still not satisfied with the judgment and hence they were left with no other local remedy. It is the Commission's view that with respect to this communication, the complainants have exhausted the domestic remedies available to them.

**85.** The respondent state's argument that the repeal or amendment of certain provisions that were found to be unconstitutional by the Supreme Court provided the CRPL with domestic remedy is noted, but does not deny the fact that the complainants exhausted local remedies.

**86.** The respondent state is of the view that after the ruling of the Supreme Court and the subsequent amendment of the provisions of the regulatory framework found to be unconstitutional, CRPL should have applied for a license using the two calls for application made by BAZ in 2002 and 2004. According to the respondent state, had CRPL applied for, and not been granted a license then it should have taken the matter to court. The position of the respondent state is that by not applying for a license there is an available and effective domestic remedy left to be pursued.

**87.** The Commission wishes to state with respect to the above submissions by the respondent state that the matter before this Commission is the compatibility of the provisions of the Broadcasting Services Act with the African Charter. The CRPL petitioned the Supreme Court of Zimbabwe arguing that seventeen provisions of the Act are unconstitutional (and restrict the enjoyment of freedom of expression). The Supreme Court ruled that four of the seventeen provisions are indeed unconstitutional. However, the complainants are not satisfied with the decision of the Supreme Court, nor are they satisfied with the measures taken by the state to amend some of the provisions found to be unconstitutional. They have thus approached the Commission challenging those same provisions as contravening articles 1, 2 and 9 of the African Charter. Nowhere in their submissions have the complainants indicated that they were before the Commission because they could not apply for a license or that they have been denied a broadcasting license. The state can therefore not rely on an issue that is not before this Commission to argue that local remedies have not been exhausted. Therefore, this communication has complied with article 56(5) of the Charter.

**88.** Article 56(6) stipulates that a communication should be submitted within a reasonable period of time after exhausting local remedies or from the date the Commission is seized with the matter.

**89.** In the present communication the Supreme Court rendered its judgment on 25 September 2003 and the complainants submitted the complaint with the Commission on 19 August 2005, which is almost two years after exhausting local remedies.

**90.** The question here is, can this period be considered as 'reasonable' in terms of article 56(6) of the Charter?

**91.** Unlike the European Convention on Human Rights and Fundamental Freedoms[29] and the American Convention on Human Rights,[30] which provide a specific time limit for the submission of communications, which is six months, the African Charter only provides that communications should be submitted 'within a reasonable period' which is not defined. The Commission thus treats each case on its own merit to ascertain the reasonableness of the time.[31]

**92.** Thus, in *Darfur Relief and Documentation Centre v Republic of Sudan*[32] the Commission stated that the lapse of two years and five months or 29 months without any reason or justification was considered as unreasonable. The Commission noted further that where there is a good and compelling reason why a complainant does not submit his complaint to the Commission for consideration, the Commission has a responsibility, for the sake of fairness and justice, to give such a complainant an opportunity to be heard.

**93.** In the present communication, it took the complainants two years after the exhaustion of local remedies to bring the matter to the Commission. The reason advanced by the complainants for this delay in submission is that they wanted to wait and see how the Supreme Court's judgment would be implemented and whether any broadcasting licenses would be issued.

**94**. Is the reason advanced by the complainants 'good and compelling'?

**95.** The issue brought before the Supreme Court by CRPL was that seventeen provisions of the broadcasting regulatory regime (the BSA) were unconstitutional. The Supreme Court held that four of the provisions were indeed unconstitutional and the others were constitutional and that CRPL had no standing before the Court. The court's decision was not appealable as the Supreme Court is the highest court in Zimbabwe. CRPL was not satisfied with the court's ruling as it insisted that the provisions restrict the enjoyment of freedom of expression. So why was it necessary for the complainants to 'wait and see' how the Supreme Court's decision would be implemented, and whether any broadcasting license would be issued?

**96.** The reason advanced by the complainants for the delay is neither good nor compelling. The CRPL itself did not apply for a license. It was 'waiting to see' whether others who applied would be

29 Art 26 European Convention on Human Rights and Fundamental Freedoms.
30 Art 46(1)(b) American Convention on Human Rights.
31 Communication 310/05, *Darfur Relief and Documentation Centre v Republic of Sudan* [(2009) AHRLR 193 (ACHPR 2009)] para 74.
32 *Darfur Relief and Documentation Centre v Republic of Sudan* para 77.

granted the license. In any case the matter before the Commission is not the refusal to grant licenses, it is rather the incompatibility of provisions of the BSA with the African Charter. The complainants knew as far back as September 2003 that they had reached 'a dead end' at domestic level. They could have within a reasonable time seized the Commission with the matter. Waiting for two years with no compelling reason is not justifiable.

**97.** For the above reasons the Commission finds that the communication was not filed within a reasonable time after the exhaustion of local remedies and hence does not comply with article 56(6) of the Charter.

**98.** Article 56(7) of the Charter states that a communication submitted to the Commission should not be one already settled by states involved according to the principles of the Charter of the United Nations, or the Charter of the OAU or the provisions of the African Charter. The complainants submit that the communication has not been submitted to any other international body for settlement and the respondent state has not contested this claim. Thus, the Commission holds that the communication fulfils the requirement under article 56(7) of the Charter.

## Decision of the commission on admissibility

**99.** In view of the above, the African Commission on Human and Peoples' Rights decides:

(i) To declare this communication Inadmissible as it does not comply with the requirement of article 56(6) of the African Charter;

(ii) To give notice of this decision to the parties; and

(iii) To include this decision in its report on communications.

# SUB-REGIONAL COURTS

# ECOWAS COMMUNITY COURT OF JUSTICE

## Socio-economic Rights and Accountability Project (SERAP) v Nigeria and Another

**(2010) AHRLR 145 (ECOWAS 2010)**

*Registered trustees of the socio-economic rights and accountability project (SERAP) v Federal Republic of Nigeria & Another*

Community Court of Justice of the Economic Community of West African States (ECOWAS), suit ECW/CCJ/APP/12/02, judgment, 30 November 2010

Judges: Donli, Benin, Sidibe

Corruption and resources available for education

**Corruption** (link to education, 19-21)
**Evidence** (issue estoppel, 12)
**Remedies** (limit to power of court to order arrest, 24)
**Education** (justiciability, 26)

**1.** The plaintiff is a human rights non-governmental organisation registered under the law of the Federal Republic of Nigeria. The first defendant is a member state of the Economic Community of West African States. The second defendant, Universal Basic Education Commission (UBEC) is body set up by the first defendant to ensure the success of basic education in the country.

**2**. The plaintiff filed an application against the defendants alleging the violation of the human rights to quality education, the right to human dignity, the right of peoples to their wealth and natural resources, and the right of people to economic and social development guaranteed by articles 1, 2, 17, 21 and 22 of the African Charter on Human and Peoples' Rights (ACHPR).

**3**. According to the applicant, the genesis of this matter is a report of investigations conducted into the activities of the second defendant. Indeed the investigation centred on the mismanagement of funds allocated for basic education in ten states of the Federation

of Nigeria. This report was submitted to the Presidency on 13 April 2006. The exact amount though has not been disclosed.

**4.** The applicant further avers that besides, in October 2007, the Independent Corrupt Practices Commission (ICPC) reported having more than 488 million naira of funds looted from state offices and headquarters of the second defendant and was still battling to recover another 3.1 billion naira looted by officials of the second defendant.

**5.** The applicant contends that this is not an isolated case but an illustration of high level corruption and theft of funds meant for primary education in Nigeria. The result is that Nigeria is unable to attain the level of education that she deserves in that over five million Nigerian children have no access to primary education, among others. The applicant catalogued a number of factors that have negatively affected the educational system of the country, including failure to train more teachers, non-availability of books and other teaching materials etc.

**6**. The applicant case against the first defendant is that she has 'contributed to these problems by failing to seriously address all allegations of corruption at the highest levels of government and the levels of impurity that facilitate corruption in Nigeria.' The result is that this has contributed to the denial of the right of the peoples to freely dispose of their natural wealth and resources, which is the backbone to the enjoyment of other economic and social rights such as the right to education.

**7.** The applicant submitted that the destruction of Nigeria's natural resources through large scale corruption is the sole cause of the problems denying the majority of the citizens' access to quality education. Hence, the first defendant has violated the right to education, the right of the people not to be dispossessed of their wealth and natural resources and the right of the people to economic and social development.

**8.** In arguing its case, the applicant quoted the provisions of article 4(g) of the 1993 Revised Treaty of ECOWAS, as well as articles 1, 2, 17, 21 and 32 of the ACHPR and submitted that the first defendant has violated the right to education, the right of the people not to be dispossessed of their wealth and natural resources and the right of the people to economic and social development

**9**. In conclusion, the applicant prayed the court for:

(1) A declaration that every Nigerian child is entitled to free and compulsory education by virtue of article 17 of the African Child's Rights Act, section 15 of the Child's Rights Act 2003 and section 2 of the Compulsory Free and Universal Basic Education Act 2004;

(2) A declaration that the diversion of the sum of 3.5 billion naira from the UBE fund by certain public officers in 10 states of the Federation of

Nigeria is illegal and unconstitutional as it violates articles 21 and 22 of the ACHPR;

(3) An order directing the defendants to make adequate provisions for the compulsory and free education of every child forthwith;

(4) An order directing the defendants to arrest and prosecute the public officers who diverted the sum of 3.5 billion naira from the UBE fund forthwith;

(5) An order compelling the government of Nigeria to fully recognise primary school teacher's trade union freedoms, and to solicit the views of teachers throughout the process of educational planning and policy-making;

(6) An order compelling the government of Nigeria to assess progress in the realisation of the right education with particular emphasis on the Universal Basic Education: appraise the obstacles, including corruption, impeding access of Nigerian children to school, review the interpretation and application of human rights obligations throughout the education process.

**10.** The defendants totally rejected the claims by the applicant. The defendants filed separate statements wherein they identified some issues as being material to a determination of this matter. The first defendant formulated three issues relating to namely, court's jurisdiction, failure on the part of the applicant to exhaust local remedies, and failure by the applicant to establish their claims.

**11.** The second defendant set out a number of issues, namely, competence of court to answer the allegations made by the applicant, whether the proper parties are before the court, whether the applicant has established their case and whether the applicant has exhausted local remedies.

## Preliminary issues

**12.** On 27 October 2009, the court issued a ruling in an application for preliminary objection raised by the defence. These issues about the court's jurisdiction in this matter as well as the exhaustion of local remedies were decided in that ruling. It is thus inappropriate for counsel to raise the same issues again. The principle of law is clear that when a court has decided on some issues in the case, the decision creates issue estoppel as between the parties and/or their privies in the present and any subsequent proceedings in which same issue's is/ are raised. Besides, the decision of this court is final and can only be altered through a revision if the correct procedure is followed. In view of the foregoing, the court cannot re-open these two issues about its jurisdiction and exhaustion of local remedies.

## Analysis of the main issues

**13.** The key issue is whether, having regard to the record before the court, the applicant has established a case against the defendants or any of them. The other issue about whether the second defendant is answerable for the education units of the states who they regard as the proper parties to this case will be addressed first. This is because

if the second defendant is a wrong party sued, there will be no point discussing the main issue with reference to them.

**14.** According to the second defendant, among other duties they are mandated by law to perform, they 'receive block grant from the Federal Government and allocate the states and Local Governments and other relevant agencies implementing the Universal Basic Education'. In fulfilling these duties, they are required under the enabling Act not to disburse such grant until satisfied that the earlier disbursements have been applied in accordance with the provisions of the Act.

**15.** A cursory reading of this provision in the Act which the second defendant themselves relied upon shows that they have a responsibility to ensure that the funds they disburse to the states, *inter alia*, are utilised for the purposes for which they were disbursed. Thus the second defendant cannot be heard to say that if funds given to the states are not properly accounted for they are not responsible, albeit vicariously. It is clear from the use of the mandatory expression 'shall not disburse' that the Act has placed the onus on them to be satisfied that the funds are properly utilised, hence the power given to them to refuse further disbursements. The language of the statute is so clear and unambiguous requiring no interpretation. Thus the second defendant is a proper party in this action, despite the fact that the ten states mentioned in the report might also have been joined to this action.

**16**. Turning next to the main issue, the applicant relies largely on the ICPC report which they annexed to their papers filed in this case. The ICPC report uncovered corrupt practices in the management of funds allocated for education. On this basis, the applicant contends that the 'allegations of high level corruption have contributed to series of serious and massive violations of the right to education, including lack of access to quality primary education in Nigeria.'

**17**. The defendants are alleged to have contributed to the denial of education to a lot of Nigerians by failure to seriously address all allegations of corruption at the highest levels of government and the levels of impunity that facilitate corruption in Nigeria. This situation has contributed to the denial of the right of the peoples to freely dispose of their natural wealth and resources, which is the backbone to the enjoyment of the right to education and other economic and social rights.

**18.** To begin with, the ICPC report is the product of investigations into the affairs of the basic education sector. In law, such investigative report is not conclusive of the facts stated therein, nonetheless they provide prima facie evidence of the facts investigated. If the report finds that there is evidence of corruption, it behooves the appropriate authority to act further on it, and secure

a judicial verdict. It is only then that a person investigated can be said to be guilty of the allegations or findings of corruption contained in the report. The fact that the report is not conclusive of the facts stated therein explains the use of such words and expression as 'allegedly', 'reportedly', 'according to reports', in the initiating application.

**19.** Granting that the ICPC report has made conclusive findings of corruption that *per se* will not amount to a denial of the right of education. Admittedly, embezzling, stealing or even mismanagement of funds meant for the education sector will have a negative impact on education since it reduces the amount of money made available to provide education to the people. Yet it does not amount to denial of the right to education, without more. The reason is not far to seek. The federal government of Nigeria has established institutions, including the second defendant to take care of the basic education needs of the people of Nigeria. It has allocated funds to these institutions to carry out their mandate. We believe these are all geared towards fulfilling the right to education. Some officers charged with the duty of implementing the education mandate, are said to have misused, misapplied, embezzled or even stolen part of the funds. The federal government and the second defendant are said to have failed to act against such persons and for that reason, they are said to have denied the right of the peoples of Nigeria to education. There must be a clear linkage between the acts of corruption and a denial of the right to education. In a vast country like Nigeria, with her massive resources, one can hardly say that an isolated act of corruption contained in a report will have such devastating consequence as a denial of the right to education, even though as earlier pointed out it has a negative impact on education.

**20**. The applicant appreciated this last point and so went on to argue that 'this is not an isolated case but an illustration of high level corruption and theft of hands meant for primary education in Nigeria.' This court cannot accept such sweeping conclusion. It is a serious indictment on authorities of the Federal Republic of Nigeria which calls for strict proof, being a criminal matter. In the absence of such proof, the court will reject any suggestion of high level corruption in the educational sector which has resulted in a denial of the right to education.

**21**. The court takes note that in the course if implementing policies, especially financial policies, if funds are stolen or embezzled or misapplied, it behooves the matter to be dealt with internally, that is at the domestic level. This court will only hold a state accountable if it denies the right to education to its people. Funds stolen by officers charged with the responsibility of providing basic education to the people should be treated as crime, pure and simple or the culprits may be dealt with in accordance with the applicable civil

laws of the country to recover the funds. Unless this is done, every case of theft or embezzlement of public funds will be treated as a denial of human rights of the people in respect of the project for which the funds were allocated. That is not the object of human rights violation in this court where every breach or violation must be specifically alleged and proved by evidence.

**22.** Indeed the ICPC report itself did not recommend prosecution in the first place. Paragraph (viii) of its recommendations is pertinent and germane to the ongoing discussion, and it reads:

> All illegal and unauthorised payments including transfers, diversion, misapplied funds or fictitious claims discovered during the course of investigation should be refunded to the government, failure to accede to this request will lead to criminal prosecution of those involved or the Agency.

**23.** The court notes that there is no time frame set in the report for the funds to be recovered. The applicant has jumped the first step in the implementation of the report and is calling for prosecution which is the last resort.

**24.** Be that as it may, even if the report had recommended prosecution, this court will not have the power to order the defendants to arrest and prosecute anybody to recover state money. It is the duty of the Attorney-General to decide on what matter or who to prosecute, and that power is entirely his to exercise and the Attorney-General is not a community official. Within the meaning of article 10(c) of the Supplementary Protocol on the court no ASP/1/01/05 that could be ordered for having failed to perform official act.

**25.** Another order sought by the applicant was that the government of Nigeria should recognise school teachers' trade union freedoms, and to solicit the views of teachers throughout the process of educational planning and policy-making. There is no evidence in support of this. Besides, this is not a human rights issue, whether the government will include another organisation in the planning and execution of its programs. Be that as it may, the Act which established the second defendant, which they annexed to their document, shows that the teachers are not ignored as the applicant wants to imply from the order sought. The Nigeria Union of Teachers, as well as the National Parents/Teachers Association of Nigeria, and the National Teachers Institute are all represented on the board of the second defendant.

## Decision

In the light of foregoing analysis of the facts, the court is able to decide as follows:

**26.** Relief 1. The defendant does not contest that every Nigerian child is entitled to free and compulsory basic education. What they earlier on argued was that the right to education was not justiciable

in Nigeria, but the court in its earlier ruling of 27 October 2009 in this case, decided it was justiciable under the ACHPR.

**27.** Relief 2. As stated already, the ICPC report provides only *prima facie* and not conclusive evidence of the facts stated therein, and there is no judicial pronouncement on these findings. Also the alleged suspects are not parties before us in this action, so this court is unable to make any declaration of illegality or unconstitutionality in this matter.

**28.** Relief 3. The applicant argued that following the diversion of funds, there is insufficient money available to the basic education sector. Embezzlement or theft or part of the funds allocated to the basic education sector will no doubt have a negative impact. However, this is normal since shortage of funds will disable the sector from performing as envisaged by those who approved the budget. Thus, whilst steps are being taken to recover the funds or prosecute the suspects, as the case may be, it is in order that the first defendant should take the necessary steps to provide the money to cover the shortfall to ensure a smooth implementation of the education programme, lest a section of the people should be denied a right to education.

**29.** Relief 4. The court cannot grant this order for the arrest and prosecution of the alleged suspects for reasons already explained.

**30.** Relief 5 and 6. For lack of evidence these orders are refused.

**31.** In conclusion, subject to reliefs one and three which the court grants in terms as stated above, the court rejects all the other reliefs and orders sought.

## Costs

**32.** Since the matter succeeds in part the parties shall bear their own costs.

# SADC TRIBUNAL

## Gondo and Others v Zimbabwe

**(2010) AHRLR 152 (SADC 2010)**

*Barry LT Gondo, Kerina Gweshe, Nyaradzai Katsande, Peter Chirinda, Phanuel Mapingure, Ruth Manika, Sophia Matasva, Trust Shumba, Mercy Magunje v The Republic of Zimbabwe*

Case no SADC (T) 05/2008, 9 December 2010

Judges: Pillay, Mtambo, Mondlane

Non-enforcement of judgment against the state due to State Liability Act

**Remedies** (must be effective, non-enforcement of court order, 13)
**Equality, non-discrimination** (non-enforcement of judgment against the state, 31)
**Remedies** (revalorisation of damages, 43)

[**1.**] The applicants are victims of violence inflicted upon them by the National Police and/or the National Army of the Republic of Zimbabwe (the respondent). Consequent upon the acts of violence, the applicants instituted proceedings against the government of Zimbabwe in various courts in Zimbabwe. They were successful and judgments were entered as follows:

| Applicant's name | Amount awarded | Date of judgment |
|---|---|---|
| 1. Barry LT Gondo | Z$ 5,650,000.00 | 17 May 2006 |
| 2. Kerina Gweshe | Z$ 810,000.00 | 1 March 2006 |
| 3. Nyaradzai Katsande | Z$ 133,144.00 | 20 February 2003 |
| 4. Peter Chirinda | Z$ 3,264,000.00 | 17 August 2003 |
| 5. Phanuel Mapingure | Z$ 950,000.00 | 16 November 2005 |
| 6. Ruth Manika | Z$ 8,552.50 | 1 July 2005 |
| 7. Sophia Matasva | Z$ 4,850,000.00 | 29 March 2006 |
| 8. Trust Shumba | Z$ 1,085,000.00 | 4 October 2004 |
| 9. Mercy Magunje | Z$ 9,030.00 | January 2007 |

[**2.**] The courts also made orders for interest in respect of each award and gave costs to the applicants. The judgment debts have not been paid. It is upon the non-compliance with the judgments or orders of the courts that this application has been brought.

[**3.**] The applicants' case is that the respondent has violated articles 4(c) and 6(1) of the Treaty of the Southern African Development Community, SADC, (the Treaty) by:

> (a) failing to ensure that effective remedies are available to them, and thus failing to act in accordance with the principles of human rights, and
>
> (b) implementing measures likely to jeopardise the principles of human rights provided for in the Treaty.

[**4.**] Article 4(c) provides: 'SADC and its member states shall act in accordance with the following principles ... human rights, democracy, and the rule of law'. Article 6(1) states as follows:

> Member states undertake to adopt adequate measures to promote the achievement of the objectives of SADC, and shall refrain from taking any measures likely to jeopardise the sustenance of its principles, the achievement of its objectives and the implementation of the provisions of this Treaty.

[**5.**] In the circumstances, the applicants seek, the following reliefs:

> (a) a declaration that the respondent is in breach of the Treaty by failing to comply with orders of the High Court of that country;
>
> (b) a declaration that section 5(2) of the State Liability Act [Cap 8:14] of the respondent is in breach of the Treaty in so far as it provides that property of the state may not form the subject-matter of execution, attachment or process to satisfy a judgment debt;
>
> (c) such further and/or alternative reliefs as the Tribunal may deem fit.

[**6.**] They also claim costs of the proceedings.

[**7.**] We note at the outset that while the application is indeed chiefly about the respondent's non-compliance with the orders or judgments of its own courts of law, it also raises the issue whether section 5(2) of the State Liability Act of the respondent, is compatible with the obligations of the respondent under the Treaty in so far as it immunises the respondent from enforcement of judgment debts against it, thereby removing any incentive for it to comply with the orders of the Court and, ultimately, the observance of the rule of law. Section 5(2), in the relevant part, reads:

> Subject to this section, no execution, or attachment, or process in the nature thereof shall be issued against the defendant or respondent in any action or proceedings ... against any property of the state, but the nominal defendant or respondent may cause to be paid out of the Consolidated Revenue Fund such sum of money as may, by a judgment or order of the court, be awarded to the plaintiff, the applicant or petitioner, as the case may be.

[**8.**] Such are the facts before us to which we must now apply the law. We must also mention here that the respondent has left default and not opposed the application on the merits.

[**9.**] As held by this Tribunal in *Mike Campbell (Pvt) Ltd v The Republic of Zimbabwe* (SADC (T) Case No 2 of 2007), 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 in terms of 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 human rights, democracy and the rule of law.

[**10.**] It is settled law that the concept of the rule of law embraces at least four fundamental rights, namely, the right to have an effective remedy, the right to have access to an independent and impartial court or tribunal, the right to a fair hearing before an individual is deprived of a right, interest or legitimate expectation, the right to equality before the law and the right to equal protection of the law.

[**11.**] Article 2(3) of the International Covenant on Civil and Political Rights (the Covenant), which the respondent has ratified, states as follows:

> Each state party to the present Covenant undertakes:
>
> (a) to ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
>
> (b) to ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the state, and to develop the possibilities of judicial remedy;
>
> (c) to ensure that the competent authorities shall enforce such remedies when granted
>
> (the underlining is ours).

[**12.**] Article 5(1) of the Covenant states that the provisions of article 2(3) above may not be impaired or limited through governmental acts, legislative or otherwise. It provides as follows:

> Nothing in the present Covenant may be interpreted as implying for any state, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognised herein or at their limitation to a greater extent than is provided for in the present Covenant.

[**13.**] Article 2(3) of the Covenant, when read in conjunction with article 5, thus forbids, in our view, any legislation or conduct which may render remedies ineffective or may obstruct the implementation of judicial remedies or may provide state immunity from enforcement of Court orders.

[**14.**] Furthermore, articles 27 and 60 of the Vienna Declaration and Programme of Action provide as follows:

> Every state should provide an effective framework of remedies to redress human rights grievances or violations. The administration of justice, including law enforcement and prosecutorial agencies and, especially, an independent judiciary and legal profession in full conformity with applicable standards contained in international human rights instruments, are essential to the full and non-discriminatory realisation of human rights and indispensable to the processes of democracy and sustainable development ...
>
> (the emphasis is ours).

[**15.**] Article 13 of the European Convention on Human Rights provides as follows:

> Everyone whose rights and freedoms as set forth in the Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

[**16.**] In *Ramirez Sanchez v France* [GC], No 59450/00, ECHR 2006-IX – (4.7.06), the European Court of Human Rights held that the absence of a remedy constitutes a violation of the Convention. Where a remedy exists, it must be both effective in practice as well as in law.

[**17.**] In the *Campbell* case, cited above, reference was made by this Tribunal to the pronouncement of the Inter-American Court of Human Rights on article 27(2) of the American Convention of Human Rights which requires American states to respect effective remedies before courts of law or competent tribunals as follows:

> 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
>
> (underlining is ours) — *vide* paragraph 41 of the Advisory Opinion OC-9-87 of October, 1987, Judicial Guarantees in States of Emergency (Articles 27(2), 25 and 8 of the American Convention on Human Rights).

[**18.**] The African Charter on Human and Peoples' Rights (the Charter) which the respondent has ratified, for its part, provides in article 7(1)(a) as follows:

> Every individual shall have the right to have his case heard. This comprises:
>
> (a) the right to an appeal to competent national organs against acts of violating his fundamental rights …

[**19.**] In *Bissangou v Republic of Congo* (2006) AHRLR 80 (ACHPR 2006), the African Commission in dealing with the state's refusal to pay a judgment debt stated at paragraphs 75 and 77 as follows:

> Article 7 includes the right to the execution of judgment. It would therefore be inconceivable for this article to grant the right for an individual to bring an appeal before all the national courts in relation to any act violating the fundamental rights without guaranteeing the execution of judicial rulings ... as a result, the execution of a final

judgment passed by a tribunal or legal court should be considered as an integral part of the right to be heard which is protected in article 7.

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

[**20.**] Article 26 of the Charter provides as follows:

States 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.

[**21.**] In *Zimbabwe Lawyers for Human Rights and the Institute for Human Rights and Development in Africa (on behalf of Andrew Barclay Meldrum) Zimbabwe*, 294/04 [(2009) AHRLR 268 (ACHPR 2009)], the African Commission held that Zimbabwe had violated article 26 and stated in paragraphs 118 to 120 as follows:

It is impossible to ensure the rule of law, upon which human rights depend, without guaranteeing that courts and tribunals resolve disputes both of a criminal and civil character free of any form of pressure or interference. The alternative to the rule of law is the rule of power, which is typically arbitrary, self-interested and subject to influences which may have nothing to do with the applicable law or the factual merits of the dispute. Without the rule of law and the assurance that comes from an independent judiciary, it is obvious that equality before the law will not exist.

It is a vital requirement in a state governed by law that court decisions be respected by the state, as well as individuals. The courts need the trust of the people in order to maintain their authority and legitimacy. The credibility of the courts must not be weakened by the perception that courts can be influenced by any external pressure.

Thus, by refusing to comply with the High Court orders, staying the deportation of Mr Meldrum and requiring the respondent state to produce him before the Court, the respondent state undermined the independence of the courts. This was a violation of article 26 of the African Charter

(the emphasis is ours).

[**22.**] Finally, reference may be made to a decision of one of the courts in the SADC region, the Constitutional Court of South Africa, which has underlined the importance of states complying with court orders. In *Nyathi v MEC for Department of Health, Gauteng and Another* Case CCT 19/07 (2008) ZACC 8 the Constitutional Court stated at paragraph 80 as follows:

In a state predicated on a desire to maintain the rule of law, it is imperative that one and all should be driven by a moral obligation to ensure the continued survival of our democracy. That ... means at the very least that there should be strict compliance with court orders.

[**23.**] We hold, therefore, in the light of the authorities quoted above, that the respondent is in breach of articles 4(c) and 6(1) of the Treaty in that it has acted in contravention of various fundamental human rights, namely the right to an effective remedy, the right to have access to an independent and impartial court or tribunal and the right to a fair hearing.

[**24.**] We now turn to examine the effect of section 5(2) of the State Liability Act (Chapter 8:14) of the respondent which has already been reproduced. Section 5(2) is similar to section 3 of the State Liability Act 20 of 1957 of South Africa which was declared unconstitutional by the Constitutional Court in *Nyathi*, already cited above. The Court held that section 3 placed the state above the law since it did not oblige the state to comply with court orders. The Court stated, *inter alia*, that section 3 infringed:

> (a) the right to equality since it disallows a judgment creditor who obtains judgment against the state the same protection and benefit that a judgment creditor who obtains judgment against a private litigant enjoys;
>
> (b) the right of access to courts since 'deliberate non-compliance with, or disobedience of, a court order by the state detracts from the dignity, accessibility and effectiveness of the courts'. Indeed, the right of access to courts obliges the state to ensure the enforceability of court orders — *vide* paragraphs 40 and 43.

[**25.**] The Court stated at paragraph 18 that the State Liability Act

> is a relic of a legal regime which was pre-constitutional and placed the state above the law: a state that operated from the premise that 'the king can do no wrong'. That state of affairs ensured that the state and, by parity of reasoning, its officials could not be held accountable for their actions
>
> (the emphasis is ours).

[**26.**] The Constitutional Court also considered at paragraph 50 that these violations constituted unreasonable and unjustifiable limitations to the human rights involved and that 'the more substantial the inroad into fundamental rights, the more persuasive the grounds of justification must be'. The Court then explained at paragraphs 51 and 52 that

> section 3 serves to protect the state interests by disallowing attachment as it has the potential to disrupt service delivery and interfere with the state's accounting procedures. The Act does purport to make the state liable for judgment debts that accrue against it. However, the processes involved in gaining satisfaction of such debts are not in place. The doors are closed before compliance has been achieved.

[**27.**] The Court went on to remark at paragraph 79 on the practical effect of section 3 as follows:

> The practical effect of section 3 is that the state cannot be forced to honour court orders as there is no manner in which compliance can be enforced. In the result, the ordinary citizen has no effective remedy available in a situation where the state and its officials fail to comply with a court order.

[**28.**] The Court tellingly rejected at paragraphs 75 and 79 an argument to the effect that since a judgment creditor could seek a *mandamus* or, for that matter, initiate contempt of court proceedings, the restriction or execution against state assets was justified. The Court stated that such an argument ignored the harsh realities of litigation with its risks and expenses.

[**29.**] We would also refer to article 26 of the Covenant which states as follows:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

[**30.**] The Human Rights Committee has explained the provisions of article 26 in its General Comment 18 on Non-Discrimination at paragraphs 7 and 12 as follows:

> The Committee believes that the term 'discrimination' as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.
>
> …
>
> Article 26 provides that all persons are equal before the law and are entitled to equal protection of the law without discrimination, and that the law shall guarantee to all persons equal and effective protection against discrimination on any of the enumerated grounds. In the view of the Committee, article 26 does not merely duplicate the guarantee already provided for in article 2 but provides in itself an autonomous right. It prohibits discrimination in law or in fact in any field regulated and protected by public authorities. Article 26 is therefore concerned with the obligations imposed on states parties in regard to their legislation and the application thereof. Thus, when legislation is adopted by a state party, it must comply with the requirement of article 26 that its content should not be discriminatory. In other words, the application of the principle of non-discrimination contained in article 26 is not limited to those rights which are provided for in the Covenant
>
> (the underlining is ours).

[**31.**] It follows, therefore, that the list of grounds of discrimination in article 26 is non-exhaustive and that section 5(2) of the State Liability Act of the respondent is discriminatory in its content under article 26 of the Covenant since it treats judgment creditors unequally in that a judgment creditor who obtains judgment against the state is not given the same protection and benefit that a judgment creditor who obtains judgment against a private litigant is accorded.

[**32.**] Article 3(1) of the Charter states as follows: 'Every individual shall be equal before the law.'

[**33.**] In the *Zimbabwe Lawyers'* case, cited above, the African Commission has interpreted this article as follows at paragraph 96:

> The most fundamental meaning of equality before the law under article 3(1)of the Charter is the right by all to equal treatment under similar conditions. The right to equality before the law means that individuals legally within the jurisdiction of a state 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. Its meaning is the right to have the same procedures and principles applied under the same conditions. The principle that all persons are equal before the law means that existing laws must be applied in the same manner to those subject to them. The right to equality before the law does not refer to the content of legislation, but

> rather exclusively to its enforcement. It means that judges and administration officials may not act arbitrarily in enforcing laws.

[**34.**] We consider that, although the African Commission has restricted its meaning of the right to equality before the law to the enforcement of the law as such, if the content of the law itself does not allow the law to be enforced equally, as in the case of section 5(2) of the State Liability Act of the respondent, then article 3(1) would be infringed, as the Human Rights Committee has demonstrated in its General Comment 18, quoted earlier.

[**35.**] We consider that section 5(2) of the State Liability Act of the respondent is also in contravention of article 3(2) of the Charter which lays down that 'every individual shall be entitled to equal protection of the law'.

[**36.**] The African Commission has interpreted article 3(2) in the *Zimbabwe Lawyers'* case, already quoted, at paragraphs 99 – 101 as follows:

> Equal protection of the law under article 3(2), on the other hand, means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or class of persons in like circumstances in their lives, liberty, property and in their pursuit of happiness. It simply means that similarly situated persons must receive similar treatment under the law. In its decision in *Zimbabwe Lawyers for Human Rights and the Institute for Human Rights and Development in Africa v Zimbabwe*, (293/04) this Commission relied on the Supreme Court decision in *Brown v Board of Education of Topeka*, in which Chief Justice Earl Warren of the United States of America 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'. In order for a party therefore to establish a successful claim under article 3(2) of the Charter, it should show that the respondent state had not given the complainant 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 complainant.

[**37.**] We hold, therefore, that, in the light of all the authorities already quoted by us, section 5(2) of the State Liability Act of the respondent is not only in breach of the right to an effective remedy, the right to have access to an independent and impartial court or tribunal and the right to a fair hearing but also in contravention of the right to equality before the law and the right to equal protection of the law, and, therefore, is incompatible with the respondent's obligations under articles 4(c) and 6(1) of the Treaty.

[**38.**] We can only reiterate at this stage what the Inter-American Court of Human Rights stated at paragraph 35 of its Advisory Opinion given in 1987, quoted in *Campbell*, already cited, namely 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.'

[**39.**] In this regard, we draw the attention of any member state of SADC to the adverse effect which its existing state immunity or state liability legislation has on the principles of human rights, democracy and the rule of law in so far as such legislation provides that state property cannot be the subject-matter of execution, attachment or process in satisfaction of a judgment debt.

[**40.**] We turn now to the issue of the damages awarded to the applicants which, according to learned counsel for the applicants, should be revalorised, given that the currency of the respondent has suffered excessive depreciation over the years.

[**41.**] In *Eden and Another v Pienaar* 2001 (1) SA 158 (WLD), the Court explained the process of revalorisation, at paragraph 159B as follows:

> This process by which the law seeks to reflect and (counteract) the influence of inflation on the amount of a claim is known as 'revalorisation'. Its effect is that the depreciation of currency does not redound to the benefit of the judgment debtor, and to ensure that the judgment creditor is protected against the ravages of inflation by receiving the actual value of the amount awarded in judgment, as on the day on which he is paid — no less and certainly no more. Although the face value of the debt increases once revalorisation is applied, its real value does not: the purchasing power of the currency in which it is expressed remains constant. Accordingly, revalorisation has nothing to do with interest, nor does it increase the real value of a debt.

[**42.**] In this connection, reference may also be usefully made to article 12(h) of the SADC Charter of Fundamental Social Rights where the process of revalorisation is also mentioned and which states as follows:

> Workers have the right to services, that provide for the prevention, recognition, detection and compensation work related illness or injury, including emergency care, with rehabilitation and reasonable job security after injury and adequate inflation-adjusted compensation
>
> (the underlining is ours).

[**43.**] The amount of damages awarded to the applicants must, in our opinion, be revalorised, in the interests of justice, in order to ensure that the real or actual value of the compensation awarded in the various court orders is received by each applicant on the date of full and final payment, after taking into account the adverse effects of runaway inflation. In other words, the damages awarded to the applicants must be inflation-adjusted.

[**44.**] We therefore hold and declare that:

> (a) section 5(2) of the State Liability Act [Chapter 8:14] of the respondent is in contravention of the fundamental rights to have an effective remedy; to have access to the Courts; to be entitled to a fair hearing, to equality before the law and to equal protection of the law; in so far as it provides that property of the state may not form the subject-matter of execution, attachment or process to satisfy a judgment debt;

(b) the respondent has acted in contravention of article 4(c) and 6(1) of the Treaty by:

(i) failing to comply with the orders of the High Court of Zimbabwe regarding the applicants;

(ii) persisting in its non-compliance with the Court orders referred to in sub-paragraph (i) above.

We further order the respondent's agents to meet with the agents of the applicants, under the supervision of the Registrar, to agree to a mutually satisfactory adjustment to the damages awarded in the court orders referred to in paragraph (b)(i) above.

[**45.**] In the event of non-compliance with the order made above by the Tribunal, the applicants may revert to this Tribunal on the same papers, appropriately amplified if necessary, in terms of article 32(4) of the Protocol on Tribunal, on written notice to the respondent's agents, for further relief regarding enforcement.

[**46.**] With regard to the issue of costs, we shall first refer to rule 78 of the Rules of Procedure of SADC Tribunal (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.

[**47.**] In terms of rule 78, 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.

[**48.**] We consider that there are exceptional circumstances on the particular facts of the present case justifying the award of costs to the applicants in the interests of justice. We need only to highlight in this regard the fact that the respondent persistently flouted the orders of its own High Court and that the applicants have not yet been paid the compensation to which they are entitled since the court orders were made in their favour in 2006 (in respect of the first and second applicants), 2003 (in respect of the third and fourth applicants), 2005 (in respect of the fifth and sixth applicants), 2006 (in respect of the seventh applicant), 2004 (in respect of the eighth applicant) and 2007 (in respect of the ninth applicant). We accordingly award costs to the applicants, under rule 78(2) of the Rules. The costs are to be taxed by the Registrar.

# DOMESTIC DECISIONS

# GHANA

## Ocansey and Another v The Electoral Commission and Another

**(2010) AHRLR 165 (GhSC 2010)**

*Ahumah Ocansey v The Electoral Commission; Centre for Human Rights & Civil Liberties (CHURCIL) v Attorney General and The Electoral Commission*

Supreme Court, Accra, Writ No JI/5/2008, 23 March 2010

Judges: Wood, Date-Bah, Owusu, Dotse, Anin Yeboah
Extracts: Judgment of Wood, CJ (presiding)

Prisoners' right to vote

**Fair trial** (speedy resolution of constitutional disputes, 6, 7; presumption of innocence, 73)
**Political participation** (prisoners' right to vote, 30, 41, 46, 47, 53, 55, 64, 66, 80; right to vote is a fundamental right, 38)
**Interpretation** (broad and generous approach to constitutional interpretation, 43; purposive-literalist, 46, 53, 55; international law, 67; guided by foreign case law, 72)

[**1.**] These two consolidated cases raise important constitutional questions pertaining to the right of prisoners to vote in public elections and referenda, pursuant to article 42 of the 1992 Constitution, as do other citizens of the republic, save those below the age of eighteen years, and persons of unsound mind.

### Suit numbered J1/5/2008 - (The *CHURCIL* case)

[**2.**] In the suit numbered J1/5/2008, instituted by the Centre for Human Rights and Civil Liberties (CHURCIL), pursuant to article 2(1) of the Constitution, this Court is being invited to determine the question in relation to persons being held in prisons and who are usually referred to as remand prisoners. These are persons who have been arraigned before court on criminal charges, are awaiting trial, but are being kept in prison custody, ie legal custody, on court orders. Incidentally, not all remand prisoners are detained in prisons contrary to the law; some spend their period of detention in police cells.

[**3.**] CHURCIL is an advocacy-based organisation, dedicated to the promotion of human rights and the protection of civil liberties through a number of activities including public interest litigation. CHURCIL's action was triggered by the decision of the Electoral Commission (EC), to preclude remand prisoners from exercising their electoral franchise in the then upcoming December 2008 elections, in full recognition of their voting rights under article 42 of the Constitution, unless otherwise ordered by a court of competent jurisdiction to allow them to do so. The Commission had persistently refused to heed to the calls of human rights activists and organisations to respect the voting rights of remand prisoners on the basis that the electoral laws of Ghana, particularly s 7(5) of The Representation of The People Law, 1992, PNDC L.284 (PNDCL 284), disqualify prisons as places of residence for purposes of voter registration, a pre-requisite to voting, thus effectively disenfranchising remand prisoners.

[**4.**] By this court's decision in *NPP v A-G* (*CIBA* case) [1996-97] SCGLR 729, the word 'person' appearing in article 2(1) of Constitution, encapsulates natural and artificial or corporate persons. CHURCIL declares its corporate status as a not-for-profit civil society organisation and as plaintiff prays for the following reliefs:

> (1) A declaration that section 7(5) of the Representation of the People Law, 1992 (PNDCL 284) is inconsistent with, and in contravention of article 42 of the 1992 Constitution, and that consequently, to the extent of such inconsistency the said PNDCL 284 is void;
>
> (2) A declaration that section 7(5) of the Representation of the People Law (PNDCL 284) is null and/or void because the enactment was made in excess of the powers conferred on Parliament by section 93(2) of the 1992 Constitution, or any other head of legislative power;
>
> (3) A declaration that section 7(5) when read together with section 8 of PNDCL 284 is inconsistent with and in contravention of article 17(1) and 17(2) of the 1992 Constitution and that consequently, to the extent of such inconsistency the said PNDCL 284 is void;
>
> (4) Consequential orders in exercise of the Supreme Court's jurisdiction under article 2(2) of the 1992 Constitution compelling/ ordering the Electoral Commission to exercise its constitutional powers under the electoral laws and where necessary under article 45 of the Constitution to facilitate and ensure the registration for effective voting of all remand prisoners entitled to vote by reason of article 42 of the Constitution.

## Suit numbered J1/4/2008

[**5.**] The second action, numbered J1/4/2008, is at the instance of Ahuma-Ocansey, a private legal practitioner. He instituted the action, in his capacity as a citizen of Ghana, and an advocate of prisoners' rights. The reliefs he sought, though substantially the same as CHURCIL's, is broader in scope; to the extent that his action covers all categories of prisoners, that is, both remand and convicted prisoners. It is also not restricted to the 2008 elections, but all future public elections, including all bye elections and referenda. He sought the following declaratory reliefs:

(i) Declaration that non-registration of prisoners for voting by the Electoral Commission contravenes arts 42, 45(a) of the Constitution, and s.1 (a-e) of the Public Elections (Registration of voters) Regulations, 1995 CI 12 and art 21 of the Universal Declaration of Human Rights (United Nations)

(ii) Declaration that refusal or failure of the EC to register prisoners for voting is a violation of their rights as citizens of Ghana, and amounts to derogation of their integrity as human beings. This conduct of the EC contravenes art 15(1) of the Constitution and principle 3 of Body of Principles for the protection of all persons under any form of detention or Imprisonment (United Nations)

(iii) Declaration that the conduct of the EC is defeatist of the Civic responsibility of Ghanaians as citizens of this country, to uphold the sanctity of the freedoms and rights of Ghanaians, as enshrined in arts 35(4) and 41(b) - (d) of the Constitution.

[**6.**] The *CHURCIL* case provokes an important preliminary question, which in my opinion, must be addressed. CHURCIL instituted its action on 7 July 2008, as already noted to enable remand prisoners to vote in the December 2008 presidential and parliamentary elections, whilst the plaintiff in J1/4/2008, instituted his action on 20 June, 2008, on account of all prisoners, without targeting any specific national elections or referenda. That it has taken over a year to dispose of these two cases is indeed regrettable. Constitutional disputes, especially those touching on fundamental rights and freedoms deserve to be determined expeditiously. That is not, to say however that, the disposal of these two cases before 4 December 2008, and in the favour of all categories of prisoners, would have enabled them exercise their franchise in the presidential and parliamentary elections of 2008. However, given the legal calendar and the statutory time frames for filing statements, the chances that these cases could have been disposed of before the election date were indeed very limited. But, there is an even more fundamental reason why prisoners' participation in the 2008 elections, was not feasible. It appears doubtful, indeed very doubtful to me, that the second defendant, the EC would have had the space to meet all the legal and logistical requirements that would have made the prisoners' participation in the December 2008 elections possible.

[**7.**] These challenges do not, however, provide valid justification for the delay. It is hoped that in future, parties and their counsel will assist our courts to carry out their judicial functions in a manner that would promote the timely disposal of constitutional cases, particularly, those related to human rights.

[**8.**] The failure to hear and dispose of the CHURCIL action before the December elections raises the question of whether the action is consequently moot. The scope of the doctrine of mootness has been decisively settled by this court. *JH Mensah v Attorney-General* [1996-97] SCGLR 320, at page359, sets out the parameters as follows:

The principle guiding the court in refusing to decide the moot questions is quite settled. If the question, though moot, is certainly not likely to

> re-occur, the courts will not waste their time to determine questions and issues which are dead and buried forever. But where it is not so established, the courts would go into the questions to forestall a multiplicity of suits. Thus for a court to decline deciding a moot question, it must be established or shown that: 'Subsequent events made it absolutely clear that the allegedly wrong behaviour could not reasonably be expected to recur'.

[**9.**] Firstly, public elections, bye elections included, and referenda are key elements of constitutional democracy. The sovereign will of the people of Ghana, as expressed through article 35(1) of the Constitution, is that Ghana 'shall be a democratic state dedicated to the realisation of freedom and justice'. Consequently, public elections will remain a permanent feature of democratic governance in Ghana and will continue to play a central role in our political affairs until the end of time.

[**10.**] Secondly, the detention of persons awaiting trial in prison custody, in the absence of clear legislation to the contrary, will continue to be an essential feature of our criminal jurisprudence. Ordinarily, persons charged with criminal offences are, by virtue of the rule that presumes them innocent, until they are proven guilty, entitled to be admitted to bail. But bail is not automatic, it is sometimes withheld; with the order that the accused person be detained in legal, ie prison custody. Also, under our criminal laws, there are a number of offences on our statute books, in respect of which courts are constitutionally or statutorily mandated to refuse bail, and order the detention of accused persons in legal, ie prison custody. The overriding consideration for curtailing accused persons right to liberty in such matters is that they are not likely to appear to stand trial if granted bail, having regard to the nature of the offences and the 'severity of the punishment which conviction entails'.

[**11.**] *Gorman & Others v The Republic* [2003-4] SCGLR 784, identifies one other circumstance under which the liberty of persons awaiting trial could be curtailed. The court made this observation:

> we must always guard against a sweeping invocation of fundamental human rights as a catch-all defence of the rights of defendants. People tend to overlook the fact that the Constitution adopts the view of the human rights that seek to balance the rights of the individual as against the legitimate interests of the community. While the balance is decidedly tilted in favour of the individual, the public interest and the protection of the general public are very much part of the discourse on human rights in our Constitution. Thus article 14(1)(d) makes it clear that the liberty of certain individuals, including drug addicts may be curtailed not only for the purpose of their own care and treatment, but also 'for the protection of the community'. Article 14(1)(g) sanctions the deprivation of an individual's liberty upon reasonable suspicion of the commission of an offence under the laws of Ghana, ostensibly for the protection of the community and the body politic.

[**12.**] The second defendant's past conduct, the continuing existence of section 7(5) of the PNDCL 284 on our statute books, clearly points to the future direction in which matters are likely to go. Who will challenge the fact that some more persons have been

admitted into legal custody since CHURCIL filed its writ? The second defendants will continue to deny prisoners the right to vote, unless otherwise directed by this court. We are thus faced with an active controversy over which, this court should adjudicate, in the exercise of its legislative review jurisdiction.

[**13.**] CHURCIL contends that the entrenched provisions of article 42 of the Constitution, confers a constitutional right to vote on all Ghanaian citizens without a single exception, save those below the age of eighteen years and persons of unsound mind. This fundamental right, the argument went, has however been unconstitutionally curtailed by s 7(5) of the PNDCL 284 and s 1(d) of the Public Elections (Registration of Voters) Regulations, 1995 [CI 12].

[**14.**] The relevant portions of the detailed argument setting forth the manner in which PNDCL 284 effectively trammels on the right to vote of remand prisoners is reproduced for its full impact and effect.

> (19) Section 7 of PNDC 284 sets out a legislative criteria (sic) on who qualifies to be registered as a voter. Section 7(1) provides that a person qualifies to be registered as a voter if he is:
>
> (a) a citizen of eighteen years of age or above, and
>
> (b) of sound mind, and
>
> (c) resident in a polling division, or hails from the constituency and
>
> (d) not otherwise disqualified to be registered as a voter by law.
>
> (20) In the same vein, it prohibits a person's name from being included in the register of more than one constituency or in more than one divisional register in a constituency. Section 7(3) creates a conclusive presumption of residence by providing that a person is resident in a polling division on a qualifying date if that person has a place of abode in the division on that date. In addition, section 7(4) establishes a conclusive presumption of loss of residence in a polling division if a person has been 'absent from that person's place of abode for a continuous period of six months ending on the qualifying date.'
>
> (21) More importantly, section 7(5) provides that: 'A person who is a patient in an establishment maintained wholly or mainly for the reception and treatment of persons suffering from mental illness or mental defectiveness or who is detained in legal custody in a place shall not be treated as resident there for purposes of this section ...'
>
> (24) If prisons do not qualify as places of residence then legally such places of legal custody and detention cannot be classified as falling within any polling division *per se* to offer any opportunities for voter registration for the thousands of remand prisoners held in our prisons. The legal and practical result is that when a remand prisoner has been in custody for more than six months ending on a qualifying date the remand prisoner, by reason of the impugned section, automatically loses whatever previous residency status he had in any polling division, for voter registration purposes, because of the remand prisoner's absence from his or her place of abode for a continuous period of six months ending on a qualifying date.
>
> (25) The conclusive presumption of the loss of residency set forth by section 7(5) of PNDC 284 means that all remand prisoners in custody for six months or more ending on a qualifying date are disqualified from registering as voters and therefore denied the right to exercise their constitutional right to vote simply because the impugned section denies legal recognition to prisons as places of residence. Consequently,

remand prisoners are unable to meet the 'resident in the polling division' voter qualification requirement of section 7(1)(c) of PNDC 284.

(26) In the same vein, all remand prisoners are disqualified from having their names included in any register of voters by reason of section 1(d) of the Public Elections (Registration of Voters) Regulation, 1995 [CI 12], because the impugned section disqualifies them from being 'resident or ordinarily resident in an electoral area', a key pre-condition for the inclusion of a person's name in a voters register. CI 12 therefore reinforces the disqualification of remand prisoners from voting.

[**15.**] CHURCIL presses the invalidity charge by the further argument that no 'legitimate or constitutionally permissible state or governmental interest is served by the non-recognition of prisons as places of residence for voter qualification and registration purposes'. They urge that since the challenged legislation fails to meet the proportionality test, the same ought to be struck down on the grounds that it is clearly violative of articles 42 and 93(2) of the Constitution.

[**16.**] In the same vein, he submits that, s 1 of CI 12, made pursuant to article 51 of the Constitution, is unconstitutional, and deserves to be nullified.

[**17.**] Since Ahuma Ocansey's arguments are not fundamentally different from CHURCIL's, I will refer to only those fresh matters that he introduced into the debate. He submitted that having regard to articles 35, 41 and 42 of the Constitution and the Body of Principles of the United Nations, to which Ghana is a signatory, the EC's refusal to allow all categories of prisoners to enjoy their fundamental right to vote is not only plainly unconstitutional, but robs prisoners of their Ghanaian citizenship, given that in our democratic regime, the right to vote is constitutive of citizenship, and the two, namely, voting and citizenship are inextricably linked

[**18.**] In respect of convicted prisoners in particular, he argues that 'the lawful punishment of persons is not tantamount to psychological annihilation, nor political depersonisation; that denying prisoners the right to vote deprives the nation of a vital plank in its democratic machinery and compromises the integrity of our democracy'.

[**19.**] Prisoners, he further submitted, must have a say in matters affecting their welfare as prisoners, namely, how the political governance and judicial and penal administrative systems are working and as these are matters of political decisions and political ideology, they must exercise their right to vote the government into being that best addresses their concerns.

[**20.**] In response, the first defendant argued in favour of validity and the retention of the impugned legislation on the main ground that s 7(5) of PNDCL 284, is reasonably necessary to meet the constitutional duty imposed on the EC by article 47 of the Constitution, which requires that the country be divided into as many constituencies for the purpose of election of Members of Parliament; and with PNDCL 248, deriving its authority from article 47 of the

Constitution. To be eligible to register in a polling division or in a constituency, s 7(5) of PNDCL 284, the argument proceeded, meets an essential electoral requirement that 'a person must have his place of residence in that polling division or constituency on the date of registration for a continuous period of six months.'

[**21.**] Counsel contends that having regard to the dictionary and consequently ordinary meaning of the word 'resident' as appears in the challenged legislation, as well as s 7(5) of PNDCL 284, prisoners do not qualify to register for the purposes of voting in public elections and referenda.

[**22.**] Additionally, counsel justified prisoners' disenfranchisement in terms of article 295(1) of the Constitution, namely that, it is critical, in the interest of public safety and security, that prisoners, who have deliberately violated the laws of the land and the rights of other citizens, be punished and kept away 'under lock and key', as he put it.

[**23.**] The second defendant, the EC, the major player around whom this controversy revolves, set down for our determination, the one broad issue which lies at the heart of this matter. It reads: 'Whether the Electoral Commission has, in this matter, committed any act or made any omission in contravention of the Constitution of the Republic of Ghana.'

[**24.**] In the unreported case titled J1/8/2009, *Daasebre Nana Baah III & 4 Others v The Attorney-General & Electoral Commission*, dated 18 February 2010, I discussed two important principles of constitutional law, applicable in cases relating to judicial review of legislative action. They are the presumptive principle of constitutional validity and the principle of severability of impugned legislation. I explained that the universal principle of validity is so entrenched, 'to doubt the constitutional validity of a law, is to resolve it in favour of its validity. In other words, doubts are resolved in favour of constitutionality and not the person challenging or attacking it.'

[**25.**] The local case of the *Republic v Tommy Thompson Books Ltd Quarcoo & Coomson* [1996-97] SCGLR 804 at 851, and two foreign decisions, *Commonwealth v Tasmania* (The *Tasmanian Dam* case) 158 CLR 1, *F Hoffman-La Roche & Co v Secretary of State for Trade and Industry* 1974 2 All E R 1128 (HL) are clear authorities on the point. As per Lord Diplock in the *Hoffman* case:

> Unless there is such challenge and, if there is, until it has been upheld by a judgment of the court, the validity of the statutory instrument and the legality of the acts done pursuant to the law declared by it, are presumed.

[**26.**] The rule is said to be the result of the respect which one organ of state, the judiciary owes to the other, the elected representatives. Additionally, I think the juridical basis for this principle is the *omnia*

*praesumuntur rite et solemniter esse acta* rule, meaning all acts are presumed to have been done rightly and regularly. In discussing the rationale for the rule in the *Tasmanian Dam* case, reference was made to a text by Hogg writing in the *Constitutional law of Canada* (1977):

> There should be, in other words, a presumption of constitutionality. In this way a proper respect is paid to the legislators, and the danger of covert (albeit unconscious) imposition of judicial policy preferences is minimised.

[**27.**] Another cardinal principle of constitutional law is that in actions challenging the infringement of a fundamental right, the onus is on those alleged to have restricted the right to justify the restriction.

[**28.**] Braithwaite JA of the Trinidad and Tobago Court of Appeal, discussed the principle in the case of *Attorney General v Morgan* [1985] LRC (Const) 770. He addressed the issue (page 797) in the following terms:

> Where an act is passed into law ... and that Act is one that restricts the rights and freedoms of an individual, in order to impugn such an Act all that is required to do is to show that one more of his rights has been restricted. Having done so, because of the expressed constitutional Policy, the burden is then shifted to the proponents of the Act to show that the provisions of the Act restricting such rights and freedoms are reasonable 'restrictions'. If the proponents of the Act fail to discharge this burden, then a court of competent jurisdiction may pronounce against the validity of the impugned Act.

[**29.**] The principle is of universal application. Dickson CJ similarly observed in *R v Oakes* [1986] 26 DLR (4th) 200 at 225-226, in relation to the Canadian Charter on human rights that:

> The onus praying that a limit on a right or freedom guaranteed by the Charter is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation. It is clear from the text of section 1 that limits on the rights and freedoms enumerated in the Charter are exceptions to their general guarantee. The presumption is that the rights and freedoms are guaranteed unless the party invoking section 1 can bring itself within the exceptional criteria which justify their being limited.

[**30.**] Admittedly, s 7(5) of PNDCL 284, the impugned legislation, is not a direct right creating or right extinguishing provision. The section 7(5) merely defines what constitutes residence for purposes of voter registration. But in doing so, prisoners find themselves in positions where they cannot meet the 'resident in the polling division' voter qualification requirement, of s 7(1)(c) of PNDCL 248. The impugned legislation thus effectively takes away prisoners' right to register or vote, in that it refused to recognise prisons as residence within the meaning of that specific law, leading to the following far reaching negative consequences, as contended by CHURCIL:

> By virtue of s 7(1)(c), a conclusive presumption of loss of residence in a polling division, is thereby established in those instances where the prisoner has been absent from his or her place of residence for a continuous period of six months ending on the qualifying date.

[**31.**] Similarly, all prisoners find themselves unable to meet the residency requirement under s 1(d) of the Public Elections (Registration of Voters Regulations, 1995 [C1 12]. Since the offending legislation disqualifies them from being 'resident or ordinarily resident in an electoral area', they are unable to have their names included in a voters' register.

[**32.**] PNDCL 284 was enacted principally for the purposes of concretising the representation of the people of Ghana. The crucial question for our consideration is not whether Parliament has power to enact PNDCL 284 to regulate the division of Ghana into constituencies for the purpose of giving effect to the right to vote as provided under article 42 of the Constitution. The general residency requirement is also not the matter in contention. The central question in these two cases is whether s 7(5) & 8 of PNDCL 284, are inconsistent with article 42 of the Constitution, leading to the violation of prisoners voting rights as guaranteed by the express provisions of the said Constitutional provision. Consequently, it is the validity of the express stipulation under s 7(5) of PNDCL 284, that prisons shall not qualify as places of residence and the legal consequence or effect of the non-recognition of prisons as places of residence that is under challenge.

[**33.**] The answers to this and other ancillary issues which may emerge, lie largely in the interpretation which we ascribe to article 42 of the Constitution.

[**34.**] The PNDCL 284 predates articles 42 and 47 of the Constitution, the basic law which empowers the Electoral Commission, *inter alia* to divide Ghana into as many constituencies as may be prescribed. The main purpose, according to its preamble is to 'provide for the division of the Republic into constituencies for the purposes of the election of members of Parliament and to provide for related matters'.

[**35.**] It is trite learning that PNDCL 284, which was made on 24 July 1992 and gazetted on 7 August 1992 is clearly subordinate to articles 42 and 47 of the Constitution. The fundamental rule is that the Constitution is the supreme law of the land and, in the absence of express constitutional provisions, any other law, whether it pre dates or post dates constitution, which is found to be inconsistent with any of its provisions, shall, to the extent of the inconsistency be void is further reinforced by the internal provisions of the PNDCL 284.

[**36.**] PNDCL 284 is within the category of existing laws as contemplated by article 11(4) of the Constitution and must necessarily be construed by the Court in terms of article 11(6) 'with any modifications, adaptations, qualifications and exceptions necessary to bring it into conformity with the provisions of the constitution, or otherwise to give effect to, or enable effect to be given to, any changes effected by this Constitution'.

[**37.**] Article 42 of the Constitution provides:

> Every citizen of Ghana of eighteen years of age or above and of sound mind has the right to vote and is entitled to be registered as a voter for the purposes of public elections and referenda.

[**38.**] Admittedly, article 42 does not fall under either Chapter Five or Six of the Constitution, which deals with Fundamental Human Rights and Freedoms and The Directive Principles of State Policy, respectively. It falls under Chapter 6. But there is no doubt, that voting rights constitute a fundamental right of such significance or importance it does qualify as a fundamental human right. My stated position is in the light of article 33(5) of the Constitution, which provides:

> The rights, duties, declarations and guarantees relating to the fundamental human rights and freedoms specifically mentioned in this Chapter shall not be regarded as excluding others not specifically mentioned which are considered to be inherent in a democracy and intended to secure the freedom and dignity of man.

[**39.**] Section 7(1) of PNDCL 284 in setting out who qualifies to be registered as a voter stipulates:

(a) a citizen of eighteen years of age or above, and
(b) of sound mind, and
(c) resident in a polling division or hails from the constituency and
(d) not otherwise disqualified to be registered as a voter

[**40.**] However, s 7(5) of PNDCL 248 in spelling out the voting criteria provides:

> A person who is a patient in an establishment maintained wholly or mainly for the reception and treatment of persons suffering from mental illness or mental defectiveness or who is detained in legal custody in a place shall not be treated as resident there for purposes of this section.

[**41.**] The legal impact and consequence of the non-recognition of prisons as places of residence implies that prisons cannot also be classified as falling within a polling division for the purposes of voting.

[**42.**] To determine the broader question of whether or not the s 7(5) of PNDCL 284 is inconsistent with article 42 of the Constitution, we must first throw the search light on article 42 of the Constitution, with a view to discovering who qualifies to vote in terms of its provisions. For the sake of clarity I reproduce it:

> Every citizen of eighteen years of age or above and of sound mind has the right to vote and is entitled to be registered as a voter for the purposes of public elections and referenda.

[**43.**] How do we construe this important constitutional provision? The correct approach to interpreting Constitutions generally and fundamental human rights provisions in particular, is clearly so well settled, it does not admit of any controversy. The jurisprudence of this court does show that these must be broadly, liberally, generously or expansively construed, in line with the spirit of the Constitution, history, our aspirations, core values, principles, and with a view to promoting and enhancing human rights rather than derogating from

it. This court has clearly moved away from the doctrinaire approach adopted years ago in the case of *In re Akoto* [1961] 2 GLR 523.

[**44.**] The famed words of Sowah JSC as he then was in the celebrated case of *Tuffuor v Attorney-General* [1980] GLR 637 at 647-648, is very much still relevant for our purposes, not to mention the tall list of case law that was cited in one of the most recent decisions of this court namely, the unreported suit numbered J1/1/2009 of *William Brown v Attorney-General* dated 3 February 2010. Two of the older decisions of this court are *Mensima v Attorney-General* [1996-7] SCGLR 676 at p 714, and *New Patriotic Party v Inspector-General of Police* [1993-94] 459 at 482. In the latter case, Bamford–Addo JSC as she then was observed that:

> fundamental human rights are inalienable and can neither be derogated from or taken away by anyone or authority whatsoever ... This court is therefore not permitted to give an interpretation which seeks to tamper in any way with the fundamental human rights but rather to see that they are respected and enforced.

[**45.**] In *Minister of Home Affairs & Another v Fisher* [1980] AC 319, Lord Wilberforce in delivering the judgment of the Privy Council stated at page 329:

> A constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language ... and to be guided by the principle of giving full effect to those fundamental rights and freedoms with a statement of which the Constitution commences.

[**46.**] Judged along these universal basic principles of constitutional interpretation, I can only but conclude that the express provisions of article 42 of the Constitution confers the right to vote on all Ghanaians, save those below eighteen years and persons of unsound mind. I adopted the purposive–literalist interpretive approach to arrive at this conclusion. In so doing, I ascribed to the words in article 42 of the Constitution, their plain and ordinary meaning, being fully satisfied that such an approach leads to no ambiguity, obscurity, incongruity, confusion or the like. I was also guided in my thinking by other interpretive values and other constitutional principles of universal application, some of which I have already referred to.

[**47.**] It bears emphasis that the Constitution did not set down the residency criteria; it (the residency criteria) is the product of the subordinate PNDCL 284. But the people of Ghana adopted and enacted for themselves a democratic regime of constitutionally guaranteed adult suffrage for all Ghanaians, save only persons under eighteen years of age and persons of unsound mind. We crafted for ourselves a Constitution that set out its own limitations on the right to vote and perhaps having regard to the value it places on the right in question, never ceded any of its authority to either the EC or some other authority to add further to the list of who shall not have the right to vote.

[**48.**] On the crucial issue of who qualifies to vote, there is a vast difference between Ghana's constitutional arrangement and that of other countries, including Australia, as is clearly borne out from *Roach v Electoral Commissioner* [2007] HCA 43 (26 September 2007). In such countries, the disenfranchisement of some category of serious criminal offenders is a deliberate constitutional choice. These offenders are, by express constitutional provisions, forbidden from participating in public elections, in order, as was explained in the *Roach* case, to 'deliver a message to both the community and offenders themselves that serious criminal activity will not be tolerated by the community'. Such disenfranchisement is therefore a product of the Supreme Law, not a subordinate law in contravention of the Superior Law. Gleeson CJ points out the underlying philosophy in the *Roach* case. The learned Chief Justice explained that:

> It is consistent with our constitutional concept of choice by the people for Parliament to treat those who have been imprisoned for serious criminal offences as having suffered a temporary suspension of their connection with the community, reflected at the physical level in incarceration, and reflected also in the temporary deprivation of the right to participate by voting in the political life of the community.

[**49.**] In my opinion, other internal constitutional provisions, point unequivocally to the path Ghana chartered for herself, namely, adult suffrage for all citizens, save the mentally challenged and those under eighteen years could only be described as a deliberate choice.

[**50.**] The general rule that constitutional provisions must be liberally, generously, benevolently or purposively construed, admits of an exception, an exception which in my view, is intended to give full meaning and effect to general rights, so as not to render them nugatory. The exception to the general rule is that, qualifications, restrictions or limitations on fundamental rights must be strictly or narrowly construed. Indeed, as observed by Heath J in the Ciskei Supreme Court case of *ANC (Border Branch) & Another v Chairman, Council of State, Ciskei & Another* 1995 (4) BCLR 401 (SA) at 411: 'A restriction in relation to a fundamental right that it qualifies, is to be seen as an exception to a general rule, and therefore to be narrowly construed.'

[**51.**] It is to be seen that the narrow and restrictive approach is intended to avoid a negation of the general right. Thus, the Tanzanian Court of Appeal in the case of *Pumbun v Attorney-General* [1993] 2 LRC 313 at 317, cautioned that if the strictly narrow interpretative approach were not adopted, it would lead to a situation where: 'the guaranteed rights under the constitution may easily be rendered meaningless by the use of derogative or claw back clauses of that very same constitution'.

[**52.**] Thus the legal position is that the restrictions or limitations within article 42 of the Constitution, while being given their plain meaning, must, at the same time, be strictly and narrowly construed.

[**53.**] It must be noted that in these matters, there is hardly any room for implicit or implied restrictions. Where the Constitution intends to impose any limitations or restrictions on fundamental rights and freedoms, these must expressly be stated, unless of course implicit restrictions can without any doubt be read from the requisite laws. It is on account of these basic principles, that I have not the slightest doubt that had the framers of the Constitution intended to include persons in legal custody, particularly, convicted persons from those debarred from exercising the franchise, they would have said so in explicit terms.

[**54.**] Articles 62 and 94 of the 1992 Constitution, reinforces the conclusion I have reached that the restrictions under article 42 of the Constitution are only those clearly intended to apply. Articles 62 and 94 of the Constitution comprehensively set down who qualifies or is eligible to stand as a President and a Member of Parliament respectively. Article 94(2), which equally applies to a person seeking election to the high office of President, stipulates *inter alia* that:

> A persons shall not be qualified to be a member of parliament if he:
>
> (a) ...
>
> (b) has been adjudged or otherwise declared:
>
> (i) ...
>
> (ii) to be of unsound mind or detained as a criminal lunatic under any law in force in Ghana; or
>
> (c) has been convicted:
>
> (i) for high crime under this constitution or high treason or treason or for an offence involving the security of the state, fraud, dishonesty, or moral turpitude; or
>
> (ii) for any other offence punishable by death or by a sentence of not less than ten years; or
>
> (iii) for an offence relating to or connected with election under a law in force in Ghana at anytime; or
>
> (d) ...; or
>
> (e) is under sentence of death or other sentence of imprisonment imposed on him by any court ...

[**55.**] This is a classic case in which it can be argued that similarly elaborate restrictions would have been provided under article 42 of the Constitution, if the clear intention of the framers were that convicted prisoners were to be excluded or barred from enjoying the constitutional right to vote.

[**56.**] It is to be emphasised that apart from the restrictions expressly imposed by article 42 of the Constitution, no other constitutional provisions sets out any further limitations on who qualifies to vote. Article 42, unlike other sister rights conferring constitutional provisions, does not vest power in either the EC or any other authority to pass legislation for the purposes of further restrictions. As I understand it, the EC's function, as per article 47 of the Constitution, was limited to the division of Ghana into constituencies and polling stations, in a manner such as would not

derogate from, but rather effectuate the right to vote as enshrined under article 42. On the other hand, article 21(1)(d) of the Constitution, which guarantees the right to freedom of assembly, reserves power in the appropriate authority, to pass laws curtailing the right conferred, within the stipulated limits. It states:

> 21(4) Nothing in, or done under the authority of, a law shall be held to be inconsistent with, or in contravention of, this article to the extent that the law in question makes provision-
>
> (a) ...
>
> (b) ...
>
> (c) for the imposition of restrictions that are reasonably required in the interest of defence, public safety, public health or the running of essential services, on the movement or residence within Ghana of any person or persons generally, or any class of persons; or
>
> (d) for the imposition of restrictions on the freedom of entry into Ghana, or of movement in Ghana, of a person who is not a citizen of Ghana; or
>
> (e) that is reasonably required for the purpose of safeguarding the people of Ghana against the teaching or propagation of a doctrine which exhibits or encourages disrespect for the nationhood of Ghana, the national symbols and emblems, or incites hatred against other members of the community; except so far as the provision or, as the case may be, the thing done under the authority of that law shown not to be reasonably justifiable in terms of the spirit of this Constitution.

[**57.**] In interpreting article 42, further light is shed by other relevant human rights provisions, given the elementary rule that a constitution must be construed as a whole, from preamble to post amble. In this regard, it is to be noted firstly, that sovereignty rests with the people and further that the entrenched article 42, the right to vote, provides the basic constitutional democratic framework for securing the exercise of the will of the people of Ghana.

[**58.**] We read from the preamble:

> We the people of Ghana,
>
> In exercise of our natural and inalienable right to establish a framework of government which shall secure for ourselves and posterity the blessings of liberty, equality of opportunity and prosperity; ...
>
> The principle that all powers of government spring from the sovereign will of the people;
>
> The principle of universal adult suffrage ...

[**59.**] Also, under the directive principles of state policy which this court has held constitute clearly enforceable rights, it is provided under article 35 as an essential part of our political objectives that:

> (1) Ghana shall be a democratic state dedicated to the realisation of freedom and justice; and accordingly, sovereignty resides in the people of Ghana from whom the government derives all its powers and authority through the Constitution.
>
> ...
>
> (6)(d) make democracy a reality by decentralizing the administrative and financial machinery of government to the regions and districts and *by affording all possible opportunities to the people to participate in decision-making at every level in national life and in government*. [Emphasis supplied]

[**60.**] Significantly, the only means of giving effect to the exercise of the sovereign will is through adult suffrage. When this court had opportunity to examine the nexus between the sovereign will of the people and the right to vote it unanimously declared in *Tehn-Addy v Electoral Commission* [1997-8]1 GLR at 595:

> in order to give meaning and content to the exercise of this sovereign power by the people of Ghana, article 42 guarantees the right to vote every sane citizen of eighteen years and above. *The exercise of this right of voting, is therefore indispensable in the enhancement of the democratic process, and cannot be denied in the absence of a constitutional provision to that effect*. [Emphasis supplied]

[**61.**] True democracy, with its hall mark of all inclusiveness, recognises certain key fundamental values and principles. Without these there can be no functional democracy. A core value of any democratic system is the concept of sovereignty of the people, and as expressed through the right to choose representatives, through whom the sovereign will of the people, shall be exercised. This choice can only be achieved through the popular participation in public elections. Other foundational values which lie at the heart of democracy include rule of law, judicial independence, with human rights being of paramount importance. As the learned judge and author Aharon Barak explains:

> Democracy is not just about legislative supremacy — it requires actualising the values and principles at its core. There can be no true democracy without protecting human rights, rule of law, and the independence of the judiciary. Democracy is not just rule by the majority. It is also rule by fundamental values, in general, and human rights, in particular. Democracy is not just formal democracy (concerned with the electoral process governed by the majority and expressed in legislative supremacy). Democracy is also substantive democracy (concerned with fundamental values and human rights).
>
> (*Purposive interpretation in law*, 239).

[**62.**] That s 7(5) of PNDCL 248, has no redeeming features, in that it totally flies in the face of all the fundamental democratic core values and principles which lie at the heart of multi-party democracy, the system of governance to which Ghanaians have bound themselves, is evident from a number of entrenched human rights provisions; as for example:

> Respect for humanity
>
> Article 15
>
> (1) ...
>
> (3) *A person who has not been convicted of a criminal offence shall not be treated as a convicted person and shall be kept separately from convicted persons.* [Emphasis supplied]
>
> Equality and freedom from discrimination
>
> Article 17
>
> (1) All persons shall be equal before the law.
>
> (2) A person shall not be discriminated against on grounds of gender, race, colour, ethnic origin, religion, creed or social or economic status.
>
> (3) For the purpose of this article, 'discriminate' means to give different treatment to different persons attributable only or mainly to

> their respective descriptions by race, place of origin, political opinions, colour, gender, occupation, religion or creed, whereby persons of one description are subjected to disabilities or restrictions to which persons of another description are not made subject or are granted privileges or advantages which are not granted to persons of another description.
>
> Fair trial
>
> Article 19
>
> (2) A person charged with a criminal offence shall-
>
> (a) ...;
>
> (b) ...;
>
> (c) be presumed to be innocent until he is proved or has pleaded guilty;
>
> General fundamental freedoms
>
> Article 21
>
> (1) All persons shall have the right to:
>
> (a) ...
>
> (b) freedom of thought, conscience and belief, which shall include academic freedom.

[**63.**] The right conferred under article 21(b) finds expression *inter alia* through universal franchise.

[**64.**] Anchored to the fundamental right to vote, is the right to be registered, the key precondition for actualising the right to vote. The right to be registered as a voter is thus not a privilege but a right, and the EC has a constitutional obligation to register all persons who are qualified in terms of the express provisions of article 42 and desirous of exercising their franchise.

[**65.**] The proper test for determining an infringement to a fundamental right is to examine its effect and not merely its object. This is the clearly discernible principle from the case of In *Bennet Coleman and Co Ltd & Others v Union of India & Others* AIR 1973 SC 106 at 118. The Indian Supreme Court per Ray J explained the principle in relation to the right to free expression thus:

> The true test is whether the effect of the impugned action is to take away or abridge fundamental rights. If it be assumed that the direct object of the law or action has to be direct abridgment of the right of free speech by the impugned law or action it is to be, related to the directness of effect and not to the directness of the subject matter of the impeached law or action. The action may have a direct effect on a fundamental, right although its direct subject matter may be different.

[**66.**] The effect of s 7(5) of PNDCL 248 is the non-recognition of prisons as residences, thus barring prisoners from being registered for the purposes of exercising their fundamental right to vote. Crucially, s 7(5) of PNDCL 248 clearly violates a fair number of prisoners' basic rights — right to humanity or dignity, right to equality, and non-discrimination and most importantly, the right to vote.

[**67.**] International treaties provide a legitimate guide to constitutional interpretation. Indeed, this court proceeded to use the African Charter to influence its decision in the case of the *New Patriotic Party v Inspector-General of Police* [1993-94] 2GLR 459, at

a time when it had not even been domesticated. Archer CJ speaking on behalf of the Court justified the Court's stand in these terms: 'I do not think that the fact that Ghana has not passed specific legislation to give effect to the African Charter, the Charter cannot be relied upon.'

[**68.**] Interestingly, the Court concluded in that case, that not only was the impugned legislation violative of the article 21(1) of the Constitution, but actually in contravention of article 11 of the African Charter on Human and Peoples' Rights adopted by the Assembly of the African Heads of State and Government in June 1981 in Nairobi, Kenya.

[**69.**] Ghana ratified the International Covenant on Civil and Political Rights (ICCPR) on 7 September 2000. Article 25(2) of the said Covenant provides as follows:

> Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions ... To vote ... at genuine periodic elections which shall be by universal adult and equal suffrage and shall be by secret ballot, guaranteeing the free expression of the will of the electors.

[**70.**] The Supreme Court of Canada in *Richard Suave v Attorney-General of Canada & Others* 2002 SCC 68 or [2002] 3 SCR 519, held in its ruling of 31 October, 2002, that to ban prisoners serving over two years from voting was too broad. The Court in throwing light on the effect of disenfranchisement observed that:

> denial of the right to vote ... undermines the legitimacy of government, the effectiveness of government, and the rule of law ... It countermands the message that everyone is equally worthy and is entitled to respect under law.

[**71.**] Of persuasive worth also is the decision of the Constitutional Court of South Africa, which empowered all prisoners to vote through its decision in *August and another v Electoral Commission and Others*, CCT 8/9 on 4 April, 1999. The Court outlined the importance of adult franchise in these terms:

> the universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and person hood. Quite literally, it says that every body counts.

[**72.**] In the case of *William Brown v Attorney General* suit CM J1/1/ 2009 dated 3 February 2010, my respected brother Dotse JSC, cautioned courts against the slavish application of foreign judicial pronouncements, given that their value systems, history and other circumstances may differ from ours. I agree in principle with this caution, but I must point out that we are here dealing with basic universal adult suffrage, a right common to humanity. Constitutional principles of universal application and decisions from other true democracies on the right to vote, a right which has been described as the 'indispensable foundation of a democratic system' serves as useful guides in fashioning our constitutional jurisprudence.

[**73.**] In our jurisprudence, remand prisoners, no matter the heinousness of the crimes they are charged with, are presumed innocent, until their guilt is established in accordance with due process. They do not lose their citizenship as Ghanaians. Prisons form part of Ghana's territory. If a national census were to be ordered, prisoners would be counted, not discounted. More over prisoners do not lose other fundamental constitutional rights by virtue of their status or deprivation of their liberty, whether temporary or permanent. To the contrary, they are entitled to a full enjoyment of these rights and liberties enshrined under the Constitution accorded to other citizens not similarly circumstanced, and the judiciary's duty, as guardians of the constitution, is to unremittingly protect these rights.

[**74.**] Principle 3 of the Body of Principles for the Protection of All Persons Under any Form of Detention or Imprisonment (United Nations), is another set of international instruments which expressly state that persons under detention or imprisonment must not be denied their rights. It reads:

> There shall be no restriction upon or derogation from any of the human rights of persons under any form of detention or imprisonment recognised or existing in any state pursuant to law, conventions, regulations or custom on the pretext that this body of principles does not recognise such rights or that it recognises them to a lesser extent.

[**75.**] As emphasised by this court in Republic *v Court of Appeal; Ex parte Attorney-General* (*Frank Benneh* case)[1998-99] SCGLR 559, at 568:

> It is the right of every person in Ghana to enjoy his liberty, freedom of movement, etc, as enshrined in the 1992 constitution. It is also the duty of the courts to protect, defend and enforce these rights whenever they are being suppressed or stifled by any authority or person in authority. Respect for human rights is an attribute or an element of good governance, and all efforts must be made to ensure its observance.

[**76.**] I have considered the first defendant's counter arguments that the impugned legislation is reasonably required in the public interest, in that access to prisons must be restricted, and further that violators of the law must be punished, kept away from the public, under lock and key, disenfranchised and not allowed to have any say in who governs them. These, counsel contend, do serve as their just deserts for causing pain and suffering to others. In short counsel contends that the legislation meets the proportionality test. These arguments, examined in the best of lights, I am afraid, would have no place in participatory democracy, with the guaranteed rights that are enshrined in the Constitution.

[**77.**] Admittedly, the rights are paired up with corresponding obligations and duties, arising under the directive principles of state policy, under and by virtue of article 41 of the 1992 Constitution. These reciprocal duties and obligations, owed to the state, other

citizens and indeed the international community include the following:

> 41 ... the duty of every citizen:
>
> (a) ...
>
> (b) to uphold and defend this Constitution and the law;
>
> (d) to respect the rights, freedoms and legitimate interests of others, and generally to refrain from doing acts detrimental to the welfare of other persons;
>
> (g) to contribute to the well-being of the community where that citizen lives; ...
>
> (i) to co-operate with lawful agencies in the maintenance of law and order.

[**78.**] But to meet the proportionality test, the following must be established. First that the infringement of the right achieves a constitutionally valid purpose and that the chosen means are reasonably and demonstrably justified. This calls for identifying particular problems that require the denial of the right, and the impairment is directed at a pressing and substantial purpose. (see *Suave v Canada (Chief Electoral Officer)* [2002] 3 SCR 519; 2002 scc 68.

[**79.**] The Ghanaian decisional law on the proportionality test, known also as the *Oakes* test, with its two tier approach, was formulated by Acquah JSC, as he then was in *Republic v Tommy Thompson Books Ltd (No 2)* [1996-97] SCGLR 484 at 500-501 as follows:

> Now from the language of article 164 and similar provisions like 21(4)c, the law in question must be 'reasonably necessary or required' in the public interest, national security etc. This really implies that, for any law to qualify as being reasonably necessary or required the objective of that law must be of such sufficient importance as to override a constitutionally protected right or freedom. In other words, the objective of that law must not be trivial or frivolous; otherwise that law will not be reasonably necessary or required. The objective must be sufficiently important in the sense that it must relate to concerns which are pressing and substantial.
>
> After this, it must further be shown that, the law itself is a fairly proper means of achieving this important objective. This will involve an examination of the provisions of the law to determine *inter alia*, whether the provisions infringe any fundamental principle of law like natural justice, and whether they unduly impair the constitutional right. The nature of the examination in the second stage will depend on the nature of the law and issues at stake.

[**80.**] The first defendant failed to demonstrate that the s 7(5) of PNDCL 284, is in any way justified. Counsel failed to identify any substantial or pressing matters of such importance that justifies the infringement of prisoners' rights. Not surprisingly, he was unable also to demonstrate any clear benefits arising from the impairment. I find no rational connection between the impugned legislation as it stands in achieving the objectives or purpose of PNDCL 284, namely that the denial of prisoners' right to vote is reasonably required in the public interest for the purposes of facilitating or achieving the objectives of

dividing the country into constituencies for the election of members of Parliament. I find it extremely difficult to understand what constitutionally legitimate interest is served by the non-recognition of prisons as places of residence for the purposes of voter registration; even for those who have been convicted of high crime against the state, such as subversion or high treason. Even for those who attempt to derail the democratic process, voting remains an important means of teaching them democratic values.

[**81.**] The s 7 of PNDCL 284 is inconsistent with article 42 of the 1992 Constitution. I would grant the core reliefs prayed.

[**82.**] I have based the call on Ghana to join the league of nations who place a high premium on prisoners' fundamental right to vote, not on sentimentality or some other non-legal reasoning, but on the just requirements of the Constitution, the supreme law of the land we voluntarily enacted for ourselves.

[**83.**] Finally, I commend legal counsel on both sides of this legal divide, but more especially Messieurs Kojo Graham and Ahuma Ocansey for taking up this important constitutional case on behalf of prisoners and for the industry they put into this work, which was done *pro bono*. In a legal regime where legal aid or *pro bono* service is virtually non–existent, we cannot overlook the crucial role played by these two gentlemen in advancing the frontiers of human rights law in our jurisdiction.

# KENYA

## Wachira Weheire v Attorney-General

### (2010) AHRLR 185 (KeHC 2010)

*Wachira Weheire v the Hon Attorney-General*

High Court, Nairobi, Miscellaneous Civil Case 1184 of 2003, 8 April 2010

Judges: Okwengu, Dulu

Responsibility of state for arbitrary detention and torture committed by previous regime

**State responsibility** (no statute of limitation for seeking redress for human rights violations, 31, 41)
**Personal liberty and security** (arbitrary arrest and detention, 45, 54)
**Torture** (failure of state to respond, medical reports 46, 47, 54)
**Cruel, inhuman or degrading treatment** (47, 54)
**Evidence** (balance of probability, 48)

[**1.**] Before us is an originating summons dated 6 October 2003 in which the plaintiff is Wachira Waheire and the defendant is the Attorney-General.

[**2.**] The originating summons is said to have been brought under section 84(1),(2) and (6) of the Constitution, and rules nine and 11 of the Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules 2001, as read together with Chapter five of the Constitution (namely section 70 to 83) and order XXXVI of the Civil Procedure Rules, and section 3A of the Civil Procedure Act (Cap 21). The orders sought are as follows:

> (1) A declaration that the plaintiff's fundamental rights and freedoms under section 70, 72(3 & 5), 74(1) 77, 78(1), 79(1), 80(1), and 82(3) have been and were contravened and grossly violated by police officers and other government servants, agents, employees and institutions in 1986 and on diverse dates thereafter.
>
> (2) A declaration that the plaintiff is entitled to the payment of damages an compensation for violations an contraventions of his fundamental rights and freedoms under the aforementioned provisions of the constitution.

(3) General damages, exemplary damages on an aggravated scale under section 84(2) of the Constitution of Kenya for the unconstitutional conduct by government servants and agents.

(4) Any further orders, writs, directions, as this Honourable Court may consider appropriate.

(5) Costs of the suit, with interest at court rates.

[**3.**] The originating summons was accompanied by a supporting affidavit sworn by the plaintiff on 6 October 2003. It was deponed in the said affidavit, *inter alia*, that on 2 December 1986 the applicant who was a commercial officer with Associated Battery Manufacturers (EA) Ltd Nairobi, was arrested without a warrant in breach of section 72(3) and (5) of the Constitution.

[**4.**] The plaintiff swore that while at Nyayo house he was interrogated while naked for lengthy sessions, while hungry, thirsty and without sleep, and held *incommunicado* in a dark cell. That he was frequently assaulted by Special Branch officers using slaps, kicks, whips, tyre strips, broken table, chair legs, as well as hose pipes, and placed naked in water logged cells, and that he was threatened with death and forced to confess to false charges in breach of section 74(1) of the Constitution.

[**5.**] The plaintiff further averred that he was arraigned in court on 17 December 1986 on charges of taking an illegal oath and failure to prevent a felony to which he pleaded guilty; that the court failed in its constitutional and mandatory statutory duties in that it failed to notice that the plaintiff was not a free agent, and allowed the same officers who had tortured the plaintiff to stay in court thus psychologically forcing the plaintiff to plead guilty, and failing to enquire about his unlawful and inordinate incarceration for 16 days.

[**6.**] The plaintiff also deponed that his appeal No 469 of 1987 was summarily rejected in breach of the provisions of section 77 of the Constitution; and that he was taken to Industrial Area Prison where he underwent severe mental and psychological torture. He was later transferred to Kamiti Maximum Prison and then further transferred to Kodiaga Maximum Security Prison Kisumu, (then notorious for high prisoner mortality rate), where he was subjected to hard labour thus aggravating his mental and psychological suffering.

[**7.**] In a supplementary affidavit sworn by the plaintiff on 11 August 2009 and filed on 21 August 2009, with leave of the court, the plaintiff reiterated the same facts that he had sworn in the earlier affidavit, but provided annexures in support of his averments. The annexures included a charge sheet and proceedings in respect of Chief Magistrate's criminal case No 5864 of 1986, which confirmed that the plaintiff was charged before the Chief Magistrate on 17 December 1986 with two counts. The first count was that of taking an unlawful oath, contrary to section 61(b) of the Penal Code Cap 63 of the Laws of Kenya. And the second count was that the neglect to

prevent a felony contrary to section 392 of the Penal Code cape 63 Laws of Kenya as read with section 36 of the same code. The plaintiff who was unrepresented was convicted on his own plea of guilt, and sentenced to four years imprisonment on count one, and 18 months on count two.

[**8.**] Also annexed to the supplementary affidavit, is the plaintiff's letter of appointment with Associated Batteries Manufactures East Africa Limited and correspondences showing his progression. Newspaper reports reporting the plaintiff's arrest and conviction, as well as medical reports from a doctor and counselling psychologists which showed that the plaintiff suffered physical and psychological trauma, were also annexed.

[**9.**] The plaintiff filed two sets of written submissions. The first submission were filed on 28 February 2008 by which time no reply to the originating summons had been filed by the Attorney-General, and the plaintiff assumed that the matter was proceeding *ex parte*. The second set of submission was filed by the plaintiff on 5 November 2008. In the submissions, the plaintiff recapped the facts leading to his claim. He explained that as result of this arrest and imprisonment, he suffered physical and psychological trauma. In addition, the plaintiff claimed that he lost his employment, and his reputation was also ruined, as a result of which he was not able to secure formal employment. It was the contention of the plaintiff that the Police Act (Cap 84) and the Criminal Procedure Code (Cap 75) do not allow the subjection of any individual to degrading or inhuman treatment.

[**10.**] The plaintiff urged the court to take judicial notice of the fact that there existed a torture chamber at Nyayo House, as the existence of the torture chamber was documented in many publications including Amnesty International, index AFR/32/17/87 of July 1987 entitled 'Kenya torture political detention and unfair trials' and another one entitled 'We lived to tell the Nyayo House stories', both of which captured the plaintiff's story. The plaintiff further referred to the High Court of Kenya at Nyeri criminal case No 12 of 2006, *Republic v Amos Karugu Karatu* in which the existence of the Nyayo House Torture Chambers was acknowledged.

[**11.**] The plaintiff cited the case of *Felix Njagi Maretev Attorney-General* [1987] KLR 690, where Shields J in awarding damages for contravention of section 74(1) of the Constitutional stated:

> The Constitution is not a toothless bulldog nor is it a collection of pious platitudes. It has teeth and in particular these are found in section 84. Both section 74 and 84 are similar to the provisions of other Commonwealth constitutions. It might be thought that the newly independent states who in their constitutions enacted such provisions were eager to uphold the dignity of the human person and to provide remedies against those who wield power.

[**12.**] The plaintiff also cited the case of *Dominic Arony Amolov Attorney-General* HC misc application No 494 of 2003, contending

that in that case, the High Court asserted that claims under the Fundamental Rights and Freedom in the Constitution, cannot be interpreted subject to the restrictions imposed by the Limitation of Actions Act Cap 22, and that under section 84(1) of the Constitution, the High Court can grant redress to a party in a manner specified in section 84(2) of the Constitution if there exist proof of violation of section 70 to 83. The plaintiff further pointed out that the rules under the Legal Notice No 133 of 2001 Constitution of Kenya (protections of fundamental rights and freedoms of the individual, practice and procedure rules), do not place any limitations on the citizen's rights to institute a suit of the nature before the court.

[**13.**] The plaintiff relied also on HCCC No 3829 of 1994, *James Njau Wambururu v Attorney-General*, in which the High Court considered article 4 of the Convention against Torture and other Cruel, Inhuman and Degrading Treatment, and article 5 of the African Charter on Human and Peoples' Rights, and expressed the view that the state has a duty in its legal system to ensure that victims of acts of torture obtain redress and adequate compensation as contemplated by article 14, and further confirmed that the constitution of Kenya recognises the dignity of all persons and entitles any victim of breach of fundamental rights to damages.

[**14.**] In his first set of submissions the plaintiff asked the Court to award him general damages of Kshs 3 million and exemplary damages of Kshs 2 million, while in the second set of submissions the plaintiff asked the court to award him general damages of Kshs 4 500 000, special damages for loss of income Kshs 1 902 600 and exemplary damages, Kshs 2 million. The plaintiff further urged the Court to consider awarding moral damages arising from gross violation of international human rights law and international humanitarian law by the government and its agents.

[**15.**] In response to the originating motion, the defendant filed grounds of opposition and written submissions. Both documents were filed on 6 November 2009. Briefly, the defendant pointed out that the plaintiff failed to fully disclose the facts of the matter. This was because the identity of the policemen who arrested him was not disclosed. Nor did the plaintiff offer any evidence that he was tortured at Nyayo House torture chamber, or disclose the name of the Chief Magistrate before whom he was arraigned, or cite the criminal case number. It was contended that the allegations made by the plaintiff were therefore oppressive to the defendant and not capable of being respondent to.

[**16.**] Further, it was maintained that the matters complained of by the plaintiff could be adequately adjudicated upon by the Truth, Justice and Reconciliation Commission Act 2008, Parliament was concerned that some of the transgression against our country and its people, could not be properly addressed by our judicial institutions

due to procedural and other hindrances. But that the nation must address the past in order to prepare for the future, by building a democratic society based on the rule of law and desirous to give the people of Kenya a fresh start, where justice is accorded to the victims of injustice, and past transgressions are adequately addressed. It was argued that the Court could not make informal decisions without the very important facts left out by the plaintiff. It was noted that there was a grave danger that the Court could award damages to imposters whose rights were never violated.

[**17.**] The plaintiff's claim was further objected to on the grounds that there was inordinate delay and acquiescence. It was noted that the plaintiff's claim was stale having been made after 17 years. It was further submitted that the plaintiff having been arraigned in court, he ought to have invoked the provisions of section 84 of the Constitution which gave him the right to raise issues regarding the violation of his rights. It was noted that the High Court to which the plaintiff appealed against his sentence had the jurisdiction to consider the alleged breaches but the same was not brought to it.

[**18.**] It was contended that the plaintiff was circumventing the inordinate delay and the limitation period by filing a constitutional reference instead of a normal suit commenced by a way of plaint. It was emphasised that the plaintiff's complaints, if at all, were tortuous in nature and that under section 3 of the Public Authorities Limitations Act (Cap 39) such proceedings could not have commenced after the lapse of 12 months. It was also emphasised that there were no facts provided that would establish that the plaintiff was detained for more than 16 days before being arraigned in court contrary to the provisions of section 72 of the Constitution. It was noted that the plaintiff had remedies for his alleged claim under the law of tort but he slept on his rights and was caught up by the limitation period.

[**19.**] The defendant relied on Chaudhuri and Chaturvedi's commenting on *Law of Fundamental rights,* 4th edition, for submission that delay, laches and acquiescence has the effect of rendering the application fatal if the subject matter is such that if a suit was filed the same would have been barred by the law of limitation and therefore such an application should be dismissed on the ground of delay.

[**20.**] It was pointed out that under the Public Authorities Limitation Act Cap 39 Laws of Kenya the limitation period for all torts committed by the state was 12 months. Reference was further made to Constitutional Application No 128 of 2006 in the matter of *Lt Col Peter Ngari Kagume & Others v Attorney-General*, where Nyamu J (as he then was), considering a similar suit stated:

> The petitioner had all the time to file their claim under the ordinary law and the jurisdiction of the court but they never did and are now counting on the Constitution. None of the petitioners has given any explanation as to the delay for 24 years. In my view the petitioners are

> guilty of inordinate delay and in the absence of any explanation on the delay; this instant petition is a gross abuse of the court process … In view of the specified time limitation in other jurisdictions the court is in a position to determine what a reasonable period would be for an applicant to file a constitutional application to enforce his or her violated fundamental rights. I do not wish to give a specific time frame but in my mind, there can be no justification for the petitioners delay for 24 years. A person whose constitutional rights have been infringed should have some zeal and motivation to enforce his or her rights. In litigation of any kind, time is essential as evidence may be lost or destroyed and that is possibly the wisdom of time limitation in filing cases.

[**21.**] It was further noted that the plaintiff was convicted on his own plea of guilty and therefore the plaintiff acquiesced to the magistrate's decision by appealing against the decision, instead of challenging the constitutionality of the proceedings.

[**22.**] It was submitted that the plaintiff failed to disclose sufficient facts upon which his claim could be anchored. It was noted that allegations made against the Kenya police, were not clearly spelt out as required by law, as there was no clear disclosure of the police officers who arrested the plaintiff and tortured him. It was pointed out that the plaintiff had not annexed any tangible documents as proof of his allegation that he was taken to the Nyayo House Torture Chambers and tortured. It was noted that the plaintiff's allegations of torture could only be proved by a medical report. It was contended that the medical documents annexed by the plaintiff to his affidavit were hearsay documents and ought to be struck out as offending the provisions of Order XVIII rule 3(1) of the Civil Procedure Rules.

[**23.**] It was further submitted that the plaintiff had not demonstrated that his constitutional rights under section 70 to 83 of the Constitution had been violated. It was argued that the enjoyment of the plaintiff's rights was subject to limitation under section 70 of the Constitution. It was maintained that the plaintiff had not offered any evidence to the effect that the defendant had hindered the enjoyment of his fundamental rights contrary to section 80 of the Constitution nor had the plaintiff demonstrated that he was discriminated against. It was submitted that the state being a signatory to the charter of human rights does not condone torture and that any police officer who in the course of conducting investigations tortured a suspect was liable to very serious punishment. It was further submitted that although the essence of section 72(3) and (5) of the Constitution was to provide protection of rights to personal liberty, that fundamental right was not absolute and could be taken away by the state, if the enjoyment of that right by an individual prejudices the rights and freedom of others.

[**24.**] It was pointed out that the plaintiff pleaded guilty before the Chief Magistrate and therefore his arrest could not be termed as having been done in bad faith. It was argued that the seriousness of the charge that the plaintiff was facing justified interference with his

freedom. It was submitted that the plaintiff was tried by a court of competent jurisdiction and that the High Court having dismissed his appeal, the High Court was *functus officio*. It was maintained that the charge against the plaintiff were within the provisions of the law and that the plaintiff's arguments were contrary to the provisions of section 82(8) and (9) of the constitution. The court was urged to dismiss the plaintiff's case as he had not demonstrated the violation of any rights.

**[25.]** In his oral submissions before the Court, Mr Obwayo who appeared for the Attorney-General reiterated the written submission. Mr Obwayo took exceptions to some of the annexures to the plaintiff's supplementary affidavit sworn in support of his originating summons. Mr Obwayo pointed out that the annexure WW6A and 6B which were newspaper report, regarding Mwakeyna trials were not of any evidential value, and that annexure WW7A, B and C which were the medical reports, were not properly produced in accordance with the evidence act, and that annexure WW8A and B which were the publication on the Nyayo House Torture story and the Hansard report from the National Assembly, were not properly produced as they were not prepared by the plaintiff.

**[26.]** Mr Obwayo reiterated that the plaintiff was guilty of non-disclosure as the issue of his arrest and torture was not properly brought out in his affidavit. Mr Obwayo further reiterated that the plaintiff was guilty of inordinate delay in bringing this suit. He noted that the plaintiff's appeal to the High Court was dismissed 13 years ago and that the plaintiff ought to have filed his suit immediately upon his release on 17 August 1989. He urged the Court to find that the plaintiff's claim was time barred and dismiss it. He further urged the Court find that there were reasonable and probable grounds for the arrest of the plaintiff. And that there were no facts in support of alleged violations of the plaintiff's rights.

**[27.]** We have considered the applications, the documents filed, the written and oral submissions of both parties, as well as the authorities cited to us.

**[28.]** In our view, the following issues stand out for determination.

(1) Whether the plaintiff's claim as pleaded is statute barred.

(2) Whether the plaintiff has disclosed or failed to disclose sufficient facts upon which his claim can be anchored.

(3) Whether the plaintiff's claim should be defeated on grounds of inordinate delay and acquiescence.

(4) Whether the plaintiff's claim should be referred to the Truth Justice and Reconciliation Commission established under section 3(1) of the Truth Justice and Reconciliation Act 2008.

(5) Whether the plaintiff has established to the required standard the unlawful violation of his fundamental rights and freedom contrary to section 70 to 82 of the Constitution of Kenya.

(6) What damages if any is the plaintiff entitled to.

[**29.**] On the issue of limitation, it was maintained by the defendant that the proceedings before this Court were statute barred. The defendant relied on section 3 of the Public Authorities Limitation Act (Cap 39) which limits the period for filing tortuous claims against public authorities to 12 months. The defendant also relied on the case of *Lt Col Peter Ngari Kagume and Others v Attorney-General* Nairobi HCC Application No 128 of 2006.

[**30.**] We note that the plaintiff's proceedings have been brought under section 84 of the Constitution and the rules made thereunder. Neither section 84 of the Constitution, nor LN 133 of 2001, The Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules, provide for any limitation period for bringing actions to enforce fundamental rights. We have considered the case of *Lt Col Peter Ngari & Others v Attorney-General* (supra), which was relied upon by the defendant. We note that the judge did not say that there was a limitation period for filing proceedings to enforce constitutional rights, though he found no justification for the delay in that particular case.

[**31.**] We find that, although there is need to bring proceedings to court as early as possible in order that reliable evidence can be brought to court for proper adjudication, there is no limitation period for seeking redress for violation of the fundamental rights and freedoms of the individual under the Constitution of Kenya. Indeed, section 3 of the Constitution provides that the Constitution shall have the force of law throughout Kenya, and if any other law is inconsistent with the Constitution, the Constitution shall prevail. In our view, the provisions of the Public Authorities Limitations Act limiting the period for initiating actions against public authorities is inconsistent with the Constitution, to the extent that it limits a party's rights to seek redress for contravention of his fundamental rights. The Public Authorities Limitations Act cannot override the Constitution and it cannot therefore be used to curtail rights provided under the Constitution. We therefore find and hold that the plaintiff's claim arising from violation of his constitutional rights is not statute barred.

[**32.**] The second issue that we wish to deal with is whether the plaintiff has disclosed or failed to disclose sufficient facts upon which his claim can be anchored. There is no doubt that a person who comes to this Court under section 84 of the Constitution alleging contravention of his fundamental rights, is required to be candid with regard to the alleged contraventions, the sections contravened, as well as facts supporting the contravention. This was clearly reiterated in *Matibav Attorney-General* misc applications No 666 of 1990, as follows:

> An applicant in an application under section 84(1) of the Constitution is obliged to state his complaint, the provisions of the Constitution he considers has been infringed in relation to him and the manner in which he believes they have been infringed. Those allegations are the ones

> which if pleaded with particularly invoke the jurisdiction of the court under the section. It is not enough to allege infringement without particularising the details and manner of infringement.

**[33.]** In our present case, the plaintiff moved this Court by way of originating summons under section 84 of the Constitution as read with rules nine and 11 of the Constitution of Kenya (protection of fundamental rights and freedom of the individual) practice and procedure rules 2001. Rule 11 provides for the procedure to be followed as that laid down under Order XXXVI of the Civil Procedure Rules. Order XXXVI rules 9 and 10(1) of the Civil Procedure Rules, provides as follows:

> 9. On the hearing of the summons, if the parties do not agree to the correctness and sufficiency of the facts set forth in the summons and affidavit, the judge may order the summons to be supported by such further evidence as he may deem necessary, and may give such directions as he may think just for the trial of any issues arising thereupon, and may make any amendments necessary to make the summons accord with existing facts, and to raise the matter in issue between the parties.
>
> 10(1).Where, on an originating summons under this order, it appears to the court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause had been begun by filing a plaint, it may order the proceedings to continue as if the cause had been so begun and may, in particular, order that any affidavits filed shall stand as pleadings, with or without liberty to any of the parties to add to, or to apply for particular of, those affidavits.

**[34.]** It is apparent from the above provisions that the issue of sufficiency of facts set out in the summons and supporting affidavits, was a preliminary issue which ought to have been raised before the hearing of the originating summons, and directions of the court sought. In this case, the parties appeared before the court by way of affidavit and submissions. At no time did the defendant complain about the correctness or sufficiency of the facts, or seek the court's direction in that regard. It is therefore rather late for the defendant to complain about the sufficiency of facts at this stage.Secondly, the plaintiff filed an affidavit in support of the originating summons in which he deponed to facts in support of his claim. The plaintiff did with leave of the court file a supplementary affidavit on 12 August 2009 in which he again deponed to the facts in support of this claim, and also annexed documents in support of his claim.

**[35.]** The matters deponed to by the plaintiff in the two affidavits included the fact that he was arrested on 2 December 1986 while at his place of work at Associated Battery Manufacturers EA Limited, the fact that his house was unlawfully searched, the fact that he was locked up at Jogoo Road Police Station and later taken to Nyayo House Basement where he was held for sixteen days and subjected to various acts of physical, mental and psychological torture. The fact that he was subsequently arraigned in the Chief Magistrate's Court at Nairobi on 17 December 1986, charged and convicted on his own plea of guilty, the fact that the plaintiff's appeal to the High Court was

summarily rejected, and the fact that the plaintiff was subsequently held at various prisons whose names have been disclosed.

[**36.**] The plaintiff further identified in his affidavit the various sections of the Constitution which were contravened in regard to his fundamental rights. The defendant's complaint that the plaintiff did not state the names of the police officers who arrested him was true. However, that complaint had really no substance as the plaintiff gave sufficient particulars of his arrest, confinement and arraignment in court, which was sufficient to enable the defendant to identify the officers who were involved in the investigation and arrest of the plaintiff. In our view, even without taking into account the various annexures which were questioned by the defendant, the facts deponed to by the plaintiff a sufficient base for the plaintiff's claim regarding the infringement of his rights under the Constitution.

[**37.**] We note that as admitted by the plaintiff, the alleged contraventions occurred in the year 1986, and that the plaintiff was arraigned in the criminal court in the same year, when he was tried and convicted. Nevertheless, the plaintiff did not raise the issue of the contravention of his constitutional rights as provided under section 84(3) of the Constitution in the Chief Magistrate's Court, or in the High Court during the appeal as provided under rule 10 of the Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules. The question is, should the plaintiff be barred from raising his claim because of this failure?

[**38.**] Section 84(3) of the Constitution provides as follows:

> If in proceedings in a subordinate court a question arises as to the contravention of any of the provisions of sections 70 to 83 (inclusive), the person presiding in that court may, and shall if any party to the proceedings so requests, refer the question to High Court unless, in his opinion, the raising of the question is merely frivolous and vexations.

[**39.**] In our view, although the issue of the contravention of the plaintiff's constitutional rights could have been raised before the trial magistrate, and referred to the High Court for determination, this was not mandatory. The plaintiff's complaints included violations of his fundamental rights and freedoms, otherwise than in the course of the proceedings before the subordinate court. The plaintiff had therefore the alternative of filing an application directly to the High Court (as he eventually did), under rule 9 of the Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules 2001 which provides:

> Where contravention of fundamental rights and freedom is alleged otherwise than in the course of proceedings in a subordinate court or the High Court, an application shall be made directly to the High Court.

[**40.**] Of greater concern is the fact that the plaintiff lodged his claim before this Court after a period of about 16 years from the time his cause of action arose. As observed earlier, although there is no

time limitation for claims regarding violation of fundamental rights and freedoms of the individual, the need to bring proceedings to court as early as possible cannot be overemphasised. We have considered whether the plaintiff's delay in bringing his action was inordinate such as to vitiate his claim. The plaintiff has explained that he was confined in prison until August 1989 when he was released and that upon his release, he could not immediately lodge his claim until after the year 2002, when elections were held and there was change in the government.

[**41.**] We have considered this explanation. The elections held in the year 2002 and the consequent wave of change in this country are a historical fact. The explanation given by the plaintiff is therefore not unreasonable. In coming to this conclusion, we bear in mind many cases which came up after the change, such as *Dominic Arony Amolo v The Attorney-General* (*supra*) in which the plaintiff's claim filed in the year 2003 which was more than 20 year after the cause of action arose, was allowed. We are therefore not persuaded that the plaintiff's claim should be defeated because of the delay in filing his claim.

[**42.**] As regards the issue as to whether the plaintiff's claim should be referred to the Truth, Justic and Reconciliation Commission established under section 3(1) of the Truth Justice and Reconciliation Act, 2008, we find no basis for this. The plaintiff has come to this court seeking redress for specific violation of his fundamental rights under the supreme law of this land. Nothing has been laid before this court to show that there is any hindrance, procedural or otherwise, to this Court addressing the violations complained of. This court not only has powers to deal with the issue of violation of constitutional rights, but is also under a responsibility to uphold the Constitution of Kenya. There is therefore no reason why the court should abdicate this responsibility to an inferior tribunal.

[**43.**] We note that the defendant did not file any affidavit in response to the affidavits filed by the plaintiff. Thus, the facts deponed to by the plaintiff under oath stood unchallenged.

[**44.**] Section 72(1) and 3(a) & (b) of the Constitution states as follows:

> 72(1) No person shall be deprived of his personal liberty save as may be authorised by law in any of the following cases:
>
> (a) In execution of the sentence or order of a court whether established for Kenya or some other country, in respect of a criminal offence of which he as been convicted.
>
> ...
>
> (3) A person who is arrested or detained:
>
> (a) for the purpose of bringing him before a court in execution of the order of a court; or
>
> (b) upon reasonable suspicion of his having committed, or being about to commit a criminal offence and who is not released, shall be brought

> before a court of law as soon as a reasonably practicable, and where he is not brought before a court within 24 hours of his arrest or from commencement of his detention, or within 14 days of his arrest or detention where he is arrested or detained upon reasonable suspicion of his having committed or about to commit an offence punishable by death, the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging that the provisions of the subsection have been complied with.

[**45.**] The plaintiff's arrest, confinement and arraignment in court are clearly confirmed by the charge sheet and the proceedings in respect of Nairobi Chief Magistrate Criminal Case No 5684 of 1986 which were annexures WW1(a) and (b) to the plaintiff's supplementary affidavit. It is evident that the plaintiff was arrested on 2 December 1986 and produced in court on 17 December 1986. No explanation appears to have been given to the Criminal court, nor has any explanation been offered to this Court, for the delay in producing the plaintiff in court. The charges for which the plaintiff was arraigned in court were no doubt serious and carried a maximum penalty of ten years. Nevertheless, this did not provide any justification for the police to hold the plaintiff for a period of 16 days. We find that there was violation of the plaintiff's right to personal liberty as the plaintiff should have been produced in court within 24 hours as provided under section 72(3)(b) of the Constitution.

[**46.**] As regards the presence of the Nyayo House Torture Chamber, the plaintiff has stated under oath that he was held at Nyayo House basement where he was tortured. The plaintiff has given specific details of how the torture was carried out. The fact that the defendant has not attempted to deny these allegations under oath can only be an indication that the allegations are true. We therefore have no reason to doubt the plaintiff's assertions. Section 74(1) of the Constitution states: 'No person shall be subject to torture or to inhuman or degrading punishment or to any other treatment.'

[**47.**] The acts that the plaintiff was subjected to of being kept hungry and without sleep for several days, being physically assaulted by being kicked, whipped and burned with cigarettes, pricked with pins, hose piped and placed naked in water-logged cells, were all cruel and degrading treatment and therefore a violation of section 74(1) of the Constitution. The extent of the plaintiff's torture could only have been determined through medical evidence. No evidence of medical examination done around the time of the incidence complained of was however produced. Nonetheless, the medical reports annexed by the plaintiff as annexure WW7(A), 7(B) and 7(C) provided consistency to the evidence of the plaintiff that he was physically, psychologically and mentally tortured, and that he continues to suffer the consequences of the torture.

[**48.**] We are satisfied that the plaintiff has established on a balance of probability that his rights to personal liberty under section 72 was

violated when he was held at Nyayo House for more than 24 hours contrary to section 72(3)(b). We are also satisfied that the plaintiff was subjected to torture, inhuman and degrading contrary to section 74(1) of the Constitution, during his confinement at Nyayo House.

[**49.**] We have considered the plaintiff's claim that his house was unlawfully searched contrary to section 76 of the Constitution. However, it is apparent that the search of the plaintiff's house was related to the criminal charge with which the plaintiff was subsequently arraigned in court. The plaintiff's right to protection against arbitrary search or entry as provided under section 76(1) of the Constitution was not absolute but was subject to subsection (2) which allows such search in the interest of defence, public safety and public order or maintenance of public security. We therefore find that the search at the plaintiff's house was justified and his rights were not violated in that regard.

[**50.**] As regards the plaintiff's complaints regarding breach of his constitutional rights during the trial before the Chief Magistrate's Court, section 77 of the Constitution states as follows:

> (1) If a person is charged with a criminal offence, then unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.
>
> (2) Every person who is charged with a criminal offence:
>
> (a) Shall be presumed innocent until he is proved or has pleaded guilty
>
> (b) Shall be informed as soon as reasonably practicable in a language that he understands and in detail of the nature of the offence with which he is charged.
>
> (c) Shall be given adequate time and facilities for the preparation of his defence.
>
> (d) Shall be permitted to defend himself before the court in person or by a legal representative of his own choice.
>
> (e) Shall be afforded facilities to examine in person or by his legal representative, the witness called by the prosecution before the court and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions those applying to witnesses called by the prosecution; and
>
> (f) Shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the charge.

[**51.**] The record of proceedings of the Chief Magistrate's Court which were annexed to the plaintiff's affidavit, showed that the above provisions were complied with, and that the plaintiff who was allowed to represent himself in person, pleaded guilty to the charge. The plaintiff having pleaded guilty to the charges put to him, the Chief Magistrate had no way of knowing that the plaintiff was not a free agent, or that the plaintiff had been forced to plead guilty. The Chief Magistrate could only have known this if the same was brought

to his attention by the plaintiff. This, the plaintiff failed to do. We concur with the defendant's submission that the plaintiff relinquished his rights by submitting to a plea of guilty and further acquiesced in the Chief Magistrate's decision by appealing from that decision instead of challenging the constitutionality of the proceedings. We therefore find no substance in the plaintiff's allegation that his constitutional rights under section 77 were breached either in the Chief Magistrate's Court or in the High Court during the hearing of his criminal appeal.

[**52.**] As regards the imprisonment and confinement of the plaintiff at Industrial Area Prison, Kamiti Medium Prison and Kodiaga Maximum Prison, it is evident that the plaintiff was held in these institutions pursuant to his conviction and imprisonment, following his criminal trial. His confinement in prison was in accordance with section 72(1)(a) of the Constitution and therefore lawful. We reject the plaintiff's allegations that his imprisonment and confinement at the various prison institutions contravened his fundamental rights under the Constitution.

[**53.**] We have further considered the plaintiff's allegations that his rights to protection of freedom of assembly and association under section 80(1) and protection from discrimination under section 82(3) of the Constitution were violated. We have however found no evidence in support of these allegations.

[**54.**] We come to the conclusion that the plaintiff's constitutional rights to personal liberty under section 72 of the Constitution was violated when he was held at the Nyayo House Basement for a period of 16 days, and that the plaintiff's rights to protection against torture, degrading and inhuman treatment under section 74 of the Constitution were also violated when he was subjected to physical, mental and psychological torture during his 16 days confinement at Nyayo House. Our next task is to consider what damages if any the plaintiff is entitled to.

[**55.**] We find that the plaintiff was arrested and held by police officers, and that he suffered the violation of his fundamental rights as the hands of the officers of the government. The government must therefore take responsibility for the action. As already stated, this court has the responsibility of upholding the supreme law of this land. In the case of the plaintiff, this court will do this by ensuring appropriate redress for the violation of the constitutional rights of the plaintiff through monetary compensation.Therefore an award of damages would be appropriate.

[**56.**] The plaintiff relied on the case of *Dominic Arony Amolo v Attorney-General* (supra), where a sum of Kshs 2.5 million was awarded in the year 2005, for similar violations; *Dr Odhiambo Olel v Attorney-General,* HCCC (Kisumu) No 366 of 1995, where a sum of

Kshs 12 million was awarded, including exemplary damages of Khs 4 million; the case of *James Njau Wambururu v Attorney-General* (*supra*), where Kshs 800 000was awarded; and *Rumba Kinuthia v Attorney-General*, HC Msic App No 1408 of 2004, where a sum of Kshs 1.5 million was awarded in 2008. No submissions were made by the defendant on the issue of quantum of damages.

[**57.**] Having considered the authorities which were cited to us, we wish to distinguish the case of *Dr Odhiambo Olel v Attorney-General* (*supra*). In that case, the plaintiff sought general and special damages for unlawful arrest, malicious prosecution, false imprisonment, loss and damage arising from severe physical, psychological and mental torture. The damages awarded to the plaintiff included Kshs 4.5 million in respect of malicious prosecution and special damages of Kshs 3 977 675 in respect of medical expenses, loss of salary and loss of pension all of which were proved. We have taken into account the circumstances of the plaintiff which include the fact that the plaintiff lost his job and that his social standing and reputation was adversely affected by the violation of his fundamental rights and freedom, and that he also suffered physical, mental and psychological torture.

[**58.**] We note that the plaintiff did not specifically plead or prove any special damages. We are therefore of the view that a global award of Ksh 2.5 million would be sufficient compensation to the plaintiff for the violations suffered by him and the consequent loss. In the light of the acknowledged change in the government, and the attempts at dealing with human rights violation, we find it inappropriate to award exemplary or aggravated damages.

[**59.**] In conclusion, we give judgment for the plaintiff and declare:
(i) That his fundamental rights and freedom under section 70, 72(3) and (5) and 74(1) of the Constitution were contravened and violated by police officers and other government servants or agents in the year 1986.
(ii) We declare that the plaintiff is entitled to damages for the violation and contravention of this fundamental rights and freedoms under the Constitution.
(iii) We award the plaintiff general damages of Kshs 2.5 million.
(iv) We further award the plaintiff costs of the suit and interest on the judgment sum from the date of this judgment.

# NAMIBIA

## Trustco Group International Ltd and Others v Shikongo

**(2010) AHRLR 200 (NaSC 2010)**

*Trustco Group International Ltd, Max Hamata and Free Press Printers (Pty) Ltd v Matheus Kristof Shikongo*

Supreme Court of Namibia, Case No SA 8/2009, 7 July 2010

Judges: Chomba, Langa, O'Regan

Footnotes omitted

Defamation of politician

**Expression** (defamation, 24, reasonable publication in public interest, 30, 37, 38, 53, 56, 73; burden of proof, 30, 52; impression of ordinary reader, 58, 63; absence of factual basis, 66; performance of public duties always of public interest, 74; journalistic codes of ethics, 75; anonymous sources, 82, 84; publicly available sources, 83; urgency 85)

[**1.**] How should the law of defamation give effect both to the right to freedom of speech as entrenched in article 21(1)(a) of the Namibian Constitution and the constitutional precept that the dignity of all persons shall be inviolable as set out in article 8 of the Constitution? That is the question that arises in this appeal. It is a question that has arisen in many democracies in many parts of the world.

[**2.**] The three appellants are the owner, editor and printer of a weekly newspaper published in Windhoek called *Informanté*. The circulation of *Informanté* is approximately 65 000 copies per week. It is also made available on the internet.

[**3.**] The respondent is Mr MK Shikongo, the Mayor of Windhoek. The Mayor sued the appellants for defamation in relation to an article published in *Informanté* on 21 September 2006. He succeeded in the High Court and was awarded N$175 000 damages. The High Court also ordered the first and second appellants to pay the costs of the respondent on the scale as between attorney and own client.

[**4.**] The appellants appeal on the merits, the quantum of the award and the special order of costs made against them. The respondent cross-appeals on the issue of the quantum of damages only, seeking an increase in the award to an amount of N$250 000.

[**5.**] The article that gave rise to the defamation case read as follows:

> Fincky aids Broederbond's land cause
>
> A Broederbond cartel is said to have made a killing after buying municipal land in Olympia for one cent per square meter and cashing in on millions of dollars after reselling the land. The land sale to the cartel was facilitated by Chairperson of the City of Windhoek Management Committee Dr Bjorn von Finckenstein.
>
> The City of Windhoek is expected to lose out by at least N$4,8million after the Management Committee allegedly misled the City of Windhoek on the status of the prime land in Pioneerspark, which was sold to Wanderers Sports Club at a subsidised price of N$1 172.
>
> The piece of land has now been sold to Viking Developers, which is busy constructing a N$40 million housing development, financed by Bank Windhoek, on the land.
>
> Inside sources said the Mayor of Windhoek Matthew Shikongo, who is a Bank Windhoek board member, should have declared his association with the bank, instead of letting the underhanded land deal go through without scrutiny. 'How could the Mayor allow himself to be used for self-gain and to empower previously advantaged persons. He is supposed to serve the people that have elected him, instead of just looking after his Bank Windhoek interests', said a concerned Council member who preferred anonymity.
>
> In July, City of Windhoek lawyers recommended that the land sale be rescinded. However, Von Finckenstein claimed he was not aware of this and therefore he said he could not comment.
>
> Informanté has reliably learned that the deal has placed the City of Windhoek's management and the Council on a collision course because City management was now trying to recover the lost revenue.
>
> The City of Windhoek could have raised close to N$5 million had it placed the land on auction and not bypassed legal advice.
>
> Wanderers Sports Club bought the land on condition that 'it may not be sold by the owner before it has been offered to the Municipality of Windhoek.'
>
> Wanderers Sports Club undertook not to sell the land until the City of Windhoek had been given the opportunity to make a purchase offer.
>
> 'One wonders why the Council was never advised of its rights in terms of the pre-emptive right which was part and parcel of selling such huge tracts of land to Wanderers Club, while it was obvious that Wanderers Sports Club was diverting from its sporting activities,' stated the legal opinion submitted to the Council.
>
> 'Would the type of facilities which Wanderers wish to provide on the erven benefit the community at large or are they venturing into businesses which Council can also undertake,' asked another Council member.
>
> 'It is my submission that Wanderers Sports Club must be made to pay the difference in value as per deed of sale and the current market value of the sub-divided properties', the source added.
>
> The Council now also faces the task of reversing its decision of giving away the land cheaply after it has been cautioned that Viking Developers have been constructing on the 'site without the necessary approved building plans and foundations were excavated and built and

services were inserted without the said densities being proclaimed by the Government.'

It is also feared that the land sale to Wanderers Sports Club will serve as precedent for other sports clubs in Windhoek.

[**6.**] In his particulars of claim, the Mayor based his defamation claim on the grounds that the article alleged that he was connected to a *Broederbond* cartel, that he was involved in an irregular land deal, that he caused the City to lose money, that he misled the City regarding the status of the land, that he abused his position both as a board member of the Bank Windhoek (which he is not) and as Mayor of the City of Windhoek for personal gain and that he neglected the electorate in favour of his Bank Windhoek interests. He stated that these allegations were wrongful and defamatory and would have been understood by readers to mean that he was dishonest, that he abused his position as Mayor of Windhoek and that he neglected his duties to the public.

[**7.**] The defendants (the appellants) resisted the claim on the basis that the publication of the article was not defamatory. In the alternative, the defendants raised three defences: they asserted that any facts contained in the article were 'essentially the truth' and that the publication was in the public interest (the defence of truth in the public benefit); insofar as the article contained comment, they asserted that it concerned matters of public interest, and the comment was fairly and reasonably made (the defence of fair comment); and they asserted that the article was published in good faith without knowledge of untrue facts and without negligence or recklessness with regard to the truth or otherwise of the facts so that the publication of the article was in all the circumstances reasonable (the defence of reasonable publication).

[**8.**] The article related to an application for the removal of title deed conditions that had been approved by the Windhoek City Council on 30 June 2005 more than a year before the article was published. The application, brought by a group of planning consultants on behalf of the Wanderers Sports Club (the sports club), sought the removal of a title deed condition that had required the land to be used as private open space and the waiver of a pre-emptive condition registered in favour of the municipality.

[**9.**] In 1973, the sports club had purchased a piece of land measuring approximately 12 hectares from the Windhoek Municipality at a price of R100 per hectare or a cent per square meter for a total price of R1172,22, well below the market value of the land which was valued in the title deed at the time at R5000. The title conditions stipulated that the land be used as private open space and that: 'the erf may not be sold by the owner before it has been offered to the Municipality of Windhoek and then for the amount which it was sold to the current owner, plus a reasonable amount for any improvements on the property'.

[**10.**] The application was first placed before the Management Committee of the Council towards the end of June 2005. The Management Committee recommended granting the application and it was then considered and approved a few days later by the full Council. The agenda and minutes of the Management Committee meeting and the Council meeting make plain that the application had been considered by all the relevant departments which, save for one department, had recommended that the application be approved.

[**11.**] The Strategic Executive: Planning, Urbanisation and the Environment suggested that the City consider seeking to enforce its right of pre-emption. The Chief Legal Officer stated that there was no way to force the Club to sell the land back to the City as provided for in the right of pre-emption. What might happen should the City seek to enforce the right of pre-emption, the Chief Legal Officer speculated, was that the Club might decide not to sell the land at all. This speculation was probably based on the fact that the application made clear that the Club intended to sell the portion of land to raise funds to enable the club to improve the facilities it offers to its members.

[**12.**] The application was approved by the Council on condition that an endowment of 7.5% of the market value of the additional erven created by the subdivision be paid to the City in accordance with section 19 of the Townships and Division of Land Ordinance, 11 of 1963 as well as an amount of N$2 137 350 to the City being betterment fees calculated at 75% of the increase in land value of the subdivided portions between 1973 and 2005.

[**13.**] In his evidence in the High Court, Mr Hamata, the second appellant who is also the editor of *Informanté,* stated that his attention was drawn to the story in September 2006 by a confidential source within the City of Windhoek. That source suggested that a 'serious corruption deal' was unfolding in the City in relation to the sale of land by the Wanderers Club. The source stated that the Council had been misled in regard to its legal position, and that if the Council had been properly advised it would not have approved the application for removal of the title deed restrictions. The source also suggested that the effect of granting the application had been to deprive the city of millions of dollars it might have made from selling the land through a tender process. The source furnished Mr Hamata with a seven-page document that Mr Hamata identified as the basis of his story. The source informed him that the document had served before the Council.

[**14.**] To verify the story Mr Hamata spoke to several other unnamed sources, including one who confirmed (incorrectly) that Mr Shikongo was a member of the board of Bank Windhoek. Mr Hamata also checked the deeds office records and telephoned Dr von Finckenstein, the chairperson of the Management Committee of the

Windhoek Council. He also attempted to call Mr Shikongo on his cell phone but it was not answered. Mr Hamata did not check the minutes of the Council meeting, which he knew he was entitled to do, nor did he seek to leave any messages for Mr Shikongo at his office, nor did he call Bank Windhoek to verify the fact that Mr Shikongo was a board member of Bank Windhoek.

[**15.**] After the publication of the story, Mr Shikongo's lawyers wrote to the publisher of *Informanté* demanding that an apology be published. The apology was not published although on 12 October 2006 a correction was — stating that Mr Shikongo was not a director of the Board of Bank Windhoek as the story had asserted but a director on the board of the parent company of Bank Windhoek.

## The High Court proceedings

[**16.**] Mr Shikongo then issued summons claiming that the publisher, editor and printer of *Informanté* had defamed him and seeking damages. When the matter came to trial, four witnesses were led on behalf of Mr Shikongo. Expert evidence was led concerning the history and nature of the *Broederbond*, the organisation mentioned in the article. A former employer of Mr Shikongo testified about Mr Shikongo's career at Metropolitan Life. The company secretary of Bank Windhoek and Capricorn Holdings gave evidence about Mr Shikongo's relationship with these two companies. Mr Shikongo's attorney gave evidence concerning monetary value to assist the Court in determining the current value of previous awards for defamation. Mr Shikongo himself did not give evidence.

[**17.**] Eight witnesses were led on behalf of the defendants. The most important of these witnesses were Mr Van Rooyen, the managing director of the first appellant, the owner and publisher of *Informanté*; Mr Hamata the editor of *Informanté* and author of the story; expert evidence led on the protection of journalists' sources; and three witnesses from the City Council who were issued with subpoenas: the Chief Executive of the City, Mr N Taipopi; as well as two officials: Ms U Mupaine (from the Strategic Executive: Planning, Urbanisation and the Environment) and Mr B Ngairorue (the Legal Officer of the City of Windhoek since February 2007 who had been acting Chief of Housing and Property at the time the application was approved).

[**18.**] The defendants also tendered the transcribed conversations Mr Hamata had had with Mr von Finckenstein and with the unnamed source within the Bank of Windhoek who had erroneously confirmed that Mr Shikongo was a board member of that Bank. The defendants also tendered several codes of professional ethics for journalists (to which I return later).

[**19.**] During the hearing it became clear that the document on which Mr Hamata had based his story had never served before Council. The Chief Executive had prevented the document being circulated once legal advice had been obtained to the effect that the Council could not rescind its decision to grant approval to remove the title deed conditions.

[**20.**] In his judgment in the High Court, Muller J noted that the Supreme Court has not reconsidered the law of defamation in Namibia since independence in 1990. Prior to independence, the South African Appellate Division decision in *Pakendorf and Others v De Flamingh*, which held the press strictly liable for the publication of defamatory statements, had been binding on the courts of Namibia. Muller J observed that '[i]n this case, the Court has to decide whether the media is still bound by the concept of strict liability or not.' The Court held, consistently with two recent judgments of the High Court, that the principle of strict liability was not appropriate given the provisions of the Constitution that entrench both the right to freedom of speech and the affirmation of the inviolability of human dignity. The Court held that a defence of reasonable publication should be developed to give effect to the constitutional provisions. In so doing, the trial court found the decision of the South African Supreme Court of Appeal in *National Media Ltd and Others v Bogoshi* to be persuasive.

[**21.**] The Court held that the article was defamatory of Mr Shikongo and that Mr Hamata had written the article with the aim to harm Mr Shikongo. The Court also found that in material respects the article was not true and that Mr Hamata had not taken steps to ascertain the truth of the article and had thus acted negligently. The Court thus dismissed all three defences and upheld Mr Shikongo's claim. It awarded damages of N$175 000, apparently the highest award of damages for defamation ever made by a Namibian court.

## Arguments on appeal

[**22.**] In this Court, the appellants assert that the High Court should have found that article 21(1)(a) of the Constitution read with article 21(2) requires a plaintiff in a defamation action to establish that the defamatory facts are false. Such an approach, they argue, would fit with the general approach to constitutional litigation in Namibia in terms of which a burden of proof is cast upon those seeking to justify the limitation of a constitutional right. The appellants also argue that article 66 of the Constitution does not permit the courts to develop the common law. This task, they argued, is reserved under article 66 of the Constitution for Parliament.

[**23.**] It was argued on behalf of the Mayor in this Court that the High Court was correct in its approach to the development of the common law. The respondent argued that the courts did have the competence

to develop the common law and that the High Court had been correct to adopt the approach developed in the South African Supreme Court of Appeal decision of *National Media Limited and Others v Bogoshi*. The respondent submitted that the High Court's application of the law to the facts was correct and that its decision on the merits should be confirmed. The respondent cross-appealed on the quantum of the award for damages, seeking an increased award.

## The law of defamation

[**24.**] The law of defamation in Namibia is based on the *actio injuriarum* of Roman law. To succeed in a defamation action, a plaintiff must establish that the defendant published a defamatory statement concerning the plaintiff. A rebuttable presumption then arises that the publication of the statement was both wrongful and intentional (*animo injuriandi*). In order to rebut the presumption of wrongfulness, a defendant may show that the statement was true and that it was in the public benefit for it to be made; or that the statement constituted fair comment; or that the statement was made on a privileged occasion. This list of defences is not exhaustive. If the defendant can establish any of these defences on a balance of probabilities, the defamation claim will fail.

[**25.**] The next question is whether a media defendant may avoid liability for defamation by showing that a defamatory statement was not made with the intention to injure. In *Pakendorf and Others v De Flamingh*, the Appellate Division held that mass media could not avoid liability by showing that they did not have any intention to injure the plaintiff. The court stated that, unlike other defendants, 'newspapers owners, publishers, editors and printers are liable without fault and, in particular, are not entitled to rely upon their lack of knowledge of defamatory material in their publications or upon an erroneous belief in the lawfulness of the publication of defamatory material.'

[**26.**] When Namibia became independent in 1990, this was the common-law rule then in operation. This Court has held that any common-law rule operative at the date of independence will not have survived the advent of the Constitution if the rule is in conflict with the Constitution. The appellants argue that the rule in *Pakendorf* is repugnant to the principles espoused in the Namibian Constitution and that therefore it did not survive the adoption of the Constitution.

[**27.**] In considering this argument, the importance of freedom of expression and the media in a constitutional democracy must be borne in mind. In *Kauesa,* this Court quoted the powerful words of Brandeis J in his concurrence in *Whitney v California*. In memorable words, Brandeis J reasoned:

> Those who won our independence believed that the final end of the state was to make men free to develop their faculties and that in its

> government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government ... Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law — the argument of force in its worst form. Recognising the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

[**28.**] Freedom of speech is thus central to a vibrant and stable democracy. The media play a key role in disseminating information and ideas in a democracy, which is why, no doubt, the Constitution specifically entrenches the freedom of the media and the press in section 21(1)(a). One of the important tasks of the media is to hold a democratic government to account by ensuring that citizens are aware of the conduct of government officials and politicians. In performing this task, however, the media need to be aware of their own power, and the obligation to wield that power responsibly and with integrity.

[**29.**] The effect of imposing strict liability on the press and mass media for any defamatory statement would mean that the only recognised defences available to the media when it is established that they have published a defamatory statement would be truth in the public interest; fair comment and in appropriate and rare circumstances, qualified privilege. The defence of fair comment itself requires the underlying facts upon which the comment is based to be true or substantially true. It is notorious that there are many facts the truth of which cannot be proven.

[**30.**] Requiring the media to establish the truth or substantial truth of every defamatory statement, given the difficulty of establishing truth in many circumstances, may often result in the media refraining from publishing information they cannot be sure they can prove to be true because of the risk of a successful defamation action against them. As McLachlin CJ observed in a recent case:

> to insist on court-established certainty in reporting on matters of public interest may have the effect of preventing communication of facts which a reasonable person would accept as reliable and which are relevant and important to public debate. The existing common law rules mean, in effect, that the publisher must be certain before publication that it can prove the statement to be true in a court of law, should a suit be filed ... This ... may have a chilling effect on what is published. Information that is reliable and in the public's interest to know may never see the light of day.

[**31.**] Such a deterrent effect is at odds with the freedom of the media entrenched in section 21(1)(a) of the Constitution and it cannot be justified under section 21(2) as 'a reasonable restriction ...

necessary in a democratic society'. The approach taken by the South African Appellate Division in *Pakendorf and Others v De Flamingh* is thus in conflict with section 21 of the Namibian Constitution. As a result, the appellants' argument that the rule in *Pakendorf* was repugnant to the Namibian Constitution must be upheld. The rule in *Pakendorf* did not form part of the common law of Namibia after independence.

**[32.]** The next question that arises is whether the rights of freedom of expression and freedom of the media require any reconsideration of the common law of defamation. Before turning to consider this question, it is necessary first to deal with an argument raised by the appellants in oral argument. Counsel submitted that article 66 of the Namibian Constitution, properly construed, does not permit this Court to develop the common law but reserves this power for Parliament. Article 66 provides that

> Both the customary law and the common law of Namibia in force on the date of Independence shall remain valid to the extent to which such customary law or common law does not conflict with the Constitution or any other statutory law.

**[33.]** In support of their submission, appellants' counsel also referred to *Myburgh v Commercial Bank of Namibia* in which this Court had to consider the proper approach to article 66. The Court held that article 66 'renders invalid any part of the common law to the extent to which it is in conflict with the Constitution.' The corollary of this principle is that the rule of the common law that is in conflict with the Constitution was rendered invalid at the date of Independence. It does not only become invalid once a court rules that it is inconsistent with the Constitution. In *Myburgh,* however, the Court did not consider the question whether the courts retained the power to develop the common law as that issue was not before the Court.

**[34.]** A common-law legal system is based upon the principle that the courts will develop the common law on an incremental basis. Common law is judge-made law and from time to time it needs to be developed to take account of changing circumstances. It is clear from article 66 that the Constitution recognises that Namibia is a common-law legal system. The proposition urged by appellant's counsel is fundamentally at odds with the nature of a common-law legal system and so it is not surprising that the authority counsel cite for the proposition (article 66 of the Constitution and *Myburgh's* case) provide not the slightest support for it. It follows that counsel's argument on this score is firmly rejected.

**[35.]** The next question that arises is whether the common law of defamation requires further development to give effect to the constitutional right to freedom of speech and the media. Appellants' counsel argued that the appropriate manner in which the law should be developed was to hold that a plaintiff in a defamation claim might

only succeed if he or she establishes that the defamatory statement was false. Counsel for the respondent, on the other hand, argued that the High Court's approach, that a defence of reasonable publication, as recognised in *Bogoshi*'s case was appropriate.

## *Approach of other jurisdictions*

[**36.**] This is a question that has been confronted by courts the world over in the last few decades. One of the earliest and most famous cases is the decision of the United States Supreme Court in *New York Times v Sullivan* in which the Court held that a public official may not recover damages for defamation unless he or she can show that the publisher acted with actual malice. Although the free speech concerns which animated this decision are shared in many other jurisdictions, the precise manner in which the balance between freedom of speech and protection of an individual's dignity was struck in *Sullivan* has generally not been adopted elsewhere.

[**37.**] In a recent judgment, *Grant v Torstar Corporation,* the Canadian Supreme Court helpfully described the developments since *Sullivan* in several other major English-speaking jurisdictions. McLachlin CJ notes that although *Sullivan* has not been followed elsewhere, there has been a shift in favour of broader defences for media defendants in many English-speaking jurisdictions. Although the precise contours of the defence are not identical, Australia, New Zealand, South Africa and the United Kingdom, have all developed a defence of reasonable or responsible publication of information that is in the public interest.

[**38.**] Having analysed the defence as developed in these jurisdictions, and after a careful consideration of the jurisprudential issues arising from the need to provide protection for freedom of expression, the Canadian Supreme Court in *Grant* also recognised a defence of responsible communication on a matter of public interest. The elements of the defence are that the publication is on a matter of public interest; and that, despite the fact that its truth cannot be established, it was nevertheless acting responsibly to publish it. Considerations identified by the Canadian Supreme Court relevant to establishing responsible publication included the seriousness of the allegation (the more serious the effect of the allegation on the named person's rights, the more care should be taken before publication); the public importance of the matter; the urgency of publication; the status and reliability of the source and whether the plaintiff's version was sought and accurately reported.

[**39.**] In concluding that the law should be developed to recognise such a defence, McLachlin CJ reasoned:

> The protection offered by a new defence based on conduct is meaningful for both the publisher and those whose reputations are at stake. If the publisher fails to take appropriate steps having regard to all the circumstances, it will be liable. The press and others engaged in

> public communication on matters of public interest, like bloggers, must act carefully, having regard to the injury to reputation that a false statement can cause. A defence based on responsible conduct reflects the social concern that the media should be held accountable through the law of defamation. As Kirby P stated in *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680 (CA) at p 700: 'The law of defamation is one of the comparatively few checks upon [the media's] great power.' The requirement that the publisher of defamatory material act responsibly provides accountability and comports with the reasonable expectations of those whose conduct brings them within the sphere of public interest. People in public life are entitled to expect that the media and other reporters will act responsibly in protecting them from false accusations and innuendo. They are not, however, entitled to demand perfection and the inevitable silencing of critical comment that a standard of perfect would impose.

[**40.**] The defence developed by the Canadian Supreme Court in *Grant's* case is similar to the defence of responsible publication established in the United Kingdom in *Reynolds* as refined in *Jameel*. It is also similar to the defence established in Australia in *Theophanous* and in South Africa in *Bogoshi* as approved in *Khumalo v Holomisa*.

## The significance of *Kauesa* in this case

[**41.**] Appellants' counsel argued that this Court should impose an onus upon a plaintiff in a defamation case to establish that the facts published were false, rather than to develop a defence of reasonable or responsible publication. They submitted that imposing an onus on a plaintiff in a defamation case was consistent with the general approach to article 21 established by this Court in *Kauesa* and followed in many cases since then.

[**42.**] In *Kauesa* this Court held that a person who bases a claim on an infringement of a constitutional right bears the onus to establish that the right has been limited or restricted. Once that onus has been discharged, a person seeking to assert that the limitation is justifiable within the meaning of article 21(2) bears the onus of establishing that. The case concerned regulation 58(32) of the regulations promulgated under the Police Act 19 of 1990 which prohibited members of the police force from publicly commenting unfavourably on the administration of the police or other government department. The Court found that regulation 58(32) constituted a limitation of the right to freedom of speech and expression entrenched in article 21(1)(a) and held that it was not a justifiable limitation within the meaning of article 21(2).

[**43.**] *Kauesa* is not directly comparable to the case at hand. It was concerned with a regulation that expressly prohibited speech and this Court held that the Minister of Home Affairs who was seeking to argue that regulation 58(32) was a reasonable and necessary restriction on the freedom of expression bore the onus of establishing that proposition. Here we are concerned with the question whether the

law of defamation should be developed to give appropriate protection to the rights.

[**44.**] To determine whether the appellants' submissions concerning the onus of proof in defamation claims should be accepted, it is necessary to consider the text of article 21(2) more closely. Sub-article (2) provides that the limitation of a fundamental freedom entrenched in article 21(1) is permissible if the limitation is one that arises from:

(a) law; that

(b) imposes reasonable restrictions on the exercise of the rights; that

(c) are necessary in a democratic society; and

(d) are required for 'the interests of sovereignty and integrity of Namibia, national security, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence'.

[**45.**] Two observations need to be made: First, article 21(2) is concerned with the question whether a rule of law that limits rights constitutes a reasonable restriction that is necessary in a democratic society. Broadly speaking, this is not a question of fact to which the rules of burden of proof apply. It is better understood as a question of law to which a burden of persuasion attaches. The person who asserts that a particular law is a reasonable and necessary restriction of rights will not succeed if the court is not persuaded that this is so.

[**46.**] Secondly, article 21(2) expressly contemplates that the law of defamation may constitute a permissible limitation of the right to freedom of speech and expression and freedom of the press if it 'imposes reasonable restrictions on the exercise of the rights' that are 'necessary in a democratic society'.

[**47.**] Having considered article 21(2), it becomes clear that the import of *Kauesa* in this case is that a person seeking to allege that the law of defamation constitutes a limitation within the meaning of article 21(2) will fail if the court is not persuaded that the law is a reasonable restriction necessary in a democratic society. The onus rule in *Kauesa* does not therefore relate primarily to the proof of facts, but concerns the question whether a law that limits a fundamental freedom is a reasonable restriction that is necessary in a democratic society. The appellants' argument that it follows from *Kauesa* that a plaintiff should establish that defamatory facts are false does not follow from *Kauesa*. A direct application of *Kauesa* in this case would mean that a party seeking to assert that the law of defamation is a reasonable restriction necessary in a democratic society would bear the risk of non-persuasion should the Court find otherwise.

[**48.**] Neither the appellants nor the respondent seek to defend the current rules of the law of defamation as being a reasonable restriction on the freedom of speech that is necessary within a democratic society. The appellants argue primarily that the rules

need to be developed to impose a burden of proof on the plaintiff in a defamation case. The respondent argues that a defence of reasonable publication should be developed to protect speech that is in the public interest in circumstances where a publisher who cannot prove the truth of the facts stated can nevertheless show that the publication was reasonable in the circumstances. The question for this Court to determine is whether the litigants are correct that the law should be developed and if so how.

## Development of the law of defamation

[**49.**] There can be little doubt that the law needs development to protect the freedom of speech and the media. Article 21(2) of the Constitution expressly mentions the law of defamation as a part of the law that may limit rights as long as it does so by the imposition of 'reasonable restrictions ... necessary in a democratic society'. The express mention of the law of defamation in article 21(2) makes it clear that the Constitution contemplates that the law of defamation must be developed to give effect to the right to freedom of speech, expression and the media.

[**50.**] Jurisdictions all over the world have recognised the need to provide greater protection for the media to ensure that their important democratic role of providing information to the public is not imperiled by the risk of defamation claims. One possibility, not proposed by either party, would be to permit the media to raise a defence of absence of intention to injure (ie to rebut the presumption that they acted intentionally that arises once a plaintiff establishes proof of publication of a defamatory statement). It was this defence that was expressly rejected by the court in *Pakendorf*'s case.

[**51.**] The difficulty with this potential defence is that it does not require those seeking to publish harmful facts about citizens to take any steps to ensure that the facts are true as long as they can establish that they did not intend to harm the person concerned. Those publishing harmful statements are not required to take steps to ensure that what they publish is true. In my view, although this approach would give greater protection to publishers of defamatory statements, it does not protect the constitutional principle of human dignity sufficiently.

[**52.**] A second possibility, the one proposed by the appellants, is that plaintiffs be required to establish that defamatory facts are false. The difficulty with this proposal is that it is the mirror image of the rule in *Pakendorf*. Before a plaintiff could succeed he or she would have to prove the falsehood of every fact in an article relating to him or her. Just as it is difficult for a publisher to prove the truth of every statement, as was described above at paragraphs 30 - 31 of this judgment, so it will often be difficult for a plaintiff to establish that all the relevant facts are false. The result, therefore, of

burdening a plaintiff with a duty to establish falsehood is that the risk of not being able to prove the falsehood of the facts will lie on plaintiffs. Such a result would put plaintiff's constitutional rights at risk, just as requiring publishers to prove truth puts their constitutional rights at risk. The appellants' arguments in this regard cannot be accepted.

## A defence of reasonable publication in the public interest

[**53.**] On the other hand, the development of a defence of reasonable or responsible publication of facts that are in the public interest as proposed by the respondent (and as accepted by the High Court) will provide greater protection to the right of freedom of speech and the media protected in section 21 without placing the constitutional precept of human dignity at risk. The effect of the defence is to require publishers of statements to be able to establish not that a particular fact is true, but that it is important and in the public interest that it be published, and that in all the circumstances it was reasonable and responsible to publish it.

[**54.**] It is clear that this defence goes to unlawfulness so that a defendant who successfully establishes that publication was reasonable and in the public interest, will not have published a defamatory statement wrongfully or unlawfully. A further question arises, however, given the conclusion reached earlier that the principle of strict liability established in *Pakendorf* was repugnant to the Constitution. That question is what the fault requirement is in defamation actions against the mass media. The original principle of the common law is that the fault requirement in the *actio injuriarum* is intentional harm not negligence, although there are exceptions to this rule. Distributors of defamatory material are liable if it is shown that they acted negligently.

[**55.**] In *Bogoshi*, the South African Supreme Court of Appeal held that the media will be liable for the publication of defamatory statements unless they establish that they are not negligent. This approach is consistent with the establishment of a defence of reasonable publication and should be adopted. It is not necessary in this case to consider whether a media defendant could avoid liability if a defence of reasonable publication does not succeed by showing that the publication was nevertheless made on the basis of a reasonable mistake. The appellants did not plead or argue such a defence and the question can stand over for another day.

[**56.**] The defence of reasonable publication holds those publishing defamatory statements accountable while not preventing them from publishing statements that are in the public interest. It will result in responsible journalistic practices that avoid reckless and careless damage to the reputations of individuals. In so doing, the defence creates a balance between the important constitutional rights of

freedom of speech and the media and the constitutional precept of dignity. It is not necessary in this case to decide whether this defence is available only to media defendants. It should be observed that in some jurisdictions, such as South Africa, the defence has so far been limited to media defendants, while in other jurisdictions, such as Canada, the defence is not limited to media defendants.

[**57.**] Having determined the law that will be applicable to this case, it is now necessary to consider the facts of the case and apply the law to them. Three questions arise: was the article defamatory of Mr Shikongo; if it was, have the appellants established a defence; and if not, may and should the quantum of the award for defamation made by the High Court be varied.

## Was the article defamatory?

[**58.**] The opening paragraph of the article states that a '*Broederbond* cartel' has made a financial 'killing' from a land sale that has been approved by the City Council. The second paragraph states that the City is going to lose at least N$4,8million as a result of the transaction and that the Management Committee misled the City. The fourth paragraph states that the Mayor is a Board member of the Bank that is financing the development of the land and that in letting the 'underhand' deal go through, he was acting in the interests of the Bank rather than the interests of citizens. From these paragraphs, an ordinary reader would have gained the impression that the Mayor was in cahoots with a profiteering *Broederbond* cartel and that he is being criticised for furthering the interests of the cartel, rather than the interests of the City or its citizens.

[**59.**] There is doubt as to how an ordinary reader would have read the words in the fourth paragraph: 'How could the Mayor allow himself to be used for self-gain and to empower previously advantaged persons.' These words could be read as implying that the Mayor himself gained financially from the transaction or as stating that only the members of the *Broederbond* cartel gained financially. Given the ambiguity of the language, I am willing to accept in favour of the appellants that a reasonable reader would not necessarily have read the words to mean that the Mayor himself was a financial beneficiary of the scheme.

[**60.**] Even accepting that the article does not state that the Mayor benefited financially from the scheme, the article unmistakably suggests that the Mayor is linked to and furthering the financial interests of a '*Broederbond* cartel' with resulting great financial loss to the City. Is this defamatory?

[**61.**] Expert evidence was led at the trial by the Mayor to indicate that an ordinary reader reading the article would conclude that the word '*Broederbond*' was a reference to the clandestine, racist and

exclusive organisation called the *Broederbond* that existed during the years of apartheid both in Namibia and South Africa. I have no doubt that this evidence is correct. The *Broederbond* was well known, as were its mode of operation and its deplorable attitudes. A reasonable reader would consider that any group described as a '*Broederbond* cartel' is a group sharing the racist attitudes and secretive mode of operation of the notorious *Broederbond* that was disbanded in the 1990s. This interpretation is strengthened by the use of the word 'underhand' later in the article as well as the reference to 'previously advantaged persons'.

[**62.**] In his evidence, Mr Hamata suggested that by the use of the word *Broederbond*, he was not referring to the infamous *Broederbond*, but rather to a group that was supportive of each other in the sense of 'you scratch my back, and I will scratch yours'. Whatever may have been Mr Hamata's intention, which is not relevant to the question of whether the article itself is defamatory, the ordinary reader would not have interpreted the phrase '*Broederbond* cartel' as he suggests.

[**63.**] Instead, the ordinary reader would have understood the article to mean that the Mayor was in league with a clandestine, racist and exclusive group of people pursuing their own financial advantage. Such a statement is defamatory. It is especially defamatory of a public figure who plays a leading role in a political party that was committed to the overthrow of apartheid and the eradication of racist policies as it suggests that the Mayor, in his role as Mayor, is betraying the principles for which he and his political party stand.

[**64.**] The article is also defamatory in suggesting that the Mayor is favouring the interests of the *Broederbond* cartel and Bank Windhoek over the interests of the City and its citizens and causing as a result a major financial loss to the City.

[**65.**] The High Court finding that the article was defamatory of the Mayor cannot be faulted.

## Have the appellants established a defence?

[**66.**] In their plea, the defendants sought to raise the defences of truth in the public interest; fair comment and reasonable publication. The appellants could point to no facts to justify describing those that were taking part in the land development as a '*Broederbond* cartel'. The complete absence of any factual basis for this damaging slur prevents them from relying on either the defence of truth in the public benefit or fair comment.

[**67.**] Moreover, the assertion that the land deal was 'underhanded' is also not supported on the evidence. What is clear from the record of the decision presented by the Mayor is that the application for the

removal of title deed restrictions was properly considered by all relevant departments within the City, by the Management Committee and by the Council itself.

[**68.**] The assertions that the Council was 'misled' as to the right of pre-emption in favour of the City and that the City 'bypassed legal advice' (in the seventh paragraph) is also not correct. The very issue before the Council was whether the title deed condition conferring the right of pre-emption should be removed from the title deed. The full minutes of the Council make plain that the issue was discussed in the Council. The legal advice provided to Council was that the City could not enforce the pre-emptive right if the Club did not want to sell at the reduced price on the basis that if the City sought to enforce the right to purchase at the reduced price, the Club may well have decided no longer to sell.

[**69.**] The quantum of the estimated N$4,8 million loss referred to in the article is also not established on the record. What is plain is that the City required the developers to pay just over N$2 million in betterment fees in order to obtain permission for the development as well as an endowment based on the increased value of the new erven. Even on the appellants' version that if the City had purchased back the land it could have sold it for $4,8 million, the quantum mentioned in the article is quite incorrect, as the amount of the betterment fees and endowment would have had to be deducted from the estimated purchase price.

[**70.**] Finally, the assertion that the Mayor was a member of the board of Bank Windhoek is incorrect. The Mayor is in fact a member of the Board of the holding company of Bank Windhoek, Capricorn Holdings. *Informanté* corrected this error in a subsequent edition.

[**71.**] In argument before this Court, the appellants pointed out that the Club had signed an irrevocable option to purchase with the developer of the land in November 2004 valid until 31 December 2005. Counsel argued that given the existence of this option to purchase, the City could have forced the Club to sell under the title deed pre-emption clause. It is not necessary for us to decide whether this argument is correct or not. At all times it was clear to the City that the Club intended to sell the land in order to raise funds to pay for the upkeep of the Club's sporting facilities. There can be no suggestion that the Council was misled in this regard. At best for the appellants, if their argument on the right of pre-emption is correct, something upon which we express no opinion, the legal advice given to the City was incorrect. Even if that were so, it still does not establish that the Management Committee misled the City, or that the transaction was 'underhand' or that the City 'bypassed legal advice', as the article alleged.

[**72.**] From the above, it is clear that the appellants have not established that the facts alleged in the article were true or substantially true. As a result the appellants have not established a defence of truth in the public benefit. Given that many of the key facts asserted in the article are false, the appellants may also not succeed on a defence of fair comment.

[**73.**] The final question for consideration is whether the appellants have established that publication of the article was reasonable in the circumstances. In order to raise this defence, the appellants must establish that the publication was in the public interest; and that, even though they cannot prove the truth of the facts in the publication, it was nevertheless in the public interest to publish.

[**74.**] There can be no doubt that the issues raised in the article are in the public interest. The manner in which democratically elected officials and institutions perform their public duties will always be issues in the public interest in a democracy. Media reporting and commentary on government affairs is one of the key ways of holding government accountable to the people. As Lewis JA remarked in the South African Supreme Court of Appeal in *Mthembi-Mahanyele v Mail & Guardian Ltd and Another*:

> Freedom of expression in political discourse is necessary to hold members of Government accountable to the public. And some latitude must be allowed in order to allow robust and frank comment in the interest of keeping members of society informed about what Government does. Errors of fact should be tolerated, provided that statements are published justifiably and reasonably.

The next question that arises is whether the publication of the article was reasonable.

[**75.**] In considering whether the publication of an article is reasonable, one of the important considerations will be whether the journalist concerned acted in the main in accordance with generally accepted good journalistic practice. During the trial, the appellants tendered three codes of conduct relating to journalistic practice in evidence in the High Court: the Code of Ethics of the Society of Professional Journalists; *The Star* (a Johannesburg daily) newspaper Code of Ethics; and the *Mail & Guardian* (a South African weekly) Code of Ethics. Codes such as these provide helpful guidance to courts when considering whether a journalist has acted reasonably or not in publishing a particular article.

[**76.**] The Code of Ethics of the Society of Professional Journalists states that:

> Journalists should be honest, fair and courageous in gathering, reporting and interpreting information. Journalists should:
>
> - test the accuracy of information from all sources and exercise care to avoid inadvertent error. Deliberate distortion is never permissible.
> - diligently seek out subjects of news stories to give them the opportunity to respond to allegations of wrongdoing.

- identify sources wherever feasible. The public is entitled to as much information as possible on sources' reliability.
- always question sources' motives before promising anonymity. Clarify conditions attached to any promise made in exchange for information. Keep promises.
- make certain that headlines, news teases and promotional material, photos ... and quotations do not misrepresent. They should not oversimplify or highlight incidents out of context ...
- avoid undercover or other surreptitious methods of gathering information except when traditional open methods will not yield information vital to the public. Use of such methods should be explained as part of the story ...
- avoid stereotyping by race, gender, age, religion, ethnicity, geography, sexual orientation, disability, physical appearance or social status ...

[**77.**] Of course, courts should not hold journalists to a standard of perfection. Judges must take account of the pressured circumstances in which journalists work and not expect more than is reasonable of them. At the same time, courts must not be too willing to forgive manifest breaches of good journalistic practice. Good practice enhances the quality and accuracy of reporting, as well as protecting the legitimate interests of those who are the subject matter of reporting. There is no constitutional interest in poor quality or inaccurate reporting so codes of ethics that promote accuracy affirm the right to freedom of speech and freedom of the media. They also serve to protect the legitimate interests of those who are the subject of reports.

[**78.**] Can it be said that the publication in this case was reasonable? Mr Hamata gave evidence about the steps he followed prior to publication. He spoke to several anonymous sources within the City and had been shown a document that had been prepared in the City concerning the land transaction and suggesting that it should be rescinded. Although his sources told him that the document had been tabled before the Management Committee, this was not in fact correct. He took several steps to verify the story. He went to the Deeds Office to check the title deeds.

[**79.**] He also testified that he called Mr von Finckenstein, the chairperson of the City's Management Committee once on 19 September in the evening nearly 15 months after the relevant application had been granted by the Council. It appears from the transcript of that phone call that Mr von Finckenstein told Mr Hamata that he had just returned from a week away and could not comment on the land transaction then. He stated that he would first need to get 'the background' before commenting.

[**80.**] It is not surprising that Mr von Finckenstein was unable to comment upon it immediately given the time that had lapsed since the application had been granted. Instead of affording Mr von Finckenstein time to refresh his memory, Mr Hamata chose to publish the story. In it he misleadingly stated that Mr von Finckenstein had

claimed that he was not aware that lawyers were seeking rescission of the approval of the land deal. This attempt to check the story does not constitute a diligent attempt to give a person named in the story an opportunity to respond as fair and reasonable journalistic practice requires.

[**81.**] Secondly, Mr Hamata called the Mayor on his cell phone several times to give him an opportunity to comment on the story. The phone was not answered and Mr Hamata made no further attempts to contact the Mayor. He neither called the Mayor's office nor sent the Mayor a text message or an email explaining why he was trying to contact him. This too does not constitute a diligent attempt to give the Mayor an opportunity to respond.

[**82.**] Thirdly, Mr Hamata 'verified' (incorrectly as it turned out) that the Mayor was a member of the board of Bank Windhoek from an anonymous source. This practice flies in the face of the principle that journalists should only use anonymous sources for information that cannot be obtained using 'traditional open methods'. Mr Hamata could have easily obtained the names of the board members of Bank Windhoek without the use of an anonymous source. This step too did not accord with ordinary journalistic practice and indeed produced an incorrect factual assertion.

[**83.**] Fourthly, Mr Hamata did not attempt to obtain copies of the minutes of the Council meeting at which the application for removal of the title deed restrictions had been granted, despite the fact that he testified that he knew that the minutes were publicly available. Again this does not accord with good journalistic practice which requires journalists to exercise care to avoid inaccuracy.

[**84.**] Such an obligation is particularly acute where the original source of the story wishes to remain anonymous given the risk that an anonymous source may be serving a particular agenda not apparent to the journalist. To minimise this risk, the rules of good practice require journalists to investigate the motives of anonymous sources and where possible to base sources upon open forms of information gathering. As the Canadian Supreme Court commented in *Grant*, 'it is not difficult to see how publishing slurs from unidentified "sources" could ... be irresponsible'.

[**85.**] Counsel for the appellants argued that the pressure of deadlines of a weekly newspaper should be taken into account in determining whether the publication was reasonable. At times, the pressure of deadlines may be a relevant consideration. But it will depend on the importance and urgency of the story and the question whether a delay will enable the journalist to verify the story and correct errors. Here the facts upon which the story was based had occurred more than a year before. The story itself constituted a significant defamation of the Mayor. The slipshod manner in which

Mr Hamata sought to give the Mayor an opportunity to respond to the story is particularly unacceptable. It is an elementary principle of fairness that a person should be given an opportunity to respond. Failure to do so will often increase the risk of inaccuracy (as indeed it did in this case).

[**86.**] It cannot be said that the publication of the article in all these circumstances was reasonable or constituted responsible journalism. It may be that if there had only been one or two departures from the principles of responsible journalism, the situation might have been different. Of particular importance is the fact that the Mayor was given no effective opportunity at all to respond to the defamatory story that was to be published about him.

[**87.**] Finally, the High Court was correct in concluding that the appellants acted wrongfully when they published the defamatory article concerning the respondent. We, therefore, uphold its determination in the regard. The next question that arises is whether the quantum of damages awarded by the High Court should be interfered with on appeal.

## Quantum

[**88.**] The award of damages is a matter ordinarily left to a trial court that is better placed than an appellate court to assess what damages are appropriate. An appellate court will only interfere with the award of damages in a defamation case if it is persuaded that the damages awarded by the trial court are 'so unreasonable as to be grossly out of proportion to the injury inflicted'. The respondent appeals on the issue of quantum seeking an increase in the amount of the award from N$175 000 to N$250 000. The appellants, on the other hand, appeal against the quantum on the ground that the award is too high.

[**89.**] In determining the amount of damages to be awarded, the High Court commenced by noting how difficult it is to place a monetary value on damage that has been caused to a person's reputation. In determining the seriousness of the defamation, it took account of the fact that the article was published on the front page of *Informanté* which is widely circulated; the seriousness of the allegations against the Mayor in the article; that, in the view of the High Court, the article was 'clearly calculated' to injure the plaintiff; and that no serious attempt was made to verify the allegations by the defendants; that the defendants refused to apologise (something the appellants' counsel mistakenly asserted the appellants had done in their written submissions to this Court). The Court also took into account the fact that the Mayor had not testified and found that his failure to testify meant that the Court could not fully assess the subjective extent of the damage caused by the article. Nevertheless the Court found that the defamation was very serious. It then

considered other recent defamation awards and determined the quantum of damages at N$175 000.

[**90.**] In determining whether this Court should interfere with this award, the primary question is whether the award of damages is grossly disproportionate to the injury suffered as a result of the defamation. One of the difficulties in applying this test is how one quantifies harm to reputation in monetary terms. As Sachs J noted in *Dikoko's* case in the South African Constitutional Court:

> There is something conceptually incongruous in attempting to establish a proportionate relationship between vindication of reputation on the one hand and determining a sum of money as compensation on the other. The damaged reputation is either restored to what it was, or it is not. It cannot be more restored by a higher award and less restored by a lower one. It is the judicial finding in favour of the integrity of the complainant that vindicates his or her reputation, not the amount of money he or she ends up being able to deposit in the bank.

[**91.**] Sachs J has however also pointed out that awards of damages remain important:

> In our society money, like cattle, can have significant symbolic value. The threat of damages will continue to be needed as a deterrent as long as the world we live in remains a money-oriented as it is. Many miscreants would be quite happy to make the most fulsome apology (whether sincere or not) on the basis that doing so costs them nothing — "it is just words". Moreover it is well established that damage to one's reputation may not be fully cured by counter-publication or apology; the harmful statement often lingers on in people's minds. So even if damages do not cure the defamation, they may deter promiscuous slander, and constitute a real solace for irreparable harm done to one's reputation.

[**92.**] It is useful to compare the award made to other awards of damages recently made for defamation. Counsel informed us that the amount awarded here is to their knowledge the highest amount ever awarded in Namibia by a significant margin. Previously, we were told the highest award for defamation was the award made in *Shidute* in 2008 where an amount of N$100 000 was awarded in favour of the first plaintiff. In that case the first plaintiff was an assistant credit controller in the Walvis Bay municipality and the second plaintiff was her attorney. The defendants were the publisher and editor of the *Namib Times*. The claim arose from a story that had appeared on the front page of the newspaper alleging that the first plaintiff paid her water and electricity accounts late. This was quite untrue but the defendants refused to acknowledge this.

[**93.**] Other recent awards include an award of N$50 000 in *Shifeta v Munamava and Others* in which the plaintiff was a former secretary-general of the National Youth Council. The *New Era* newspaper had published two articles suggesting that the plaintiff was under investigation in relation to the disappearance of National Youth Council funds amounting to N$40 000. This was not true.

[**94.**] Another recent award was made in *Universal Church of the Kingdom of God v Namzim Newspaper (Pty) Ltd t/a The Southern*

*Times*. The plaintiff complained of a story that had appeared in the defendant newspaper: the front page of the paper contained a headline 'State bans Satanic sect' and a large photograph of the plaintiff's church building situated in Windhoek. The front page referred readers to page 3 where the relevant story related not to the plaintiff church but to the Zambian government's decision to ban a church sharing the same name in Zambia. The court held the defendants liable and awarded damages of N$60 000.

[**95.**] Against this background, the award of N$175 000 seems extremely high. It is true that there are aggravating factors in this case: the defamation is serious and the appellants refused to make an apology as requested by the respondent thus losing an opportunity to make amends for the damage that they had done. But there were also aggravating factors of this kind in the other recent cases I have mentioned.

[**96.**] Thus despite these aggravating factors, it seems to me that the award is considerably in excess of the awards generally made for defamation. For that reason, the award should be set aside and replaced by a smaller amount. In all the circumstances, I consider that an amount of N$100 000 is appropriate.

## Costs

[**97.**] The last issue for consideration is the question of costs. The appellants appealed against the special order of costs made in the High Court. The High Court ordered the first and second appellants to pay the respondent's costs on the basis of attorney and own client. Such an award is ordinarily made as a mark of displeasure by a court at the manner in which the matter has been litigated. There is no clear indication in the High Court judgment of any basis for such displeasure.

[**98.**] The High Court relied upon the South African decision of *Buthelezi v Poorter and Others* in which the court made a special order of costs against the first defendant in favour of the plaintiff. The court did so after remarking that it should take care 'to avoid double punishment in the sense of loading the award for damages because of disapproval of the defendants' conduct in the actual litigation and at the same time punishing the defendants for the same conduct by means of an award of attorney and client costs.' In that case, the first defendant had withdrawn his defence of justification just before the trial, something the court found inexplicable. For this and other reasons, the Court found the conduct of the first defendant to have 'been contumacious of both the Court and of the plaintiff' and this conclusion led to the special order of costs.

[**99.**] In this case, the High Court did not point in its judgment to similar vexatious conduct by the defendants. Mr Hamata did refuse to

disclose his sources, but this cannot ordinarily be a ground for criticising the manner in which the litigation has been undertaken nor was it expressly criticised by the High Court. It is not clear therefore why the High Court considered the approach in *Buthelezi v Poorter and Others* to be relevant in this case.

[**100.**] An appellate court will not interfere with the order of costs made by a court below unless it is clear that the order was made on the basis of an incorrect principle. During oral argument in this Court, we asked counsel whether they were aware of any conduct in the appellants' conduct of the proceedings in the High Court which could have been the basis of the High Court's order. Neither counsel for the appellants nor counsel for the respondent could suggest any. Given the absence of any explicit reason for the order by the High Court, and the absence of any obvious basis for such an order in the record, the order of the High Court will be set aside and replaced with an order that the defendants shall bear the costs of the respondent, such costs to include the costs of two instructed and one instructing counsel.

[**101.**] The appellants have only succeeded in part in their appeal. Their main argument that they were not liable for defamation has been rejected. It is thus appropriate to order them to pay the costs of the respondent in this court, such costs to include the costs of one instructed, and one instructing counsel.

[**102.**] The following order is made:
(1) The appeal is upheld in part and dismissed in part.
The order of the High Court is set aside and replaced with the following order:
(i) Judgment is granted against the defendants, jointly and severally, in the amount of N$100 000,00;
(ii) The defendants must pay interest on N$100 000, jointly and severally, at the rate of 20% per annum, calculated from the date of judgment to the date of payment;
(iii) The defendants are to pay the costs of the plaintiff in this action, jointly and severally, such costs to include the costs of two instructed and one instructing counsel.
(2) The appellants shall pay the costs of the respondent in this Court, such costs to include the costs of one instructed and one instructing counsel.

# UGANDA

## Mwenda and Another v Attorney-General

**(2010) AHRLR 224 (UgCC 2010)**

*Andrew Mujuni Mwenda and the Eastern African Media Institute (U) Ltd v Attorney-General*

Constitutional Court of Uganda, consolidated constitutional petitions numbers 12 of 2005 and 3 of 2006, 25 August 2010

Judges: Mukasa-Kikonyogo, Engwau, Byamugisha, Kavuma, Nshimye

Vaguely defined crime of sedition

**Expression** (sedition, public interest, 69, vague wording, 72; burden of proof, 73)

[**1.**] The first petitioner Andrew Mujuni Mwenda, a journalist, under Constitutional petition No 12/2005 came to this Court seeking declarations of nullification of the offences of sedition and promoting sectarianism preferred against him in the Chief Magistrate's Court contending that they were unconstitutional.

[**2.**] Similarly, the second petitioner the Eastern African Media Institution (U) Ltd on its own and in public interest petitioned this Court seeking declarations of nullification of the same offences of sedition, promoting sectarianism and criminal defamation.

[**3.**] The issues and prayers of both petitioners being similar, sought leave of this Court to consolidate the hearing of their petitions, which leave we granted.

### The background to the petitions

[**4.**] The first petitioner is a professional journalist. He was formally a manager of 93.3 KFM radio station and political editor of *Monitor* newspaper. On the said 93.3 KFM he was the host of a program known as 'Tonight with Andrew Mwenda live'. It used to debate current typical issues prevailing in the country.

[**5.**] He would invite at will prominent persons in the studio who would debate a given topic and then, the listening public would be invited to phone in to react to the debate.

[**6.**] About 1 August 2005, the first Vice president of Sudan, the late Lt General John Garang died in a Uganda presidential helicopter crash together with a number of officers and men of Uganda government.

[**7.**] Two public holidays were declared in Uganda to mourn the deceased.

[**8.**] Allegedly, the President of Uganda a chief mourner, in his speech, warned the first petitioner and threatened to close the core business of Monitor publications Ltd, the then employers of the first petitioner. Following the President's speech, the first petitioner hosted a debate by prominent politicians on his above mentioned program entitled: 'Tonight is a public holiday. What justifies a public holiday?'.

[**9.**] Following what was said by the petitioner in the debate, he was with the consent of the DPP, charged before the Chief Magistrate, Nakawa with the offence of sedition contrary to sections 39(1)(a) and 40(i)(a) of the Penal Code Act.

## The particulars of the offence alleged

[**10.**] Andrew Mujuni Mwenda, on 10 August 2005 at KFM radio station, Namuwongo in Kampala District, during a live talk show, uttered the following words with intention to bring into hatred or contempt or to excite disaffection against the person of the President, the Government as by law established or the Constitution.

> You see these African Presidents. This man went to university, why can't he behave like an educated person? Why does he behave like a villager?
>
> Museveni can never intimidate me. He can only intimidate himself ... the President is becoming more of a coward and every day importing cars that are armor plated and bullet proof and you know moving in tanks and mambas, you know hiding with a mountain of soldiers surrounding him, he thinks that, that is security. That is not security. That is cowardice.
>
> Actually Museveni's days are numbered if he goes on a collision course with me.
>
> You mismanaged Garang's security. Are you saying it is *Monitor* that caused the death of Garang or it is your own mismanagement? Garang's security was put in danger by our own government putting him first of all on a junk helicopter, second at night, third passing through Imatong Hills where Kony is? ... Are you aware that your government killed Garang?
>
> I can never withdraw it. Police call them, I would say the government of Uganda, out of incompetence led to or caused the death of Garang.

[**11.**] Being aggrieved by the said prosecution, he petitioned this Court alleging that the prosecution was inconsistent with the Constitution.

## Petition of the first petitioner

[**12.**] The petition of Andrew Mujuni Mwenda was in part worded as follows:

(1) Your petitioner is a person affected by the following matters being inconsistent with the Constitution whereby your petitioner is aggrieved.

(a) That the criminal prosecution of your Petitioner under section 39 and 40 of the Penal Code Act for his expression made while moderating a debate on 10th August, 2005 on KFM Radio Station under the theme 'Today is a Public Holiday. What justifies a Public Holiday' is inconsistent with and/or is in contravention of the provisions of the Constitution, namely:

(i) Article 29(I)(a) of the Constitution in that the expressions were made in the exercise of your petitioner's freedom of expression and the press guaranteed under the said article;

(ii) Article 43(2)(c) of the Constitution in that the expressions were made under your petitioner's reasonable belief that expressing oneself is demonstrably justifiable in a free and democratic society.

(b) That sections 39 and 40 of the Penal Code Act (Cap 120) under which your petitioner is charged *are inconsistent with the Constitution in so far as they limit the enjoyment of the rights and freedoms prescribed in article 29(I)(a) and are not demonstrably justifiable in a free and democratic society as provided in article 43(2)(c) of the Constitution.*

(2) Your petitioner was on the 12th day of August, 2005 arrested by Police and detained at Kampala Central Police Station until 15 August 2005 when he was charged in Nakawa Chief Magistrate's Court under criminal case No 417 of 2005 with the offence of sedition contrary to sections 39(1)(a) and 40(1)(a) of the Penal Code Act in respect of a selected part of his expressions or opinion during the said debate as provided in the particulars of the offence.

(3) Your petitioner states that the action of the state in criminally prosecuting your petitioner for his expressions and sections 39 and 40 of the Penal Code are inconsistent with the Constitution for the following reasons:

(a) That sections 39 and 40 of the Penal Code Act are inconsistent with the provisions of articles 29(I)(a) and 43(2)(c) of the Constitution and are therefore null and void;

(4) He prayed for a declaration that the action of the state in criminally prosecuting your petitioner under the provisions of sections 39 and 40 of the Penal Code for his expressions is inconsistent with the provisions of articles 29(1)(a) and 43(2)(c) of the Constitution and is therefore null and void;

(b) Grant an order that he be freed from criminal prosecution in Chief Magistrate' s Court of Nakawa criminal case No 417 of 2005.

(c) A declaration that in view of the declaration (b) above, sections 42, 43 and 44 of the Penal Code Act which directly relate to sedition be redundant.

(d) That he is entitled to general damages for the unconstitutional prosecution and refer the mater to the High Court to investigate and determine the quantum.

(e) That he is entitled to costs of the petition.

## Evidence of the first petitioner

[**13.**] The petitioner annexed to his petition supportive evidence by way of affidavit. In most material particulars he repeated the facts contained in his petition.

[**14.**] In the like manner the second petitioner petitioned this Court partly on the following terms.

## Petition of the second petitioner

(1) Your petitioner is a non governmental organisation whose objectives among others are to encourage, promote, and support freedom of speech, human rights and democratic governance. Because of the foregoing your petitioner has great interest in the provisions of the Penal Code Act chapter 120 of the revised laws of Uganda which provisions are inconsistent with the Constitution whereby your petitioner is aggrieved.

(a) Sections 39, 40, 41, 42, 43, 179 of the Penal Code Act are inconsistent with and conflict with the provisions of articles 29,30,38, 41 and 43 of the Constitution of the Republic of Uganda.

(b) That the above sections of the Penal Code are not justifiable under the free and democratic society and being inconsistent with the provisions of article 29(a) and (b), 30, 38, 41 and 43 of the Constitution are null and void.

(2) Your petitioner contends that the above sections of the Penal Code Act creates vague offences, that are unseeable and do not provide adequate guidelines as to how the Public can avoid them and as such contravene article 29(a) and (b) of the Constitution.

(3) It prayed for grant of a declaration that:

The provisions of sections 39, 40, 41, 43, of the Penal Code Act contravene and are inconsistent with articles 29(a) and (b), 30, 38, 41 and 43 of the Constitution of the Republic of Uganda and as such are null and void.

## Supporting evidence of the second petitioner

[**15.**] The second petitioner too, attached evidence by way of affidavit sworn by Haruna Kanabi, a founder member and National Coordinator in the petitioner's organisation a non-governmental organisation, deponing to material facts contained in the petition.

[**16.**] In answer thereof, the Attorney-General/respondent briefly stated:

(1) In reply to paragraphs 2 and 3 of the petition, the respondent avers that the criminal prosecution of the petitioner does not contravene article 29(1)(a) and article 43(2)(c) of the Constitution. The respondent contends that freedoms of expression and of the press are not absolute but must be enjoyed in accordance with the Constitution and the law.

(2) The respondent further avers that sections 39 and 40 of the Penal code act

(3) are not inconsistent with articles 29(I) or 43(3)(c) of the Constitution as alleged or at all.

(4) In reply to paragraphs 3, 4, and 5 of the petition, the respondent repeats the contents of paragraphs 2 and 3 herein above and avers that freedom of expression of the press must be enjoyed subject to the rights and freedoms of other people and the public interest, and subject to the security and sovereignty of the state.

(5) The respondent further avers that in accordance with articles 41 and 43 of the Constitution, the law of sedition is justifiable and not unconstitutional, as the freedoms of expression and of the press are not absolute.

## Evidence of the respondent in rebuttal

[**17.**] The respondent's answer to the petition of the first petitioner was also accompanied by supportive evidence by way of affidavit sworn by Robinah Rwakoojo a Principal State Attorney, in the Attorney-General's chambers.

[**18.**] Likewise briefly the Attorney-General responded to the second petitioner's petition as follows:

(1) In reply to paragraph 1 of the petition, the respondent contends that sections 39, 40, 41, 42, 43, and 179 of the Penal Code Act are not inconsistent with and do not conflict the provisions of articles 29, 30, 38, 41 and 43 of the Constitution as alleged by the petitioner or at all.

(2) The respondent further avers that the above said sections of the Penal Code Act, being consistent with the provisions of article 41 and 43 of the Constitution, are justifiable and not unconstitutional.

(3) That the respondent denies that the above sections of the Penal Code Act create vague offences as alleged in paragraph 3 of the petition, and avers that the said sections conform to the Constitution.

(4) In reply to paragraph 4 of the petition, the respondent denies that the above provisions of the Penal Code criminalise freedom of speech and of conscience and avers that freedom of speech and conscience are not absolute but must be enjoyed in accordance with the Constitution, with which the above provisions of the Penal Code comply.

(5) In reply to paragraph 5 of the petition, the respondent denies that the above provisions of the Penal Code Act prevent the mere criticism of government or public officials thus contravening article 29(a) and (b) of the Constitution, and avers that any person is free to criticise government or public officials, but in doing so, is subject to the limitations provided for in the Constitution and other laws, including the above said provisions of the Penal Code which are consistent with the Constitution.

The respondent prayed that the petition be dismissed with costs.

## Supporting evidence of the respondent in rebuttal to that of the second petitioner

[**19.**] The respondent attached an affidavit in support to his answer, sworn by Margaret Apinyi, a Senior State Attorney, in the Attorney-General's chambers

[**20.**] During conferencing, before the Registrar, the parties agreed on joint issues to be decided by this court namely:

(1) Whether sections 39, 40, 41 and 179 of the Penal Code Act Cap 120 are inconsistent with and or are in contravention of article 29(1)(a) of the Constitution.

(2) Whether sections 39, 40, 41, and 179 of the Penal Code Act Cap 120 being limitations of the enjoyment of the freedom of expression are acceptable and demonstrably justifiable in a free and democratic society under article 43(1)(c) of the Constitution.

(3) Whether sections 42-44 of the Penal Code Act Cap 120 which relate to sedition and promoting sectarianism should be declared redundant.

(4) Whether sections 180-186 of the Penal Code Act Cap 120 which relate to criminal defamation should be declared redundant.

(5) Whether the petitioners are entitled to the declarations, orders and relief's sought in the petitions.

[**21.**] This Court having pronounced itself on criminal defamation in *Joachim Buwembo & 3 Others v Attorney-General*, Constitutional reference no 1/2008, that section 179 of the Penal Code Act is not inconsistent with article 29(1)(a) of the Constitution and therefore sections 180-186 of the Penal Code Act are not redundant, issue 4 above was abandoned.

## Representation

[**22.**] At the hearing of the petitions, both the first petitioner and Mr Haruna Kanabi representing the second petitioner were present. Mr Nangwala appeared for the first petitioner while Mr Kenneth Kakuru appeared for the second petitioner. Ms Patricia Mutesi a Senior State Attorney appeared for the Attorney-General.

[**23.**] Mr Nangwala submitted that the purpose of the petitions, was to challenge the constitutionality of two offences namely sedition and promoting sectarianism, contrary to sections 39, 40 and 41 of the Penal Code because they infringe article 29(a) of the Constitution, which allows freedom of speech, expression, press and other media.

[**24.**] He argued that the burden of proof that there was limitation to the said right was on the state and is heavier than balance of prompondenss. Among many decided cases, he cited case of *Rangarajan v Jagijivan Ram & Others; Union of India & Others v Jagjivan Ram* (1990) LRC (Const) 424-427 in which it was held that in a democracy, freedom of expression is to be taken for granted. Governance is by open discussion of ideas by citizens. Be it wise or unwise, foolish or dangerous statements must be tolerated in a democracy.

[**25.**] Counsel compared limitations under the 1967 Constitution and the present one. While there was a derogatory cause in the 1967 Constitution limiting freedoms and rights in the interest of public health, security and economy, there was complete departure in the 1995 Constitution. The 1995 Constitution imposed limitations only on enjoyment of freedoms and rights which prejudiced rights of others and public interest.

[**26.**] The limitation is found in article 43(1)(2). That is when enjoyment of fundamental freedom prejudices *rights of others* or *public interest*. Public interest, should not include a limitation that is not justifiably acceptable in a democratic society. He cited the judgment of Justice Mulenga (Rtd) in the case of *Charles Onyango Obbo & Another v Attorney-General* SCC no 2 of 2002 which dealt

with this limitation. Even objective two of our Constitution empowers and encourages active criticism in the governance of their state by the citizens.

[**27.**] He cited the case of *Regina v Oakes* 26 DLR (4th) 200 on accommodation of wild beliefs and [with regard to] participation in state affairs, the case of *Zundel v the Queen; Attorney-General of Canada* (211) in which their lordships observed that

> a free and democratic society is a society based on the recognition of the fundamental rights, including tolerance of expression which does not conform to the views of the majority.

[**28.**] Counsel asserted that unless sedition fits in the principles outlined, it is unconstitutional because sedition criminalises speech. It criminalises criticism of the President and government institution. Truth is not a defence. The greater the truth, the greater the offence. Counsel explained that what is criminal is bringing into ridicule, disaffection attracting ill will or hostility *mens rea* is subjectively presumed.

[**29.**] He outlined the history and objective of sedition from *Zundel v The Queen* case *supra* page 745. It originated in England. It presumed wisdom of a ruler and mistakes of that ruler were not to be pointed out openly. Truth aggravated the truth. A Nigerian case of *Nwankwo v The State* (1983) (1) NCR 383, the Court compared monarchs to elected leaders. The democratically elected President seeks mandate from the people. Seekers go through mudsliming. In Uganda where the President is elected and not born, the actions of the President and activities of the state, administration and justice offices mentioned in section 41 must undergo criticism of the citizens in fulfillment of objective 2. A leader should not cease to tolerate those who elect him, only because he has been elected. He invited us to find that the offence of sedition is unconstitutional.

[**30.**] He argued that its wordings are too wide. Any criticism of those institutions attract 20 criminal prosecutions. It gives the DPP powers to prosecute critics at his leisure. This offence may be seasonal. During campaigns, candidates criticise each other using very strong inflammatory languages. Rarely prosecution is commenced.

[**31.**] In his view, the law is vague and discretionally. A person may not be able to know whether an utterance may attract prosecution or not.

[**32.**] He cited the case of *Pumbun v Attorney-General* (1993) 2 LCR 323 and the case of *Re Ontario Film and Video Appreciation Society and Ontario Board of Censors* 147 DLR (3rd) 67 for the ratio that the law must not be arbitrary. It must provide safeguards against those in authority. It must not be drafted to target every one. The section on sedition is drafted in such a way that it catches every critic and is discretionally. He again cited the case of *Nwanko v The State* (*supra*)

in which it was said corrupt governments can use it as a tool against critics.

[**33.**] Counsel stated that many jurisdictions have struck out sedition or reformed its wordings. Where it is still in use, incitement to violence and use of force is an integral ingredient. In USA, Canada, Australia, it is treason. He invited us to hold that sedition is a limitation not justifiable in a free and democratic society. Courts must interpret the law as it is. The framers found it fit to give a heavy yard stick to the Republic of Uganda because it is a democratic society.

[**34.**] He prayed that we strike down sections 42 - 44 of the Penal Code which lead to sedition should be declared redundant.

...

## Consideration of Court

[**53.**] We have had the benefit of listening to rich submissions from the trio learned counsel. They have comprehensively made reference to useful authorities from here and in the Commonwealth. Our view is that the Supreme Court case of *Charles Onyango Oboo and Andrew Mwenda* cited by all counsel, considered in depth and is an encyclopedia to the evaluation of cases on rights of speech and expression, media and other press and acceptable constitutional limitations here and other democratic societies.

[**54.**] It so happens that the first petitioner was a second appellant in *Charles Onyango Obbo* case and Mr Nangwala who was counsel there is the same counsel here. Cases that have been cited to us are similar and the ones that had a befitting analysis in the lead judgment of Hon Justice Mulenga (Rtd). We may not therefore for the sake of it, repeat what was stated therein more than following the jurisprudence enunciated therein.

[**55.**] We shall deal with the impugned offence of sedition first. One article of the Constitution gives rights. Another creates restrictions on enjoyment of those rights for the good of other's rights, public interest and security of the state.

[**56.**] Article 29(1)(a) provides: 'Every person shall have the right to freedom of speech and expression which shall include freedom of the press and other media'.

[**57.**] The above freedom is restricted by article 43(1) which provides:

> In the enjoyment of the rights prescribed in this chapter, no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest.
>
> (2) Public interest under this article shall not permit.
>
> (a) Political persecution.
>
> (b) Detention without trial.

(c) any limitation of the enjoyment of the rights and freedoms prescribed by this chapter *beyond* what is acceptable and demonstrably justifiable in a free and democratic society or what is provided in this Constitution.

[**58.**] It follows therefore that the limitations of the enjoyment of the rights and freedoms of an individual are those provided in this Constitution namely:

(i) Those which prejudice fundamental or other human rights and freedoms of others or

(ii) Public interest beyond

(iii) What is acceptable and demonstrably justifiable in a free and democratic society.

[**59.**] Both counsel for the petitioners and the state referred us to the case of *Charles Onyango Obbo & Another v Attorney-General* (*supra*) in which the lead judgment of Justice Mulenga (Rtd) very ably dealt with the issue of limitation similar to the one we have at hand. He had this to say:

> However the limitation provided for in clause (1) is qualified by clause (2) which in effect introduces a limitation upon limitation.
>
> It is apparent from the wording of clause (2) that the framers of the Constitution were concerned about probale danger of misuse or abuse of the provision in clause (1) under the guise of defence of public interest. For avoidance of that danger, they enacted clause (2) which expressly prohibits the use of political persecution and detention without trial as a means of preventing, or measures to remove, prejudice to public interest.
>
> In addition, they provided in that clause a yard stick, by which to gauge any limitation, imposed on the rights in defence of public interest. The yard stick is that the limitation must be acceptable and demonstrably justifiable in a free and democratic society.
>
> This is what I have referred to as a limitation upon limitation. The limitation on the enjoyment of a protected right in the defence of public interest is in turn limited to the measure of that yard stick.
>
> In other words, such limitation, however otherwise rationalised, is not valid unless its restriction on a protected right is acceptable and demonstrably justifiable in a free and democratic society.

[**60.**] In further consideration of Onyango Obbo's appeal, the Supreme Court considered and accepted a proposition of the Supreme Court of India in the case of *Rangarajan* (*supra*) cited to us by counsel Nangwala. It was to the effect that freedom of expression ought not to be suppressed except where allowing its exercise endangers community interest.

[**61.**] Bearing in mind the above decisions, provisions of article 29(1)(a) and limitations under article 43(1)(2), we shall proceed to dispose of the issues as framed.

## Issue one

[**62.**] Whether sections 39 and 40 of the Penal Code Cap 120 are inconsistent with and/or are in contravention with article 29(1)(a) of the Constitution. We shall deal with section 41 later.

[**63.**] It suffices to reproduce the above sections of the Penal Code and relate them to above provisions of the Constitution before answering issue one.

Seditious intention

39(1)A seditious intention shall be an intention

(a) To bring into hatred or contempt or to excite disaffection against the person of the President, the Government as by law established or the Constitution;

(b) To excite any person to attempt to procure the alternation, otherwise than by lawful means, of any matter in state as by law established;

(c) To bring into hatred or contempt or to excite disaffection against the administration of Justice;

(d) To subvert or promote the subversion of the Government or administration of a district.

(2) For purposes of this section, an act, speech or publication shall not be deemed to be seditious by reason only that it intends:

(a) To show that the Government has been misled or mistaken in any of its measures;

(b) To point out errors or defect in the Government or the Constitution or in legislation or in the administration of justice with a view to remedying such error or defects;

(c) To persuade any person to attempt to procure by lawful means the alteration of any matter as by law established

(3) For purposes of this section, in determining whether the intention with which any act was done, any words were spoken or any document was published was or was not seditious, every person shall be deemed to intend the consequences which would naturally follow from his or her conduct at the time in the circumstances in which he or she was conducting himself or herself.

Section 40 (cap 120) seditious offences

(1) Any person who

(a) does or attempts to do or makes any preparation to do, or conspires with any person to do, any act with a seditious intention,

(b) utters words with a seditious intention;

(c) Prints, publishes, sells, offers for sale, distributes or reproduces any seditious publication;

(d) Imports any seditious publication, unless or she has no reason to believe, the proof of which shall lie on him or her, that it is seditious,

Commits an offence and is liable on first conviction to imprisonment for a term not exceeding five years or to a fine not exceeding fifty thousand shillings or to both such imprisonment and fine, and for a subsequent conviction to imprisonment for a term not exceeding seven years.

(2) Any person who, without lawful excuse, has in his or her possession any seditious publication commits an offence and is liable on first conviction to imprisonment for a term not exceeding three years or to a fine not exceeding thirty thousand shillings or to both such imprisonment and fine and on a subsequent conviction to imprisonment for five years .

(3) Any publication in respect of a conviction under subsection (1) or (2) shall be forfeited to the Government.

(4) It shall be a defence to a charge under subsection (2) that if the person charged did not know that the publication was seditious when it came into his or possession, he or she did , as soon as the nature of the publication became known to him or her, deliver the publication to the

nearest administrative officer or the officer in charge of the nearest police station.

[**64.**] The first petitioner was charged in the Chief Magistrates Court Nakawa of sedition contrary to section 39(1)(a) and 40(i)(a) of the Penal Code.

[**65.**] The particulars alleged that during a live talk show, he uttered words with the intention to bring into hatred or contempt or to excite disaffection against the person of the President, the Government as by law established or the Constitution. When one relates the above particulars to the wording of article 43(1)(2) one finds that they have to find refuge in one of the limbs of limitations found in the article namely:

(1) Enjoyment of a right that prejudices rights of others or
(2) Public interest.

[**66.**] The limb on prejudices of rights of others would on first sight be eliminated because the particulars in the first petitioner's charge did not allege so.

[**67.**] Having found the first limb irrelevant, we are left with the question whether what the first petitioner uttered prejudices public interest.

[**68.**] The burden of proof was on the respondent to prove that what the first petitioner uttered prejudiced community interests and such limitation was justifiably acceptable in a democratic society.

[**69.**] We have perused the only evidence adduced by the respondent. That is the supporting affidavits of Ms Robina Rwakojo and Margaret Apinyi. Apart from stating the law on freedom of speech and acceptable limitations thereto, there were no averments as to what were the reactions or feelings of the community. For example from political or civil leaders so as to satisfy the element of 'prejudices to public interest'.

[**70.**] Apart from citing some international conventions, Ms Patricia Mutesi counsel for the respondent adduced no evidence that the limitation was justifiably acceptable in a democratic society.

[**71.**] Be it as we have found, the defect in the particulars of the offence as charged, could be amended to bring it in the ambit of article 43(1).

[**72.**] But that does not solve the fundamental criticism that the wording creating the offence of sedition is so vague that one may not know the boundary to stop at, while exercising one's right under 29(1)(a). Mr Nangwala and Mr Kakuru complained that the section does not define what sedition is. It is so wide and it catches everybody to the extent that it incriminates a person in the enjoyment of one's right of expression of thought. Our people express their thoughts differently depending on the environment of their birth, upbringing

and education. While a child brought up in an elite and God fearing society may know how to address an elder or leader politely, his counterpart brought up in a slum environment may make annoying and impolite comments, honestly believing that, that is how to express him/herself. All these different categories of people in our society enjoy equal rights under the Constitution and the law. And they have equal political power of one vote each. That explains counsel Kakuru's observation that during elections voters make very annoying and character assassinating remarks and yet in most cases false, and yet no prosecutions are preferred against them. The reason is because they have a right to criticise their leaders rightly or wrongly. That is why he suggested, rightly so that leaders should grow hard skins to bear. We find that, the way impugned sections were worded have an endless catchment area, to the extent that it infringes one's right enshrined in article 29(1)(a). We answer issue one in affirmative and in favour of the petitioners.

## Issue 2: Whether section 39 and 40 of the Penal Code Cap 120 are being limitations of the enjoyment of the freedom of expression are acceptable and demonstrably justifiable in a free and democratic society under article 43(1)(c) of the Constitution

[**73.**] We held above that the burden of proof was on the respondent to prove that the two sections complained of fall under acceptable limitations. The respondent failed to discharge that burden of proof. We answer issue 2 in the negative in favour of the petitioners.

## Issue 3

[**74.**] Having held as we have under issues 1 and 2, we answer issue 3 in the affirmative only in relation to the offence of sedition.

## Sectarianism

[**75.**] We said earlier in our judgment that we would deal with section 41 dealing with sectarianism later. This section criminalising sectarianism was made law on 7 December 1988 before the 1995 Constitution was promulgated. Article 274 of the Constitution saved existing laws which were in force on coming unto force of the Constitution. It is therefore lawful.

[**76.**] After perusing the relevant provisions of the Constitution and considering, submissions of counsel for the petitioners and respondent together with authorities referred to us, we find nothing unconstitutional about it. We decline to grant the declaration on sectarianism as prayed.

[**77.**] In the result the petitions succeed on sedition and fail on sectarianism.

[**78.**] We make the following declarations:
(i) Sections 39 and 40 of the Penal Code are inconsistent with provisions of the articles 29(1)(a) and 43(2)(c) of the Constitution and are null and void. They are struck out of the Penal Code.
(ii) Sections 42, 43 and 44 of the Penal Code which relate to sedition are redundant.
(iii) The first petitioner be relieved of criminal prosecutions in Chief Magistrate's Court Nakawa Criminal case 417/2005.
(iv) Until our decision, the prosecution was not unconstitutional. We make no order as to damages and the issue was not seriously pursued in the submissions of counsel.
(v) Petitioners have failed to prove that the offence of promoting sectarianism is inconsistent with the Constitution.
(vi) The first petitioner will have half of the costs.

# ZAMBIA

## Kingaipe and Another v Attorney-General

**(2010) AHRLR 237 (ZaHC 2010)**

*Stanley Kingaipe, Charles Cookole v Attorney-General*

High Court for Zambia, Livingstone, case 2009/HL/86, 27 May 2010

Judge: Muyovwe

Extracts. Full text available at www.chr.up.ac.za

HIV test without free and informed consent

**Interpretation** (international law, 3)
**Cruel, inhuman or degrading treatment** (HIV testing without free and informed consent, 5, 9)
**Privacy** (HIV testing without free and informed consent, 5, 9)

[**1.**] It is not in dispute that the petitioners were discharged from ZAF in October 2002. It is not in dispute that prior to their discharge they attended before a Medical Board which fund them to be unfit to perform all forms of military duties and recommended for their discharge on medical grounds pursuant to regulation 9(13) of the Defence Force (Regular Force) (Enlistment and Service) Regulations. It is not in dispute that after appearing before the Medical Board the petitioners were among those who were ordered through a Station Routine Order to submit to a medical check-up. It is also not in dispute that the medical check-up included blood tests. It is also not in dispute that the petitioners are still attending the ZAF Clinic where they are accessing free ARVs. It is also not in dispute that following their discharge in 2001, the petitioners were paid their terminal benefits in full. It is noteworthy that after their discharge, they later found employment in various institutions.

Firstly, (a) the petitioners pray that it may be determined and declared that the respondent's decision to subject them to mandatory and compulsory medical test and examination including HIV/AIDS without their express and or informed consent as well as pre and post-test counselling:

(i) Is *ultra vires* article II of the Constitution of Zambia

(ii) Is a violation of the petitioners' right to personal liberty under article 13 of the Constitution of Zambia

(iii) It violated the petitioners' right to protection from inhuman and degrading treatment guaranteed under article 15 of the Constitution of Zambia

(iv) Was a violation of the petitioners' right to privacy guaranteed under article 17 of the Constitution of Zambia

(v) Constituted a violation of their rights to adequate medical and health facilities and to equal and adequate educational opportunities in all fields and at all levels as provided for under article 112 (d) and (e) of the Constitution of Zambia

...

[**2.**] Extracting a blood sample from any person without his or her consent infringed individual rights.

...

[**3.**] This Court is at large to consider and take into account provisions of international instruments and decided cases in other countries. The Zambian courts are not operating in isolation and any decision made by other court on any aspect of the law is worth considering.

[**4.**] In the case under consideration, there is no evidence to show that the petitioners were unable to give their consent to undergo an HIV test. As I have found, Dr Matipa formed his own medical opinion because of the condition of the petitioners and decided that they should have an HIV test and he went ahead and arranged for the same and when the results came out he proceeded to put them on ARVs without informing them. Lord Mustill at page 889 in the *Airdale NHS Trust v Bland* case said:

> If the patient is capable of making a decision on whether to permit treatment and decides not to permit his choice must be obeyed, even if on any objective view it is contrary to his best interests. A doctor has no right to proceed in the face of objection even if it is plain to all, including the patient that adverse consequences and death will or may ensue.

[**5.**] Indeed, this is how important consent is and in the case of HIV testing, we are referring to not only to consent but informed consent. It is possible that someone can give their consent but without knowing and understanding fully what are they consenting to. This was precisely the issue the House of Lords dealt with in *Chester v Afshar* where the patient consented to a risky operation yet, she was not warned of the risk involved. It is now an acceptable fact that an informed decision is the best decision that any person can make on any issue touching their lives. In *Diau v Botswana Building Society* which involved a woman who refused to undergo an HIV test. The Court had this to say:

> Informed consent is premised on the view that the person to be tested is the master of his own life and body. In the premises it should follow that the ultimate decision, whether or not to test lies with him or her, not the employer, not even the medical doctor. The purpose of informed consent is to honour a person's right to self-determination and freedom of choice.

I cannot agree more.

...

[**6.**] Our own Constitution provides in article 15 that: 'A person shall not be subjected to torture or to *inhumane or degrading* punishment or other like *treatment*' (italics mine).

[**7.**] Article 17(1) reads: 'Except with his own consent a person shall not be subjected to the search of his person or his property or the entry by others on his premises.'

[**8.**] I am convinced that no pre and post counselling were done because if this was the case, the defense would have made this an issue in cross-examination.

...

[**9.**] I find that the petitioners were subjected to mandatory testing without their consent and that they were put on ARVs unknowingly. This was a grave error on the part of the doctor. Having regard to the authorities cited herein. I find that the petitions right to protection from inhuman and degrading treatment under article 15, the right to privacy under article 17 was violated.

...