African Human Rights and Access to Justice Programme

Legal Opinion Case No. 243

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Legal Opinion developed for the Community Law Center - Ekiti State, Nigeria, on the case Gbenga Adubi and 39 Others v. Attorney General of Ekiti State and Another. The core issue implicated in this case is the right to fair trial and in particular the right to notification of charge and the right to trial without undue delay.

Summary of the opinion:

The legal opinion develops in three parts:

Part One will be the review of the applicable international human rights standards, making an assessment of their ratification and their effect on the national law

Part Two will be the review of the national law and the factual situation, giving rise to any conflict with or opportunity to apply international human rights law

Part Three looks into the remedies and drafts the conclusions.

PART ONE: INTERNATIONAL STANDARDS ON THE RIGHT TO A FAIR TRIAL AND THEIR APPLICATION IN NIGERIA

Part One firstly analyzes the international standards on the right to a fair trial, and then examines the application of such standards in the State of Nigeria and their binding force.

Summary of Part One:

THE RIGHT TO A FAIR TRIAL IN INTERNATIONAL LAW:

(i) In what does the Right to a Fair Trial consist?

(ii) International standards protecting the Right to a Fair Trial

APPLICATION OF INTERNATIONAL LAW ON THE RIGHT TO A FAIR TRIAL IN THE STATE OF NIGERIA:

(iii) International law sources and their effects in the State of Nigeria

(iv) International Customary Law on the right to a fair trial: application of the UN Charter and the UN Declaration of HR in the State of Nigeria

(v) *International Treaties on the right to a fair trial and their application in the State of Nigeria:*
The International Covenant on Civil and Political Rights
The African Charter on Human and Peoples' Rights
The European and Inter-American Conventions on Human Rights

(vi) *International 'soft-law' on the right to a fair trial and its application in the State of Nigeria*

(vii) *The Role of the Judiciary in the domestication of international law*

THE RIGHT TO A FAIR TRIAL IN INTERNATIONAL LAW

(i) In what does the Right to a Fair Trial consist?

The right to a fair trial is a fundamental right to the accused person: it starts upon his arrest to the exhaustion of the last appeal. This right has firm foundations in International Human Rights Law as a fundamental corollary to the rule of law principle. Under the Universal Declaration of Human Rights, now considered peremptory norm of international law, the right to a fair trial is expressly recognized and linked to the rule of law: when the right to a fair trial is not protected, the rule of law itself is undermined.

The right to a fair trial is one of the vastest of all human rights. It ranges from prohibition of torture during detention, to the right to an interpreter and the right to compensation and damages for miscarriage of justice. For scholastic purposes to this opinion, we have articulated the right to a fair trial into the followings rights:

Before the trial:

- The prohibition on arbitrary arrest and detention
- The right of being promptly informed of charges
- The right to assistance of a legal counsel
- The right to appear promptly before a judge
- The prohibition of torture and the right to humane detention conditions, both in pre-trial and during trial detention

During the trial:

- The right to a fair hearing
- The right to a public hearing
- The right to a competent, independent and impartial tribunal established by law
- The right to presumption of innocence
- The right to adequate time and facilities for preparation of a defence
- The right to a trial without undue delay or to be released
- The right to defend oneself (in person or through a legal counsel)
- The right to examine witnesses
- The right to an interpreter
- The prohibition on self-discrimination
- The prohibition of retroactive application of criminal law
- The prohibition on double jeopardy

After the conclusion of the trial:

- The right to appeal
- The right to compensation for miscarriage of justice

This opinion will focus on the right to be promptly informed of charges as linked to the right to adequate time and facilities to prepare the defence, the right to appear promptly before a judge and the right to trial without undue delay or to be released pending trial.

(ii) International Standards protecting the Right to a Fair Trial

The international framework protecting the right to a fair trial is made by several international standards, which have different legal status:

1) Treaties. Treaties are negotiated and signed by different states and, as a contract between states, have binding force on those states, which have agreed to be bound by them. Because of their binding force, treaties are also called 'international hard-law'. In case of lack of ratification, treaties may cover an auxiliary role in the interpretation of other international standards.

2) Non-treaty standards. Declarations, recommendations, principles from UN bodies or other international organizations do not technically have the legal power of treaties and for this reason they are also called 'international soft-law'. Nevertheless, they have the persuasive force of having been negotiated by governments over many years, and of having been adopted by political bodies such as the UN General Assembly, usually by consensus. Because of this political force they play an important role in the interpretation of the treaties.

3) Customary International Law. Treaty and non-treaty standards sometimes reaffirm principles that are already considered to be legally binding on all states under customary international law. Customary international law results from a general and consistent practice of states followed out of a sense of legal obligation, so much so that it becomes custom. As such, it is not necessary for a country to sign a treaty for customary international law to apply: rules of customary law are considered to bind all states, whether or not they have ratified relevant treaties or not.

Which are the international standards protecting the Right to a Fair Trial?

The key legal texts protecting the right to a fair trial are to be found in Articles 9 and 14 of the ICCPR, Article 7 of the African Charter on Human and Peoples' Rights, Article 8 of the Inter-American Convention on Human Rights and Article 6 of the European Convention on Human Rights.

Other *international treaties* containing fair trail guarantees are:

- The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture)
- The Convention on the Elimination of All Forms of Discrimination against Women (Women's Convention)
- The International Convention on the Elimination of All Forms of Racial Discrimination (Convention against Racism)

Many 'soft-law' standards and principles relating to the right to a fair trial are now codified. The following are the international *non-treaty standards* relevant to fair trials:

- The Universal Declaration of Human Rights (Universal Declaration),
- The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Body of Principles),
- The Standard Minimum Rules for the Treatment of Prisoners (Standard Minimum Rules)
- The Basic Principles on the Role of Lawyers
- The Guidelines on the Role of Prosecutors
- The Basic Principles on the Independence of the Judiciary

Additional rules concerning the right to a fair trial are contained in:

- Resolution on the Right to Recourse procedure and fair Trial (ACmHPR)
- Principles and guidelines on the Right to a Fair Hearing (ACmHPR)
- The Code of Conduct for Law enforcement Officials
- The Rules of Former Yugoslavia
- The Rules of Procedure of the International Criminal Tribunal of Rwanda
- The Statute of the International Criminal Court.

Lastly, the UN monitoring bodies provides guidance on the application of human rights standards, as well as the working groups and special rapporteurs appointed by the UN Commission on Human Rights. They are generally mandated to investigate complaints of a particular type of human rights violation in all countries, whether or not international human rights treaties bind the state. They can make country visits and inquiries, including on individual cases, they submit reports with findings and recommendations to governments and annually to the UN Commission on Human Rights. As far as the right to fair trial is concerned, a Working Group on Arbitrary Detention was established in 1991, with the mandate to investigate cases of detention imposed arbitrarily or otherwise inconsistent with international standards.

APPLICATION OF INTERNATIONAL STANDARDS RELATING TO THE RIGHT TO A FAIR TRIAL IN THE STATE OF NIGERIA

(iii) *International law sources and their effects in the State of Nigeria*

As general introduction, we should specify that the opinion that a state is bound by international obligations with respect to foreigners resident in its territory, but it has no limitations towards its own citizens is no more corresponding to reality. Nowadays international law has evolved towards covering not only the relationships between states or governments, but also the relationship between the state and its own citizens[1]. The human rights movement is the most relevant example. In the human rights field the international law rules even areas once ago exclusive domain of state competence: for example, a state cannot proceed to ill treatments or enact discriminatory laws, without incurring in international reprobation and sanction. The bans against South Africa during the apartheid

[1] On the individuals as subject to international law: Kelsen, *The General Theory of Law and State*, Cambridge, Mass., 1945; Gormley, *The Procedural Status of the Individual before International and Supranational Tribunals*, The Hague, 1966. On the individual responsibility under international law: Sunga, *Individual Responsibility in International Law for serious Human Rights Violations*, Dordrecht, 1992; Pisillo Mazzeschi, *International Obligations to Provide for Reparations Claims? Colloquium on Individual Reparations Claims Entitled by Human Rights Violations*, Berlin, 1997.

regime, imposed by the United Nations as sanction to the severe human rights violations perpetuated in the country, are a clear example.

The duly application of international law is the first step for a credible diplomacy. A state cannot persistently ignore the presence of international conventions and the recommendations of monitoring bodies: their judgments have an impact on many aspect of the State foreign policy. The state that complies with international law requirement has a very strong point before other states and international organizations. This argument can be particularly relevant for Third World countries, who depend on financial aid from UN and other international organizations: European and American institutions have frequently deferred financial aids to African countries because of the human rights on-going violations[2]. International law can therefore be considered as *international ethic*: States cannot hide anymore what happen inside their boundaries and are called to justify their actions before public opinion and the international community[3].

Which international standards do bind the State of Nigeria?

Nigeria is bound by treaties it choose to sign and by the fundamental principles that fall under the category of customary international law.

As a general introduction, we may say that International Law becomes part of the Nigerian law in four ways:

A. Through the ratification of treaties

B. By legislative reference to international law

C. Through the courts' interpretation of statutes and through the use of international law principles to fill eventual gaps

D. Customary international law

The treaty ratification or accession is the clearest way international law becomes part of state domestic law.

There may be other cases in which a Nigerian statute refers to specific International Law provisions. In such a case, International Law is incorporated into the statute and is thereby given the same force as the statute. This process is referred as "incorporation by reference."

As a rule, courts of Nigeria should interpret statutes in such a way as to comply with the nation's international obligations. This is a principle of customary international law known as the Rule of Interpretation: since the role of the court is to determine the intent of

[2] In 2000, the International Monetary Fund has deferred financial aid to the State of Kenya because of the high level of corruption. In the last years, the World Bank has deferred financial aid to Nigeria due to the despotic military regime. During apartheid, the American donors due to the gross human rights violations have banned South Africa and Namibia. In the last ACP-EU agreement, the European Union has introduced the new condition to participate to the aid scheme, based on the respect of democracy and human rights.

[3] On the juridical nature and binding force of the international law: Quadri, *Le fondement du caractere obligatoire du droit internationale public*, Recueil des Cours de l'Academie de droit internationale de La Haye, 1952, I; Tomuschat, *Obligations Arising for States Without or Against their Will*, Recueil…, 1993, IV.
On the transformation of the international law in internal law: Cassese, *Modern Constitution and International Law*, RC, 1985, III; Jacobs & Roberts, *The Effects of Treaties in Domestic Courts*, London, 1987; Tunkin (ed.), *International Law and Municipal Law*, Berlin, 1988; Erades, *Interactions between International and Municipal Law: A Comparative Case Law Study*, The Hague, 1993; Vereshchetin, *New Constitutions and the Old Problem of the Relationship between International Law and National Law*, European Journal of International Law, 1966.

the legislature when the court interprets a statute, and the recognized general public policy is to conform to international legal obligations, the court will interpret statutes to conform to international law. Courts should ensure that domestic law is interpreted and applied in a manner consistent with the provisions of international human rights instruments ratified by the State. The underlying principle is that courts should avoid placing their Government in violation of the terms of a treaty, which it has ratified.

As far as customary law is concerned, we have already specified that international law principles recognized as customary law apply to every state, whether or not it has signed or ratified relevant treaties.

(iv) International Customary law on the Right to a Fair Trial: application of the UN Charter and the Universal Declaration of Human Rights in the State of Nigeria

Nigeria became a member of the United Nations upon independence. Under Article 55 of the UN Charter it has the obligation to take action bilaterally or independently to promote, among others, "universal respect for and observance of human rights and fundamental freedoms of all without distinction as to race, sex, language or religion." The UN Charter provides that one of the ways of creating conditions of international peace, stability and well-being is respect for human rights This responsibility includes adherence to the rights enumerated in the Universal Declaration and elaborated in other UN sponsored covenants and declarations over the years.[4]

The Charter itself does not itemize these fundamental rights and freedoms. It is left to the second basic document, the Universal Declaration of Human Rights to elaborate these rights. Article 3, the first cornerstone of the Declaration, proclaims the right to life, liberty and security of person - a right essential to the enjoyment of all other rights. This article introduces Articles 4 to 21, in which other civil and political rights are set out, including: freedom from torture and cruel, inhuman or degrading treatment or punishment; the right to recognition everywhere as a person before the law; the right to an effective judicial remedy; freedom from arbitrary arrest, detention or exile; the right to a fair trial and public hearing by an independent and impartial tribunal; the right to be presumed innocent until proved guilty. Article 9 says: "No one shall be subjected to arbitrary arrest, detention or exile"; Article 10: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him"; Article 11: "Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence".

Since 1948, the Universal Declaration of Human Rights, it has been and rightly continues to be the most important and far-reaching of all United Nations declarations, and a fundamental source of inspiration for national and international efforts to promote and protect human rights and fundamental freedoms. It has set the direction for all subsequent work in the field of human rights and has provided the basic philosophy for many legally binding international instruments designed to protect the rights and freedoms, which it proclaims. Conceived as "a common standard of achievement for all peoples and all nations", the Universal Declaration of Human Rights has become "a yardstick by which to

[4] UN Charter, Art. 1 (3)

measure the degree of respect for, and compliance with, international human rights standards"[5].

In the Proclamation of Teheran, adopted by the International Conference on Human Rights held in Iran in 1968, the Conference agreed that "the Universal Declaration of Human Rights states a common understanding of the peoples of the world concerning the inalienable and inviolable rights of all members of the human family and constitutes an obligation for the members of the international community". The Conference affirmed its faith in the principles set forth in the Declaration, and urged all peoples and Governments "to dedicate themselves to [those] principles . . . and to redouble their efforts to provide for all human beings a life consonant with freedom and dignity and conducive to physical, mental, social and spiritual welfare". In the words of the Office of the High Commissioner for Human Rights, "the Universal Declaration is truly universal in scope, as it preserves its validity for every member of the human family, everywhere, regardless of whether or not Governments have formally accepted its principles or ratified the Covenants"[6].

Since both the UN Charter and the Universal Declaration enjoy "a general recognition among states" as "obligatory", they are now considered to be covered by Article 38 of the Statute of the International Court of Justice as "international custom…. of a general practice accepted as law". According to the US Court of Appeals for the Second Circuit[7], the U.N. Declaration is "a formal and solemn instrument, suitable for rare occasions when principles of great and lasting importance are being enunciated."[8] Accordingly, it has been observed that the Universal Declaration of Human Rights "no longer fits into the dichotomy of 'binding treaty' against 'non-binding pronouncement,' but is rather an authoritative statement of the international community."[9] Thus, it creates an expectation of adherence, and "insofar as the expectation is gradually justified by State practice, a declaration may by custom become recognized as laying down rules binding upon the States."[10] Indeed, several commentators have concluded that **the Universal Declaration and the UN Charter have become, *in toto*, a part of binding, customary international law.[11] As such, both instruments have binding force in the State of Nigeria.**

(v) International Treaties on the right to a fair trial and their application in the State of Nigeria:

The International Covenant on Civil and Political Rights

[5] OHCHR Fact Sheet no. 2 (Rev.1) The International Bill of Human Rights
[6] Ibid OHCHR
[7] *Filartiga v. Pena Irala*, 630 F.2d 876; 1980 U.S. App. LEXIS 16111
[8] 34 U.N. ESCOR, Supp. (No. 8) 15, U.N. Doc. E/cn.4/1/610 (1962) (memorandum of Office of Legal Affairs, U.N. Secretariat).
[9] E. Schwelb, Human Rights and the International Community 70 (1964).
[10] 34 U.N. ESCOR, supra.
[11] Waldlock, Human Rights in Contemporary International Law and the Significance of the European Convention, Int'l & Comp. L.Q., Supp. Publ. No. 11 at 15.

Nigeria acceded to the International Covenant on Civil and Political Rights the 19th of July 1993 and, unlike numerous other states, Nigeria entered no reservations to ICCPR and it has fulfilled its obligation of submitting reports by presenting the first report to the UN Committee on Civil and Political Rights.

Since then, the ICCPR has not been domesticated in Nigeria. Does it mean that the Covenant has no judicial consequences in the Country?

No, the ICCPR has legal consequences in the Country. In 1999, when the new Constitution was made, nothing in the record suggests that Nigeria intended to denounce ICCPR; on the contrary, all the state's actions indicate that Nigeria had agreed to be bound by all provisions of ICCPR. Form the analysis below, it will emerge that there is a clear willingness of Nigeria's government not to denounce the ICCPR but, on the contrary, to be bound to the ICCPR provisions concerning the right to a fair trial.

According to Article 19 of the Constitution "the respect for international law treaty obligations" is recognized as one of the objectives of the foreign policy. Furthermore, Constitution Articles 35 and 36 incorporate *in toto* the ICCPR provisions concerning the right to a fair trial. These articles reproduce the exact words of the ICCPR articles on fair trial. Article 35 says: "Every person should be entitled to is personal liberty and no person should be deprived of such liberty except in the following cases and in accordance with a procedure permitted by law". Then it continues: "Provided that a person who is charged with an offence and who has been detained in lawful custody awaiting trial shall not continue to be kept in such detention for a period longer than the maximum period of imprisonment prescribed for the offence". Then in paragraph (3): "Any person who is arrested or detained shall be informed in writing within twenty-four hours (and in a language that he understands) of the facts and grounds of his arrest and detention"; paragraph (4): "Any person who is arrested or detained […] shall be brought before a Court of law within a reasonable time […] and if not he shall be released". Article 36 (4) says: "Whenever any person is charged with a criminal offence, he shall […] be entitled to a fair hearing in public within a reasonable time by a Court or Tribunal". Paragraph (5): "Every person who is charged with a criminal offence shall be presumed to be innocent, until he is proved guilty" and Paragraph (6): "Every person who is charged with a criminal offence shall be entitled to (a) be informed promptly and in a language he understands and in detail of the nature of the offence; (b) be given adequate time and facilities for the preparation of his defense". Article 36 continues with the provisions of *ne bis in idem*, *nullum crimen sine lege*, the right to the assistance of a lawyer, the right to an interpreter, the right to call and examine witnesses, the prohibition to testify against oneself, and so on. We can therefore conclude that, as Namibia, **Nigeria is a case of 'domestication by seepage': the international text has seeped into the Constitution[12]. In such case, no additional legislation is required to give effect to the Covenant.**

A fortiori, the fact that ICCPR has not been domesticated into the common law of Nigeria does not render it ineffectual. The process for domestication in Nigeria is really cumbersome. Asides the passage of the law by the National Assembly under section 12(1) of the Constitution, the Constitution stipulates in section 12(3) that such a bill passed under the concurrent list with respect to ratification of treaties shall not be presented to the President until such law is ratified by a majority of all the Houses of Assembly in the Federation. This ordinarily will take a long time to achieve. If not domesticated, the ICCPR

[12] ICJ, Human Rights litigations and the domestication of human rights standards in Sub-Saharan Africa, p 247

may not have statutory force but its provisions have been incorporated in the Constitution itself, thus creating a **legitimate expectation that Nigeria will interpret its Constitution in the light of the international treaty.**

Which is the position of the ICCPR with regards to internal contrasting laws?

Has spelt out in art 1: "This Constitution is supreme and its provisions shall have binding force on the authorities and persons throughout the Federal Republic of Nigeria". The Constitution assumes a higher position in the Country with respect to the states common laws: therefore, **in case of contrast between a common law and the Constitutional provisions on the right to a fair trial, the Constitution should prevail**. As explained before the Constitutional provisions on the Right to a Fair Trial should be interpreted in the light of the Covenant.

In Paragraph (vi) concerning the role of the judiciary in the application of international law we will examine specifically the international and Nigerian jurisprudence towards the application in the Country of international treaties ratified but not domesticated. Here we just mention two important precedents on the issue. In the case *Abacha & ors. V. Fawehinmi* the Nigerian Supreme Court ruled that a treaty is not deemed abrogated or modified by a later statute unless it clearly expresses such a purpose[13]. This argument is justified by the fact that internal laws ratifying international treaties have double foundation: the parliament's will (as the other common laws) and also the government's will to respect the international obligations it has undertaken. Therefore, to abrogate an internal law ratifying an international treaty, it is not enough a later contrasting common law by the Parliament, but the government should also clearly declare its will to contravene to the obligations it has undertaken.

The Australian courts in the case *Minister of State for Immigration and Ethnic Affairs v. Ah Hin Teoh FC* give a key jurisprudence in the Commonwealth for the application of international treaties ratified but not domesticated.[14] In this case, the court explained that provisions of international treaty to which Australia is a party do not become part of domestic Australian law unless they have been incorporated by statute into domestic law. However, the Court explained that treaties ratified but not enacted into domestic law have legal consequences. According to the Court, if a local statute is ambiguous, the courts should favor the interpretation that accords with Australia's international obligations. The Court argued that the ratification of a treaty created a legitimate expectation that the government would act in accordance with the obligations stipulated in the treaty. In case of doubtful interpretation, should be preferred the interpretation respectful of the international obligations.

The African Charter on Human and Peoples' Rights

Nigeria has signed the ACHPR on the 31/08/1982 and has ratified it the 15/07/1986. Even in this case, as for the ICCPR, the ratification of the treaty is anterior the Constitution and there is no sign in the latter Constitution of the government's will to denounce the Treaty.

[13] Abacha & Ors v Fawehimi, Nigeria 2000
[14] No. 95/013, 7th April 1995: Lexis Transcript.

With difference from the ICCPR, **the ACHPR has been domesticated by incorporation in the Statute ACHPR (Ratification and Enforcement) Act, 1990. The African Charter is therefore binding Nigeria.**

What happens in case of later internal contrasting law?

According to the international and national jurisprudence, the ACHPR Statute should prevail. Nigeria's government is bound to respect the African Charter as domesticated in the 1990 Statute. This could mean that a later contrasting law should prevail on the 1990 Statute. Nevertheless, as already specified above (see the analysis on the application of ICCPR), the national and international jurisprudence has evolved towards assuring to the laws ratifying international treaties a stronger position than the other common laws, due to the fact that such laws have their foundation in the parliament's will (as the other common law), but also (with difference from the other common law) in the government's will to fulfill international obligations it has undertaken. Therefore, in case of contrast between the law ratifying the international agreement and a later internal law, the internal law may prevail only if in the law is explicitly declared the legislator will to denounce the international obligation.

In the case *Ubani v Directory of State Security Services & Anor*[15], the Supreme Court of Nigeria affirmed that the fundamental rights protected in the African Charter and the implementing Act are superior to all municipal laws in Nigeria, and could therefore not be ousted by a decree of the military government. In the case *Abacha & ors. V. Fawehinmi* the same Court ruled that a treaty is not deemed abrogated or modified by a later statute unless it clearly expresses such a purpose[16]. See also the Nigerian case *Kalu v State*[17].

The African Commission in the case *Legal Resources Foundation v Zambia* ruled that in case a national law is in conflict with the African Charter there is an obligation on the State Party to change that law and to bring it in conformity with the international treaty[18]. Then, in the case *Legal Resources Foundation v Zambia* the African Commission declared: "International treaty law prohibits states from relying on their national law a justification for their non compliance with international obligations"[19]. More precedents by Nigerian and international courts are examined infra in Paragraph (vi) (Role of the Judiciary in the application of International Law).

The application of the African Charter in the Country opens the way to the application of other human rights standards. The preamble of the African Charter affirms that states parties proclaim "their adherence to the principles of human and peoples' rights and freedom contained in the declarations, conventions and other instruments adopted by the OAU". Then Article 60: "The Commission shall draw inspiration from international law on human and peoples' right, particularly from the provision of various African instruments on human and peoples' rights, the Charter of the UN, the Charter of the OAU, the Universal declaration of Human Rights, other instruments adopted by the UN and by African countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the specialized agencies of the UN of which the States party to the present Charter are member". As specified by the African Commission in the

[15] Court of Appeal, Nigeria, 1999
[16] Abacha & Ors v Fawehimi, Nigeria 2000
[17] Mbushuu & Anor v Republic of Tanzania 1995 I LRC 216; Kalu v State 1998 13 NWLR 531
[18] Legal Resources Foundation v Zambia Communication 211/1998 reported in Compilation of decisions of the ACHPR, Institute for HR and development in Africa
[19] Legal Resources Foundation v Zambia above

case *Civil Liberties Organizations v. Nigeria,* Articles 60 and 61 of the African Charter place "an obligation on the Commission to use comparative international human rights law"[20].

The European and the Inter-American Conventions on Human Rights

On the contrary to the ICCPR and the African Charter, Nigeria is not party to the European and the Inter-American Conventions on Human Rights. **The two conventions are therefore not legally binding in the Country**. Nevertheless, whether a state is party or not, the international practice has evolved towards utilizing the international treaties on constitutional issues as a helpful instrument to interpret the constitutional provisions. The European and the Inter-American Conventions on Human Rights **may have an auxiliary role in the interpretation of the right to a fair trial.** This utilization of international conventions, especially in the human rights field, to support progressive interpretations of the states constitutions, has been sustained by the Supreme Court in Zimbabwe in its sentence on 14.12.1987[21] in which the EU Convention on Human and Political Rights (thus a conventions the Zimbabwe is not even participating to) is used to interpret a Zimbabwean constitutional article forbidding the inhuman treatments in favor of excluding the corporal punishments in case of criminal offences.

(vi) International 'soft-law' on the right to a fair trial and its application in the State of Nigeria

International standards not included in international treaties are not legally binding in Nigeria. Nevertheless, declarations, proclamations, guidelines, recommendations represent a broad consensus of the international community and, therefore, have a strong moral force on the practice of States in their international relations. The value of such instruments rests in their recognition and acceptance by a large number of States: even without binding legal effect, they may be seen as declaring principles widely accepted within the international community and they might cover an auxiliary role in the interpretation of the treaty provisions as well as in the interpretation of domestic law.

(vii) The Role of the Judiciary in the application of international law

Very often international treaties ratified are not domesticated into the internal legal system, thus creating a gap between the norm of the international treaty ratified by the Government and the internal laws. There is a growing consensus in recognizing the importance of the judiciary in the domestication of international law[22].

According to international and national jurisprudence, **ratification lacking domestication does not undermine the efficacy of the treaty into the Country**.

[20] Civil Liberties Organization v Nigeria, Communication 218/98
[21] International Law Reports, vol. 90, p. 580 ff.
[22] "The International Judicial Dialogue: when domestic Constitutional Courts join in the conversation" Harvard Law Review 2001

Ratification of a treaty is a clear act demonstrating the agreement of the government to the treaty and its will to respect and implement the provisions contained in the country. Therefore, as a logical consequence**, courts are supposed to interpret laws according to the international law instruments.** It is well settled also the principle according to which, **in case the domestic legislation is ambiguous, the court will interpret in accordance with the international obligations,** on the presumption that it is the state's will to legislate in accordance with its international commitments. This view is supported by the Vienna Convention on the Law of Treaties, according to which **there is a presumption that a State will not legislate contrary to its international obligations.**

Particularly important in the Commonwealth countries are the Bangalore Principles of Judicial Conduct, agreed by a group of lawyers, mainly from Commonwealth countries, in February 1988 in Bangalore, India. The Bangalore Principles declare[23]: "[T]here is a growing tendency for national courts to have regard to these international norms for the purpose of deciding cases where the domestic law - whether constitutional, statute or common law - is uncertain or incomplete. It is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations which a country undertakes - *whether or not they have been incorporated into domestic law* - for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law"[24].

In the Bangalore Principles, it is specified that international law (whether human rights norms or otherwise) is not, as such, part of domestic law in most common law countries; then such law does not become part of domestic law until Parliament so enacts or the judges (as another source of law-making) declare now the norms thereby established are part of domestic law and the judges will not do so automatically, simply because the norm is part of international law or is mentioned in a treaty - even one ratified by their own country. But in case an issue of uncertainty arises (as by a *lacuna* in the common law, obscurity in its meaning or ambiguity in a relevant statute), a *judge may seek guidance in the general principles of international law*, as accepted by the community of nations; and from this source material, the judge may ascertain and declare what the relevant rule of domestic law is. As specified, **it is the action of the judge, incorporating the rule into domestic law, which then makes it part of domestic law**[25].

On the relevance of the Bangalore Principles, it has been noted that "there is great opportunity ahead for new initiatives in the domestic application of international human rights norms. At Bangalore, a pebble was cast into the waters of common law"[26]. The importance of the Bangalore Principles has been widely accepted by the Courts "when they interpret their Constitutions and declare common law[27]". In 1991 a High Level Judicial Colloquium in Abuja confirmed the adherence to the Bangalore Principles as well as to the general principles of international human rights relevant to the interpretation of national Constitutions and laws. The participant to the Abuja meeting concluded that: "there is an

[23] *Bangalore Principles* , Principle 4: see (1988) 14 *Cth Law Bulletin* 1196; cf (1988) 62 *Aust L Journal* 531.
[24] Ibid Principle 7
[25] M D Kirby, "The Australian Use of International Human Rights Norms: From Bangalore to Balliol - A View from the Antipodes" (1993) 16 *UNSW L Journal* , 363.
[26] Shridath S Ramphal, Commonwealth Secretary-General, Proceedings of the 1988 Bangalore Colloquim, Introduction.
[27] Lord Lester of Herne Hill, QC "The relevance of International HR Norms in developing HR jurisprudence, vol 7: Seventh Judicial Colloquium on the Domestic Application of HR Norms (1998) Commonwealth Secretariat, p 23, 45.

impressive body of case law which affords useful guidance to the national courts – notably the judgements and the decisions of the European Court and the Commission on HR, the judgements and advisory opinions of the Inter-American Court of HR, and decisions and general comments of the UN HR Committee"[28].

An application of Bangalore Principles can be found in the important case *Mabo & Ors v. Queensland*. In this case, the Australian High Court ruled that the ratification of a treaty (in this case the ICCPR) creates a 'legitimate expectation' in the citizens that the Country would ensure that those rights are guaranteed[29]. In *Mabo v State of Queensland*, Justice Brennan said of the influence of international human rights law: "Whatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory document of that kind can no longer be accepted. The expectations of the international community agree in this respect with the contemporary values of the Australian people. The opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the International Covenant on Civil and Political Right brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law".

In the case *Unity Dow v Attorney General* the Appeal Court of Botswana stated: "…the court must interpret domestic statutory laws in a way as is compatible with state's responsibility not to be in breach of international law as laid down by treaties, conventions, agreements and protocols within United Nations Organizations and the Organization of African Unity"[30]. In another case, the Botswana Court ruled that: "we should so far as is possible so interpret domestic legislation so as not to conflict with Botswana's obligations under the Charter or other international obligations"[31].

In the case *Abacha & ors. V. Fawehinmi* the Nigerian Supreme Court declares that a treaty is not deemed abrogated or modified by a later statute unless it clearly expresses such a purpose[32]. This argument is justified by the fact that internal laws ratifying international treaties have double foundation: the parliament's will (as all the other common laws) and also the government's will to respect the obligations it has undertaken. Therefore, to abrogate an internal law ratifying an international treaty, it is not enough a later contrasting common law from the Parliament, but it should clearly declared also the government's will to contravene to its obligations. In the case *Ubani v Directory of State Security Services & Anor*[33], the Supreme Court affirmed that the fundamental rights protected in the African Charter and the implementing Act were superior to all municipal

[28] Developing HR Jurisprudence, vol 4: Fourth Judicial Colloquium on the Domestic Application of International HR Norms, Commonwealth Secretariat, Interights. 1991, pp x-xi
[29] Mabo & Ors v Queensland (1992) 175 CLR 1 F.C. 92/014
[30] Aguda J.A., Civil Appeal no. 4/91 of 3/12/92 quoted in Abiola v Abacha (Nigeria 1994)
[31] Unity Dow v Attorney General 1992 Botswana
[32] Abacha & Ors v Fawehimi, Nigeria 2000
[33] Court of Appeal, Nigeria, 1999

laws in Nigeria, and could therefore not be ousted by a decree of the military government[34].

There are cases in which the constitution or other local laws contains similar provisions to those expressed in international treaties. In such case, courts should draw upon the jurisprudence of the international courts and monitoring bodies. This is the case of the right to a fair trial in Nigeria, where the Nigeria constitution in Article 35 and 36 repeat the same words used by the ICCPR, a treaty that has been ratified by the Country in a date anterior to the Constitution. In such cases, it is a matter of common sense to say that the national courts should interpret the constitution in the light of the international jurisprudence that has already examined the same articles.

In support to this theory, there is a pronouncement from the South African Constitutional Court in the case *The State v. Makwanyane*: "…decisions of tribunals dealing with comparable instruments [to the SA Bill of Rights] such as the UN Committee on Human Rights, the Inter-American Court of Human Rights, the EU Commission and Court on Human Rights …. may provide guidance as to the correct interpretation.."[35]. Support to the theory according to which the internal jurisprudence should look at the international jurisprudence in applying internal provisions of law come from the Tanzania's courts and Botswana's ones[36] as well. In Tanzania, in the case *Ng'Omongo v Mwanga and Attorney General* the Court reasoning was: "It is a general principle of law that the interpretation of our provisions in the Constitution have to be made in light of jurisprudence which has developed on similar provisions in other international and regional statements of the law".

The courts in Ghana stated that the principles of international instruments on fundamental human rights are enforceable to so long as they were fitted into the provisions of the Constitution[37]. This can be relevant for Nigeria again, since the Constitution repeats the same words of the earlier ratified ICCPR on fair trial. In this case, the courts should interpret the constitutional norms in the light of the international standards. To similar effect were the observations of the English Court of Appeal in *Derbyshire County Council v Times Newspapers Limited*[38]. The Court of Appeal, in the course of his reasoning, Lord Justice Balcombe[39] referred to article 10 of the *European Convention on Human Rights* to which the United Kingdom is a party (freedom of expression). His Lordship said: "In my judgment ... where the law is uncertain, it must be right for the court to approach the issue before it with a predilection to ensure that our law should not involve a breach of article 10. Although this is not binding upon your Lordships, the United Kingdom is, of course, a party to the Convention for the Protection of Human Rights and Fundamental Freedoms and it is urged that it is at least desirable that the domestic law of the United Kingdom should accord with the decisions of the European Court of Human Rights under the Convention"'.

In New Zealand, a similar trend has also emerged. In *Ministry of Transport v Noort* ; *Police v Curran*[40], Justice Cooke referred to the "cardinal importance", in giving meaning

[34] Mbushuu & Anor v Republic of Tanzania 1995 I LRC 216; See also Kalu v State 1998 13 NWLR 531
[35] The State V. Makwanyane, CCT/3/1994
[36] State v. Ntesang 1995 2 LRC 338
[37] New Patriotic Party v Attorney General Ghana Supreme Court 1997
[38] 1992] 1 QB 770
[39] [1992] 1 QB 775 p 812
[40] 1992] 3 NZLR 260

to the *New Zealand Bill of Rights Act* to "bear in mind the antecedents": "The International Covenant on Civil and Political Rights speaks of inalienable rights derived from the inherent dignity of the human person. Internationally there is now general recognition that some human rights are fundamental and anterior to any municipal law, although municipal law may fall short of giving effect to them: see *Mabo v Queensland* (1988) 166 CLR 186, 217-218. The right to legal advice on arrest or detention under an enactment may not be quite in that class, but in any event it has become a widely-recognised right ... Subject to contrary requirements in any legislation, the New Zealand Courts must now, in my opinion, give it practical effect irrespective of the state of our law before the Bill of Rights Act"[41].

More pronouncements on the points above can be found in Nigeria (case *Abiola v Abacha),* New Zeland's Courts (*Simspon v Attorney General* and *Birds-Galore v Attorney Gen),* South Africa Courts (see for example *Gootbrom v Attorney General* case). Jurisprudence from Zimbabwe, Ghana, Botswana provides also interesting precedents.

[41] 1992] 3 NZLR 270

PART TWO: EXAMINATION OF THE CASE GBENGA ADUBI AND 39 ORS V NIGERIA AND OF THE INTERNATIONAL STANDARDS VIOLATED

Part Two will be the review of the national law and the factual situation, giving rise to any conflict with or opportunity to apply international standards on the right to a fair trial.

Summary of Part Two:

(i) Examination of the facts of the case Gbenga Adubi & 39 Ors. V Nigeria and of the national legislation

(ii) In the case Gbenga Adubi & 39 Ors v Nigeria, is Nigeria in breach of its international obligations relating to the Right to a Fair Trial?

1) Pre-trial detention and delay in trial

2) Notification of charges in order to enable the accused to prepare a proper defense

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(i) Examinations of the facts of the case Gbenga Adubi & 39 Ors v Nigeria and of the national legislation

In the case Gbenga Adubi & 39 Ors v Nigeria, the accused are persons who have been held in **pre-trial detention** for a number of years before appearing before a judge and starting the trial. Subsequently, when the charge has been notified to the accused, the evidence against them has not been appended to the charge sheet as per the law requires, leaving the victims without the necessary information to properly prepare a legal defence. The applicants have made several complaints to the Director of Public Prosecutions in the office of the Attorney General of Ekiti State and also several oral applications before judges in the High Court of Ekiti State without any effects.

Pre-trial detention and detention during trial is necessary when there is the risk that the accused flew away or that he tampers evidences and witnesses, or when the defendant is considered dangerous for the civil society. Nevertheless, pre-trial detention and detention during trial should be exceptional and international law puts strict requirements in such cases. On the contrary, in Nigeria pre-trial detention is a routine practice. Sometimes, accused are held in pre-trial detention for years, before even appearing before a judge. Often the pre-trial detention is longer than the detention time foreseen by the law in case of conviction. International standards require that the **notification of charges** is made immediately upon arrest and should include a clear factual and legal explanation, so that to enable the accused to prepare their defence. On the contrary, Nigerian laws allow the prosecutor to arrest and hold in custody people before even formulating the charge against them. Nigeria laws permit detention in custody while the charge has not yet been formulated, a practice referred to as 'holding charge'. Suspected are held in custody without a time limit pending legal advice from the Director of Public Prosecution in order to formulate the charge.

Many repressive decrees in Nigeria contemplate the practice of holding charges, the pre-trial detention as well as the other practices that undermines the right to a fair trial. The most relevant are the following:

- *State Security (Detention of Persons) Decree No. 2 of 1984*: this decree permits indefinite pre-trial detention on security grounds
- *Treason and Other Offences (Special Military Tribunal) Decree No. 1 of 1986* and the *Treasonable Offences Decree No. 29 of 1993*: these decrees define treason widely and provide for trial before tribunals which do not respect international standards of impartiality and independence Nigerian laws establish several special tribunals. Such tribunals bypass the regular judicial system and thereby undermine the integrity of the judicial process, resulting in denial of due process and violating the right to an impartial and independent tribunal.
- *Public Officers (Protection Against False Accusation) Decree No. 4 of 1984*: this decree prohibits "false accusations" against government officials and allows pre-trial detention in case of an suspect accusation;
- *Civil Disturbances (Special Military Tribunal) Decree No. 2 of 1987*: see case Ken Saro-Wiwa & ors v Attorney General
- *Robbery and Firearms (Special Provisions) Decree No. 5 of 1984*: this decree gives the Military Administrator powers to establish a robbery and firearms tribunal to try cases involving robbery and violence. This military tribunal lacks of independence and impartiality and can sentence civilians
- *Federal Military Government (Supremacy and Enforcement of Powers) Decree No. 12 of 1994*;
- *Legal Practitioners (Amendment) Decree No. 21 of 1994*: this decree empowers the Body of Benchers to dissolve the elected officers of the Nigerian Bar Association, and which the African Commission on Human and People's Rights Decree held to be in violation of article 10 of the African Charter.

Treatment of prisoners is in total breach of the United Nations Standard Minimum Rules for the Treatment of Prisoners. The Nigerian Human Rights Commission has described prison conditions as disgusting. These range from overcrowding and congestion to poor living conditions for prisoners (including inadequate shelter, clothing and medical services, leading to deaths in prison), and lack of adequate rehabilitation and training for prisoners. On the crisis of overpopulation in prisons, their overall capacity is 36,375, while the total inmate population at present is about 47,387 with over 60% of them awaiting trial.

Nigerian courts ruled in favour of abrogation and unconstitutionality of the practice of holding charges, of the practice of setting up special tribunal outside the normal jurisdiction and against other practices undermining the right to a fair trial. Interesting precedents can be found in: *Ubani v Directory of State Security Services & Anor*[42], *Kalu v State Abacha & ors. V. Fawehinmi, Abiola v Abacha*.

Many UN reports denounced the lack of fair trial guarantees in the Nigerian legal system. The UN report of the Secretary-General's fact-finding mission (A/50/960) denounced the defects of tribunals established under the Civil Disturbances (Special Tribunal) Decree No. 2 of 1987[43].

The African Commission in two occasions has affirmed that Nigerian special tribunals are not impartial or independent. In the case *Media Rights Agenda v Nigeria*, a

[42] Court of Appeal, Nigeria, 1999
[43] Paras. 40-55

journalist tried before military tribunal under the Treason and Other Offences (Special Tribunal) Decree no. 1/1986, the African Commission ruled that there was violation of Art 7 of the ACHPR (the right to a fair hearing) and a violation of Principle 10 of the UN Basic Principles on the Independence of Judges[44].

(ii) In the case Gbenga Adubi & 39 Ors v Nigeria, is Nigeria in breach of its international obligations relating to the Right to a Fair Trial?

In the case Gbenga Adubi & 39 Ors v Nigeria, the right to a fair trial as articulated in the Nigeria's Constitution, the African Charter, the ICCPR and other international standards examined above, has been violated in the following ways:

3) Pre-trial detention and right to trail without undue delay: the accused have been detained for several years in pre-trial detention before being brought before a judge and the trial started with considerable delay

4) Notification of charges and preparation of legal defence: detainees were not fully informed of charges at the time of the arrest and, when the charges have been notified to them, the notification wasn't exhaustive.

1) PRE-TRIAL DETENTION AND DELAY IN TRIAL

In the case Gbenga Adubi & 39 Ors v Nigeria, the accused have been detained in pre-trial detention for several years before appearing before a judge and starting the trial itself.

Which are the international standards on pre-trial detention and on delay in trial?

People awaiting trial on criminal charges should not, as a general rule, be held in custody. However, international standards explicitly recognize that there are circumstances in which the authorities may impose conditions on a person's liberty or detain an individual pending trial. Such circumstances include when it is deemed necessary to prevent the suspect from fleeing, interfering with witnesses or when the suspect poses a clear and serious risk to others which cannot be contained by less restrictive means. The burden of proof of the exceptional circumstances justifying the pre-trial detention is on the prosecution.

According to Article 9(3) of the ICCPR: "...It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment." The same Principle 39 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment: "Except in special cases provided for by law, a person detained on a criminal charge shall be entitled, unless a judicial or other authority decides otherwise in the interest of the administration of justice, to release pending trial subject to the conditions that may be imposed in accordance with the law. Such authority shall keep the necessity of detention under review." See also Principle 6 of the Tokyo Rules: "6.1. Pre-trial detention shall be used as a means of last resort in criminal proceedings, with due regard for the investigation of the alleged offence and for the protection of society and the victim. 6.2. Alternatives to pre-trial detention shall

[44] Media Rights Agenda v Nigeria 224/98 See also AI v Sudan 48/90

be employed at as early a stage as possible...." On the same point are Article 7(5) of the American Convention and Article 5(3) of the European Convention.

The Human Rights Committee in its General Comment no. 8 has stated that pre-trial detention must not only be lawful, but must also be necessary and reasonable in the circumstances and also "should be an exception and as short as possible"[45]. It has recognized that the ICCPR permits authorities to hold people in custody as an exceptional measure if it is necessary to ensure that the person appears for trial, but it has interpreted the "necessity" requirement narrowly. It has held that suspicion that a person has committed a crime is not sufficient to justify detention pending investigation and indictment. However, it has held that custody may be necessary to prevent flight, avert interference with witnesses and other evidence, or prevent the commission of other offences. The Committee has also held that a person may be detained when they constitute a clear and serious threat to society that cannot be contained by any other manner[46].

The European Court in case *Van der Tang v. Spain* has held that continued pre-trial detention could only be justified "if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty[47]."

The African Commission in the case *Krischna Achutan v. Malawi* and other cases ruled that the arrest and detention of a political figure who was detained "at the pleasure of the Head of State" without charge or trial for 12 years violated the right to liberty set out in Article 6 of the African Charter[48].

According to the Principle 39 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, if a person is held in detention pending trial, the authorities must keep the necessity of continuing such detention under regular review.

Procedures on arrest and detention must conform to international standards. An arrest or detention which is lawful according to national law, may nonetheless be arbitrary under international standards, for example if the law under which the person is detained is vague, over-broad, or is in violation of other fundamental standards such as the right to freedom of expression. The European Court in the case *Kenmache v. France* has stated that the phrase "in accordance with a procedure prescribed by law" in Article 5(1) of the European Convention refers to domestic law, but that the domestic law itself "must be in conformity with the principles expressed or implied in the [European] Convention"[49].

The Human Rights Committee has explained that the term "arbitrary" in Article 9(1) of the ICCPR (arbitrary arrest) is not only to be equated with detention which is "against the law", but is to be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability (case *Albert Womah Mukong v. Cameroon)*[50]. The African Commission in the case *Krishna Achutan* has held that mass arrests and detentions of office workers in Malawi on suspicion that they had used office equipment such as fax

[45] Human Rights Committee General Comment 8, para.3
[46] See *Van Alphen v. the Netherlands*, (305/1988), 23 July 1990, Report of the HRC Vol II, (A/45/40), 1990, at 115
[47] *Van der Tang v. Spain*, (26/1994/473/554), 13 July 1993, para. 55
[48] *Krischna Achutan (on behalf of Aleke Banda), Amnesty International on behalf of Orton and Vera Chirwa, Amnesty International on behalf of Orton and Vera Chirwa v. Malawi*, (64/92, 68/92, 78/92 respectively), 8th Annual Report of the African Commission, 1994-1995, ACHPR/RPT/8th/Rev.I
[49] *Kenmache v. France* (No. 3), (45/1993/440/519), 24 November 1994
[50] *Albert Womah Mukong v. Cameroon*, (458/1991), 21 July 1994, UN Doc. CCPR/C/51/D/458/1991, p. 12

machines and photocopiers for subversive ends were arbitrary, in violation of Article 6 of the African Charter[51].

Detainees who were initially arrested lawfully, but who are held after their release has been ordered by a judicial authority, are considered arbitrarily detained. The African Commission in the case *Annette Pagnoulle v. Cameroon* has held that the detention of a person beyond the expiry of the sentence constitutes a violation of Article 6 of the African Charter, which prohibits arbitrary detention[52].

According to international law, anyone arrested or detained must be brought promptly before a judge or other officer authorized by law to exercise judicial power. Article 9(3) of the ICCPR, Paragraph 2(C) of the African Commission Resolution, Article 7(5) of the Inter-American Convention on HR, Article XI of the Inter-American Convention on Disappearance, Article 5(3) of the European Convention o HR, Article 59(2) of the ICC Statute, Principle 11(1) of the Body of Principles, Article 10(1) of the Declaration on Disappearance. Article 9(3) of the ICCPR applies to people arrested or detained on a criminal charge, but the other standards apply more broadly to all people deprived of their liberty. Article 9(3) of the ICCPR says: "Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release...". Principle 11(1) of the Body of Principles: "A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority. A detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law."

The purposes of the review before a judge or judicial authority are to assess whether sufficient legal reason exists for the arrest and consequently whether detention before trial is necessary; to safeguard the well being of the detainee and to prevent violations of the detainee's fundamental rights.

If the detained person is brought before an officer other than a judge, the officer must be authorized to exercise judicial power and must be independent of the parties. All those exercising judicial authority must be independent, according to the criteria set out in the Basic Principles on the Independence of the Judiciary. The European Court in the case *Brincat v. Italy* held that there was a violation of Article 5(3) of the European Convention when the "other officer authorized by law to exercise judicial authority" was an *auditeur militaire* or a public prosecutor who could intervene in subsequent proceedings as a representative of the prosecuting authority[53].

International standards require that this hearing before the judge take place promptly after detention. While no time limits are expressly stated within the standards themselves, and they are to be determined on a case by case basis, the Human Rights Committee in his General Comment no. 8 has stated that "...delays should not exceed a few days"[54].

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[51] *Krischna Achutan (on behalf of Aleke Banda), Amnesty International on behalf of Orton and Vera Chirwa, Amnesty International on behalf of Orton and Vera Chirwa v. Malawi*, (64/92, 68/92, 78/92 respectively), 8th Annual Report of the African Commission, 1994-1995, ACHPR/RPT/8th/Rev.I

[52] *Annette Pagnoulle (on behalf of Abdoulaye Mezou) v. Cameroon*, (39/90), 10th Annual Report of the African Commission, 1996 -1997, ACHPR/RPT/10th

[53] *Brincat v. Italy*, (73/1991/325/397), 26 November 1992; *De Jong, Baljet and van den Brink*, 22 May 1984, 77 Ser. A 23

[54] Human Rights Committee General Comment 8, para. 2

Members of the Human Rights Committee have questioned whether detention for 48 hours without being brought before a judge is not unreasonably long[55]. In a death penalty case (*McLawrence v. Jamaica*) the Committee ruled that a delay of one week from the time of arrest before the detainee was brought before a judge was incompatible with Article 9(3) of the ICCPR[56]. The European Court in the case *Brogan et Al. v. United Kingdom* has ruled that detaining a person for four days and six hours before bringing him before a judge was not prompt access[57]. The Inter-American Commission stated that a person should be brought before a judge or other judicial authority "as soon as it is practicable to do so; delay is unacceptable"[58]. It stated that in Cuba, "in theory, the law allows for a detainee to remain in prison for a week without appearing before a judge or court competent to hear his case. In the opinion of the Commission, this is an excessively prolonged period[59]."

International rules require that anyone detained on a criminal charge have the right to trial within a reasonable time or to release pending trial. The foundations of this rights are, among others: Article 9(3) of the ICCPR: "Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment." Principle 38 of the Body of Principles: "A person detained on a criminal charge shall be entitled to trial within a reasonable time or to release pending trial." Article 7(5) of the American Convention: "Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial." Article 5(3) of the European Convention: "Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial." Paragraph 2(C) of the African Commission Resolution: "Persons arrested or detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or be released."

There are two sets of standards that require trials to be held within a reasonable time. Both are tied to the presumption of innocence. The first set is applicable to detainees, and requires that people in detention are brought to trial within a reasonable time or released. This right is protected by the safeguards set out in Article 9(3) of the ICCPR, Article 7(5) of the American Convention and Article 5(3) of the European Convention. It is based on the presumption of innocence and the right to personal liberty, which requires that anyone held in pre-trial detention is entitled to have their case given priority and to have the

[55] Report of the HRC, vol. I, (A/45/40), 1990, para. 333, Federal Republic of Germany
[56] *McLawrence v. Jamaica*, UN Doc. CCPR/C/60/D/702/1996, 29 September 1997, para. 5.6
[57] *Brogan et al. v. United Kingdom*, 29 November 1988, 145b Ser. A 33 at 62
[58] Report on the Situation of Human Rights in Ecuador, OEA/Ser.L/V/II.96, doc 10, rev.1 at 73, 24 April 1997
[59] Inter-American Commission, Seventh Report on the Situation of Human Rights in Cuba, 1983, OEA/Ser.L/V/II.61, doc.29, rev.1, at 41

proceedings conducted with particular expedition[60]. The second set of standards, which applies to everyone charged with a criminal offence, whether or not detained, requires that all criminal trials are held without undue delay. The main purpose is to ensure that people awaiting trial on criminal charges do not suffer unduly prolonged uncertainty and that evidence is not lost or undermined - the main purpose of the safeguards in Article 14(3)(c) of the ICCPR, Article 8(1) of the American Convention and Article 6(1) of the European Convention.

The right to trial without undue delay obliges the authorities to ensure that all proceedings, from pre-trial stages to final appeal, are completed and judgments issued within a reasonable time. In General Comment no 13 the Human Rights Committee stated that the right to be tried without undue delay is a guarantee that "relates not only to the time a trial should commence, but also the time by which it should end and judgment be rendered; all stages must take place without undue delay. To make this right effective, a procedure must be available in order to ensure that the trial will proceed without undue delay, both in first instance and on appeal"[61]. This view has been further emphasized in the Committee's jurisprudence, according to which articles 14 (3)(c) and (5) "are to be read together so that the right to review of conviction and sentence must be made available without delay"[62].

For anyone charged with a criminal offence and held in pre-trial detention, the obligation on the state to expedite trials is even more pressing; when the accused is detained, less delay is considered reasonable. International standards require that a person charged with a criminal offence be released from detention pending trial if the time deemed reasonable in the circumstances is exceeded. The length of time deemed reasonable to hold a person in detention pending trial may be shorter than the delay considered reasonable before starting the trial of a person not in detention.

The European Commission in case *Haase v. Federal Republic of Germany* has stated that although the length of time before trial may be reasonable under Article 6(1) of the European Convention, holding a person in detention for that period before trial may not be permissible under Article 5, "because the aim is to limit the length of a person's detention and not to promote a speedy trial"[63]. In the case *Del Cid Gomez v. Panama*, a murder suspect held without bail for more than three and a half years before his acquittal, the Human Rights Committee stated that "[i]n cases involving serious charges such as homicide or murder, where the accused is denied bail by the court, the accused must be tried in as expeditious a manner as possible"[64]. In the case *Mc Lawrence v. Jamaica* the Human Rights Committee concluded that holding a person charged with capital murder for 16 months before trial, in the absence of satisfactory explanations from the state or other justification discernible from the file, was a violation of his right to be tried within a reasonable time or released[65]. In a case from Uruguay, *Pietraroia v. Uruguay*, where a detainee was held incommunicado for four to six months (the precise dates being disputed), and his trial by military court on charges of subversive association and conspiracy to violate the constitution began after five to eight months, the Human Rights Committee held that

[60] European Court, *Tomasi v France*, 27 August 1992, 241-A Ser. A para. 84; *Abdoella v. the Netherlands*, (1/1992/346/419), 25 November 1992
[61] UN Compilation of Gen Comments p 124
[62] Communications no 210/1986 and 225/1987 E. Pratt and I. Morgan v. Jamaica in UN doc GAOR A/44/40 p229
[63] *Haase v. Federal Republic of Germany* (7412 /76),12 July 1977, 11 DR 78
[64] *del Cid Gómez v. Panama*, (473/1991), 19 July 1995, Fin. Dec., UN Doc. CCPR/C/57/1, 1996, at 46
[65] *McLawrence v. Jamaica*, UN Doc. CCPR/C/60/D/702/1996, 29 September 1997, para. 5.6

Article 9(3) of the ICCPR had been violated "because he was not brought promptly before a judge or other officer authorized by law to exercise judicial power and because he was not tried within a reasonable time"[66].

In the words of the European Court, people held in pre-trial detention are entitled to "special diligence" on the part of the authorities in the conduct of the proceedings[67]. Even if the right of an accused held in pre-trial detention to have the case examined with all necessary expedition must be balanced against and not hinder the efforts of the authorities to carry out their tasks with proper care[68]. In the case *Van der Tang v. Spain* the Court found no violation of Article 5(3) of the European Convention in a case where a foreign national was detained pre-trial in a drug-trafficking case for more than three years, due to the continuing risk of his absconding, and that the protracted time he remained in detention was not attributable to any lack of special diligence on the part of the authorities.

The right to trial within a reasonable time does not depend on the accused requesting the authorities to expedite proceedings. Although the burden of proving that proceedings were not conducted within a reasonable time is generally on the accused, an accused person does not have to show that the delay caused particular prejudice.

What is a reasonable time is judged on the circumstances of the individual case. Many factors are taken into consideration in examining whether the time within which proceedings have been completed is reasonable in view of the complexity of the case. They include, among others, the nature and seriousness of the offence involved, the number of charges faced by the accused, the nature of the investigation required, the number of people allegedly involved in the crime and the number of witnesses. Trials lasting as long as 10 years have been deemed reasonable, while others lasting less than one year have been found to be unreasonably delayed. In the case *Del Cid Gomez*, a murder suspect held without bail for more than three and a half years before his acquittal, the Human Rights Committee found that the delay between indictment and trial "cannot be explained exclusively by a complex factual situation and protracted investigations"[69]. While in the case *Suarez Rosero v. Equador*, after considering national legislation, the complexity of the case, the conduct of the proceedings and of the authorities, the Inter-American Court considered that a period of 50 months to complete proceedings greatly exceeded the requirement of Article 8(1) of the American Convention[70].

Economic or drug crimes involving a number of defendants, cases with international aspects, multiple murder cases and cases involving "terrorist" organizations have been accepted as being more difficult and complex than routine criminal cases, and thus longer delays have been considered reasonable. In a case involving 723 accused and 607 criminal offences, the European Court held that it was reasonable that the proceedings at the first instance lasted about eight and a half years. However, it held that subsequent periods of delay and inactivity, including a three-year period for the Martial Law Court to issue written reasons for its judgment, and appeals processes in two courts which lasted more than six years, exceeded a reasonable time[71]. It is in principle for the State party concerned

[66] *Pietraroia v. Uruguay*, (44/1979), 27 March 1981, paras 13.2 and 17
[67] *Tomasi v France*, 27 August 1992, 241-A Ser. A para. 84; *Abdoella v. the Netherlands*, (1/1992/346/419), 25 November 1992, para. 24
[68] *Van der Tang v. Spain*, (26/1994/473/554), 13 July 1993
[69] *del Cid Gómez v. Panama*, (473/1991), 19 July 1995, Fin. Dec., UN Doc. CCPR/C/57/1, 1996, at 46
[70] Case of Suárez Rosero (Ecuador), 17 November 1997, para. 73
[71] *Mitap and Müftüolu v. Turkey*, (6/1995/512/595-596), 25 March 1996

to show that the complexity of a case is such as to justify the delay under consideration by the Committee, although a mere affirmation that the delay was not excessive is not sufficient[72].

Another element that can influence the duration of the trial is the conduct by the accused. **The accused is not obliged to cooperate in criminal proceedings or to renounce any procedural rights**[73]. However, the conduct of the accused during proceedings is taken into consideration in determining whether the proceedings were carried out without undue delay. Attempts by the accused to abscond and failure of the accused to cooperate (for example by failing to choose counsel or to appear at hearings) have been taken as delays, which cannot be attributed to the authorities. Such delays attributable to the accused have been discounted when determining whether the proceedings were conducted within a reasonable time. In addition, applications by the accused considered unnecessary and offering no chance of success from the outset have been deemed to be deliberate obstruction.

The authorities have the duty to expedite proceedings. If they fail to advance the proceeding at any stage due to neglect, allow the investigation and proceedings to stagnate or if they take an unreasonable time to complete specific measures, the time will be deemed unreasonable. Similarly, if the criminal justice system itself inhibits the speedy conclusion of trials, the right to trial within a reasonable time may be violated. In the case *Pinkney v. Canada*, a delay of almost three years in an appeal, largely caused by the fact that it took 29 months to produce the trial transcripts, was found by the Human Rights Committee to be a violation of Article 14 of the ICCPR[74]. It is noteworthy that the HR Committee in the case *Lubutu v. Zambia* has also made it clear that the "difficult economic situation" of a state party is not an excuse for not complying with the Covenant, and it has emphasized in this respect "that the rights set forth in the Covenant constitute minimum standards which all states parties have agreed to observe"[75].

The European Court in the case *Bunkate v. the Netherlands* considered that a lapse of 15 and half months between the filing of an appeal and its transfer to the registry of the relevant court of appeal was unreasonable, where the authorities offered no satisfactory explanation[76]. In the case *E. Pratt and I. Morgan v. Jamaica* the authors were unable to appeal to the Privy Council because it took the Court of Appeal almost 3 years and nine months to issue a written judgement. The HR Committee did not accept the explanation of the State party that "this delay was attributable to an oversight and that the authors should have asserted earlier their right to have a written judgement". On the contrary, it is considered that the responsibility for this delay lay with the judicial authorities, a responsibility that "is neither dependent on a request for production by the counsel in a trial nor is non-fulfillment of this responsibility excused by the absence of a request from the accused". In reaching its conclusion that this delay violated both art 14(3)(c) and (5) the Committee stated that "it matters not in the event that The Privy Council affirmed the conviction of the authors" since" in all cases, and especially in capital cases, accused persons are entitled to trial and appeal without undue delay, whatever the outcome of those judicial proceedings turn out to be"[77].

[72] comm. No 336/1998 Fillastrev. Bolivia
[73] *Yaci and Sargin v. Turkey*, (6/1994/453/533-534), 8 June 1995.
[74] *Pinkney v. Canada*, (27/1978), 29 October 1981, 1 Sel. Dec. 95, at paras. 10, 22
[75] Communication no 390/1990 B. Lubutu v. Zambia in UN doc GAOR A/51/40 vol II p14
[76] *Bunkate v. the Netherlands*, (26/1992/371/445), 26 May 1993
[77] Comm nos 210/86 and 225/87 in UN doc GAOR A/44/40 p229

The African Commission in the case *Annette Pagnoulle v. Cameroon* found that a delay of two years without a hearing or projected trial date constituted a violation of the requirement in Article 7(1)(d) of the African Charter to be tried within a reasonable time[78]. In another case, *Alhassan Abubakar v. Ghana*, it found that detention of a person for seven years without bringing him to trial constituted a violation of the "reasonable time" standard stipulated in the African Charter[79].

The Inter-American Court stated that it would consider it an injustice to deprive a person of their liberty for a period of time disproportionate to the penalty corresponding to the criminal offence with which they were charged. In the case of Suárez Rosero, the Court considered that detention of three years and six months violated the presumption of innocence[80].

The HR Committee has examined numerous other cases of alleged violations of the right to trial without undue delay:

Communication 564/1993 *Leslie v. Jamaica*: the Committee concluded that a delay of 29 months from arrest to trial was contrary to article 14(3)(c) and art 9(3) of the Covenant: the mere affirmation by the state party that such a delay was not contrary to the Covenant did not constitute a sufficient explanation.

Communication 672/1995 *C. Smart v. Trinidad and Tobago* A delay of two years between arrest and trial was also considered to violate art 14(3)(c) and art 9(3) of the Covenant and it was therefore not necessary for the Committee " whether the further delays in the conduct of the trial [were] attributable to the State party or not".

Communication 253/1987 *P. Kelly v. Jamaica* A delay of 18 months from the arrest to the opening of the author's trial for murder was not considered to constitute an undue delay there being "no suggestion that the pre-trial investigations could have been completed earlier". But in the same case the Covenant was violated since it took to the Court of Appeal almost 5 years to issue a written judgement, thereby effectively preventing the author from petitioning the Privy Council.

Article 14(2) of the International Covenant on Civil and Political Rights provides that "**everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law**". Article 7(1)(b) of the African Charter on Human and Peoples' Rights, article 8(2) of the American Convention on Human Rights and article 6(2) of the European Convention on Human Rights all also guarantee the right to presumption of innocence, and article 11(1) of the Universal Declaration of Human Rights safeguards the same right for everyone "charged with a penal offence ... until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence". The principle of presumption of innocence has been included in art 20(3) of the Statute of the International Criminal Tribunal for Rwanda, art 21 (3) of the International Criminal Tribunal for the Former Yugoslavia, and in art 66 (1) of the Statute of the International Criminal Court. As noted by the HR Committee in General Comment no 13, the presumption of innocence means that: "the burden of proof of the charge is on the prosecutor and the accused has the benefit of doubt. Further, the presumption of innocence

[78] *Annette Pagnoulle (on behalf of Abdoulaye Mezou) v. Cameroon*, (39/90), 10th Annual Report of the African Commission, 1996 -1997, ACHPR/RPT/10th

[79] *Alhassan Abubakar v. Ghana*, (103/93),10th Annual Report of the African Commission, 1996 -1997, ACHPR/RPT/10th

[80] *Suárez Rosero Case*, Ecuador, 12 November 1992

implies a right to be treated in accordance with this principle. It is therefore a duty for all public authorities to refrain from prejudging the outcome of a trial" [81].

"The right to be presumed innocent until proved guilty by a competent court or tribunal" under article 7(1)(b) of the African Charter on Human and Peoples' Rights was violated in the case *Ken Saro-Wiwa v. Nigeria* a case where leading representatives of the Nigerian Government had pronounced the accused person guilty of crimes during various press conferences as well as before the UN. The accused were subsequently all convicted and executed following a trial before a court that was not independent as required by article 26 of the African Charter[82].

2) NOTIFICATION OF CHARGES IN ORDER TO ENABLE THE ACCUSED TO PREPARE A PROPER DEFENCE

In the case Gbenga Adubi & 39 Ors v Nigeria, the detainees have not been informed of charges at the time of their arrest and, when the charges have been notified to them, the notification was incomplete, leaving the defendants in the dilemma how to prepare a proper defense.

Which are the international standards on the notification of charges and on the right to prepare legal defense?

Anyone who is arrested or detained must be informed immediately of the reasons why he has being deprived of his liberty. This rights has its foundation in Article 9(2) of the ICCPR: "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 14(3)(a) of the International Covenant on Civil and Political Rights provides that in the determination of any criminal charge against him, everyone shall be entitled "to be informed *promptly and in detail* in a language which he understands of the nature and cause of the charge against him". Article 6(3)(a) of the European Convention is similarly worded, while, according to article 8(2)(b) of the American Convention on Human Rights, the accused is entitled to "*prior notification in detail* ...of the charges against him".

The African Charter on Human and Peoples' Rights contains no express provision guaranteeing the right to be informed of criminal charges against oneself. However, the African Commission on Human and Peoples' Rights in case *Media Rights Agenda v. Nigeria* has held that persons arrested "shall be informed *promptly* of any charges against them"[83].

Principle 10 of the Body of Principles says: "Anyone who is arrested shall be informed at the time of his arrest of the reason for his arrest and shall be promptly informed of any charges against him"; Principle 11(2) of the Body of Principles says: "A detained person and his counsel, if any, shall receive prompt and full communication of any order of detention, together with the reasons therefore". This right is contained also in Article 7(4) of the American Convention and Article 5(2) of the European Convention, Paragraph 2(B)

[81] UN Compilation of General Comments p124

[82] ACHPR International Pen and Others on behalf of Ken-Saro Wiwa Jr. and Civil Liberties Organizations v. Nigeria Communication no. 137/94, 139/94, 154/96, and 161/97

[83] ACHPR, Media Rights Agenda (on behalf of Niran Maloulu) v. Nigeria, Communication No. 224/98, adopted during the 28th session, 23 October – 6 November 2000, para. 43 of the text of the decision as published at http://www1.umn.edu/humanrts/africa/comcases/224-98.html.

of the African Commission Resolution, Articles 20(2) and 21(4)(a) of the Yugoslavia Statute, Articles 20(2) and 21(4)(a) of the Rwanda Statute.

The requirement to give prompt information about criminal charges serves two fundamental purposes: it provides all people arrested or detained with information to challenge the lawfulness of their detention - Article 9(2) of the ICCPR and parallel provisions of regional treaties. It also permits anyone facing trial on criminal charges, whether or not in custody, to begin the preparation of their defense - Article 14(3)(a) of the ICCPR, Article 8(2)(b) of the American Convention and Article 6(3)(a) of the European Convention. As stated by the Human Rights Committee in case *C. McLawrence v. Jamaica* the information to be given promptly after arrest is not required to be as specific as the information given in order to prepare the defense[84]. Nevertheless, **information about the reasons for arrest or detention must include a clear explanation of the legal and factual basis for the arrest or detention.**

For example, the Human Rights Committee in case *Drescher Caldas v. Uruguay* has held that "it was not sufficient simply to inform [the detainee] that he was being arrested under the prompt security measures without any indication of the substance of the complaint against him[85]." Similarly, the Human Rights Committee in its *Concluding Observation on Sudan* expressed concern about detentions in Sudan on grounds of "national security". The Committee recommended that the concept of national security be defined by law and that police and security officials be required to provide written reasons for a person's arrest, which should be made public and subject to review by the courts[86]. The Human Rights Committee also considered that there was a violation of Article 9(2) of the ICCPR in the case *Kelly v. Jamaica* where an accused was informed at the time of his arrest only that he was wanted in connection with a murder investigation. For several weeks he was not informed in detail of the reasons for his arrest, the facts of the crime for which he was arrested nor the identity of the victim[87].

In another case the European Court has explained that Article 5(2) of the European Convention means that every person arrested should "be told, in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a court to challenge its lawfulness..."[88]. The European Commission in *X v. Federal Republic of Germany* has stated that Article 5(2) of the European Convention requires that everyone arrested be "informed sufficiently about the facts and the evidence which are proposed to be the foundation of a decision to detain him. In particular, he should be enabled to state whether he admits or denies the alleged offence[89]."

Article 9(2) and 14 of the ICCPR, Principle 10 of the Body of Principles, and Paragraph 2 (B) of the African Commission Resolution require that **notification of the reasons for arrest must take place at the time of the arrest.** According to the Human Rights Committee in his General Comment no. 13, the term "'promptly' [art 14 ICPR] requires that information is given in the manner described as soon as the charge is first

[84] Communication No.702/1996, C. McLawrence v. Jamaica (Views adopted on 18 July 1997), UN doc. GAOR, A/52/40 (vol. II), p. 232, para. 5.9.
[85] Drescher Caldas v. Uruguay (43/1979), 21 July 1983, 2 Sel. Dec. 80
[86] Concluding Observations of the HRC: Sudan, UN Doc. CCPR/C/79/Add.85, 19 November 1997, para.13
[87] Kelly v. Jamaica, (253/1987), 8 April 1991, Report of the HRC, (A/46/40), 1991, para. 5
[88] Fox, Campbell and Hartley, (18/1989/178/234-236), 30 August 1990, paras. 40, 41
[89] X v. Federal Republic of Germany, (8098/77), 13 December 1978, 16 DR 111 at 114

made by a competent authority"[90]. The Committee has in this respect specified "this right must arise when in the course of an investigation a court or an authority of the prosecution decides to take procedural steps against a person suspected of a crime or publicly names him as such. The specific requirements of subparagraph 3(a) may be met by stating the charge either orally or in writing, provided that the information indicates both the law and the alleged facts on which it is based"[91]. In the view of the Committee, this also means that the "detailed information about the charges against the accused must not be provided immediately upon arrest, but with the beginning of the preliminary investigation or the setting of some other hearing which gives rise to a clear official suspicion against the accused" (*D. Williams v. Jamaica*)[92]. The Human Rights Committee in the case *Portorreal v. Dominican Republic* found that there was a violation of Article 9(2) of the ICCPR, in a case in which a lawyer for a local human rights organization was held for 50 hours without being informed of the reasons for his arrest[93].

The right to be informed of charges in a language one understands implies, of course, that the domestic authorities must provide adequate interpreters and translators in order to fulfill this requirement, which is essential for the purpose of allowing a suspect to defend him or herself adequately. This more general right to provide interpretation during investigation is specifically included in Principle 14 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, according to which "A person who does not adequately understand or speak the language used by the authorities responsible for his arrest, detention or imprisonment is entitled to receive promptly in a language which he understands the information referred to in principle 10, principle 11, paragraph 2, principle 12, paragraph 1, and principle 13 and to have the assistance, free of charge, if necessary, of an interpreter in connection with legal proceedings subsequent to his arrest." The duty to inform a suspect of his or her rights in general during investigation "in a language the suspect speaks and understands" is also included, for instance, in article 42 (A) of the Rules of Procedure and Evidence of the Rwanda and Yugoslavia Criminal Tribunals, which guarantee, furthermore, the right of a suspect "to have the free legal assistance of an interpreter" if he "cannot understand or speak the language to be used for questioning".

The HR Committee in *Kelly v. Jamaica* held, however, that "the requirement of prompt information ... only applies once the individual has been formally charged with a criminal offence", and that it does not, consequently, "apply to those remanded in custody pending the result of police investigations", a situation covered by article 9(2) of the Covenant[94]. In applying the principle of prompt information, the Committee concluded that article 14(3)(a) had not been violated in the case *D. Williams v. Jamaica* another case where the author complained that he had been detained for six weeks before being charged with the offence for which he was later convicted. The Committee concluded simply that it transpired from the material before it that the author had been "informed of the reasons for his arrest and the charges against him by the time the preliminary hearing started"[95]. Article

[90] General Comment No. 13 (Article 14), in United Nations Compilation of General Comments, p. 124, para. 8
[91] Ibid., loc. cit
[92] Communication No. 561/1993, D. Williams v. Jamaica (Views adopted on 8 April 1997), UN doc. GAOR, A/52/40 (vol. II), p. 151, para. 9.2;
[93] Portorreal v. Dominican Republic, (188/1984), 2 Sel. Dec. 214
[94] Communication No. 253/1987, P. Kelly v. Jamaica (Views adopted on 8 April 1991), UN doc. GAOR, A/46/40, p. 247, para. 5.8;
[95] Communication No. 561/1993, D. Williams v. Jamaica (Views adopted on 8 April 1997), UN doc. GAOR, A/52/40 (vol. II), p. 151, para. 9.2.

14(3)(a) had however been violated in the case *S. Antonaccio v. Uruguay* where the victim had not been informed of the charges against him prior to his being tried in camera by a military court that sentenced him to 30 years' imprisonment and 15 years of special security measures; furthermore, he had never been able to contact the lawyer assigned to him[96].

Article 8(2)(b) of the American Convention on Human Rights was violated in the case *Castillo Petruzzi et al. v. Peru*, where "the accused did not have sufficient advance notification, in detail, of the charges against them"; indeed, the indictment was presented on 2 January 1994, and the attorneys were only allowed to view the file on 6 January "for a very brief time", with the judgment being rendered the following day[97].

Under article 6(3)(a) of the European Convention on Human Rights, the European Court held that it was sufficient in order to comply with this provision that the applicants were given a charge-sheet" within respectively ten hours and one hour and a quarter after their arrest; these charge-sheets contained information about the charge (breach of the peace) as well as the date and place of its commission[98]. However, article 6(3)(a) was violated in a case where the applicant, who was of foreign origin, had informed the Italian authorities of his difficulties in understanding the judicial notification that had been served on him, asking them to send the information to him in his mother tongue or in one of the official languages of the United Nations. He received no answer to his letter and the authorities continued to draw up the documents in Italian. The Court observed that "the Italian judicial authorities should have taken steps to comply with [the applicant's request] so as to ensure observance of the requirements of [article 6(3)(a)] unless they were in a position to establish that the applicant in fact had sufficient knowledge of Italian to understand from the notification the purport of the letter notifying him of the charges brought against him"[99].

A part from the charges, **everyone arrested or detained has the right to be informed of their rights and an explanation of how to avail themselves of such rights.** Principles 13 of the Body of Principles says: "Any person shall, at the moment of arrest and at the commencement of detention or imprisonment, or promptly thereafter, be provided by the authority responsible for his arrest, detention or imprisonment, respectively, with information on and an explanation of his rights and how to avail himself of such rights." This right is laid down also in Principle 14 of the Body of Principles, Rule 42 of the Yugoslavia Rules, Rule 42 of the Rwanda Rules. The Yugoslavia and Rwanda Rules require that suspects questioned by the Prosecutor, whether or not in custody, be informed of their rights to counsel of their choice or free legal assistance, free interpretation and to silence.

One of the most important rights which all arrested or detained people need to know is that they are entitled to the help of a lawyer. Everyone arrested, detained or charged must be informed of his right to have the assistance of legal counsel. According to Principle 5 of the Basic Principles on the Role of Lawyers, this information should be provided immediately upon arrest or detention or when charged with a criminal offence. Principle 17(1) of the earlier Body of Principles provides that this information should be given

[96] Communication No. R.14/63, R. S. Antonaccio v. Uruguay (Views adopted on 28 October 1981), UN doc. GAOR, A/37/40, p. 120

[97] *I-A Court HR, Castillo Petruzzi et al. case v. Peru, judgment of May 30, 1999, Series C, No. 52, p. 202, paras. 141-142*

[98] European Court f HR, Steel and Ors v UK, 23/09/1998, Reports 1998-vii, p 2741

[99] EU Court HR, Brozicek v Italy, 1989, Series A no 167 p18

promptly after arrest. The Yugoslavia and Rwanda Rules require that notice of the right to legal counsel be given to all suspects questioned by the Prosecutor, whether they are detained or not. Principle 5 of the Basic Principles on the Role of Lawyers says: "Governments shall ensure that all persons are immediately informed by the competent authority of their right to be assisted by a lawyer of their own choice upon arrest or detention or when charged with a criminal offence."

Article 14(3)(b) of the International Covenant on Civil and Political Rights provides that in the determination of any criminal charge against him, **everyone shall be entitled "to have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing**". Article 8(2)(c) of the American Convention on Human Rights guarantees the accused "adequate time and means for the preparation of his defense", while article 6(3)(b) of the European Convention on Human Rights speaks of "adequate time and facilities for the preparation of his defense". Article 7(1) of the African Charter on Human and Peoples' Rights globally guarantees "the right to defense, including the right to be defended by counsel of his choice". Articles 20 and 21 respectively of the Statutes of the International Criminal Tribunals for Rwanda and the former Yugoslavia were heavily inspired by article 14 of the International Covenant and both provide that the accused shall "have adequate time and facilities for the preparation of his [or her] defense and to communicate with counsel of his or her own choosing" (arts. 20(4)(b) and 21(4)(b)).

As emphasized by the Human Rights Committee, "the right of an accused person to have adequate time and facilities for the preparation of his or her defense is an important element of the guarantee of a fair trial and a corollary of the principle of equality of arms"[100]. In General Comment No. 13 on article 14, the Committee also explained that the meaning of "'adequate time' depends on the circumstances of each case, but the facilities must include access to documents and other evidence which the accused requires to prepare his case, as well as the opportunity to engage and communicate with counsel.

When the accused does not want to defend himself in person or request a person or an association of his choice, **he should be able to have recourse to a lawyer**."[101] This provision moreover "requires counsel to communicate with the accused in conditions giving full respect for the confidentiality of their communications", and lawyers "should be able to counsel and to represent their clients in accordance with their established professional standards and judgment without any restrictions, influences, pressures or undue interference from any quarter"[102]. But in the case *M. Steadman v. Jamaica*, where the author claimed that he did not have adequate time and facilities for the preparation of his defence, the Committee noted that he was actually "represented at trial by the same counsel who had represented him at the preliminary examination", and further, that "neither the author nor counsel ever requested the Court for more time in the preparation of the defence"; consequently, there was no violation of article 14(3)(b)[103].

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[100] Communication No. 349/1989, C. Wright v. Jamaica (Views adopted on 27 July 1992), UN doc. GAOR, A/47/40, p. 315,
para. 8.4; and similar wording in Communication No. 702/1996, C. McLawrence v. Jamaica (Views adopted on 18 July 1997), UN doc. *GAOR, A/52/40, p. 232, para. 5.10.*

[101] *United Nations Compilation of General Comments, p. 124, para. 9; emphasis added.*

[102] Ibid., loc. cit.;

[103] Communication No. 528/1993, M. Steadman v. Jamaica (Views adopted on 2 April 1997), UN doc. GAOR, A/52/40 (vol. II), p. 26, para. 10.2.

If the defense considers that it has not had sufficient time and facilities to prepare itself, it is thus important that it requests an adjournment of the proceedings. The Committee has however emphasized in the case *Wright v. Jamaica* that "in cases in which a capital sentence may be pronounced, it is axiomatic that sufficient time must be granted to the accused and his or her counsel to prepare the defense for the trial", and that "this requirement applies to all the stages of the judicial proceedings"; again, however, "the determination of what constitutes 'adequate time' requires an assessment of the individual circumstances of each case"[104]. In the case of Wright, the author contended that he had not had adequate time for the preparation of the defense, "that the attorney assigned to the case was instructed on the very day on which the trial began", and that, therefore, "he had less than one day to prepare the case"[105]. The Committee accepted that "there was considerable pressure to start the trial as scheduled" because of the arrival of a witness from the United States and that it was "uncontested" that, as submitted by the author, the lawyer was appointed "on the very morning the trial was scheduled to start" and, accordingly, "had less than one day to prepare" the author's defense; yet it was "equally uncontested that no adjournment of the trial was requested by" the author's counsel[106]. Consequently, the Committee did "not consider that the inadequate preparation of the defense may be attributed to the judicial authorities of the State party", adding that "if counsel had felt that they were not properly prepared, it was incumbent upon them to request the adjournment of the trial"[107]. It followed that there was no violation of article 14(3)(b) in this case. The applicant was convicted of murder and the sentence was executed.

In another death penalty case, *L. Smith v. Jamaica*, the Committee concluded that article 14(3)(b) had in fact been violated. In this case the author also complained that his trial was unfair, and that he had inadequate time to prepare his defense since he could only consult with his lawyer on the opening day of his trial and that, as a result, a number of key witnesses could not be called. According to the Committee it was "uncontested that the trial defense was prepared on the first day of the trial"; one of the author's court-appointed lawyers asked another lawyer to replace him, and another had withdrawn the day prior to the beginning of the trial. The attorney who actually defended the author was present in court at 10 a.m. when the trial opened and asked for an adjournment until 2 p.m. "so as to enable him to secure professional assistance and to meet with his client, as he had not been allowed by the prison authorities to visit him late at night the day before"[108]. The request was granted and the lawyer consequently "had only four hours to seek an assistant and to communicate with the author, which he could only do in a perfunctory manner"[109]. This, the Committee concluded, was "insufficient to prepare adequately the defense in a capital case" and there was moreover "the indication that this affected counsel's possibility of determining which witnesses to call"[110]. Consequently, these facts constituted a violation of article 14(3)(b) of the Covenant. In the Smith case the defense actually asked for a brief adjournment.

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[104] Communication No. 349/1989, C. Wright v. Jamaica (Views adopted on 27 July 1992), UN doc. GAOR, A/47/40, p. 315, para.8.4
[105] Ibid., p. 311, para. 3.4.
[106] Ibid., pp. 315-316, para. 8.4.
[107] Ibid., loc. cit. For a similar reasoning in a death penalty case see also Communication No. 702/1996, C. *McLawrence v. Jamaica (Views adopted on 18 July 1997), UN doc. GAOR, A/52/40, p. 232, para. 5.10.*
[108] Communication No. 282/1988, L. Smith v. Jamaica (Views adopted on 31 March 1993), UN doc. A/48/40 (vol. II), p. 35, para.10.4.
[109] Ibid., loc. cit.
[110] Ibid.

Both article 14(3)(b) and article 14(3)(d) were violated in the case *Yasseen and Thomas v Guyana*, where Yasseen had no legal representation for the first four days of his trial, at the end of which a death sentence was imposed[111]. In numerous cases brought against Uruguay in the 1970s and the beginning of the 1980s this particular provision was violated, among others, and common features of these cases were that the authors had been arrested and detained on suspicion of being involved in subversive or terrorist activities, held incommunicado for long periods, subjected to torture or other ill-treatment and subsequently tried and convicted by military courts[112].

Article 14(3)(b) was also violated in the case of *Wight v. Madagascar*, who was "kept incommunicado without access to legal counsel" during a ten-month period "while criminal charges against him were being investigated and determined"[113]. Further, in the case of *Peñarrieta et al. v. Bolivia*, the Committee concluded that article 14(3)(b) had been violated because the authors had had no access to legal counsel "during the initial 44 days of detention", i.e. when they were kept incommunicado following their arrest[114].

With regard to access to documents by the accused and/or his or her legal counsel, the Committee has specified that article 14(3)(b) "does not explicitly provide for a right of a charged person to be furnished with copies of all relevant documents in a criminal investigation, but does provide that he shall 'have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing'". In one case the author had been able, for almost two months prior to the court hearing of his case, either "personally or through his lawyer", to examine "documents relevant to his case at the police station", although he had chosen "not to do so, but requested that copies of all documents be sent to him". Article 14(3)(b) of the Covenant had not, consequently, been violated in this case[115]. Furthermore, according to the Committee's case-law, "the right to fair trial does not entail that an accused who does not understand the language used in Court, has the right to be furnished with translations of all relevant documents in a criminal investigation, provided that the relevant documents are made available to his counsel"[116]. Where a British citizen tried in Norway had a Norwegian lawyer of his own choice, who had access to the entire file and who had moreover the assistance of an interpreter in his meetings with the author, neither the right to a fair trial in article 14(2) nor the right to have adequate facilities to prepare his defense as provided by article 14(3)(b) was violated. An additional factor in this case was that if the lawyer had considered that he had not enough time to familiarize himself with the file, he could have requested an adjournment, which he did not do[117].

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[111] Communication No. 676/1996, A. S. Yasseen and N. Thomas v. Guyana (Views adopted on 30 March 1998), UN doc. GAOR, A/53/40 (vol. II), p. 161, para. 7.8.

[112] See, for example, Communication No. R.13/56, L. Celiberti de Casariego v. Uruguay (Views adopted on 29 July 1981), UN doc. *GAOR, A/36/40, p. 188, para. 11; Communication No. 43/1979, A. D. Caldas v. Uruguay (Views adopted on 21 July 1983), UN doc. GAOR, A/38/40, p. 196, para. 14; and Communication No. R.17/70, M. Cubas Simones v. Uruguay (Views adopted on 1 April 1982),* UN doc. GAOR, A/37/40, pp. 177-178, para. 12.

[113] Communication No. 115/1982, J. Wight v. Madagascar (Views adopted on 1 April 1985), UN doc. GAOR, A/40/40, p. 178, para. 17.

[114] Communication No. 176/1984, L. Peñarrieta et al. v. Bolivia (Views adopted on 2 November 1987), UN doc. GAOR, A/43/40, p. 207, para. 16.

[115] Communication No. 158/1983, O. F. v. Norway (decision adopted on 26 October 1984), UN doc. GAOR, A/40/40, p. 211, para. 5.5.

[116] Comm no 526/93 M and B Hill v Spain UN doc GAOR A/52/40 vol II p 18

[117] Communication 451/1991 Harvard v Norway UN doc GAOR A/49/40 vol II p154

Article 8(2)(c) of the American Convention on Human Rights was violated in the case of Castillo Petruzzi et al. where "the conditions under which the defense attorneys had to operate were wholly inadequate for a proper defense, as they did not have access to the case file until the day before the ruling of first instance was delivered". In the view of the Inter-American Court of Human Rights, "the effect was that the presence and participation of the defense attorneys were mere formalities", and consequently, it could "hardly be argued that the victims had adequate means of defense"[118].

[118] Inter-American Court of HR Castillo Petruzzi et alii v Peru Series C no 52 p202

PART THREE: CONCLUSIONS AND REMEDIES

Part Three looks into the remedies available and draft the conclusions

(i) Conclusions: the violation of the right to a fair trial in the case Gbenga Adubi & Ors V Nigeria

(ii) Remedies available under International Law and Right to Reparation

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(i) Conclusions: the violation of the right to a fair trial in the case Gbenga Adubi & 39 Ors v Nigeria

In this opinion we have reviewed the treaties and other international instruments protecting the right to a fair trial; we have examined the interpretations by the Human Rights Committee, the African Commission on Human and Peoples' Rights and other international monitoring bodies; we have analyzed materials about national constitution and laws and national practices relating to the right to a fair trial. We have found that in Nigeria, the right to a fair trial is undermined by the practice of holding charges, the establishments of special tribunals, and the practice of pre-trial detention. We have also found that the case Gbenga Adubi & 39 Ors V Nigeria is in clear violations of international and national standards relating to the right to a fair trial. Below, we summarize the most important conclusions in the argumentation concerning the violation of the right to a fair trial in the case Gbenga Adubi & 39 Ors v Nigeria.

1) The right to a fair trial has firm foundations in international law. The key legal texts protecting the right to a fair trial are Articles 9 and 14 of the ICCPR, Article 7 of the African Charter on Human and Peoples' Rights, Article 8 of the Inter-American Convention on Human Rights and Article 6 of the European Convention on Human Rights, but several other international standards contain fair trial guarantees.

2) Nigeria is bound by treaties it has signed and by the fundamental principles that fall under the category of customary international law. The Universal Declaration and the UN Charter are considered to be a part of binding, customary international law and as such, both instruments are binding Nigeria. They contain provisions relating to the right to a fair trial in Article 55 (UN Charter) and Articles 7 to 11 (UDHR).

3) Nigeria acceded to the International Covenant on Civil and Political Rights in 1993. The ICCPR protect the right to a fair trial in Articles 9 and 14. The Parliament has not ratified the treaty, but the Covenant's provisions concerning the right to a fair trial have been incorporated in the latter Constitution of 1999, with a technique called 'domestication by seepage'. This creates the legitimate expectation that Nigeria will interpret its Constitutional provisions concerning the right to a fair trial in the light of the ICCPR. Furthermore, there is a clear national and international jurisprudence towards the application of international treaties ratified but not domesticated.

4) Article 7 of the African Charter on Human and Peoples' Rights protects the right to a fair trial. The ACHPR has been ratified and domesticated in Nigeria by incorporation in a Statute (Statute ACHPR (Ratification and Enforcement) Act, 1990). The African Charter is therefore binding Nigeria.

5) The European and Inter-American Conventions on Human Rights contain provisions concerning the right to a fair trial. While not binding in Nigeria, these conventions might have an auxiliary role in the interpretation of other international standards.

Declarations, proclamations, guidelines, recommendations even without binding legal effect, are principles widely accepted within the international community and cover an auxiliary role in the interpretation of other international the treaty provisions as well as in the interpretation of domestic law.

6) Nigeria's practices of holding charges and of detaining accused in pre-trial detention for long period of time are in violation of the right to a fair trial as articulated in the Nigeria's Constitution, in the African Charter, in the ICCPR and in other international standards examined. In particular, in the case Gbenga Adubi & 39 Ors v Nigeria, the State of Nigeria has violated the right to a fair trial in the following ways:

7) The accused have been held in pre-trial detention for several years, according to a common practice to detain in custody the suspected persons while formulating the charges against them. International standards explicitly recognize that people awaiting trial on criminal charges should not, as a general rule, be held in custody. Art 6 of the African Charter, art 9 of the ICCPR and Art 9 of the UDHR also require that anyone arrested or detained must be brought promptly before a judge or other officer authorized by law to exercise judicial power and that hearing take place promptly after detention. International standards on the right to a fair trial also require that anyone detained on a criminal charge has the right to trial within a reasonable time or to release pending trial. The right to trial without undue delay obliges the authorities to ensure that all proceedings, from pre-trial stages to final appeal, are completed and judgments issued within a reasonable time and in case of pre-trial detention, the obligation on the state to expedite trials is even more pressing.

8) In the case Gbenga Adubi & 39 Ors v Nigeria, the State of Nigeria has violated the accused right to proper notification of charges in order to enable them to prepare a legal defense. Article 9(2) of the ICCPR says: "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". The African Commission in its jurisprudence has confirmed this principle. Notification of the reasons for arrest must take place at the time of the arrest and they must include a clear explanation of the legal and factual basis for the arrest or detention. Article 14(3)(b) of the International Covenant on Civil and Political Rights provides that everyone shall be entitled "to have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing" and the Human Rights Committee has specified that the facilities must include access to documents and other evidence, which the accused requires to prepare his case, as well as the opportunity to engage and communicate with counsel.

9) In the case Gbenga Adubi & 39 Ors v Nigeria, the State of Nigeria is therefore in breach of its own Constitution, the African Charter and the International Covenant on Civil and Political Rights relating to the provisions concerning the right to a fair trial.

10) The applicants should seek a declaration that the on-going trial is unconstitutional, void and of no effect and in violation of Nigeria's obligations under international law. The applicants should also seek an order to be released by prison custody while pending trial or to be detained provided it is demonstrated the legal grounds required by the Constitution and the international standards for pre-trial detention. Lastly, the applicants should demand appropriate compensation for the violations occurred.

(ii) Remedies available under International Law and Right to Reparation

In relation to violations of the ICCPR, Nigeria has not yet signed the First Optional Protocol giving the Human Right Committee jurisdiction to hear individual complaints. However, the violation of the Covenant can be submitted as a report from the NGO Community Law Center to the Committee.

Provided that it is demonstrated that the complainant has no opportunity to seek redress before a national court (rule of the exhaustion of local remedies), the Community Law Center could file a communication before the African Commission on Human and Peoples' Rights, claiming both the violation of the Charter and of the general principles of customary law, as source of law recognized by the Charter. According to Article 55 of the Charter, others than the States parties can file a communication to the Commission and it has been argued that this could include NGOs. It should be noted that before the African Commission can be pleaded also the violation of the ICCPR and other international standards, pursuant to Article 60 of the African Charter.

Both the recommendations from the Human Rights Committee and the African Commission are not binding, as there exists no mechanism for ensuring enforcement of such decisions. Nevertheless, as seen in Part One Paragraph (iii), recommendations or decisions from international bodies cover a relevant role in the state's diplomatic relationships.

Nigeria has signed the Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights. The complaint could then be submitted to this Court as well. According to Article 5 of the Protocol, the court may entitle individuals to institute cases directly before the Commission, in accordance with Article 34(6) of the Protocol. Article 30 provides that parties to the Protocol undertake to comply with the judgement of the Court.

The applicants should seek a declaration that the on-going trial and detention are in violation of Nigeria's obligations under international law. Lastly, the applicants should demand appropriate compensation for the violations occurred.

As far as reparation or compensation is concerned, the UN Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity in Principle 33 declares: "Any human rights violation gives rise to a right to reparation on the part of the victim or his or her beneficiaries, implying a duty on the part of the State to make reparation and the possibility for the victim to seek redress from the perpetrator." Then, in Principle 34: "all victims shall have access to a readily available, prompt and effective remedy in the form of criminal, civil, administrative or disciplinary proceedings subject to the restrictions on prescription set out in principle 24. In exercising this right, they shall be afforded protection against intimidation and reprisals… The exercise of the right to reparation includes access to the applicable international procedures". And Principle 26: "The right to reparation shall cover all injuries suffered by the victim; it shall include individual measures concerning the right to restitution, compensation and rehabilitation, and general measures of satisfaction as provided by the set of basic principles and rules concerning the right to reparation", as well as guarantees of non-recurrence of violations.

Measures designed to give effect to the right to reparation should include the matter of appropriation of assets as well as that of material, physical and moral harm. It may be inferred from the current case law of the international legal bodies that the basis for determining the amount and nature of the compensation is not solely the physical or material injury or damage but also the direct or indirect moral injury. In its observations on Communication No. 107/1981, the Human Rights Committee stated that the mother of a disappeared person was herself a victim: "The Committee understands the anguish and stress caused to the mother by the disappearance of her daughter and by the continuing uncertainty concerning her fate and whereabouts ... In these respects, she too is a victim of the violations of the Covenant suffered by her daughter..." Jurisprudence from other international bodies, such as the Committee on the Elimination of Racial Discrimination, the Commission of Inquiry set up by the International Labor Organization and the European Court of Human Rights, confirm the principle of compensation for moral injury.