# THE JUDGEMENT IN THE FIRST ALL-AFRICAN HUMAN RIGHTS MOOT COURT COMPETITION

Paper 7
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**IN THE INTER-AFRICAN COURT OF HUMAN RIGHTS (MOOT COURT DIVISION)** Case No: 1/1996
In the matter between:

**MINISTER SLILILI** (Petitioner)
and
T**HE GOVERNMENT OF CAPRICORNIA** (Respondent)

## JUDGEMENT

ALI CJ: This matter has been referred to this court by the African Commission on Human Rights ('the Commission'). The petitioner is a citizen and former cabinet minister of Equatoria, who is at present imprisoned in the Capricornia Maximum Security Prison, where he is serving a sentence of life imprisonment imposed upon him by the Capricornia Supreme Court. Particulars of the charges in respect of which such sentence was imposed and of his apprehension, trial and conviction will be detailed shortly. Suffice it at this stage to say that the charges related to the alleged commission by the petitioner of three international crimes.

The case had its genesis in prolonged political strife, civic unrest and intermittent armed conflict in Equatoria. The three charges on which the petitioner was convicted and sentenced relate to his conduct as an officer in the Equatorian Defence Force ('EDF'), in the course of such conflict. The first and second charges related to a cross-border raid into Capricornia in July 1992 when the petitioner, in hot pursuit of cadres who had just blown up a power station, allegedly entered Capricornia with a contingent of EDF troops and killed five of the cadres and three Capricornian civilians. The words 'Death to all Panis' were written with their blood on the ground. The second charge related to two other Capricornian civilians, killed by a booby-trap set up in the head office of the 'Pani Cultural Club' by the petitioner and his men during the same period.

The third charge relates to events that took place some two years later in or near the village of Lembo in Equatoria. The Organisation of African Unity (the 'OAU') had in the interim sponsored and supervised a general election in Equatoria. Only two parties contested the election, the Equatoria Nationalist Party ('ENP'), which held a majority in the national legislative assembly prior to the election, and the Freedom Movement of Equatoria ('FME'), a well-organised resistance movement with a strong support base amongst the Pani people, the

smaller of the two major ethnic groupings in Equatoria. (The largest part of the Pani people live in neighbouring Capricornia.) The ENP won the election by securing 73% of the total vote.

Immediately after the election the FME announced that it would not accept the result of the election and requested the Election

Monitoring Commission to declare the election void, due to widespread irregularities. When the Commission refused to do so, the tension between supporters of the ENP and FME erupted into widespread rioting in all the major metropolitan areas of Equatoria. The government of Equatoria immediately stepped in to suppress the riots and deployed the Equatorian Defence Force for this purpose. During a week of bloodshed a number of FME supporters were killed by government troops.

Instead of quelling the political unrest, the response of the government added fuel to the fire and the unrest rapidly spread from the urban centres to the countryside. The FME decided to exploit the volatile situation and mobilised their supporters for an armed struggle against the government.

Within a week the FME had managed to set up a command structure and a training camp in the mountainous area of the Paniki Province, the traditional home of the Pani people in Equatoria. Soon afterwards they started enlisting members of the local population into their cadres. Among those enlisted were women, elderly men and children, many as young as thirteen years of age. After receiving brief training the rebels were equipped with various types of firearms. No uniform was issued and, but for the open carrying of their firearms, the rebel troops blended easily with the local population.

With the support of the local population, mainly in the form of the supply of basic foodstuffs to the rebel camps, the uncompromising and inaccessible mountain region proved to be a secure hide-out for the FME rebels. A number of successful attacks on government installations and patrols were launched from these camps. As the rebel troops strengthened their hold on the mountains and surrounding area, more bases were gradually set up. By the end of April three such bases had been established in the region.

As the hostilities between the government troops and the rebel cadres for control of the Paniki Province intensified, the local population became more and more involved in the fighting. When it became clear that the government troops would not be able to penetrate the rebel strongholds the government troops decided to embark on a campaign of intimidation of the civilian population. The large number of youths supporting the FME was of particular concern to the government troops.

On 2 May 1994 the government troops, under the command of the petitioner, launched an attack on Lembo, one of the larger villages in the foothills of the Paniki mountains. The rebel troops in Lembo at the time offered little resistance and fled into the mountains leaving the inhabitants of Lembo at the mercy of the government troops. The EDF forces captured a large number of youths working on the farmlands outside the village that provides most of Lembo's food and, as such had become an important source of food to the rebel soldiers. A significant portion of these youths were under the age of 14 years and a few were in possession of firearms.

The petitioner ordered that all the captured youths be assembled in the town square. There he ordered his men to flog the children publicly as punishment for supporting the rebels. He also instructed his troops to burn or otherwise destroy the crops grown on the farmlands. The words 'Death to all Panis' were written with a knife on the backs of two children and several children were also raped by the soldiers. At his trial in the Capricornia Supreme Court it was not clear what the petitioner's role in the latter two incidents had been. It subsequently came to light that, unbeknown to the petitioner and his men, a television news team from an international network had been filming the events.

A fragile truce was reached between the ENP and the FME at the end of 1994. A government of national unity was formed in which the petitioner was given a cabinet post. The government of national unity set up a Truth Commission to investigate the worst excesses of the past. The Commission sat in camera and gave indemnity to a number of people, who testified before it, including the petitioner. Shortly thereafter the television footage filmed at the Lembo was broadcast worldwide. This led to an international outcry against the Equatorian authorities generally and the petitioner in particular. The outcry was met with silence on the part of the Equatorian government.

The Equatorian government was formally requested by the government of Capricornia to bring the petitioner and his men to book for what was termed 'grave violations of basic humanitarian law' but there was no response.

The government of Capricornia decided to take action. On 3 July 1995 the petitioner was forcibly kidnapped from his office in Canca, the capital of Equatoria, by five or six men belonging to a special unit of the Capricornian defence force. He was taken at gunpoint from the office to his house where he was held captive for three hours. After the house had been extensively searched the petitioner was injected with a substance that put him to sleep and flown to Capricornia, where he was arrested by Capricornian officials for his alleged participation in the Lembo attack.

He appeared before the Capricornian Supreme Court the following morning and was charged with having committed the three international crimes detailed above. In support of the first charge, relating to the killing of the five FME cadres and the three Capricornian civilians in the course of the cross-border raid in 1992, the prosecution tendered, and the court admitted, the text of a statement which had been found in the petitioner's home by his captors. It was a detailed confession by the petitioner, signed by him and the members of the Truth Commission, regarding the cross-border raid. The second charge was substantiated by the evidence of a Capricornian citizen who saw the soldiers entering the club. In support of the third charge the video of the events at Lembo was shown.

After a protracted trial the petitioner was found guilty on all charges and sentenced to life imprisonment without the option of parole on all charges. In Capricornia such sentence means that the prisoner is in fact detained until his death.

With the assistance of the Equatorian Criminal Justice Group, the petitioner challenged his conviction and sentence in the Capricornian High Court, the highest judicial authority in Capricornia. It was argued on his behalf that:
(1) the Capricornian Supreme Court had had no jurisdiction to try him;
(2) the trial had accordingly violated his basic rights in terms of the Charter;

(3) his unlawful abduction by Capricornian troops barred the courts of that country from exercising jurisdiction over him;
(4) his alleged conduct at Lembo did not in any case constitute a 'grave breach' of humanitarian law and hence did not constitute an international crime cognisable by a Capricornian court;
(5) the text of his confession to the Truth Commission was inadmissible evidence;
(6) he had received indemnity for his actions;
(7) the sentence imposed on him was cruel and inhuman.

The High Court rejected all his arguments and hence the resort to this court. With the help of the Equatorian Criminal Justice Group he petitioned the Commission as a last resort to redress the alleged violations of his basic rights. The Commission has now referred the matter to this court.

The case raises a number of important issues, not only with regard to the petitioner's claim for redress, but also in the broader context of comity and harmonious co-existence of the member states of the OAU and their peoples. The obvious starting point in the discussion of such issues is the jurisdiction of this court to try the matter.

Ordinarily, the jurisdiction of this court extends to all cases concerning the interpretation and application of Part 1 of the African Charter on Human and Peoples' Rights ('the Charter'). Cases can be brought before this court by either a state party to the Inter-African Convention on Human Rights ('the Convention') or after petition to it by the Commission. In terms of the Convention any person or non-governmental organisation or group of individuals claiming a violation by a state party to the Convention of their rights set forth in the Charter may petition the Commission for appropriate redress. After he had exhausted all the domestic remedies available to him under Capricornian law the petitioner, supported by the Equatorian Criminal Justice Group, a non-governmental organisation or group as contemplated by the Convention, petitioned the Commission, alleging the violation of his rights under the Charter.

The Commission duly considered the petition and referred the petitioner's case to this court for adjudication upon and, if found appropriate, redress of the alleged violations of the petitioner's Charter rights. Equatoria and Capricornia are both parties to the Convention and have as such accepted the compulsory jurisdiction of this court. Both states are members of the United Nations and have signed and ratified the four Geneva Conventions of 1949 and both the 1977 Protocols to the Conventions. Equatoria and Capricornia have, in addition, acceded to the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity. It is therefore clear that this court is clothed with the requisite jurisdiction to hear this case and to make such order as it may deem appropriate in the circumstances. Indeed, there was no serious challenge to such jurisdiction on behalf of the respondent.

The next subject to be considered relates to the background, cause, nature and general circumstances of the armed conflict in Equatoria. In this context it is important to note that at all material times there was a lawfully elected government functioning in Equatoria. Even at the time of the violence during 1992 (in the course of which the cross-border raid occurred) there was a lawful government in the country, although its legitimacy was manifestly not accepted by the whole of the population.

The very reason why the OAU sponsored the election during February 1994 was to resolve the historical conflict and to promote national reconciliation. On the face of it, that election

indicated that the ENP, ie the pre-existing regime, enjoyed the support of the overwhelming majority of the electorate.

The ensuing unrest in due course escalated into hostilities which constituted 'armed conflict not of an international nature' within the territorial boundaries of Equatoria, as contemplated in article 3 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War. The terms of Protocol II, additional to the Geneva Convention ('relating to the protection of victims of non-international armed conflicts') are therefore directly in point. Two of the provisions of that protocol are of fundamental importance in this case. They are articles 3 and 4, which read as follows:

**ARTICLE 3 - NON-INTERVENTION**

1 Nothing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a state or the responsibility of the government, by all legitimate means, to maintain or re-establish law and order in the sate or to defend the national unity and territorial integrity of the state.

2 Nothing in this Protocol shall be invoked as a justification for intervening, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the High Contracting Party in the territory of which that conflict occurs.

**ARTICLE 4 - FUNDAMENTAL GUARANTEES**

1 All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors.

2 Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever:
(a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
(b) collective punishments;
(c) taking of hostages;
(d) acts of terrorism;
(e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
(f) slavery and the slave trade in all their forms;
(g) pillage;
(h) threats to commit any of the foregoing acts.

3 Children shall be provided with the care and aid they require, and in particular:
(a) They shall receive an education, including religious and moral education, in keeping with the wishes of their parents, or in the absence of parents, of those responsible for their care;
(b) All appropriate steps shall be taken to facilitate the reunion of families temporarily separated;
(c) Children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities;

(d) The special protection provided by this article to children who have not attained the age of fifteen shall remain applicable to them if they take a direct part in hostilities despite the provisions of subparagraph (c) and are captured;
(e) Measures shall be taken, if necessary, and whenever possible with the consent of their parents or persons who by law or custom are primarily responsible for their care to remove children temporarily from the area in which hostilities are taking place to a safer area within the country and ensure that they are accompanied by persons responsible for their safety and well-being.'

Accepting, as we must in the circumstances, that the election was not materially flawed, the subsequent rioting and insurrection fomented by the FME were unjustified. The Equatorian government was accordingly entitled and obliged to take all reasonable steps to quell the unrest and to restore its control over the whole of its national territory. It should also be observed that such unrest escalated into a rebellion once the FME established military bases, targeted government installations for attack and rendered parts of Paniki Province inaccessible to the government and its agencies. From that stage onwards the government forces became entitled to capture the rebels and those it had reason to suspect were giving them active support.

Moreover – and more significantly – there can be no justification for the refusal by the FME to accept the unequivocal judgment of the people of Equatoria as expressed in the election. There was no justification for the commencement or continuation of an armed struggle against the democratically elected government of the country to which all Equatorians, regardless of political persuasion or ethnic loyalty, owed allegiance. In this regard we wish to emphasise that the concept of democracy postulates reciprocal rights and obligations. Thus the preamble to the Charter expressly states 'that the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone'. Even more explicitly, article 29 of the Charter inter alia provides as follows:

The individual shall also have the duty:

3) not to compromise the security of the state whose national or resident he is;
5) to preserve and strengthen the national independence and the territorial integrity of his country and to contribute to its defence in accordance with the law;

We stress the duty of loyalty of the citizen or resident for this reason. As we see it, the conduct by the Capricornian authorities in causing the petitioner to be apprehended, prosecuted and imprisoned was triggered by his actions against the FME and its cadres. In a very real sense the Capricornian intervention can be seen as being on behalf of a political (and ethnic) minority operating in the national territory of a fellow member of the OAU. Had the FME been the aggrieved party seeking redress against the petitioner in a court of law, it would have been met with the universally accepted and time-honoured response that he who has unclean hands cannot invoke the assistance of the law. That response would apply with added force to Capricornia, which involved itself in an issue between a fellow member of the OAU and its internal dissidents. It is at least arguable that, in dong so, the Capricornian government acted in breach of the duty of non-intervention imposed on it by article 3.2 of Protocol II (quoted above). In any event, the moral justification for its actions vis-à-vis the petitioner cannot but be attenuated by the immoral conduct of the FME.

A particularly disquieting feature of the armed struggle waged by the FME in Paniki Province was the widespread use of children as combatants. The terms of article 4.3(c) of Protocol II

(quoted above) are quite clear, so are their context and purpose. Indeed the case before us highlights the undesirable consequences set in train when children become embroiled in hostilities. Although many youths in their early teens (and even younger) are physically equipped to bear arms, and although their youthful idealism and sense of adventure render them ready candidates for recruitment. it is their very youthfulness which should be protected. The killing fields of South East Asia, Latin America, the Middle East and our own continent are all too familiar with the spectre of children with old faces and empty eyes armed to the teeth.
But international human rights norms have come to recognise the unique vulnerability of children and to make special provision for their protection – also against their own lack of that judgment which comes only with maturity. (See eg Chapter 11 of Protocol 1; article 4 of Protocol II; article 25.2 of the Universal Declaration of Human Rights.) Here, of course, the use of children in making war was compounded by camouflaging combatants as innocent bystanders. They wore no uniforms and were deliberately commingled with their genuinely non-combatant fellows. However reprehensible the Equatorian government's reaction was, the fons et origo of the programme of intimidation against children was the ambiguity introduced when the FME failed to draw the line between their soldiers and children. These features, too, would have obliged a court to scrutinise closely any claim for legal redress emanating from the FME. We cannot ignore those circumstances either.

The next substantive issue to be considered is whether the evidence adduced at the trial established that any of the petitioner's proven acts or omissions constituted international crimes which, as such were cognisable by the Capricornian courts. With regard to the first two charges the issue does not arise. Those charges relate to events that took place on Capricornian soil and do not require the quality of internationality to render them triable in that country in the ordinary course. In the case of the third charge, however, relating to the Lembo incident, the question certainly does arise; and, in turn, it raises a number of difficult subsidiary questions. We mention the most salient. Was the petitioner's command for the children to be captured and flogged en masse and the execution of such command under his supervision a grave breach of humanitarian law such as to render it an international crime? Did the indiscriminate capture of children constitute such a breach? Was the summary infliction of corporal punishment on captives such a breach despite the fact that they were children whom the petitioner presumably did not wish to keep in captivity? Is the petitioner not in any event vicariously liable for the atrocities committed by his troops when they raped some of the captives and carved words onto the backs of others? For reasons which will become clear shortly, we do not find it necessary to resolve these issues. We shall assume, without deciding, that one or more of the petitioner's acts and omissions in the course of the Lembo raid did indeed constitute an international crime.

In similar vein it is not strictly necessary to determine the soundness of the petitioner's contention that the indemnity he received at the hands of the Truth Commission set up by the Equatorian government of national unity rendered him immune from any prosecution on any charge and before any court in respect of the matters covered by the indemnity. Our prima facie view is that there is no merit in the contention. It does not lie within the power of a domestic tribunal, such as the Truth Commission, to afford an offender against international law immunity against prosecution in respect thereof. On the contrary, articles 146 and 147 of the Geneva Convention (referred to above) oblige state parties to the Convention to search for and prosecute persons alleged to have committed grave breaches involving conduct of the nature alleged against the petitioner. More pertinently United Nations General Assembly Resolution 3074 (XXVIII) of December 1973 (relating to the 'principles of international co-

operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity') contains detailed provisions which render the petitioner's contention unarguable. Had it been necessary to make a finding on the point, the court would have held against the petitioner.

We turn, next, to the question of admissibility of evidence. In the course of the trial the prosecution relied upon two pieces of evidence which we regard as either wholly inadmissible or of such doubtful value and slight cogency as to require material corroboration. The first piece of evidence to be discussed is that of the written and signed statement made by the petitioner to the Truth Commission. It will be recalled that the prosecution on the first two charges relied heavily on that statement, which constituted a full confession to those events. In the case of count two there was a snippet of additional evidence by a Capricornian witness who saw the Equatorian troops entering the club house where the fatal booby-trap explosion took place. That witness's evidence, however, in no way implicates the petitioner or corroborates his involvement in the incident. In the ultimate analysis the sum total of the incriminating evidence is derived from the confession.

Now, there are no universally accepted rules of evidence which can be applied in international hearings such as this – or, indeed, in a trial on international charges before a municipal tribunal. Nor are there any rules specifically applicable to this court. In the premises we have decided that we should be guided by standards of scrupulous fairness to both the prisoner and the prosecution. We are also satisfied that we should bring to bear the collective experience we have gained in our domestic courts. Applying those standards we have no hesitation in ruling that no reliance should be placed on the confession. It matters not whether that is interpreted as a ruling on admissibility or on weight. Our reasons should be self-evident. First, the confession was made in response to an unequivocal promise on the part of the Equatorian authorities that it would not be used against him. That promise, in the circumstances, also implied that the contents of any statement the petitioner might make would be kept confidential. That was inherent in the Truth Commission hearings being held in camera. In the second instance, and in itself conclusively, we hold that the evidence was obtained in the course of an armed incursion by agents of a member state into the territory of another, in flagrant breach of the spirit and letter of international law. The evidence was, moreover, discovered in the course of an unlawful invasion of the petitioner's privacy and illegally seized from his home.

Notwithstanding its manifest cogency, civilized legal systems have long since recognised that confessions are to be accepted as evidence of guilt only in carefully monitored circumstances. The temptation for those with powers of compulsion to extract evidence of guilt from the suspect is notorious and pervading. Therefore the law declines to use such evidence where it is tainted with such abuse. This is a textbook case: The broader interests of justice, fair-dealing and international comity demand that evidence obtained in so reprehensible a manner be excluded from the material to which a court of law gives consideration.

THE SECOND EVIDENTIARY QUESTION relates to the use that was made of the television video material. On the third charge the prosecution relied exclusively on the film itself. There is unanimity among us that no weight is to be attached to that evidence, some members of the court being of the view that the film was inadmissible without authenticating evidence and others that the absence of such evidence deprived it of probative force. In view of the ultimate conclusion to which we have come on another – decisive – issue, it is unnecessary to say any more on the topic. We turn now to deal with that issue.

Notwithstanding its importance, both in this case and generally, little need be said about it. Were the Capricornian courts entitled to exercise jurisdiction over the petitioner in the circumstances of this case? In terms of UN General Assembly Resolution 2583 of December 1973 Equatoria was entitled and obliged to act against the petitioner, assuming his acts or omissions to have constituted international crimes. It did not do so despite the Capricornian request. Thereupon Capricornia – and indeed any other state – becomes entitled to try the charges against the petitioner. To that end they were entitled to call upon Equatoria for the petitioner's extradition. Alternatively there could have been a demand for the appointment of an international tribunal to try the charges. Capricornia did not elect to adopt either of these lawful options. On the contrary, it opted to take the law into its own hands. And, having so opted, it executed its decision in a manner which violated the territorial integrity and national sovereignty of Equatoria. That was a flagrant breach of international law and conduct calculated gravely to prejudice peace and tranquillity between neighbouring states. Counsel for Capricornia sought to persuade us that there had been no breach of international law because a local police station commander in Equatoria rendered assistance to the Capricornian kidnappers. The contention is untenable. The Equatorian police officer was clearly not acting with the authority of his superiors, let alone on behalf of the Equatorian government. There is no authority for the contention that an individual police officer's clandestine connivance with an invasion of his country by forces of another affects the illegality of such conduct. In addition, of course, the raid involved serious invasions of the petitioner's rights. Conduct of such a nature can never be condoned. Nor can a court of justice ignore it. There is a difference of opinion as between the US Supreme Court, on the one hand, and several other jurisdictions, on the other. We, for our part, have no hesitation in associating ourselves with the latter point of view, which declines to exercise jurisdiction over persons who have been brought before its court unlawfully by the agent of the prosecuting authority. You cannot found jurisdiction by acts of piracy.

For the reasons set out above the conviction and sentences cannot be allowed to stand. They are hereby set aside. The respondent is ordered forthwith to release the petitioner and to cause him to be returned to his place of residence.

All my brothers concur in this judgement.

Allear CJ, who participated in the judicial deliberations, was not able to attend the hearing of argument.