

# HUMAN RIGHTS LITIGATION AND THE DOMESTICATION OF HUMAN RIGHTS STANDARDS IN SUB SAHARAN AFRICA

AHRAJ CASEBOOK SERIES

VOLUME 1

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# TABLE OF ABBREVIATIONS

<b>ACHPR</b>	African Charter on Human and People's Rights
<b>ACmHPR</b>	African Commission on Human and Peoples' Rights
<b>AHRAJ</b>	African Human Rights and Access to Justice Programme
<b>AU</b>	African Union
<b>CAF</b>	Canadian Armed Forces
<b>CAT</b>	Convention Against Torture
<b>CCAR</b>	Central Conference of American Rabbis
<b>CEDAW</b>	Convention on the Elimination of all forms of Discrimination Against Women
<b>CERD</b>	Convention for the Elimination of all forms of Racial Discrimination
<b>CHRA</b>	Canadian Human Rights Act
<b>CLA</b>	Caprivi Liberation Army
<b>CRC</b>	Convention on the Rights of the Child
<b>ECHR</b>	European Convention on Human Rights and Fundamental Freedoms
<b>ECHR</b>	European Court of Human Rights
<b>ECOSOC</b>	Economic and Social Council
<b>EEOC</b>	Equal Employment Opportunity Commission
<b>GPU</b>	Gambia Press Union
<b>HRC</b>	Human Rights Committee
<b>HURINET</b>	Human Rights Network Uganda
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>ICESCR</b>	Covenant on Economic, Social and Cultural Rights
<b>ICJ</b>	International Commission of Jurists
<b>IL</b>	International Law
<b>ILO</b>	International Labour Organization
<b>KTDC</b>	Kenya Tourist Development Corporation
<b>LAC</b>	Legal Assistance Centre
<b>MFWA</b>	Media Foundation for West Africa
<b>OECD</b>	Organization for Economic Cooperation and Development
<b>PCIJ</b>	Permanent Court of International Justice
<b>UDHR</b>	Universal Declaration of Human Rights
<b>UPDF</b>	Uganda's Peoples Defence forces
<b>URJ</b>	Union for Reform Judaism
<b>WTO</b>	World Trade Organization



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The AHRAJ team is hopeful that this casebook will be an important resource to legal practitioners and people seeking information on the domestication of international human rights standards.

**George Kegoro**  
*Executive Director*





# INTRODUCTION \*1

## The challenge

How does one go about ensuring that the legal protection of human rights in Africa conforms to the standards and obligations that African states assume responsibility for, when they ratify international human rights treaties and conventions? How does one secure remedies that meet international standards, when faced by violations at home, through recourse to municipal/national judicial remedies?

To some observers, undertakings assumed by states to protect the human rights of all within their territory, have little or no relation to subsequent state practices, save when there is a compelling self-interest.<sup>2</sup> A few have therefore disingenuously argued that ratification of international human rights treaties is a cynical masquerade, sometimes deliberately aimed at masking willful and concurrent violations. The situation in Africa is perhaps grotesque. Despite all African states, with the sole exception of Morocco, being state parties to the *African Charter on Human and Peoples' Rights*, in force since 1986, only a handful have taken any measures to implement the *Charter* nationally.<sup>3</sup> The failure stands stark considering the Charter itself does not spell out sanctions for violations. Instead, each year the Commission established under the *Charter* reports without failure to the AU assembly tasked with enforcing the Charter, the dismissal performance of the member states in fulfilling even their periodic reporting obligations. On the other hand, and with the exception few countries such as Namibia and Senegal, for the majority of African victims recourse to individual petition has only been theoretically possible within the African system. It is no wonder then that many law reformists are concerned only with reforms to municipal laws and practices as though international human rights law did not offer practical relief. Those pursuing regional human rights mechanisms such as an African human rights "Court" are viewed as theoretical; sub regional courts with a human rights jurisdiction remain idle and the growing "jurisprudence" of the Commission lacks procedures to bring it to the attention of national and sub regional courts. Indeed this is one of the challenges the

<sup>1</sup> Authored by Winluck Wahiu, LL.B University of Nairobi, Advocate of the High Court of Kenya

<sup>2</sup> See for instance Hathaway, O (2002) Do Human Rights Treaties make a Difference? 111 Yale L.J. 1935. The article analyzes quantitative country data over a 40-year period in order to assess the impact of human rights treaties on human rights practices.

<sup>3</sup> See for reference ICJ Judiciary Watch (2006), Report on the African Human Rights System, ed. Frans Viljoen. Visit also [www.achpr.org](http://www.achpr.org)

cases considered here have to grapple with – what to do with a successful outcome in their litigation strategies before international fora. In drawing conclusions, commentators allude to institutional and structural shortcomings within states and at the AU, or to the effects of legal pluralism and perspectives of cultural relativism and historical plurality.

The seeming disconnect between codified “minimum” international human rights standards, whether norm setting or sanction-making, and domestic guarantees within the municipal legal system, is a major set back for lawyers and judges alike. Each year, the gap between international law and municipal law enforcement continues to widen as newer norms and practices are codified at the international level, and then ignored or codified but not enforced at the domestic level.<sup>4</sup> Yet because ratification of these international law texts, in terms of the Law of Treaties, immediately imposes obligations on state parties, within their territory, to respect, fulfill and protect, it may be said that actions that are ordinarily violations at home will also amount to violations at the international level.<sup>5</sup> Double violations are not easy to dismiss by respectable regimes, and a part of their problem does lie, as they frequently report, in the inadequate development of national institutions required to forestall violations at home, and hence, at the international level. In Africa, one of the lesser-developed institutions is the municipal judiciary. Particularly weak is the power of judicial review based on Bills of Rights, as demonstrated by a wide body of judicial decisions.

Whether construed as a strategy to develop international law through strengthening the national institutions required to carry out its mandate, it is inescapable that building the capacity of the national legal sector is one of those sine non qua conditions. For the International Commission of Jurists (ICJ), the objective of building the capacity of a national legal system is, to enhance its implementation of international human rights law. It is also an agency in that the capacity of the national legal system is built through having to deal with, for instance, judicial reasoning that has contact with international jurisprudence. It is a specialized aim and a specialized agency.

The **African Human Rights and Access to Justice Programme (AHRAJ)** is a joint programme of the Kenyan and Swedish Sections of the ICJ<sup>6</sup>. Its programmatic goal of national implementation, also termed as “domestication” is advanced by enabling the capacity of municipal legal systems in sub Saharan Africa, to remedy violations of human rights through judicial remedies. The

<sup>4</sup> See Steiner and Alston, (2000) *International Human Rights in Context*, 2nd edn, Oxford, pp 1082–1305, for a useful collection of cases and materials in this regard.

<sup>5</sup> The principle *puncta sunt servanda* and the obligations arising from signature and ratification spelt out in Articles 26 and 27 of the Vienna Convention on the law of Treaties, 1969 which can be downloaded from [www.untreaty.un.org](http://www.untreaty.un.org)

<sup>6</sup> Visit [www.icj.org](http://www.icj.org), [www.icj-kenya.org](http://www.icj-kenya.org), [www.icj-sweden.org](http://www.icj-sweden.org)

objective is that the remedies themselves comply with international standards with regard to their effectiveness, adequacy, timeliness and availability.<sup>7</sup> The result is that litigation therefore materializes at home, relevant international human rights provisions. Through selected cases, AHRAJ provokes the national judicial system to confront international norms and sanctions, and rationalize their conformity, on judicial grounds. It enables judges to objectively state what norms and sanctions are comprehensively within the range of the victim of the violation. It enables lawyers to creatively situate claims for remedies found **only** within the international human rights corpus of law, within reach of both judge and victim. It enables the legal system to address the legislature on the requisite developments in the law, needed to bring it into step with the state's international obligations. It enables the state to claim that it has taken the necessary measures to domesticate the international standard.<sup>8</sup>

Domestication therefore remedies rights, but also strengthens the constitutional system by virtue of which state obligations under international human rights law are invoked. As a strategy, it is quite narrow and specialized, but it makes up by having a sharper focus and better defined tools. In the select cases pursued so far, AHRAJ has dealt with a number of African constitutional texts, in addition to the corpus of international human rights law. Shortcomings within these constitutional texts and the practices they generate or passively permit are brought under focused scrutiny using tools of legal doctrine, rather than politics, and the constitution is seen as the agency for compliance with international human rights provisions. The question in practice is not whether the strategy works. The cases demonstrate it does. However, there is one essential assumption, which is that within the municipal system in question, judicial findings can and do catalyze or directly compel structural changes in law and practice. Moreover, that the judiciary compelled action is positive, which is to say, that it will improve the protection of human rights, deter violations, afford an effective remedy and reduce the barriers against liability. In this approach, the cases are selected and discussed in this casebook for purposes of–

- Defining the core contents of the rights to fair trial, fair labour practice, housing and indigenous title to land food, and to freedom of expression.
- Determining what remedy would correct the violation

<sup>7</sup> As a general rule, individual petition before international fora is premised on exhaustion of local remedies which must as a result satisfy certain conditions. Like other regional and international tribunals, the African Commission has a number of decisions that are relevant, for instance, Communications 25/89, 47/90, 56/91, 100/93 Free Legal Assistance group Lawyers Committee for Human Rights, Union Africain des droits de l'Homme, Les Temoins de Jehova versus Zaire (DRC) decided 2000, para 36. These and other communications are compiled in volumes of the Institute for Human Rights and Development in Africa, based in Banjul, The Gambia.

<sup>8</sup> Compare AHRAJ's rationale of judicial review with the role of courts in constitutionalism in *Comparative Constitutional Law*, University Casebook Series, (1999) eds. Vicki Jackson and Mark Tushnet, Foundation Press, New York, pages 445 - 707 can be better understood

- Establishing norms and rules for comparatively evaluating domestic legal standards;
- Determining state obligations
- Evaluating the role of courts and lawyers in establishing mechanisms of enforceability and justiciability;
- Mobilizing and generating support for domestication by civil society and lawyers' bodies

## **Tension with convergence: areas of enquiry and additional research**

When courts encounter international human rights law, the problem indicated from the cases considered is not one of reference to that corpus of law; rather it has been with how that reference is used in relation to judicial power. Do we see any pattern of affecting judicial power at all within the above context of domestication? Is it purely **legitimizing** of, or can it also in addition **effectuate** international standards?

On the account of judicial power to effectuate, the cases reveal disparate results based on a stronger judicial preference for domestic as opposed to international guarantees. Frequently have judges aligned themselves with domestic needs even when based more on political expediency. The alignment is more subtle when judges formally agree with the legal doctrine in question, but reduce courts to legitimizing roles and nothing more. Most of the cases, if not all, reveal international standards being accepted, but still subsumed under what are framed as exempting, limiting or exception genres. A major edit is needed here: the few case studies are indicative; they call for further enquiry for those who are interested. Without generalizing, the issue here is delineation of the power of the courts in domestication strategies that require judges to effectuate, in addition to legitimizing international standards. That power has been asserted but restricted the judges' role to avoid saying something articulate about the position of domestic rules and practices that stand as violations of international standards being considered. The technique is interpretative - reading literal meanings and making only formal enquiries as to the rationality of state ends in legislation and practices complained against.

In these cases that follow, judges have been asked to do two things: First, to interpret municipal/national law in line with international human rights jurisprudence; secondly, to award judicial remedies that conform to international standards. The findings are therefore invariably rooted in the technique of judicial interpretation. But in addition, they are influenced by the political and constitutional maneuverability of courts, by the prevailing understanding of international legal doctrine, and by the nature of reparations awarded, if at all, to victims of human rights violations. What is interesting with some cases that allude to judges adopting techniques of upholding international law, while still maneuvering findings into categories of excuse or

permissible exceptions, is the maintenance of status quo. Under predominant judicial interpretation, most of the actions complained against were either rational means or acts permitted by the constitution in line with domestic exceptions. Hence, the courts as seen below, criticized but retained media restrictive laws in Zimbabwe, long detention awaiting trial in Senegal, suspension of rights to fair trial in Eritrea and the dispossession of indigenous groups in Kenya. If a conclusion about the role of courts in domesticating international standards through legitimization *and* effectuation is to stand, it must do so with a strong edit. Additional cases would have to be systematically considered within more varied subject areas.

Furthermore, what arguments or bargains could be made in courts to deal with exceptional circumstances are not disclosed in the cases. Instead, the rationales, if they exist, reach us in the results, through decisions, made usually without any dissent. In the Zimbabwean media case, a dissenting judgment offers a window into the competing claims and arguments, but this is the exception to the rule.<sup>9</sup> In general, when the state had a strong competing interest and a dominant executive culture, judges seemed willing to accept the state's perspective, even while agreeing on the relevance of international law. In Senegal, the courts faulted a practice of the prosecution that is not possible without judicial acquiescence, and it is by combination of acts of both the prosecution and the judiciary roles that delay in trial, a prevalent problem, is unreasonably extended.<sup>10</sup> Nor were judges willing to subvert established statutory law in a conflict prone policy area. Namibia's case on the constitutionalism of statutory limitation to legal aid is an exception, but even so, one without conflict in the sense that the statute already implements the constitution.<sup>11</sup> In the Kenyan case on indigenous claims to land, there is a telling difference.<sup>12</sup> Here, a decision for the applicants would have led to a conflict between the use of the international law norms, and settled national law on land ownership. Moreover, providing the remedy sought would have invented a new judicial remedy into the system, but also have exploded a policy crisis in the politically sensitive land question. Political resilience and residualism in courts must therefore account for some of the findings in these cases. In the extreme, judges in the above enumerated cases upheld the politically favourable solution while rejecting that violations occurred or even if accepting violations occurred, declining to offer remedies. What is relevant here is the judicial reasoning as such, and not outright intimidation and fear of reprisals, which is a different matter. In reasoned judgments, judges made the domestic scene absolutist, and while upholding the relevance of international law, subsumed it, and their judicial power to state authority. The seeming contradiction may be explained in part, by seeing international law normatism as not overriding, but rather as

<sup>9</sup> Infra, pages 183-187 of the Case book

<sup>10</sup> Infra pages 259-269 of the Case book

<sup>11</sup> Infra pages 268 of the Case book

<sup>12</sup> Infra page 166-167 of the Case book

explaining a wider margin of proportionality, limitations et al. By seeing the domestic system as mirroring international law, judges expanded their understanding of exceptions/limitations/derogation in the former to be exceptions in the latter, or saw the latter as irrelevant in the circumstances. Perhaps these cases also indicate that the legal team has to deal more squarely with exceptions and excuses, but that requires more systemic study. It may also be stated that by forcing municipal law to conflict with international human rights norms, both victims and courts learnt new ways of evaluating their own laws and practices.

The cases indicate what happens when international law is cited and pushed by the victim's lawyer to strengthen the case for more expansive or even novel remedies. Judges can accept the argument but situate the violations in excuse and exception using rules such as the rationality or proportionality of means, or derivatives of the European doctrine of margin of appreciation.<sup>13</sup> An interesting case would be where the norms cited in the international law are actually opposed to the norms situated in the national law, as in cases dealing with discrimination of women in customary law. See for instance the infamous *Magaya versus Magaya* where the court affirmed hereditary norms of customary law even though it agreed they discriminated against women contrary to international law obligations of Zimbabwe.<sup>14</sup> The question then seems to be: When would pleading an international law norm be beneficial to the victim's case? In the foregoing part, the suggestion is to go beyond pleading international law in a national context, to examining violations in the context of exceptions and limitations. There is an argument in favour of pleading international law as a "fill in" either because the national law is silent, contains no remedy or has contradictory interpretations. This is the approach adopted in the Commonwealth Bangalore Principles<sup>15</sup>, but fill in has its own conceptual shortcomings, not least that it relegates international law to residual and non threatening usages.

Is there any point pleading or relying on an international law provision when there are no gaps in the national law? Responding to these questions allows us to consider the status of international law norms in the specific context. In

<sup>13</sup> Although not mentioned in the cases, the analogy is derivative. The doctrine is a measure of the discretion allowed to individual member states in the manner they implement their human rights commitments within the European System, while taking into account their particular circumstances. The doctrine was developed by the European Court for Human Rights, not national courts, given its obligation to balance between the uniform rules and the sovereignty of national institutions. Reference from Human Rights Law and Practice, (2004) 2nd Edn, Eds. Lester and Pannick, LexisNexis UK, from page 94 – 102

<sup>14</sup> More on that case, see Women and Law in Southern Africa Research Trust Vol. II No.2, 1999 from page 99.

<sup>15</sup> The Principles were developed at a Judicial Colloquium on "The Domestic Application of International Human Rights Norms", held in Bangalore, India from 24 - 26 February 1988. Reprinted in Commonwealth Secretariat Developing Human Rights Jurisprudence Vol. 3 at page 151 and in I African Journal of International and Comparative Law/RADIC (1989) at page 345

the Kenyan case considered hereunder, there is a claimant group insisting on an indigenous status that is recognized in international human rights law, but not in the municipal law. Secondly, this group is asking for recognition of its exclusive rights to land based on among other things, cultural attachment and historical use. None of these grounds is recognized in the municipal law as rights-claims; indeed there is no right to land at all under the right to property clause in the Constitution. Finally, the group's prayer is for restitution to specified land, but restitution is a remedy that is not recognized in such cases for such groups in the municipal law. On the basis of the municipal law, the group would be entitled to monetary compensation or alternative land against a compulsory acquisition. Such a remedy would be blind to their status as an indigenous group and blind as well to their cultural attachments to a specific piece of land. The Kenyan courts were being asked to create new constitutional group rights and new constitutional remedies. The justification was compliance and convergence with international human rights standards.

In all the other cases, textual convergence already exists between international law and domestic constitutional provisions. It is therefore unavoidable that the cases evidence the resilience of the practice of constitutional supremacy, in the countries concerned.<sup>16</sup> From a litigation strategy point of view, the reference to international law may not strengthen the case, but it does not weaken it either.

The cases suggest that exceptions to international law also amount to exceptions under the constitution. When judges were asked to rely on "higher" law, they had in mind the constitution, and not customary norms of international law. So far as legal doctrine is concerned, the reality is that the cases could not contribute to a normative legitimization of international law, assuming the constitution made no reference as to its status as law, before the eyes of the local court. In fact, that legitimacy was not affected by the decision of the court, so that the nature of the legal recognition of indigenous rights for instance, did not change. Reference could of course legitimize the claims of the groups in question. In the eyes of judges, reliance on international law was ineffectual in the absence of enabling constitutional provision or jurisprudence.

The cases therefore present the challenge of arguing that judges develop the constitution in terms of international human rights law. In reality, citing and arguing international law texts before the national courts, was meant to

<sup>16</sup> Conflict in national laws and between national laws and other laws are resolved in favour of the Constitution as a general rule where the state has not conceded superiority to some other supra national structure. It is on this legal theory that modern courts have invalidated laws enacted by popularly elected parliaments. Those interested can compare *Madison versus Marbury* 1803 U.S. 1 Cranch. 137, with the common law position in *Madzimbamuto versus Lardner-Burke* (1969) 1 AC 645.



support the view that the judges' actions should be "legitimate" in the eyes of international law, even if, and especially if not so at home, and that this was the modern thing to do to develop the constitution. But in the cases considered save for the indigenous rights claims, legal doctrine was already sufficiently developed before the national court, and in the national constitution, and that in part actually dispelled the need to create legitimacy enhancing actions for the judge. Senegal's Constitution is a pointer, with its unique references to the *Declaration of the Rights of Man* of 1789. Another pointer is the Nigeria Constitution of 1996, and an earlier legislation adopting the entire *African Charter on Human and Peoples' Rights*. Eritrea's Constitution even compels the reflection of human rights in the National Action Plan. How would citations of international law affect the constitution, which is supreme, in this regard? Only by allowing the sanctions found in the category of international law, that were not afforded by the constitution, but that could not be done without changing the constitution and conceding its supremacy.

Consider the arguments about the limitations to freedom of expression, which relied on the text of the constitution as seen in light of the UN Human Rights Committee that exceptions be supportable within a "democratic order". If the aims of the legislation requiring journalists to register with a government regulator were to restrict freedom of the press, was the restriction unreasonable in a democratic order? When would it be unreasonable to require the mandatory registration of journalists within a democratic order? These questions could not be answered without reference to the meaning of a "democratic order". Reviewing the judgment from Zimbabwe, there is no reference to the meaning of "democratic order" nor indeed was the legal team asked to lead evidence as to the proper way to register journalists in any "democratic order". Both judgment and arguments before bar as could be discovered from the reports of the national legal team, reflect attitudes that were only borne from an extra national, extraneous context, such as the requirements of a "democratic order".

In The Gambia in a similar case,<sup>17</sup> the judges declared laws requiring journalists to register with a government dominated body rather than an independent body, to be unreasonable within a democratic order. That judgment also makes no determination as to what a "democratic order" is. Interestingly, the judgment of the court in this case led to the withdrawal of the concerned legislation (but also to its replacement with another equally draconian one), so that the executive dominated but elected parliament had the last word on supremacy. The meaning of "democratic order" in each of these cases, with their opposing results, is the meaning given by the International Human Rights Committee, and it was never contested, nor evidence required to be led as to whether the

<sup>17</sup> Infra pages 190-191 of the Case book



state was at the time a “democratic order”. Moreover, dispensing with the necessity of evidencing that a government dependent media regulator would adversely affect the rights of journalists even if there were no actual cases of bias, was done extraneously. That there need not be an experience of a violation, before a remedy could be sought was not based only on the constitution, but on accepted interpretation and judicial practice, supported by comparative and international human rights law. Indeed, the degree of independence of a media regulator is not compelled by international law, nor is the assertion that self discipline is the most appropriate form of regulation of journalists.

Finally, while international law was cited in such cases, it was not strictly necessary to do so. The constitution was already framed in same or similar language as the cited international text, there was no controversy as to its interpretation, and moreover, applicable international precedents were already available through the courts’ previous jurisprudence. Going through the judicial process reveals in reality the porous nature of the dichotomy between international law and municipal law, even where the constitution is supreme. The cases demonstrate, despite the results, which are mostly categories of justifiable excuse within a “democratic order” that a form of domestication had already happened through textual seepage from the international text to the constitution or by practice evolved inside and between states. Hence for instance, the prohibition against torture, the right to legal aid, the freedom of expression, the right to a fair trial etc, were more or less replicas from international texts to the Constitutions of Eritrea, Namibia, Zimbabwe and The Gambia, and Senegal respectively.<sup>18</sup> Did domestication require repetition? It may be argued that the problem was one of constitutional malpractice and political culture, the behavioural aspects surrounding the cases, rather than inadequate legal doctrine. So here too, the casebook points forward to additional and important area of research.

However, it is important to note that the cases raised the notion of the behaviour of the court as an indicator of its legitimacy before the international arena, precisely because a majority of these cases had, and could not avoid an international constituency. In some more meshed cases, international activists were part of the local legal team (media cases in Zimbabwe and The Gambia) or the entire team (detention of journalists in Eritrea). Some were proxy litigants (indigenous and native title in Kenya). The casebook refrains from discussing the legal team, or its choice of litigation approach. It is not meant to do so, since its perspective is formalistic and intended to focus on the judicial application of legal doctrine. In another forum, it may be worthwhile to investigate the impact of the team on case outcomes. Successful outcomes in the cases here considered would strengthen the mergence of international

<sup>18</sup> All references to the country constitutions are references to the texts downloaded from the constitution finder on [www.confunder.richmond.edu](http://www.confunder.richmond.edu)

with national law, applying norms and fashioning appropriate sanctions domestically, without much novelty. Only in the cases canvassed under the indigenous rights claims in Kenya and Tanzania, would a successful outcome evidence judicial led development of the national law, into an entirely novel area within the municipal legal system. Results are mixed, but are not strongly conclusive that either system has consequently given legal recognition to the existence of these peoples. The Kenyan legal team in the indigenous rights claims, stated that it argued international legal recognition of indigenous groups on the basis of a legal opinion prepared by an international team. In the assessment of the case that follows here, the judicial outcomes as explained as a result of mis-categorisation of the claim as one of dispossession of indigenous groups. Part of the blame for that seems to lie in the mix of both national and international strategies in the same case, with the expectation that both would be vindicated even separately.. What happens in such cases would be well worthy additional scrutiny, more so in light of the close collaboration between local and international legal activists in the limelight impunity cases against ex dictators.

A final area of research indicated by the casebook is the absence of national judicial criteria for the application of international human rights standards. The South Africa Constitution, 1996 and the Namibia Constitution are but few examples of “open” constitutions that direct judges to consider and give effect to international standards. Most are silent, while judges have revealed their need for predictability rules. It needs mentioning that not all the countries considered have a general judicial practice or history of disclosing the reasoning in their judgments, and that affects special courts such as the Constitutional Courts of Benin, Senegal etc. In the countries where judicial practice can be gauged from precedents, what needs to be addressed is the rule of law culture. In others, judicial behaviour may be anticipated from common law practices such as laid down in the Latimer House Guidelines and Bangalore Principles. Finally, in only a handful of the countries considered is there recourse to guidelines resorted to through self executing treaties. Here, the casebook points to a rich and urgent field of rule making that is currently unaddressed.

### Which areas does casebook cover?

While AHRAJ covers five standing subject areas, which is to say, the **right to fair trial, fair labour practices, health rights, the right to access to justice, and rights of women** individually and as a group, the cases covered here are only a part of those supported in these subject areas. In addition, there is an extra or miscellaneous category that covers rights not specifically assigned in the subject areas. Hence there is a chapter addressing minority and indigenous group rights, with emphasis on their native title to land, and another chapter on freedom of expression.

The casebook includes some selected cases supported under AHRAJ.

**Chapter One** lays the foreground of the domestication project in sub Saharan African countries. Part of that is the historical development and emergence of judicial review in the post 1990s constitutional reform. Judicial review is a special jurisdiction dealing with constitutional complaints and is a power vested either in newly established Constitutional Courts or appellate Supreme Courts. All the Constitutions of the countries covered include a Bill of Rights, which in all the post reform scenarios include expanded protection of rights. The casebook considers how domestication develops judicial review, particularly in regard to the possibilities of using an international human rights jurisprudence.

**Chapter Two** seeks to cover the issue of discrimination. Maina Wachira the reviewer takes four African countries as the focus of his analysis on violation of human rights through discrimination. The chapter acknowledges that an international norm has over time been established against all forms of discrimination, however discriminatory practices are still quite prevalent in many countries. The reviewer identifies three forms of discrimination- sex, health rights and race and with the aid of AHRAJ supported cases in the four identified countries seeks to create an awareness tool for litigators in Africa on the avenues that can be used to counteract such discriminatory practices. Discrimination on the basis of sex is considered under two spheres; in relation to citizenship with the cases under consideration being from Uganda and Nigeria and with regard to sexual harrassement the case under consideration originates from Kenya.

Discrimination on ones health rights with specific attention to a persons medical condition is covered using a case from Nigeria and the final case being based on discrimination due to a persons race has been evaluated with reference to the collateral rights to information and housing that have a bearing to discriminarion on the basis of race.

The chapter analyses the relevant articles in the international human rights instruments vis a vis the relevant local legislation in addition to comparative jurisprudence on the question of discrimination. The reviewer seeks to bring out situations where the various principles can be utilized to resolve the issues at hand while still being alive to the challenges that exist in the adoption of internationl human rights standards where national laws have gaps or in supplement of the national laws.

**Chapter three** deals with labour rights and fair labour practices. Nerida Nthamburi, the reviewer, celebrates the formalisation of labour rights within the international system, tracing it to its philosophical roots. She acknowledges the influence of the normative provisions of ILO conventions, which she tracks to contemporary labour rights in East Africa through colonial statutes and what has filtered from these ordinances to the post independence era. This

track, via the colonial gateway roots the formal protection, and hence understanding of labour rights, back to the international system. However, she concedes that the motivation for the colonial legislation may have been different within that specific context because “colonial governments introduced codified labour laws mainly as a way of sanctioning forced labour among natives and to ensure adequate supply of cheap labour to service the emerging enterprises” and that the labour laws in force during the colonial period “gave more priority to economic exploitation and control than to an integrated socio-economic development”. The comment could be taken further to enquire into the law as a source of violation, but its significance here is in the context of locating the origins of labour rights in the ILO system. Consequently, she introduces the obligation to legislatively domesticate international conventions as a continuum of ILO, colonial and post colonial precedents and practice.

Is there any active role for courts in these legislation led domesticating developments? How have courts contributed to labour rights, from their traditional role of refining constitutional and legislative standards, to remedying prevalent violations? What role have the courts played in applying international standards to unregulated labour practices and relations outside the statutory protection of labour rights? These are some of the questions insinuated by the cases she considers.

The chapter also touches on the international responsibility of the states concerned to redress the violation of labour rights. What is omitted for the purposes of delimitation between municipal and international courts, is the relevant international jurisprudence against Uganda, in this case, and what effect it has had on the domestic courts. Two cases are discussed to deal with rampant violations of fair labour practice, due to failures or shortcomings in the statutes. One relates the situation of “undocumented workers” who by that definition fall outside the legal definition of employees. Yet, these are workers in the informal sector who form the bulk of Ugandan workers, and do not have any legal entitlements to wage protection and statutory benefits, including minimum wage. They also lack the standing to seek remedies in terms of the existing labour laws. The second case relates the situation of “casual workers” in Kenya, who are employees originally hired on short term basis, for twenty four hours, but retained on those terms continuously, some for as long as ten years. As casual workers, they have no right of collective bargaining, no right to form a trade union, and no right to statutory benefits enjoyed by regular workers.

From workers in general, the chapter scrutinises two conditions in the workplace that spur the violation of different rights, in this case the right not to be subject to sexual harassment, and not to be discriminated on the basis of HIV. Both cases require the courts to award exemplary damages for breach of contract resulting in unlawful dismissal. The remedies would modify the

common law remedies awarded in such cases to include new heads of damages. The cases are therefore about domestic courts considering legislative and common law loopholes in light of the substantive meaning in the international labour rights conventions. This means construing the space between the protections afforded by national law, in both cases formally nonexistent or exigent to the law, and the protection afforded under international labour standards.

**Chapter four** addresses the other widely litigated issue of land rights. Clara Polsinelli, the reviewer, frames access to land within the right to housing framework of international human rights law and considers its relevance as a window for litigating dispossession from land in Africa. As a result she starts by conceding that communal land rights in Africa present a unique challenge due to the collective nature of the assertion of groups of individuals to land, based on group identity conceptions that are under developed in the international human rights law framework and may be in fact legally unrecognised at the national level. The root violation is introduced under a notion of actual dispossession through negation of native title, to crude forced eviction. The reviewer adopts a scholarly distinction to the violation with classifications between “historical” and “contemporary” dispossession. Historical dispossession may become a distinct legal classification, with some prominence from its use in the liberation rhetoric of independence and liberation struggles in Africa and elsewhere.

The reviewer traces a number of international law provisions whose ambit is to protect the pre-existing title of an indigenous group, based on the premise that the dispossession amounted *a priori* to a violation of pre-existing rights. In the case of historical dispossession, the violation preceded the state. Beyond the formal recognition of the rights to land of indigenous and other corporatist groups, the chapter presents the problem essentially as one of weakness or absence of enforcement at the national level. Enforcement mechanisms would also address a multitude of issues, among them, remedy of legal recognition of native title, of legal recognition of dispossession, of legal recognition of indigenous groups and the rights of such peoples to be protected from dispossession of their land and cultural way of life, based on historical occupation and modern theories of enjoyment of property.

Several cases are considered and discussed. Some deal with colonial period dispossession that has survived into post independence. What ought the domestic court to do in light of the view that international treaties protecting land rights of indigenous peoples cannot be used to redress historical inequities, dating back to the colonial time? Other cases deal with dispossession by the state in post colonial periods, including by compulsory acquisition under the property clause. Can such acquisition be quashed on account of claims that it did not take into consideration the full effect on the livelihood and cultural as

well as historical use of indigenous people? What if there is no legal recognition of such people under the domestic law? Would recognition automatically spell out the remedy sought?

A final set of cases deal with dispossession by a private entity for commercial reasons, albeit by licensing permission. In the litigation, the question is framed as an enforcement of the right to housing. What are the obligations of private parties and of governments, when dealing with the claims of groups who are settled on land on traditional title?

Part of the problem dealt in these cases is certainly the absence of constitutional recognition, a feature shared with those cases dealing with rights of undocumented workers. Hence, a part of the solution seems to be judicial development of the law based on subsequent ratification of international texts that could fill in the “gaps”. International human rights standards are relevant to restore the rights of the affected groups, even though, as we see in the Kenyan case on indigenous claims, the judges limit such restoration to classes where it would not be required to overcome any conflict with the constitution.

In **Chapter Five**, Benson Ngugi, the reviewer, addresses freedom of expression, through scrutiny of laws affecting the press in Eritrea, Gambia and Zimbabwe. In the latter two countries, freedom of the press, arises as a corollary to right to freedom of expression from statutory requirements affecting a professional group, that is, journalists claiming this right as the basis of their occupation and profession. In both cases, the journalists claim beforehand that their occupations are endangered by new media legislation which establishes systems of mandatory licensing, and hence, control, by statutory media bodies whose independence from the government cannot be vouchsafed.

The reviewer sets the freedom of expression in its classical liberal traditions, and explores the historical development of the idea of the independent, liberal press and its class of professional journalists. Accordingly, “the practice of journalism is different from other liberal professions, such as law and medicine, in that it involves the exercise of freedom of expression including the receiving and imparting of information.” (at page 179). These are the ideas challenged by the new laws. Fortunately, these cases provide some of the rare instances when judicial reasoning is available in the final decisions. They allow us to investigate whether the core of the freedom of expression is understood as including in Zimbabwe and The Gambia, the free press, and what minimum guarantees affect the press in this regard.

That the courts in both cases quickly accept the notion of independent liberal press in its classical formulation dispenses with the need to examine the difference in legal doctrine that arises in the two cases. The reviewer suggests this is not a controversy even though the legislature in both cases appears to

have alternative perceptions of the role of the press. Indeed, the cases consider only whether the legislative licensing system meets the standards of proportionality, justification and limitation as can be expected and accepted in a democratic society. In Zimbabwe, the majority decision affirms the legislation on the rationale that the maintenance of public order, the stated and formal objective of the statute in question, is “reasonably justifiable in a democratic society”. The actual operational context of the statute is only mentioned as a concern in a dissent. Part of that dissent also reasons disingenuously that existing criminal law is adequate to the task of maintaining public order, hence the new measures may be superfluous. On nearly similar facts, the Gambian High Court upholds the spirit of the dissent and the requirements of proportionality in a democratic order.

The different conclusions point to better judicial decision making in The Gambia, and the decision in that country is closer to comparative precedents in democratic societies. Accordingly the decision stands more within the international human rights framework than Zimbabwe’s and is a clear example of courts effectuation human rights at home.

**Chapter six** brings out a case for the need to abolish of the death penalty with specific bias to the African countries that still impose this punishment for certain offences. Grace Maingi the reviewer addresses the emotive issue of the death penalty sentence, she analyses the perception of different religions on the application of death as a punishment. The chapter also identifies some of the International Human Rights Standards bordering on the right to life as against the death penalty bringing out the fact that global trend is that states are moving towards the abolition of the death penalty as a form of punishment with over half of the countries in the world having abolished the practice and the law sanctioning such practice.

The terms of most of the international instruments analysed favour abolition as opposed to the retention of the death penalty and only proscribe the punishment for exceptional circumstances. The reviewer has delved further in comparing different practices by different countries around the world bordering on the application of the death penalty with the aid of case law. The reviewer also summarises two cases from Kenya and Botswana supported under the AHRAJ Programme that seek to challenge the application of the death penalty. In a nutshell the chapter creates a case for the need of the twenty three African countries still practicing the death penalty to work towards abolishing the practice.

In the final **Chapter Seven**, Winluck Wahi reviews the right to fair trial in a number of practices in Nigeria, Senegal, Uganda and Namibia. The cases reviewed deal with extended and unconstitutional delay in criminal trial, with torture and with the delivery of legal aid. Given the *jus cogens* status of the



right to fair trial, this is an area where both national and international jurisprudence is rich and comprehensive, sharply so when compared to the other areas dealing with labour rights of undocumented workers, or land claims of indigenous groups. The right to fair trial moreover underpins many other rights, such as the right to trial within reasonable time, to legal defence of choice, to legal aid for indigent litigants, to an impartial tribunal etc. In all these sub areas, the influence of international human rights law cannot be gainsaid.

In nearly all the countries considered, the constitutional protection of the right to fair trial mirrors nearly word for word, the provisions of the International Covenant on Civil and Political Rights, 1969. Legal doctrine is precedented and well articulated. What the cases show is that divergence from international standards is also divergence from national standards in the formal guarantees, and that moreover, serious divergence seems to follow hard political issues which place human rights in subordinate positions. Thus, while there is no doubt about the delivery of legal aid in Namibia, the state dithers in relation to persons accused of treason following an attempted secession attempt. Torture is rife in cases dealing with military intervention in Uganda to protect the resistance movement, with a measure of judicial acquiescence. The same can be said of the actions of the secret police agents in The Gambia who see their duty as the entrenchment of a military junta transiting itself into a civilian regime. In Senegal and Nigeria, the violations are systematic of an overstretched and underresourced judicial system. Because of the textual convergence, international human rights discourse can be seen with more clarity in its effect on how courts effectuate protection domestically.

## Conclusion

Finally, this is the first casebook of its kind under the AHRAJ Programme. Its depth of case study is hardly sufficient, nor conclusive in terms of how municipal courts actually effectuate international human rights standards in the subject areas. Its perspective is intended to be highly formalistic. More case studies would be needed, with a bias on concluded cases where the judgments were reported. The casebook however makes an overall assessment that is positive and inclined to point out where additional litigation and legal opinions are needed. Cases canvassed herein do reveal instances where human rights doctrine was applied and its intention is to assist lawyers and civil society actors to understand their role and that of judges in domestication through litigation. In other words, the casebook will fill a knowledge gap in advocacy strategies.



# CHAPTER 1

## GENERAL PRINCIPLES: JUDICIAL IMPLEMENTATION OF INTERNATIONAL HUMAN RIGHTS NORMS\*<sup>1</sup>

### Introduction

Through ratification and domestication, international human rights laws and standards become part and parcel of domestic law. International and Regional Human Rights Instruments have been widely ratified and accepted. Whether a state automatically acknowledges international law, entrenches human rights in its constitution or incorporates them through judicial interpretation rules, human rights are an important feature of almost every jurisdiction in one way or another.

But the practice in the actualization of rights has been more mixed. Compliance depends on a variety of factors, amongst them politics as well as a country's legal system, its courts and other institutions. And though, the current international system can exert pressure on the State to comply, creating inducements and a culture of compliance is especially difficult for human rights than it is for other international law. Nevertheless, the international human rights system and the cognate bodies created by treaty bodies have developed an enforcement machinery. This enforcement procedure primarily involves reporting, comments by treaty bodies and decisions of judicial and quasi-judicial bodies.

In a globalized world, a state cannot persistently ignore the real and significant effect of these international bodies: their judgments and comments will have an impact on many aspects of a State's relations with others. Its reputation will be governed, at least in part, by its compliance to international and regional instruments it has ratified. When interpreting the laws of a State, a Court ought to take into account of these international obligations, even if they are not directly incorporated into domestic law.

The melding of diplomacy and law has meant that over the last few decades, human rights have ceased to be a fringe activity for non-governmental

\*<sup>1</sup> Authored by Krissie Hayes, LL.B Deakin University (Australia) and LL.M University of Melbourne (Australia)

organizations and instead have become important aspects of a state's economic and social life, influencing both public and private law<sup>2</sup>.

## The basis of a state's obligation under international law

A state's compliance with international law rests on two main grounds: custom and treaty. A custom is binding upon a state when there is "a general recognition among states of a particular practice as obligatory."<sup>3</sup> As Brownlie notes custom may be divined from a variety of sources including diplomatic correspondence, policy statements, opinions of official legal advisers, executive decisions and practices. Though customary rules emerge through practice and acquiescence some rules are so fundamental that they are binding per se. These are termed jus cogens and include the ban on genocide, piracy and war crimes. Treaties are binding on the principle that agreements shall be honoured or more technically pacta sunt servanda. The principles governing the application and interpretation of treaties are specified in the Vienna Convention on the Law of Treaties. Article 18 obligates "states not to defeat the object and purpose of a treaty prior to its entry into force." Article 26 enacts the principle of pacta sunt servanda and specifies that "every treaty in force is binding on the parties to it and must be performed by them in good faith." Article 27 states that a State "may not invoke the provisions of its internal law as justification for its failure to perform a treaty." Article 31 is a general rule interpretation: "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."

Human rights obligations are, similarly, in two parts Customary and treaty law. Matters like racial discrimination, sex discrimination and genocide are regulated both by custom and by treaty. The obligation of state's to protect human rights is founded on article 56 of the United Nations Charter, 1945. Under the article each state has the obligation, bilaterally or independently, to take action to promote "universal respect for and observance of human rights and fundamental freedoms of all without distinction as to race, sex, language or religion." This responsibility includes adherence to the rights enumerated in the Universal Declaration of Human Rights, 1948 and elaborated in other UN covenants and declarations over the years. These responsibilities are, in turn, anchored in the fact, made clear by the UN Charter itself, that in the modern age how a state treats its citizens is a matter of international concern.

The Charter says that in order to create the condition for peaceful and friendly relations among nations ...

<sup>2</sup> See editorial of Lord Goldsmith QC and Nicholas R. Cowdery QC, "The Role of the Lawyer in Human Rights", in HRI News (Newsletter of the IBA Human Rights Institute), vol. 4, No. 2, 1999, p. 1.

<sup>3</sup> Brierly, The Law of Nations, 6th edition, p. 61.

*“the United Nations shall (among other goals) promote ... universal respect for, and observance of, human rights and fundamental freedoms for all without distinctions as to race, sex, language or religion.”<sup>4</sup>*

And further that the people of the United Nations “reaffirm faith in international human rights, in the dignity and worth of the human person, in the equal rights of men and women...”

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. Paragraph 5 of the Universal Declaration preamble reaffirms “the faith” of the “peoples of the United Nations” in the “dignity and worth of the human person and in the equal rights of men and women...” The Charter explains why a Universal Declaration was thought necessary. It notes that “a common understanding of these rights and freedoms is of the greatest importance for the full realisation of this pledge.”

The rights themselves are then elaborately set forth in the body of the Declaration. So far as applies to this case Article 2 and 16 need to be highlighted. Article 2 emphasises that “everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind, such as race, colour, sex, language, language, religion, political or other opinion, national or social origin, property birth or other status.”

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.”<sup>5</sup> Thus, the Declaration 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.”<sup>6</sup> Indeed, several commentators have concluded that the Universal Declaration has become, *in toto*, a part of binding, customary international law.”<sup>7</sup>

### **Application of International human rights in the domestic sphere: The dualist/monist debate**

The Committee on Economic, Social and Cultural rights in its General Comment 9<sup>8</sup> stated that the Covenant does not stipulate the specific means by which it

<sup>4</sup> UN Charter, Art. I (3)

<sup>5</sup> E. Schwelb, Human Rights and the International Community 70 (1964).

<sup>6</sup> 34 U.N. ESCOR, *supra*.

<sup>7</sup> Waldlock, Human Rights in Contemporary International Law and the Significance of the European Convention, *Int'l & Com*

<sup>8</sup> E/C. 12/1998/24 CESCR General Comment 9p. L.Q., Supp. Publ. No. 11 at 15.

is to be implemented into the national legal order. And there is no provision obligating its comprehensive incorporation or requiring it to be accorded any specific type of status in international law. Nonetheless, the Committee went on to say that whatever the preferred methodology, several principles follow the duty to give effect to the Covenant and must therefore be respected.

## Incorporating Human rights obligations in Constitutions

Many systems, especially countries transiting from authoritarianism, have chosen to incorporate international human rights law into the new constitutions they have made to mark a break with the past. Most constitutions include elaborate Bills of Rights. In India, the 1947 Constitution contains extensive human rights provisions. Upon independence many Commonwealth countries adopted human rights chapters or Bills or Rights based on the Universal Declaration of Human Rights. To buttress such rights, these constitutions also entrenched the court's jurisdiction to interpret and apply the provisions of the Bills of Rights. Comparative law was thus a logical progression from the shared foundation of Commonwealth constitutions.<sup>9</sup> The use of common language in stipulating constitutional guarantees for fundamental rights and freedoms enables judges, prosecutors and lawyers to draw upon the jurisprudence of international courts and other monitoring bodies in interpreting their own constitutions or other provisions.

The newer post-transition constitutions in Africa and East and Central Europe go even further. Some specifically direct courts to apply international instruments as interpretive guides in decision making. The constitutional court of South Africa<sup>10</sup> has referred to its obligation under the constitution to apply public international law when interpreting the provisions of the new constitution. In interpreting the scope of its obligation in this regard the court has stated:

*“In dealing with comparative law, we must bear in mind that we are required to construe the South African constitution, and not an international instrument or the constitution of some foreign country, and this has to be done with due regard to our legal system, our history and circumstances, and the structure and language of our constitution. We can derive assistance from public and international and foreign case law but we are in no way bound to follow it.”<sup>11</sup>*

<sup>9</sup> Pool, M., Mayhew, A Cross-Border Traffic in Human Rights Jurisprudence: Interights experience, Interights 1999

<sup>10</sup> in *State V Makwanyane* (1995) 1 LRC 269; (1996) CHRLD 164

<sup>11</sup> *ibid* per Chakalson P

## International Standard setting 1: Bangalore Principles in the Commonwealth

Thus far, international human rights are binding either because they are *jus cogens* or because states have ratified a relevant international instrument or because they are a part of the constitution of a country. However, international human rights instruments can also become part of a country's legal culture through diplomatic and other multilateral processes. Such processes are important in the development of an international culture of rights. Many soft standards and principles are now codified: for instance, the United Nations Draft Principles on the Independence of the Judiciary (1981); International Bar Association's Minimum Standards of Judicial Independence (1982); the United Nations Basic Principles on the Independence of the Judiciary (1985); the UN Basic Principles on the Role of Lawyers (1990); the Bangalore Principles of Judicial Conduct (2002); the Cairo Declaration on Judicial Independence (2003); and the Suva Statement on the Principles of Judicial Independence and Access to Justice (2004). In the case of the Commonwealth, the Bangalore Principles have been particularly influential, perhaps because they specifically itemize customary or common law practices for the domestication and application of human rights principles. They provide that:

1. Fundamental human rights and freedoms are inherent in all humankind and find expression in constitutions and legal systems throughout the world and in the international human rights instruments.
2. These international human rights instruments provide important guidance in cases concerning fundamental human rights and freedoms.
3. There is an impressive body of jurisprudence, both international and national, concerning the interpretation of particular human rights and freedoms and their application. This body of jurisprudence is of practical relevance and value to judges and lawyers generally.
4. In most countries whose legal systems are based upon common law, international conventions are not directly enforceable in national courts unless their provisions have been incorporated by legislation into domestic law. However, there 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.
5. This tendency is entirely welcome because it respects the universality of fundamental human rights and freedoms and the vital role of an independent judiciary in reconciling the competing claims of individuals and groups of persons with the general interests of the community.

6. While it is desirable for the norms contained in the international human rights instruments to be still more widely recognized and applied by national courts, this process must take fully into account local laws, traditions, circumstances and needs.
7. 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 form, national constitutions, legislation or common law.
8. However, where national law is clear and inconsistent with the international obligations of the State concerned in common law countries the national court is obliged to give effect to national law. In such cases the court should draw such inconsistency to the attention of the appropriate authorities since the supremacy of national law in no way mitigates a breach of an international legal obligation, which is undertaken by a country.
9. It is essential to redress a situation where, by reason of traditional legal training, which has tended to ignore the international dimension, judges and practicing lawyers are often unaware of the remarkable and comprehensive developments of statements of international human rights norms. For the practical implementation of these views it is desirable to make provision for appropriate courses in universities and colleges, and for lawyers and law enforcement officials; provision in libraries of relevant materials; promotion of expert advisory bodies knowledgeable about developments in this field; better dissemination of information to judges lawyers and law enforcement officials; and meetings for exchanges of relevant information and experience.
10. These views are expressed in recognition of the fact that judges and lawyers have a special contribution to make in the administration of justice in fostering universal respect for fundamental human rights and freedoms.

Subsequent to the Bangalore meeting, in 1991 a High Level Judicial colloquium was held in Abuja, Nigeria. The Bangalore principles were confirmed and the meeting agreed that the general principles of international human rights are relevant to the interpretation of national Bills of Rights and laws, where choices have to be made between competing interests in the discharge of the judicial function. The participants concluded that:

*“...There is an impressive body of case law which affords useful guidance to the national courts – notably, the judgments and decisions of the European Court and Commission of Human Rights, the judgments and advisory opinions of the Inter-American Court of Human Rights, and decisions and general comments of the United Nations Human Rights Committee. There is also an important body of comparative constitutional law, for example from the Supreme Courts of Commonwealth Jurisdictions. This is also an area in which resort can be had to the writings of eminent scholars and jurists”<sup>12</sup>.*

It was noted by Lord Lester of Herne Hill, QC, the relevance of the Bangalore Principles ‘...has been widely accepted by the courts when they interpret their constitutions and declare common law, making choices which it is their responsibility to make in free, equal and democratic societies.’<sup>13</sup> In his introduction to the published proceedings of the 1988 Bangalore Colloquium, the Commonwealth Secretary-General, Shridath S Ramphal, wrote:

*“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. I share the hope that the ripples it created will reach into the farthest corners of the Commonwealth.”*

## International Standard Setting 2: Judicial Interpretation

As democracy has spread across the continent, human rights have gained recognition, starting with an explicit mention in the Constitutive Act of the African Union, 2001. More African national and intergovernmental institutions recognize that they cannot be oblivious to rights issues and all African sub regional inter governmental organizations have set up courts with a treaty based human rights jurisdiction. Contemporaneous with the growth of democracy many African States are now signatories to the major international and regional human rights instruments. Most countries have signed multiple instruments: Zambia is a signatory to ICCPR, ICESCR, CERD, CEDAW and the CRC; Swaziland is a signatory to CERD, Convention on Political Rights of Women, Convention on Nationality of Married women, Protocol to the Status of Refugees and CRC; Malawi has ratified CEDAW, African Charter, CRC, ICCPR, ICESCR, Convention on Nationality of Married Women, Convention on Political Rights of women, Convention relating to the status of refugees and its protocol; Namibia has ratified the African Charter, ICCPR, ICESCR, CEDAW, CAT and

<sup>12</sup> Developing Human Rights Jurisprudence, Vol 4: Fourth Judicial Colloquium on the Domestic Application of International Human Rights Norms, Commonwealth Secretariat, Interights. 1991 pp x-xi

<sup>13</sup> Lord Lester of Herne Hill, QC ‘The Relevance of International Human Rights Norms’ in Developing Human Rights Jurisprudence, Volume 7: Seventh Judicial Colloquium on the Domestic Application of International Human Rights Norms (1998) Commonwealth Secretariat, p23, 45



CRC; Kenya has ratified all major human rights instruments, as has Uganda whilst Tanzania has ratified the African Charter, ICESCR, ICCPR, CERD, CRC, and CEDAW. Ethiopia has ratified or acceded to 26 instruments including ICCPR and ICESCR.

However, this impressive ratification record has been undermined by weak implementation in the domestic front. In state reporting to the African Commission (available from the Commissions website), weak implementation is very often alluded to dualist arguments that treaties have no provenance until domesticated via statute. In order to counter legislative sloth in proposing legislation to implement the state's international obligations, some human rights advocates have resorted to treaty and constitution driven rights litigation. The intention is to use the human rights jurisdiction of courts, and the court's remedies, to narrow the gaps between international human rights norms and domestic practice.

There is now a growing body of comparative jurisprudence and an emergent dialogue<sup>14</sup> on the role and possibility of using courts to deepen respect and enforcement of human rights even where the relevant treaties have not been ratified. Courts have developed a number of approaches to apply or borrow from human rights instruments to strengthen local laws: 1) International human rights instruments are used to resolve ambiguities in local law and 2) where provisions of local law are similar to those of international human rights law courts may draw upon the jurisprudence of international tribunals.

## 1) Removing Ambiguity or Gaps within Domestic Legislation

It is now well settled that in construing domestic legislation that is ambiguous, English courts will presume that Parliament intended to legislate in accordance with its international obligations.<sup>15</sup> The courts may also draw upon international obligations to resolve uncertainty or ambiguity in the common law.<sup>16</sup>

In Australia, the justices of the High Court noted the influence of such international conventions as the International Covenant on Civil and Political Rights on domestic law and identified the rights and interests of indigenous peoples in a colonized Australia<sup>17</sup>. The principle adopted in Australia is that ratification of a treaty created a "legitimate expectation" in the citizens that the country would ensure those rights are guaranteed. The "legitimate

<sup>14</sup> "The International Judicial Dialogue: When domestic Constitutional courts join in the Conversation." Harvard Law Review 2001.

<sup>15</sup> Reg v Home Secretary; Ex parte Brind (1991) 1 AC 696, per Lord Bridge of Harwich at p777

<sup>16</sup> Derbyshire County Council v Times Newspapers Ltd (1992) 3 WLR 28

<sup>17</sup> MABO AND OTHERS v. QUEENSLAND (No. 2) (1992) 175 CLR 1 F.C. 92/014



expectations” approach has been adopted by several other jurisdictions. Examples?

As a general principles of international law, undergirded by the Vienna Convention on the Law of Treaties, there is a presumption that a State will not legislate contrary to its international obligations. The proper principle of interpretation is that if an act and a treaty deal with the same subject matter, the court will construe them so as to give effect to both without acting contrary to the wording of either<sup>18</sup>. For example, in the case of *United States v Palestine Liberation Organization*<sup>19</sup> the New York district court held that it could not be clearly and unambiguously established that the *Anti-Terrorism Act* intended to violate an obligation under the UN Headquarters Agreement. Similarly, the Nigerian Supreme Court held that a treaty is not deemed abrogated or modified by statute unless it clearly expresses such a purpose<sup>20</sup>.

In keeping with these developments, the Appeal Court in Botswana<sup>21</sup> has said:

*“In this regard, I am bound to accept the provision that this country will not deliberately enact laws in contravention of its international undertakings and obligations under those regimes. Therefore, the courts 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 Organization and the Organization of African Unity.”*

In the case of *Unity Dow v Attorney General* in Botswana, the court held 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.”<sup>22</sup> As Aguda, J.A noted:

*“If an international convention, agreement, treaty or protocol or obligation has been incorporated into domestic law, there seems no problem since such a convention, agreement, treaty or protocol or obligation will be treated as part of domestic law, domestic court must accept the proposition that the Legislature or Executive will*

<sup>18</sup> *Sion Gabriel v the united republic of Tanzania* Argument by ICJ (K) Legal opinion by Wachira Maina  
<sup>19</sup> 695 F. Supp. 1456 (1988)

<sup>20</sup> *Abacha & Ors v Fawehinmi Nigeria* 2000

<sup>21</sup> *Aguda J.A*, Civil appeal No. 4/91 of 3/12/92 quoted in *Abiola v Abacha* (Nigeria 1994)

<sup>22</sup> 1992 per Amissa J.P.

*not act contrary to the undertaking given on behalf of the country by the Executive...However, where the country has not in terms become a party to an international convention...it may only serve as an aid to the interpretation of domestic law, or the constitution if such an international convention...purports to or by necessary implication, creates an international regime within international law recognized by a vast majority of States.”*

It can therefore be seen that where a treaty has been ratified, courts have usually accepted the obligation to interpret domestic law so as to conform with such treaty. Some courts have accepted that even if a treaty is not so ratified it nevertheless serves as a guide.

In the words of Australian High Court Judge, Justice Kirby, in a report of the Judicial Colloquium in Bangalore:

*“...In the function of Courts in giving meaning to a written constitution, to legislation on human rights expressed often in general terms, or even to old precedents inherited from judges of an earlier time, there is often plenty of room for judicial choice. In that opportunity for that choice lies the scope for drawing upon each judge’s notions of the content and requirements of human rights. In doing so, the judge should normally seek to ensure compliance by the court with the international obligations of the jurisdiction in which he or she operates...An increasing number of Judges in all countries are therefore looking to international developments and drawing upon them in the course of developing the solutions which they offer in particular cases that come before them.”<sup>23</sup>*

The committee on Economic, Social and Cultural Rights stated in General Comment 9:

*“Within the limits of the appropriate exercise of their functions of judicial review, courts should take account of Covenant rights where this is necessary to ensure that State’s conduct is consistent with its obligations under the Covenant. Neglect by the courts of this responsibility is incompatible with the principle of the rule of law, which must always be taken to include respect for international human rights obligations. It is generally accepted that domestic law should be interpreted as far as possible in a way which conforms to a State’s international legal obligations. Thus, when a domestic decision maker is faced with a choice between an interpretation of domestic law that would place the State in breach of the Covenant and one that*

<sup>23</sup> Quoted in *Unity Dow v Attorney-General* (Botswana, 1992)

would enable the State to comply with the Covenant, international law requires the choice of the latter.<sup>24</sup>

There is, then, a basis for concluding that when there is an ambiguous or uncertain provision in local law, preference is to be given to an interpretation that conforms with international law, whether or not the relevant treaty has been ratified. The presumption must be that a state intended to act in accordance with its international obligations.

## 2. Reference where similar provisions adjudicated

In addition to using international law to fill gaps and resolve ambiguity, there are instances where the constitution or other local laws specifically provide for rights similar to those protected by international instruments. If so, courts should read these provisions in light of international jurisprudence which has already given meaning to the same or similar wording. Most bills of rights enshrined in domestic law take their terms from the International Bill of Rights. It is a matter of reason and common sense, that in such cases the courts should adopt or follow the meanings that these terms have in the source treaties.

*The South African Constitutional Court has adopted this line in its interpretation of provisions in the Constitution of 1996. In the absence of a developed local jurisprudence, the CC has used international law to interpret human rights provisions. Though in South Africa customary international law and self-executing international treaties are binding, the CC has ruled that even treaties that are not binding – because not enacted by parliament – can be used as tools of interpretation. In The State v Makwanyane<sup>25</sup> Chaskalson J held that: “International agreements and customary law... provide a framework within which the bill of rights can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments such as the United Nations Committee on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights and the European Court of Human Rights and, in appropriate cases, reports of specialized agencies such as the ILO may provide guidance as to the correct interpretation of the provision of the bill of rights.”*

In *Makwanyane*, the CC looked to international law to decide on the constitutionality of the death penalty. It noted that while the death penalty did not violate international law per se, evolving international practices and sensibilities treated it as cruel and inhuman. In reaching this conclusion,

<sup>24</sup> E/C. 12/1998/24 CESCR General Comment 9, Para 14 and 15

<sup>25</sup> CCT/3/1994

the CC referred to decisions of the United Nations Committee on Human Rights, the Hungarian Constitutional Court, and the Canadian Supreme Court.<sup>26</sup>

When there is ambivalence in international law, as there is in the case of the death penalty, courts can develop highly asymmetric jurisprudence. Thus, though the South Africa constitutional court read international in a manner that invalidated the death penalty, other countries have read international law the other way and so affirmed the death penalty.

In Tanzania, the Court of Appeal, in *Mbushuu & Anor v Republic*<sup>27</sup> considered international jurisprudence and concluded that the death penalty did not violate the right to life and the protection against cruel and inhuman punishment in the Tanzanian Constitution. However, the court acknowledged that international human rights instruments and court decisions of other countries provide valuable information and guidance in interpreting the basic human rights in the Tanzanian constitution. In reaching a different conclusion, the Nigerian Constitutional Court also looked to international comparative law but held that the death penalty was unconstitutional<sup>28</sup>.

In the Botswana case of *State v Ntesang*,<sup>29</sup> the Court of Appeal also upheld the constitutionality of the death penalty on the grounds that it was expressly preserved by the Constitution as a legitimate form of punishment and, despite international sentiment in favour of its abolition. Because the court imposed a jurisdiction limitation on itself, it decided to treat the matter as one falling beyond its mandate. However, even in that case, the Court urged parliament to consider the legislation in favour of the death penalty in light of evolved international standards. International law was therefore significant consideration. The court observed that it could not ‘close its ears and eyes to happenings in other parts of the world and among the international community to which we belong.’

In Nigeria, the Supreme Court affirmed that the fundamental rights protected in the African Charter and the implementing Act were superior to all municipal laws in Nigeria, and could therefore not be ousted by a decree of the military government.<sup>30</sup> In Ghana, it was said that municipal law could not supersede the international instruments referred to in the constitution and, therefore, the courts were obliged to apply these instruments in their

<sup>26</sup> *State v Makwayne* CCT/3/1994

<sup>27</sup> 1995 1 LRC 216; 1996 2 CHRLD 160

<sup>28</sup> *Kalu v State* 1998 13 NWLR 531

<sup>29</sup> 1995 2 LRC 338; 1996 CHRLD 159

<sup>30</sup> *Ubani v Directory of state Security Services & Anor*, Court of Appeal, Nigeria 1999

interpretive duties, whether or not they ratified. The point being that the principles of international human rights instruments on fundamental human rights were enforceable to so long as they fitted into the provisions of the constitution.<sup>31</sup>

Other countries have considered and used international human rights jurisprudence in different contexts and the Interights Case Digest provides one resource that is helpful for lawyers in this regard.

The conclusion from this brief survey is that even where treaties are not ratified, they can have great force and application where judges are ready to use the principles these instruments enshrine in resolving uncertainty, filling gaps, or in giving meaning to provisions in local law that are similar to provisions in international instruments.

### **Do differences between rights affect enforceability?**

An old problem in international human rights debate is whether rights are everywhere the same and whether in fact all are to be enforced through the same mechanisms. During the cold war this question plagued relations between the West and Communist block. In the West Civil and Political Rights were privileged: the argument being made that these had the quintessential attributes of rights, in particular, judicial enforceability. Economic, Social and Cultural Rights were on the other hand thought of as mere aspirations, statements of social goals to aim at and, hopefully, to eventually attain.

As the cases in this volume demonstrate, there is an inchoate but growing jurisprudence on the justiciability of economic and social rights. The Covenant on Economic and Social Rights (unlike ICCPR) allows for progressive realization of the rights. But it also imposes some obligations which are of immediate effect. The Committee has pointed out that the Convention creates “obligations of conduct and obligations of result”<sup>32</sup> and also creates some obligations which are of immediate effect<sup>33</sup>. Furthermore, the Committee notes that State parties have a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights in the Convention.<sup>34</sup> The Committee has stated that “in most cases the decision as to whether a treaty provision is self-executing will be a matter for the courts not the executive or the legislature...When Governments are involved in court proceedings, they should promote

<sup>31</sup> New Patriotic Party v Attorney-General Ghana supreme Court 1997

<sup>32</sup> CESCR General comment 3

<sup>33</sup> *ibid*

<sup>34</sup> *ibid*

interpretations of domestic law which give effect to their covenant obligations... Many of them are stated in terms as clear and specific as those in other human rights, the provision of which are regularly deemed to be self-executing.”<sup>35</sup>

Likewise, article 1 of the African Charter defines the legal obligations of States Parties with regard to all rights, duties and freedoms contained in the charter, including economic, social and cultural rights. This imposes a duty on state parties to recognize these rights and to “adopt legislative or other measures to effect them.” Neither this provision nor the provisions defining the rights in question suggest anything other than a legal duty to implement the legal obligations *immediately*.

India and South Africa have taken a more robust approach. In the Indian case of *Olga Tellis v Bombay Municipal Council*<sup>36</sup> slum dwellers used the right to life to challenge a municipal decision to evict them from their hovels without offer of alternative accommodation. They argued that the right to life in the Indian constitution included the right to a livelihood and therefore individuals must be permitted some form of shelter when forced to flock to cities to find work. The court agreed, holding that that the right to life did include the right to a livelihood. If the right to livelihood is not treated as part of the right to life, the easiest way to deprive a person of their life is to deprive them of their livelihood.

## Approaches to Human Rights enforcement in Specific Countries

### a. Tanzania: Protecting Access to a Remedy

In Tanzania, a good decision to draw upon is the case of *Ng’Omongo v Mwanga and Attorney-General* (Tanzania 1992). This case considered whether the right to free access to the courts for a remedy was infringed by the requirement, in s.6 of the *Government Proceedings Act, 1967* that a litigant notify the minister before filing a suit in court. Mwalusanya J adopted as persuasive caselaw developed by the European Human Rights Court. He also noted the UN Human Rights Committee decision in *White v. Madagascar*<sup>37</sup> that a right of access to the courts is infringed not only when an individual is denied the right to file a suit but also when restrictions are imposed in such a way as to render the right illusory or cumbersome.

After referring to other comparative international jurisprudence, the court concluded:

<sup>35</sup> United Nations Compilations of General Comments, page 60 para 9

<sup>36</sup> Supreme Court of India 1985

<sup>37</sup> Case No. 15/1982

“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. That view is in line with the Harare Declaration of Human Rights issued at the end of a high level judicial colloquium of Commonwealth judges on the topic of Domestic Application of international Human Rights Norms (whether or not incorporated into domestic law) for the purpose of resolving ambiguity or uncertainty in national constitutions and legislation.”

The court found that the Act had no safeguards and effective control against gross abuses and concluded that it was for this reason not a lawful “law” and was thus void and unconstitutional.

## 2. New Zealand

A related question arose in the 1994 New Zealand case of *Simpson v. Attorney-General*. The court held that the purpose of the Bill of Rights was to affirm, protect and promote human rights and freedoms in New Zealand’s and ensure the country’s commitment to the ICCPR. From these purposes, it was implicit that effective remedies should be available to any person whose rights had violated. It was noted by the Court that compensation was consistent with a rights-centered approach to the Bill of Rights and international jurisprudence for human rights violations. The court made reference the jurisprudence on remedies from the Human Rights Committee and also the Inter-American Court of Human Rights.

The application of international standards is re-inforced by the New Zealand’s earlier decision in *Birds Galore v A-G* (1989) LRC 928. In that case, Barker J stated that “an international treaty, even one not acceded to by New Zealand, can be looked at by the court on the basis that in the absence of express words Parliament would not have wanted decision maker to act contrary to such treaty.”

## 4. South Africa: Progressive Realization of Economic and Social Rights

Comparative jurisprudence and comments of treaty bodies were also central to the resolution of the question of the right to housing in the case of *The Government of RSA and others v Gootbroom and others*.<sup>38</sup> After a survey of the authorities, Yacoob J concluded that:

*“a state with a significant number of individuals deprived of basic shelter and housing is regarded as prima facie in breach of its*

<sup>38</sup> CCT11/00 2001 (1) SA 46; 2000 ZACC 19 (4 October 2000)



*obligations under the covenant. It is not possible to determine the minimum threshold for progressive realization of access to housing without first identifying the needs and opportunities for the enjoyment of such a right... Variations ultimately depend on the economic and social history and circumstances of a country. Neither s 26 nor s 28 entitles the respondents to claim shelter or **housing** immediately upon demand. Accordingly the High Court order ought not to have been made. Nonetheless, s 26 does oblige the State to devise and implement a coherent, co-coordinated programme designed to meet its s 26 obligations. In this regard the programme implemented by the municipality fell short. A declaratory order is made requiring the State to meet the obligations imposed upon it by s 26(2), including the devising, funding, implementing and supervising of measures to provide relief to those in desperate need. All **rights** are inter-related and mutually supporting. Affording socio-economic **rights** to all enables them to enjoy the other **rights** enshrined in the Constitution. In this regard the **right** of access to adequate **housing** cannot be viewed in isolation and its close relationship with other socio-economic **rights**, must be taken into account in determining State obligations, together with its social and historical context. There is insufficient information to determine whether the State has fulfilled its minimum core obligation to guarantee access to adequate **housing**. However, it is clear that for a person to have such access requires more than bricks and mortar - it requires available land, appropriate services and a dwelling. Moreover, recognizing that it is not solely responsible for **housing** provision, the State must create conditions for access at all economic levels of society reflecting varying contexts and needs."*

*Gootbroom* illustrates how courts may use materials from human rights bodies to adjudicate cases before it. Here the court relied on the decisions and comments of the Economic and Social Committee in the United Nations to interpret a right similar to one protected by the South African Constitution. In this way, the Committee's concept of a minimum core obligation and progressive realization came to be entrenched in South Africa's domestic law.

## 5. Nigeria: Detention without Trial

The Nigerian case of *Fawahenmi v Abacha, AG, et al* (Nigeria 1996) involved the constitutionality of detaining a person incommunicado and without trial for a week. In considering the matter, the court made reference to many international instruments and jurisprudence on similar rights provisions as were in the Nigerian constitution. It noted that the African Charter on Human and Peoples Rights, which Nigeria had ratified and domesticated, was an international obligation which the nation voluntarily entered into and agreed to be bound by. In its opinion the arrest and



detention of the appellant clearly breached the provisions of the Charter. States parties to the Charter were bound to establish machinery for the effective protection of the rights in the charter.

Acholonu, J.C. A held that by ratifying the Charter, the sovereign government of Nigeria manifested its intention and willingness to abide by the tenets of the Charter. He said that:

*“This by itself did not connote its enforceability within the corpus juris civilis of Nigeria. Our National government went further and incorporated the spirit of that treaty into our law, thereby giving due notice that it is to be recognized and applied and enforced by the three arms of government. The African Charter on human and Peoples’ Rights having been incorporated into our organic law, legislation, is enforceable in this country.”*

The case of *Abiola v Abacha* (Nigeria 1994) also confirms this incorporation of international law.

## **6. Ghana: Freedom of Assembly**

The Ghanaian case of *New Patriotic Party v Inspector General of Police* (Ghana 1996) involved the freedom of assembly. The New Patriotic Party had applied for and been granted permits for proposed demonstrations. However, before the day of the demonstrations these permits were withdrawn.

In deciding the case, the Court said that it could not ignore the fact that the attainment and enjoyment of fundamental rights had become prime components of international relations. In its view, the struggles, exploits and demands of oppressed peoples in Africa, America and elsewhere provided helpful examples to guide the interpretation of the fundamental rights provisions of the Ghanaian Constitution. Permits were not required in South Africa, and civil rights cases relating to freedom of expression and assembly from the United States showed major victories won in aid of the social and political standing of the African-American.

Each of the presiding judges was emphatic about the centrality of this right and the provenance of international law. Archer C.J said:

*“Ghana is a signatory to the African Charter and Member States of the Organization of African Unity and parties to the Charter are expected to recognize the rights and freedoms enshrined in the charter and to undertake to adopt legislative or other measures to give effect to the rights and duties. I do not think that the fact Ghana*

*has not passed specific legislation to give effect to the Charter means the charter cannot be relied upon. On the contrary, article 21 of our constitution has recognized the right of assembly mentioned in Article 11 of the African Charter.”*

Hayfron-Benjamin, J.S.C added:

*“ This court cannot ignore the fact that at the close of this second millennium of the modern era the attainment and enjoyment of fundamental human rights have become prime instruments of international relations.”*

In a poignant comment Amua-Seyki J.S.C noted that the Ghanaian bill of rights existed to safeguard the country from the abyss of despair associated with military coups in Ghana in 1969, 1979 and 1982. He added that these rights were set out in detail and the courts given clear and unequivocal power to enforce them. He lamented the lack of a culture of rights in these terms:

*“Like a bird kept in a cage for years we have come to think of the cage as a home rather than a prison. The door has been flung wide open, yet we huddle in a corner and refuse to leave. I would have thought it was self-evident that the continued enjoyment by any community of fundamental human rights was incompatible with any requirement that a permit or license be first obtained.”*

## **7. Zimbabwe: Freedom of Assembly**

The Zimbabwean case of *Re Munnumeso & Ors* raised issues similar to the Ghanaian case of *New Patriotic Party v Inspector General of Police*. In this case, the applicants sought a declaration that the law that requiring one to obtain a permit to hold a peaceful assembly, was unconstitutional as contrary to the rights to freedom of expression and assembly.

The court held that there were two general interpretation principles to be applied: (a) one, if the challenged provision had more than one interpretation, one constitutional and the other unconstitutional, the court would presume that the legislature intended to act constitutionally and would uphold the legislation; and (b) two, that the broad, purposive approach would be used to interpret the constitution. As a general approach, the court said that all constitutional provisions bearing on a particular subject were to be considered together and construed as a whole in order to effect the true objective of the Constitution. As a corollary, derogations from guaranteed rights and freedoms would be read strictly and narrowly.

As the Court saw it, rights and freedoms should not be dulled or diminished unless necessity or intractability of language dictated. The Freedom of **assembly** encompassed the right to hold public processions which played a vital role in bringing important issues to the public's attention. Considering the European Human Rights decision in *Handyside v. UK* (1976) 1 EHRR 737 the court underlined the importance attached to the exercise of the right to freedom of expression and **assembly** and noted that these rights lay at the foundation of a democratic society and were one of the basic conditions for its progress and for the development of every man considered.

The Court then issued a rule nisi calling upon the Minister of Home Affairs to show cause before the court, why the legislation should not be declared not reasonably justifiable in a democratic society and therefore invalid.

## 8. Botswana: Discriminatory Application of citizenship laws

The Botswanan case of *Unity Dow v Attorney General Botswana* 1992 considered the asymmetrical application of citizenship laws whereby a man but not a woman could automatically confer citizenship on their foreign born spouse upon marriage. The court referred to a variety of international human rights instruments and conventions, including: the African Charter on Human and Peoples' Rights, Convention on the Elimination of all forms of Discrimination Against Women, CEDAW, Convention on the Rights of the Child, the Universal Declaration of Human Rights, UDHR as well as comparative case law.

In the words of Amissah J.P., after referring to Australian decisions, comparative case law taught that the very nature of the Constitution requires a broad and generous approach be adopted in the interpretation of its provisions; that all relevant provisions bearing on the subject for interpretation be considered together as a whole in order to effect the objective of the constitution; and where rights and freedoms are conferred on persons by the constitution, derogations should be narrowly or strictly construed. In particular the judge noted that fundamental rights are conferred on the basis that, irrespective of the government's nature or predilections, the individual should be able to assert his rights and freedoms without reliance on its good will or courtesy.

He emphasized the fact that by the law of Botswana, relevant international treaties and conventions, may be referred to as an aid to interpretation and that so far as possible, the court should "interpret domestic legislation so as not to conflict with Botswana's obligations under the African Charter or international obligations."

Aguda, J.A, consistent with the emergent human rights jurisprudence concluded:

“We have a written constitution, and if there are two possible ways of interpreting that constitution or any of the laws enacted under it, one of which obliges our country to act contrary to its international undertakings and the other obliges our country to conform with such undertaking, then the court should give their authority to the latter.”

## Conclusion

A majority of African countries have ratified the major international and regional human rights instruments, from the UN treaties and conventions and all save Morocco, the African Charter on Human and People's Rights. Ratification, is not a meaningless act: it is a clear and unambiguous statement to the citizens of the State, to judges, to lawyers and to the international community, that the country intends to be bound and to act in accordance with the rights in that instrument. Based on this reality, courts will be called upon to take these commitments seriously and to interpret laws, and adjudicate cases before them in accordance with principles in these instruments. To be certain, there will be formal difficulties, institutional as well as political, but lawyers and judges may be able to use provisions in their Constitution to import best practices from around the world. Where the constitutions specifically refer to and protect rights, courts may be willing to interpret such rights consistently with international standards. If they find that provisions in constitutions before them are similar to, or deal with the same subject matter as international human rights conventions, courts may be bold enough to look at the jurisprudence from the treaty bodies as well as comparative cases to interpret such provisions.

Constitutions may also be silent. If so, lawyers and judges can examine domestic legislation and where local legislation has been enacted to implement an international treaty, or parts of a treaty, then this could be used as an anchor for comparative borrowing. If domestic legislation is also silent, courts can use international law to plug the gaps in existing legislation. It is legitimate for courts to interpret legislation to give meaning to the act of ratification. Judges themselves in international colloquia have agreed that 1) where a law is ambiguous, courts may use international law to resolve such uncertainty; 2) where ratified but not domesticated treaties have some provenance in that ratification creates a legitimate expectation in the citizens they were meant to enjoy rights in the ratified convention or treaty; 3) the presumption is that Parliament will not legislate contrary to its international obligations. Unless the relevant legislation

clearly states an intention to abrogate or contradict international obligations, courts are should interpret local laws in a manner which complies.

It should be noted that even when a treaty has not been ratified, international texts and their corresponding jurisprudence can help give body to a country's case law and guide its legal system so as to be in conformity with the international community.



## CHAPTER 2

### USING INTERNATIONAL HUMAN RIGHTS TO CONFRONT DISCRIMINATION: THE CASE OF NIGERIA, TANZANIA, KENYA AND SOUTH AFRICA<sup>1</sup>\*

“Equality needs no reason, only inequality does...”  
Isaiah Berlin: Two Concepts of Liberty<sup>1</sup>

#### Introduction: Discrimination In International Law

There is an emerging consensus that the ban against discrimination based on sex, race, nationality, religion or ethnicity or other status is now a peremptory norm of international law. But the persistence of discrimination across the world suggests that much legal ground remains to be covered. Drawing on the expert opinions written for AHRAJ on discrimination cases in four Africa Countries: Nigeria, Kenya, Tanzania and South Africa, this chapter explores a number of approaches through which practicing human lawyers may confront some of the most pervasive aspects of discrimination in Sub-Saharan Africa. The cases considered here relate to discrimination on the basis of sex, race and health status. The Chapter explores the various approaches that Human Rights lawyers involved in strategic human rights litigation may use to confront discriminatory laws and practices in both the public sphere as well as in the private sector. The Chapter is in three parts.

Part One focuses on sex discrimination. This part has three cases: two of these are citizenship cases from Tanzania and Nigeria and the third is a sexual harassment case from Kenya. The facts patterns in the two citizenship cases are similar: these are suits by women married to foreign men who find that under the law in the country they cannot transmit citizenship to their spouses even though similarly situated men can. In Nigeria this disability is imposed by the constitution; in Tanzania it is in the Citizenship Act. The sexual harassment case from Kenya involves the sacking of a woman by a private company for

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<sup>1</sup> Isaiah Berlin, *Two Concepts of Liberty* in Four Essays on Liberty, pp. 117-172, Oxford University Press, 1969.

refusing the persistent and unwelcome sexual advances of her supervisor. Though the Constitution of Kenya does not specifically contain provisions for the horizontal application of the bill of rights, the analysis in the chapter argues that there is a plausible case for applying the bill of right in just this way in cases of sex discrimination.

Part Two relates to discrimination on the basis of one's medical condition in Nigeria, in this case HIV/AIDS. Though there is no specific convention barring such discrimination, this chapter argues-on a review of the relevant conventions- that such discrimination is barred. In this case, the fact situation is compounded by the fact that the applicant was in fact not HIV positive.

Part Three focuses on violation of the twin rights of information and housing bundled up with a type of discrimination that seems to rest on one's socio-economic status and, collaterally, on race. This case deals with the lending policies of a private South African bank whereby certain areas and neighbourhoods are "redlined" as inappropriate for lending to. In my conclusion, this case presents a situation, altogether too rare, where national law offers more protection for a right than international human rights instruments.

Each of these three parts review the relevant articles in the applicable human rights instruments and situate this review in the context of local legislation in each of the cases and explains how the factual situation in each of the cases can be resolved through interpretation of human rights instruments and local laws.

## **A. Part One: Sex Discrimination:**

### **1. Nigeria: Using Human Rights Law to Resolve when two Provisions in the Constitution are Inconsistent**

The two citizenship cases considered in this Part concern the asymmetry of citizenship rights between men in women. In both cases the men can but women cannot confer citizenship rights on their foreign spouses. The Nigerian case involves inconsistencies between two provisions of the constitution whilst the Tanzanian one involves conflict between statute, the Tanzania Citizenship Act, and the Constitution.

The Nigerian case turns on provisions of the 1999 Constitution of Nigeria which allow men but not women to confer citizenship on their foreign spouses through marriage. However, the same constitution prohibits discrimination on the basis of sex, place of origin, religion or political opinion. The legal point is one of resolving internal conflicts between the anti-discrimination or equality provision and the citizenship provision. The issues for decision in the case are whether 1) Nigeria's law and practice violates international human rights? 2) The inconsistent provisions of 1999 Constitution can be resolved using international human rights standards? The Tanzanian case turns on sections 11(1) and 23 of the Tanzania



Citizenship Act read against provisions of the Constitution prohibiting sex discrimination. There are two issues involved. The first is the differential treatment of men and women under the Tanzania Citizenship Act. Section 11(1) of the act allows men but not women to confer citizenship on their foreign spouses through marriage. The second issue concerns the ouster of the jurisdiction of the court under section 23 of the same act. That section says that the decisions of the minister responsible need not be backed up with reasons and that the courts have no jurisdiction of the court to review such a decision. Section 11(1) is, on the face of it, at odds with section 12 (1) and (2) of the 1977 Constitution of Tanzania and with her obligations under international human rights treaties. Section 23 of the *Tanzania Citizenship Act* appears to violate sections 13 of the same Constitution relating to equality before the law as well as section 30(3) regarding the enforcement of rights. The issues on which opinion is sought can be clustered as follows

- 1) What are Tanzania's obligations under International human rights treaties are regards treatment of men and women?
- 2) Does Tanzania law square with these obligations?
- 3) Are provisions of the Citizenship Act at war with both the Constitution and international human rights law?
- 4) If the answer to (2) and (3) is yes, what recommendations can be made in this case to ensure respect for both the Constitution and international human rights treaties to which Tanzania is party?

We begin by identifying the applicable international and comparative jurisprudence on the question of discrimination and then use these principles to resolve the questions at issue in the two cases discussed here.

#### i. Definition of 'Discrimination against Women' under CEDAW

The foundation for these two cases is the bar against sex discrimination in international human rights instruments. Surveying the conventions, there are two approaches to the definition of sex discrimination under international human rights law: the wide definition in the Convention for the Elimination of all forms of Discrimination Against Women, CEDAW and the narrower, process-based definition in other Human Rights instruments such as the International Covenant on Civil and Political Rights, ICCPR. This chapter draws on CEDAW. In CEDAW, 'discrimination against women' is defined in Article 1. For the purposes of the Convention:-

“[T]he term ‘discrimination against women’ shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”<sup>2</sup>

<sup>2</sup> Art. 1, CEDAW.

This definition has three elements: first, conduct, practice or legislation may be discriminatory both *in effect* and *in intent*. It is discriminatory in effect when it has discriminatory impact. It is discriminatory in intent, if it is purposefully designed to be so by the law-makers. Secondly, in CEDAW, “discrimination against Women” is not limited to state action or to actions done under colour of law. The obligations of CEDAW are horizontally enforceable. This means that private discrimination is also prohibited. Thirdly, the definition is inclusive and is expanded beyond traditional categories by the phrase “or any other field.”<sup>3</sup> In short, gender-based discrimination is not immune from scrutiny merely because it does not involve “political, economic, social, cultural and civil” questions.

CEDAW’s all encompassing definition of “discrimination against women” echoes that in Article 1 of the Convention for the Elimination of all forms of Racial Discrimination, CERD. In important respects, sex discrimination is much like racial discrimination: both are based on immutable characteristics- the person against whom there is sex or race discrimination can do nothing about his or her race or sex; both intersect and are re-inforced by other forms of discrimination. Thus, for instance, discrimination against a group because of its religious beliefs intersects with discrimination against the same group on race and sex grounds. Victims of sex or race discrimination are thus doubly discriminated against precisely for this reason. More pernicious both racial and sex discrimination are easily privatized and removed from the realm of state action.

## ii. Other Definitions of Discrimination against Women under International Law

Other international human rights instruments do not specifically define “discrimination against women.”<sup>4</sup> Rather, they mandate equality of treatment between men and women. Under Article 2 of the International Covenant of Civil and Political Rights, ICCPR each state party undertakes “to respect and to ensure to all individuals<sup>5</sup> within its territory and subject to its jurisdiction, the rights recognised in the present Covenant, without distinction of any kind such as race, colour, sex, language religion, political or other opinion, national or social origin, property, birth or other status.” Under Article 4, states may derogate from their obligations under the Covenant. But even then, the measures they take may “not involve discrimination solely on the basis of race, colour, sex, language, religion or social origin.” And under Article 26,

<sup>3</sup> Id.

<sup>4</sup> Art.2, International Covenant of Civil and Political Rights, ICCPR, Art. 3 of International Covenant on Economic, Social and Cultural Rights, ICESCR, Art. 2 of African Charter of Human and Peoples Rights, ACHPR.

<sup>5</sup> These are not rights of citizens, they are rights of individuals subject to the jurisdiction of a state party to the covenant, whether citizen or not.

the Covenant simply states that “all persons are equal before the law and are entitled without any discrimination to equal protection of the law.”<sup>6</sup>

Unlike CEDAW, ICCPR focuses on equality of treatment and of rights under the law. In addition, state action under-girds all obligations imposed by the ICCPR. Other human rights instruments echo the approach of ICCPR. Article 3 of the International Covenant on Economic, Social and Cultural Rights, ICESCR, requires the state parties to “ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present covenant.”

Similarly, Article 2 of the African Charter of Human and Peoples Rights, ACHPR, guarantees to every individual “the rights and freedoms recognized and guaranteed by the present charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or other opinion, national and social arising, fortune, birth or other status.”<sup>7</sup> Under Article 18 on the family, the state must ensure that they eliminate “all forms of discrimination against women” and also “ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.”<sup>8</sup>

Though these covenants do not, unlike CEDAW, explicitly broach the question of positive discrimination, the principles of international law as well as the practice of international tribunals suggest that one may take sex or race into account for the purposes of certain social policies. The correct view is probably as stated by the Permanent Court of International Justice, PCIJ, in the *Minority Schools in Albania case*.<sup>9</sup>

In that case, the PCIJ said that “equality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations.” This recognises that the formal treatment of two individuals who are not similarly situated may in law amount to equality of treatment but it may not, substantively, amount to fair treatment. It would seem then that the appropriate test of acceptable differentiation centres upon what is just and reasonable or objectively and reasonably justified. In other words, taking someone’s sex into account or considering other specific distinction is not always *per se* impermissible. It is taking someone’s sex into account for arbitrary reasons or certain unjust purposes that is prohibited. Nigeria, Tanzania and Kenya’s Obligations under International Law Relating to Sex Discrimination.

<sup>6</sup> Similar language-equal protection-has been used by the US court to scrutinize and strike down paternalistic or invidiously discriminatory legislation.

<sup>7</sup> Art.2 ACHPR

<sup>8</sup> id.Art. 18.

<sup>9</sup> Minorities in Albania Case, PCIJ, Series A/B, 1935 no. 64.

## ***Obligations under Customary International Law: The UN Charter and the Universal Declaration of Human Rights***

Nigeria, Tanzania and Kenya became members of the United Nations upon independence. Under Article 56 of the UN Charter the three countries have the duty 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.” This responsibility includes adherence to the rights enumerated in the Universal Declaration and elaborated in other UN sponsored covenants and declarations over the years. These responsibilities are, in turn, anchored in the fact, made clear by the Charter itself, that in the modern age how a state treats its citizens is a matter of international concern. It is therefore important to understand the precise nature of the obligations imposed on or voluntarily assumed by the three countries under both the Charter and other international instruments.

Let us begin with the UN Charter. The Charter recognises that the basis of international peace, stability and well-being is respect for human rights. It says that to create the conditions for peaceful and friendly relations among nations...

*“the United Nations shall (among other goals) promote ... universal respect for, and observance of, human rights and fundamental freedoms for all without distinctions as to race, sex, language or religion.”<sup>10</sup>*

And further that the people of the United Nations “reaffirm faith in international human rights, in the dignity and worth of the human person, in the equal rights of men and women....”

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 identify these rights. Paragraph 5 of the Universal Declaration preamble reaffirms “the faith” of the “peoples of the United Nations” in the “dignity and worth of the human person and in the equal rights of men and women...” The Charter explains why a Universal Declaration was thought necessary. It notes that “a common understanding of these rights and freedoms is of the greatest importance for the full realisation of this pledge.”

The rights themselves are then elaborately set forth in the body of the Declaration. So far as applies to the cases here Article 2 and 16 need to be highlighted. Article 2 emphasises that “everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind, such as race, colour, sex, language, language, religion, political or other opinion, national or social origin, property birth or other status.”

<sup>10</sup> UN Charter, Art. I (3)

What precisely is the status of the Universal Declaration as a matter of international law and as a source of enforceable rights? Does it create any binding obligations for Nigeria, Tanzania and Kenya? On the authorities, it would appear to. According to the US Court of Appeals for the Second Circuit<sup>11</sup>, a U.N. Declaration is ..... “a formal and solemn instrument, suitable for rare occasions when principles of great and lasting importance are being enunciated.”<sup>12</sup> 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.”<sup>13</sup> Thus, a Declaration 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.”<sup>14</sup> Indeed, several commentators have concluded that the Universal Declaration has become, *in toto*, a part of binding, customary international law.”<sup>15</sup>

The view of the Second Circuit finds some support in the earlier opinion of the Restatement (Third), Foreign Relations Law of the United States. The Restatement sets down the categories of contemporary customary international law of human rights. On gender discrimination the Restatement says:<sup>16</sup>

*“The United Nations Charter (Article 1(3)) and the Universal Declaration of Human Rights, (Article 2) prohibit discrimination on various grounds, including sex. Discrimination on the basis of sex in respect of recognised rights is prohibited by a number of international agreements including the Covenant on Civil and Political Rights, the Covenant on Economic, Social and Cultural Rights, and more generally by the Convention for the Elimination of all forms of Discrimination Against Women... The domestic laws of a number of states, including those of the United States mandate equality for, or prohibit discrimination against, women generally or in various respects. Gender based discrimination is still practiced in many states in varying degrees but freedom from gender discrimination as state policy, in many matters, may already be a principle of customary international law.*

If the Second Circuit and the Restatement are right, then both the Charter and the Universal Declaration are now covered under Article 38 of the Statute of

<sup>11</sup> *Filartiga v. Pena Irala*, 630 F.2d 876; 1980 U.S. App. LEXIS 16111

<sup>12</sup> 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).

<sup>13</sup> E. Schwelb, *Human Rights and the International Community* 70 (1964).

<sup>14</sup> 34 U.N. ESCOR, *supra*.

<sup>15</sup> 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.

<sup>16</sup> Restatement (Third), *Foreign Relations Law of the United States*. Comment following section 702. Quoted in Steiner & Alston, *International Human Rights in Context: Law, Politics, Morals* pp. 905-906.

the International Court of Justice as “international custom....of a general practice accepted as law.” In order to qualify as such the two instruments must enjoy “a general recognition among states” as “obligatory.”

Where the conditions for custom to become binding law are satisfied, a long-standing practice passes into *jus cogens* or a peremptory norm of international law. On this analysis, then, the prohibition against sex discrimination is *jus cogens* and obligatory for Nigeria, Tanzania and Kenya. But even if these countries were to contest the Restatement’s argument that the Universal Declaration has now passed into international customary law, that would not conclude the matter for the purposes of this opinion. These states have also ratified a range of international instruments prohibiting sex discrimination. As at date of writing, Nigeria, Tanzania and Kenya are among 178 countries who are state parties to CEDAW.

But how do these obligations square with local law in each of the three cases considered here? Beginning with Nigeria, we consider each country in turn.

### **Nigeria: Obligations under International Law and the State Constitution**

Nigeria signed CEDAW on the 23<sup>rd</sup> of April 1984 and ratified it on the 13<sup>th</sup> of June 1985. The Convention came into force for Nigeria on the 13<sup>th</sup> of July 1985. Unlike Egypt, Iraq and numerous other states, Nigeria has entered no reservations to CEDAW. Indeed, it has always fulfilled its reporting obligations under CEDAW from the very first. It submitted its first periodic report promptly on the 13<sup>th</sup> of July 1986. It then combined its second and third reports and submitted them to the 396 and 397<sup>th</sup> UN Committee on the Elimination of all Forms of Discrimination against Women held on the 2<sup>nd</sup> of July 1998.

There is therefore nothing in the record that suggests that by 1999 when the Constitution now under challenge was made, that Nigeria intended to denounce CEDAW. Indeed all its actions indicate that Nigeria had unequivocally agreed to be bound by all provisions of CEDAW. This background buttresses both my analysis of Nigeria’s obligations and its own admissions in its reports of the ways in which it has failed to meet CEDAW standards.

#### **i. Status of CEDAW vis a vis the 1999 Constitution: What are Nigeria’s Obligations?**

The enactment of the 1999 Constitution for the Federal Republic of Nigeria antedates the ratification of CEDAW. Nigeria made the new Constitution fully knowing of its continuing obligations under international law. There is a presumption that a state will “not legislate contrary” to its international obligations. And the proper principle of interpretation is that where an act and a treaty deal with the same subject, the court will seek to construe them so as to give effect to both without acting contrary to the wording of either.

It is arguable that in interpreting acts of Parliament, there is a presumption that where two acts of Parliament are in conflict on some matter, the later in time prevails. *A fortiori*, it may be said here, where there is conflict between an earlier treaty and a later statute, it must be the intention of the legislature to modify the full force of the treaty obligation in its domestic application. The balance of argument is against this interpretation. For this interpretation to be applied, the language of the later enactment, in this case the Constitution, must be unambiguous. Neither the language of the 1999 Constitution nor Nigeria's continuing observance of obligations under CEDAW suggests that the country intended to repudiate any of the provisions of the Convention.

The question whether a later enactment by a state modifies that state's international obligations under international law was considered by the United States District Court for New York in the case of *United States v. Palestine Liberation Organisation*.<sup>17</sup> Under the 1987 *Anti-Terrorism Act* all Palestine Liberation Organisation, PLO, offices in the United States were to be shut down. The then Attorney General interpreted this stipulation to include the office of the PLO Mission to the United Nations. Such an action would have been in breach of the United States obligations under the United Nations Headquarters' Agreement. The District Court ruled that it could not be clearly and unambiguously established that the *Anti-Terrorism Act* intended to violate an obligation arising under the Headquarters' Agreement.

Likewise, the 1999 Nigerian Constitution must be interpreted in a way that does not do violence to CEDAW or to the Constitution itself. At this point, we put aside this discussion in order to bring into sharper relief the precise nature of the obligations under CEDAW. The enquiry must surely start with Article 2. Under this Article, State Parties "condemn discrimination against women" and agree to pursue "by all appropriate means" and "without delay" means to eliminate discrimination against women and in particular to ensure that 1) their "constitutions embody equality between men and women"<sup>18</sup>; 2) they adopt "legislation prohibiting discrimination against women"<sup>19</sup>; 3) they adopt legal protection for women;<sup>20</sup> 4) they refrain from engaging in discrimination<sup>21</sup> 5) they outlaw private discrimination<sup>22</sup> 6) they modify existing legislation and policy to attune it to CEDAW<sup>23</sup> and 7) they repeal all criminal laws that "constitute discrimination against women."<sup>24</sup>

<sup>17</sup> USA v. Palestine Liberation Organisation, 695 F. Supp. 1456 (1988)

<sup>18</sup> Art. 2 (a)

<sup>19</sup> Art. 2(b)

<sup>20</sup> Art. 2(c)

<sup>21</sup> Art. 2(d)

<sup>22</sup> Art. 2(e)

<sup>23</sup> Art. 2(f)

<sup>24</sup> Art. 2(g)



Though a number of states, Bangladesh and Iraq among them, have entered reservations to Article 2, the balance of opinion<sup>25</sup> is that reservations to this article are incompatible with the Convention's objects and purpose within the meaning of the Vienna Convention on the Law of Treaties as well as the opinion of the International Court of Justice in the *Reservations to the Genocide Convention case*.

For our purposes, however, this debate does not matter as Nigeria has entered no reservations with respect to any of CEDAW's articles. So far as is pertinent to the case in issue in this opinion, the relevant obligation is in Article 16 read together with the undertaking in Article 2. Under Article 16 states undertake to ensure equality of rights between men and women with reference to marriage and family. The states commit themselves to taking all "appropriate measures to eliminate discrimination against women in all matter relating to marriage and family relations." In particular, they are to "ensure on a basis of equality" that men and women shall have the same rights 1) "to enter into marriage"<sup>26</sup>; 2) "to freely to choose a spouse and to enter into marriage with their free and full consent"<sup>27</sup>; 3) "and responsibilities during marriage and at its dissolution"<sup>28</sup>; 4) "and responsibilities as parents, irrespective of their marital status, in matters relating to their children"<sup>29</sup>; 5) "to decide freely and responsibly on the number and spacing of their children and to have access to information, education and means to enable them to exercise these rights"<sup>30</sup>; 6) "and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation"<sup>31</sup> 7) "personal rights as husband and wife, including the right to choose a family name, a profession and an occupation"<sup>32</sup> and 8) "for both spouses in respect of ownership, acquisition, management, administration, enjoyment and disposition of property."<sup>33</sup>

The provisions of the 1999 Constitution disabling women from conferring citizenship on their non-Nigerian spouses not only violate Nigeria's undertaking in Article 2 but also violate Article 16 1(a). Collaterally, these provisions impose additional burdens on women with regard to their married life. The Constitution introduces barriers to what a family can collectively do given the disability arising from the fact that a foreign spouse is not

<sup>25</sup> See Rebecca Cook, *Reservations to the Convention on the Elimination of all Forms of Discrimination Against Women*, 30 Va. J. of Int. L. 643 (1990); Also Belinda Clark, *The Vienna Convention Regime and the Convention on Discrimination Against Women*, 85 Am. J. Int. L. 281 (1991). Consider the Objections of the Federal Republic of Germany to the Reservations by Egypt, Bangladesh, Brazil, Jamaica and the Republic of Korea at <http://jurist.law.pitt.edu/>

<sup>26</sup> Art. 16 1(a)

<sup>27</sup> Art. 16 1(b)

<sup>28</sup> Art. 16 1(c)

<sup>29</sup> Art. 16 1(d)

<sup>30</sup> Art. 16 1(e)

<sup>31</sup> Art. 16 1(f)

<sup>32</sup> Art. 16 1(g)

<sup>33</sup> Art. 16 1(h)



automatically a citizen. The family may face different visa requirements when they travel; different charges may be applicable to the husband for services otherwise available for free or for a modest fee for Nigerians; there may be severe restrictions on joint ownership of property. The legal capacity of a Nigerian woman married to a non-Nigerian to live a meaningful family life is radically different from the legal capacity of a similarly situated Nigerian man. This differential treatment of Nigerian women is based solely on the fact that they are women. There is no compelling state interest or policy objective claimed by Nigeria as a reason for imposing these disabilities on women. In legal terms, these additional burdens are, taken together, additional violations of the obligations imposed on Nigeria by Articles 2 and 16 of CEDAW.

Our reading of CEDAW is consistent with the Nigerian Government's own reading of the Convention. In its own reports to the CEDAW Committee, Nigeria admits that section 131 *-on language* – and section 29 *- on citizenship* - are discriminatory against women. This admission means that under the Government's own reading of the anti-discrimination provisions of its own Constitution and of CEDAW, the state has not fulfilled its obligations under Articles 2 and 16. Indeed, commenting on the anti-discrimination provision in its own Constitution, Nigeria appears to lament that section 42 only “prohibits discrimination on the grounds of sex” but does not go the full distance required by CEDAW. The Report laments that this section “preserves equal status between men and women” only in relation to law but fails to extend this protection to practice or to shield women from discrimination by private actors.

As a starting point, then, it is common ground between that the Nigerian Government breaches CEDAW in its differential treatment of men and women. This means that Nigeria's a statement in its CEDAW report that section 42 of the Constitution “preserves equal status between men and women” in relation to law is surely not true. Men and women do not have the same legal status as relates to citizenship under the Constitution. This means either of two things. The choice that confronts a Nigerian Court boils down to this: the court could choose to ignore the equality of the men and women required by section 42 or it could re-interpret section 29 as requiring an equality of rights between men and women in relation to spousal rights. But equality is such a foundational constitutional principle that to ignore it drains life out of the 1999 Constitution altogether. The core issue, then, is for the court to be persuaded to judicially resolve the clear inconsistency between the *equality of rights* and the *disabilities of women as against men* to confer citizenship on their foreign spouses.

Secondly, in its Report Nigeria seems to have over-looked an additional commitment expressly undertaken under CEDAW. Under article 2 (a) states undertake a double commitment: first, they promise “to embody the principle of the equality of men and women in their national constitutions.” Nigeria

has partially done this under section 42. Secondly, they promise “to ensure through law and other appropriate means the practical realization of this principle.” Nigeria has not done this. The point is that once Nigeria recognised that the provisions on citizenship and language were discriminatory, article 2(a)’s obligation to initiate changes to correct this “without delay” kicked in.

The conclusion, then, is two fold. First, as a matter of customary international law and under treaty voluntarily ratified by the Government without reservation, Nigeria is in breach of duty not to discriminate against women on the basis of sex. Second, as a matter of domestic law, there is internal inconsistency between the *equality clause* and the *citizenship clause* of the Nigerian Constitution. How is compliance with CEDAW to be achieved and inconsistencies in the Constitution removed? That is the subject matter of the next part.

## ii. Enforcing the Equality of Men and Women under the Nigerian Constitution: Analytical Approaches

**The dilemma that would confront a Court is in two parts:** On what basis and based on what materials can it decide that there is inconsistency in the Constitution of Nigeria? What is the appropriate relief once such a decision is made?

The 1999 Constitution of Nigeria offers no guidance on how to resolve internal inconsistencies within it. In particular, it says nothing about smoothing the obvious conflict between the two foundational human rights principles implicated in this case: the *principle under-girding citizenship rights* and the *equality principle*. Framing the issue as a conflict between *equality of citizenship rights* and *anti-discrimination* helps to clarify the nature of inconsistency. In the standard case, the realization of equality of rights must surely entail full realization of the anti-discrimination principle. In most cases, the two principles are two sides of the same coin. There are times, to be sure, when equality of rights and anti-discrimination appear to pull in different directions, for example in affirmative action cases. But that happens for tactical considerations not for reasons of principle. Thus, a government may legitimately correct for past discrimination by allowing for compensatory but temporary unequal treatment. This benign discrimination is considered permissible in order to achieve substantive equality between two or more groups that have been unequal in the past.

Fortunately, this is not the case here. The Government cannot argue that men must have more citizenship rights than women in order to compensate them for past inequalities and discrimination. Since there is no tactical consideration for inequality in citizenship rights in Nigeria, any case on this question must surely be decided on principle.

How the court might go about dealing with the matter is suggested by the United States Supreme Court decision in *Frontiero v. Richardson*<sup>34</sup>. Though *Frontiero* does not bind Nigerian courts, it provides a highly persuasive framework for analyzing the relevant issues. The issue before the Supreme Court in *Frontiero* was, like the matter before us, the legal disparity of rights between men and women as spouses. Under Federal Law, a male member of the uniformed service could automatically claim his spouse as a dependant, thereby receiving greater quarters allowance and medical benefits. However, a woman in the uniformed services could claim comparable benefits *only if* she demonstrated that her husband was, in fact, dependent on her for more than half of his support. The Court considered the matter and ruled that this differential treatment violated the equal protection portion of the due process clause of the 5<sup>th</sup> amendment to the US Constitution.

*Said the Court:*

*“...sex like race and national origin, is an immutable characteristic determined solely by the accident of birth. [The] imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate ‘the basic concept of our system that legal burdens should bear some relationship to individual responsibility.’*

The Court considered that “classifications based on sex, like classifications based upon race, alienage and national origin, are inherently suspect and must, therefore, be subject to close judicial scrutiny.”

In coming to this decision, the Court quoted its earlier decision, *Reed v. Reed*, with approval. At issue in *Reed* was an Idaho statute that established a hierarchy of persons entitled to administer the estate of a person who died intestate e.g. 1) Parent 2) child 3) sibling. The statute provided further that when two or more individuals were equally entitled to be appointed as administrators of an estate, the male applicant must be preferred to the female. Idaho justified this differentiation on the basis that it avoided conflicts where two or more persons were entitled to administer a decedent estate.

The Court voided the statute on the basis that it provided “dissimilar treatment for men and women who were similarly situated.” Likewise in Nigeria. The Constitution of Nigeria treats in a dissimilar fashion men and women who are similarly situated. The violation lies in the fact that though both men and women are equal, if they get married to foreigners they have unequal rights; the woman having fewer rights solely because of her sex. To sustain such a constitutional preference, so arbitrary on the face of it, the state needs a compelling reason. The presumption and starting point of judicial

<sup>34</sup> Cite as *Frontiero v. Richardson*, 411 US 677 (1973)

inquiry must surely be that men and women are equal in rights, responsibilities and opportunities. It matters not that the exception to the presumption is stated in the Constitution rather than in statute, the Court must be persuaded that the exception is based on considerations or grounds that are “reasonably justifiable in a democratic society.”

In *Reed*, the Supreme Court thought the statute under attack particularly pernicious because it did not bear “a rational relationship to a state objective that is sought to be advanced by [its] operation.” Even though accepting that the state had a legitimate interest in minimizing conflicts that may eventually end up in probate courts, the Supreme Court had not doubt that this gender classification was “the very kind of arbitrary legislative choice forbidden by the equal protection clause.”

So far as is relevant to the issue before us, the core holdings of *Frontiero* and *Reed* do not require absolute non-discrimination. Nor does CEDAW<sup>35</sup>. Rather, the two cases insist that the differential treatment of men and women that serves no purpose or any legitimate state interest is void as such. Analogously, the Nigerian Government must persuade the Court that the granting to men but not to women of the right to confer citizenship by marriage somehow serves a legitimate state objective consistent with its obligations under the Constitution as well as international law. Without such a showing, the disparate treatment of men and women is illegitimate as such. To paraphrase Justice Stevens<sup>36</sup> in a different context, a rule that authorizes the sovereign to impose disabilities on only one of two similarly situated persons violates the essence of the requirement, implicit throughout the Constitution, that the sovereign must govern impartially.

To this point, the focus has been on the obligations imposed by international human rights law. I have pointed out the Nigerian Government’s view of its own Constitution *vis a vis* its obligations under international law and highlighted the approaches that a Nigerian court might use to formulate criteria for attacking the discriminatory treatment of women under the citizenship clause. But this analysis must yet confront an important procedural issue: are there judicially available remedies that one could seek in the Courts of Nigeria? It is to this issue that I now turn.

<sup>35</sup> In fact CEDAW requires affirmative action to remove the consequences of past discrimination against women. See Article 4.

<sup>36</sup> Dissenting in *Michael M. v. Sonoma County Superior Court*, 450 U.S. 464 (1981); “A rule that authorises punishment of only one of two equally guilty wrongdoers violates the essence of the constitutional requirement that the sovereign must govern impartially.”

## Do Nigerian Courts have Subject Matter Jurisdiction in this Matter?

There are two possible arguments against the availability of any remedies in this case. One, it could be said that the decision whether to confer citizenship or not is a matter left by international law to the domestic jurisdiction of state parties. That would mean that Nigeria is free to decide who to confer citizenship on at its absolute discretion. The citizenship clause cannot therefore be subject to CEDAW standards. Two, it may also be contended that as a matter of Nigerian law, Nigerian Courts only have jurisdiction to enforce the municipal law and to the extent that CEDAW has not been enacted as an act of the local legislature, it cannot be an independent source of rights for citizens.

### i. The Legal Question at issue is Discrimination not Citizenship

Both objections have some force but there are more compelling arguments in response. First, let me consider the first objection. There is a misunderstanding about the nature and scope of the domestic jurisdiction of a state with regard to its treaty obligations. One influential commentator has perspicaciously remarked:

“the sphere of domestic jurisdiction is not an irreducible sphere of rights which are somehow inherent, natural, or fundamental. It does not create an impenetrable barrier to the development of international law. Matters of domestic jurisdiction are not those which are unregulated by international law, but those which are left by international law for regulation by States. There are, therefore, no matters which are domestic by their ‘nature.’ All are susceptible of international legal regulation and may become the subjects of new rules of customary law of treaty obligations.”<sup>37</sup>

In short, the proper inquiry starts by establishing what matters international law has left to the domestic jurisdiction of states. This is precisely the question involved here. Put differently, the issue implicated here is not the right of Nigeria to decide who to confer citizenship on. International law has left that matter to states as part of their domestic jurisdiction.<sup>38</sup> The issue here is different: why does Nigeria treat its women citizens differently from its men citizens? The point is that Nigeria does not have a duty under international law to grant its men citizens the right to confer citizenship on their non-Nigerian spouses. That is a choice that Nigeria makes as a matter of its own domestic law. However, once Nigeria decides to grant its men citizens the right to do so, it is then immediately required, as a matter of international law, to grant the same right to its women citizens.

<sup>37</sup> Preuss, Article 2, Paragraph 7 of the Charter of the United Nations and Matters of Domestic Jurisdiction, Hague Recueil (Extract, 149) at 8, reprinted in H. Briggs, *The Law of Nations* 24 (1952).

<sup>38</sup> Although even this issue is now tangentially influenced by a growing body of treaty law such as the Convention on the Status of Refugees.

In short, once a state decides to confer certain rights to its citizens, it cannot, in the absence of truly compelling arguments, cherry-pick which of its nationals will enjoy those rights. Thus, under international law, there is no difference between Nigeria deciding that only Fulanis can confer citizenship by marriage and it deciding, as it has done here, that only men can confer these rights. Under the UN Charter and under all the human rights conventions to which Nigeria is party, the obligation not to discriminate on the grounds of race, sex, language and status is a matter of international law. The choice for Nigeria is, *put negatively*, to impose the same burdens on men that it has placed on women or, *put positively*, to confer the same benefits on women that it has conferred on men.

On this analysis, the objection that the decision to confer citizenship is a matter of domestic jurisdiction has no force.

## ii. CEDAW may not be a Nigerian Statute but it has Legal Consequences

The second objection has more force. The traditional approach in the Commonwealth regarding international law is as stated in Australian case of *Minister of State for Immigration and Ethnic Affairs v. Ah Hin Teoh FC*.<sup>39</sup> 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. The problem as the Court saw it, is that treaties were made by the executive but legislation was made by Parliament. However, the Court would not go so far as to say that treaties ratified but not enacted into domestic law had no legal consequences. They do. According to the Court, if a local statute was ambiguous, the courts should favour the interpretation that accords with Australia's international obligations.

More important for our purposes, the Court argued that in the absence of clear evidence from parliament or the executive, the ratification of a treaty created a legitimate expectation that the government would act in accordance with the obligations stipulated in the treaty. *A fortiori*, the fact that CEDAW has not been incorporated into the domestic law of Nigeria does not render it ineffectual as against the Nigerian Government. In particular, the fact that a judge of the Supreme Court has accepted, in the case of *Mojekwu v. Ejikeme*, that CEDAW offers a standard to be followed opens even more room.

CEDAW may not have statutory force in Nigeria but it has three elements important to us. First, it creates a legitimate expectation that Nigeria will

<sup>39</sup> No. 95/013, 7th April 1995: Lexis Transcript.

treat men and women as equal in rights. Two, it provides standards that the government has undertaken to follow and by which it can be judged. The Nigerian Government's own CEDAW Reports acknowledge this. Thirdly, where Nigerian law is ambiguous or in conflict, CEDAW provisions and values can be used to resolve the conflicts and remove the ambiguities. Looking at CEDAW from this perspective robs the second objection of much of its force.

## **Conclusion: How will CEDAW be used and what Orders Should one seek?**

### **i. Recommendations as to the Orders to be Sought before Nigerian Courts**

To this point, the following conclusions can be made: 1) Nigeria is bound both under customary international law (the Charter and Universal Declaration) to outlaw sex discrimination; 2) Nigeria has voluntarily undertaken, through CEDAW and ICCPR and the African Charter to eliminate sex discrimination both in its Constitution and in its practice; 3) Nigeria accepts in its Reports to the CEDAW Committee that its own Constitution and practices violate the principles of equality under CEDAW. 4) Nigeria quotes with approval the statement of the Supreme Court in *Mojekwu vs. Ejikeme* that CEDAW provides a standard to be followed. 5) Nigeria recognizes, though does not admit, that there are internal inconsistencies within its own Constitution as between the equality and anti-discrimination sections.

To my mind, there are two judicial possibilities.

Since the Constitution provides no methods for resolving internal inconsistencies, it is legitimate for the court to interpret the provisions of the Constitution in manner that a) ensures overall coherence of the Constitution and the freedom and equality values for which it stands and b) is consistent with Nigeria's on-going obligations under international law generally and under CEDAW in particular.

Although, CEDAW has not been re-enacted as a statute of the Nigerian Parliament, as is the practice within the British Commonwealth, it has legal consequences. Those consequences are threefold. One, CEDAW can be used to settle disputes before the court. If the dispute involves a statute and the statute does not itself provide standards by which it is to be interpreted, the court can and should formulate standards from CEDAW or from any other applicable international human rights treaty. Two, CEDAW has application in relation to legislation. When Parliament enacts new legislation on any matter, it shall legislate consistent with the Nigerian Constitution and, to the extent possible, consistent with Nigeria's continuing obligations under international human rights law. Three, it can apply to resolve inconsistencies within the Constitution or between statutes. Where there are inconsistencies between provisions of the Nigerian Constitution and or between various statutes, those conflicts may be resolved with the help of standards



formulated from CEDAW or other applicable human rights instruments. Given these conclusions, the proper remedies to seek are a combination of declaratory orders and a moratorium on the implementation of the discriminatory sections of the citizenship provisions of the Nigerian Constitution, that is to say, declarations as follows:-

That there is inconsistency between the equality provision of the Nigerian Constitution and the provisions relating to citizenship as applied to women;

That in the absence of constitutional mechanisms for resolving this conflict, the Courts in Nigeria can and should use the standards and values embodied in such international instruments as the UN Charter, the Universal Declaration of Human Rights, CEDAW and other human rights instruments to which Nigeria has subscribed.

That on application of these standards, section 26 of the Nigerian Constitution is discriminatory in intent and effect, inconsistent with Nigeria's international obligations under CEDAW and not reasonably justifiable in a democratic society.

A moratorium suspending the enforcement of this discriminatory citizenship section of the Constitution and a declaration that pending its repeal, Nigerian men and women marrying non-Nigerians will be subject to the same rights and duties.

## **2. Tanzania: When a Statute is Inconsistent with the Constitution and International Human Rights Obligations**

The Tanzanian case raises different questions. Here, even though the Constitution does not bar discrimination on the basis of one's sex, it does not, as in Nigeria, contain internal inconsistencies. The inconsistency is one between the Citizenship Act on one hand and the provisions of the Constitution and human rights instruments on the other.

### **ii. Obligations under CEDAW and other International Human Rights Treaties**

As of 1<sup>st</sup> October, 2004 Tanzania was one of 178 countries who are state parties to CEDAW. Tanzania signed CEDAW in August 1985 and ratified it in 1986. Like Nigeria, Tanzania entered no reservations to CEDAW. Indeed, it has always fulfilled its reporting obligations under CEDAW from the very first. Upon coming into force of CEDAW, Tanzania submitted its first report promptly and this was discussed by the Committee on the Elimination of All forms of



Discrimination Against Women in January 1987. The addendum to that initial report was submitted in 1989 and discussed and accepted by the Committee in 1990. The Republic combined its second and third reports covering the period 1990 to 1996 and submitted them to the Committee in 1996.

From the record, Tanzania has not equivocated by law or practice about its obligations under CEDAW. In addition, Tanzania ratified both the International Covenant of Economic, Social and Cultural Rights, ICESCR and the International Covenant on Civil and Political Rights on 11<sup>th</sup> September, 1976. As with Nigeria, though the 1977 Constitution predates CEDAW, it antedates the Republic's accession to the UN Charter and the Universal Declaration and the ratification of ICECSR and the ICCPR. What ramifications, if any do these time-lines have on Tanzania's obligations under international law?

We begin with the ratifications of ICCPR and the ICESCR. Both predate the 1977 Constitution. It is arguable that Tanzania, like Nigeria, made its Constitution fully alive to its continuing obligations under international law. As noted already, the presumption is that a state will "not legislate contrary" to its international obligations. The proper principle of interpretation is that where an act and a treaty deal with the same subject, the court will seek to construe them so as to give effect to both without acting contrary to the wording of either. We must therefore presume that the Republic never intended to modify or repudiate any of its international obligations under the two Conventions when it enacted the 1977 Constitution.

On the authority of the *United States v. Palestine Liberation Organisation*.<sup>40</sup> the 1977 Constitution must be interpreted in a way that does not do violence to either the ICESCR and the ICCPR. How about CEDAW?

Tanzania ratified CEDAW after the 1977 Constitution. Are any of the Convention's obligations weakened by this fact? It may be argued that Tanzania ratified CEDAW fully cognisant of the commandments of its own Constitution. In spite of that, the Republic entered no reservations to CEDAW. As a matter of interpretation, this fact should raise a presumption that the Republic saw no contradiction between the text of CEDAW and the commandments of its own Constitution. Such a presumption implies that when faced with rival interpretations of the Constitution, the Court must prefer the interpretation that gives full effect to CEDAW. To see what this might mean in practice we turn to the relevant provisions of the Constitution of the United Republic of Tanzania.

The entry point is the preamble: though this is not enforceable in court, it provides the ethical content and values against which specific provisions of

<sup>40</sup> USA v. Palestine Liberation Organisation, 695 F. Supp. 1456 (1988)

the Constitution are to be interpreted and understood. The preamble commits the Republic to principles of freedom and justice and to the creating an independent judiciary to ensure “that all human rights are preserved and protected.”<sup>41</sup>

Part I- sections 1-5 of Chapter One - is constitutive. Parts II, that is, sections 6 to 11 of the same chapter, are statements of foundational principle. Section 3(1) of Part I, proclaims the United Republic “a *democratic* and socialist state which adheres to multiparty democracy.”<sup>42</sup> The principles commit the Government to the triple duty of ensuring that 1) “human dignity and other *human rights* are respected and cherished;”<sup>43</sup> 2) “human dignity is preserved and upheld in accordance with the spirit of the *Universal Declaration of Human Rights*;”<sup>44</sup> and 3) “all forms of *injustice*, intimidation, discrimination, corruption, oppression or *favouritism* are eradicated.”<sup>45</sup> (*emphasis added*).

Though the constitution makes it clear that “*the provisions of this part of this chapter are not enforceable by any court*”<sup>46</sup> similar provisions in other constitutions have been used as interpretative guides that give meaning to the rest of the constitution. In India, Courts have long regarded such principles as embodying the spirit of the Constitution. A line of decisions<sup>47</sup> from the Indian Supreme Court have held that principles such as these are useful in supplementing the bill of rights. The court has even been willing to allow Parliament to amend fundamental rights in order to give effect to these principles so long such amendments do not attack the core of the right. General provisions in the constitution may also be construed in light of the directive principles. As one commentator has observed:

“the Indian experience has shown that the value and influence of constitutional principles can largely be determined by the willingness of the courts to apply the principles.”<sup>48</sup>

Read this way, that is, as interpretive guides, these provisions add life to the provisions of the Bill of Rights and Duties set out in Part III of the 1977 Constitution. Like the Universal Declaration, the Constitution recognises the three different rights essential to equality: the equality of rights, the

<sup>41</sup> p. 13, Constitution of the United Republic of Tanzania, 1977.

<sup>42</sup> *id.* Section 3(1)

<sup>43</sup> *id.* Section 9(a)

<sup>44</sup> *id.* Section 9(f)

<sup>45</sup> *id.* Section 9(h)

<sup>46</sup> *id.* section 7(2)

<sup>47</sup> see *State of Kerala v. Thomas*, A.I.R. 1976 S.C. 389; *Mukesh v. State of M.P.* A.I.R. 1985 S.C. 537; *Laxmi Khanna v. Union of India*, A.I.R. 1987 S.C. 232; *Chief Justice v. Dikshitulu*, (1979) 2 S.C.C. 34; *A.B.K. Singh v. Union of India*, A.I.R. 1981 S.C. 298.

<sup>48</sup> see Bertus de Villiers, *The Constitutional Principles: Content and Significance in Birth of a Constitution*, ed. Bertus de Villiers.

principle of non-discrimination and the right to equal protection of the laws. Section 12 (1) proclaims that “[a]ll human beings are born free and are *all equal*.”<sup>49</sup>

The next section, 13 (1) says that “[a]ll persons *are equal before the law* and are entitled, without any discrimination, to *protection and equality* before the law.”<sup>50</sup> This provision is, in terms, an amalgam of similar clauses in the Indian, American and Irish Constitutions. Cases from those jurisdictions interpreting the reach of the concept of equal protection may therefore have some relevance.

Section 13(2) provides further that “[n]o law enacted by *any authority* in the United Republic shall make provision that *is discriminatory either of itself or in its effect*.”<sup>51</sup> The definition of discrimination under section 13 is somewhat unusual. Subsection (5) says that “[f]or the purpose of this Article, the expression “*discriminate*” means to satisfy the needs, the rights or other requirements of different persons on the basis of their *nationality, tribe, place of origin, political opinion, colour, religion or station in life* such that certain categories of people are regarded as *weak or inferior* and are subjected to restrictions or conditions whereas persons of other categories are treated differently or are accorded opportunities or advantage outside the specified conditions or the prescribed necessary qualifications.”<sup>52</sup> (*emphasis added*)

There are three things to note about these provisions. First, they recognize, like the Universal Declaration, three different notions of equality. This opens more scope for judicial interpretation than constitutions that simply grant only equal protection of the laws. Secondly, unlike CEDAW but very much like the ICCPR, these provisions apply only to state action. In other words, on the face of it, the 1977 Constitution does not bar private individuals from violating the constitutional rights of others. Indeed, sections 13(3) above and 13(4) below appear to put this matter beyond dispute. Sub-section (4) specifically providing that “[n]o person shall be discriminated against by any person or any authority acting under any law or in the discharge of the functions or business of any state office.”<sup>53</sup>

Though this provision raises important questions whether in fact Tanzania is complying fully with its international law when its constitution appears to immunize private conduct from scrutiny, it is fortunately, not a question

<sup>49</sup> supra note 23, section 12(1)

<sup>50</sup> *id.* section 13(1)

<sup>51</sup> *id.* section 13(2)

<sup>52</sup> *id.* section 13(5)

<sup>53</sup> *id.* section 13(4)

involved in the AHRAJ case we have here. Thirdly, the anti-discrimination provision appears to deliberately avoid outlawing sex discrimination. The relevant criteria for the purposes of article 13 are “nationality, tribe, place of origin, political opinion, colour, religion or station in life.” Is this a closed list or an open list? Put differently, can more grounds of discrimination be added to this list or are these the *only permissible* grounds for an anti-discrimination suit in Tanzania? For our purposes, I shall argue that it does not matter what view one takes.

I make two arguments in this regard. First, I contend that the *anti-discrimination clauses* of the 1977 Constitution, that is, sections 13(2), (4) and (5), do not, on the face of it, prohibit sex-discrimination. But this is not fatal. Both the language of the *equal protection clause* -section 13(1) - and the *equality clause* - section 12(1) are sufficient to support a sex discrimination claim such as that involved in this case. The second argument, developed rests on the proposition that the Government of Tanzania has violated the constitutional rights of the applicant’s husband by denying him the right to challenge in court the rejection of his application for citizenship by naturalization. Put another way, then, I am arguing as follows. One that based on the Tanzanian Constitution and international human rights law, the Government is in double violation of the applicant’s *right to equality* under section 12(1) and her *right to equal protection of the laws* under section 13(1). Two, that the Government has, through the provisions of the Citizenship Act, violated her husband’s constitutional rights by denying him the right to challenge the decision of the government not to naturalize him.

I turn now to an elaboration of the first argument. The proper starting point is Tanzania’s own Report to CEDAW Committee. Speaking of its efforts to implement CEDAW provisions on the “citizenship rights” of women, the government reports that:

*“The position has not changed since 1990. The nationality of women depends on various factors such as birth and marriage. Men and women have equal rights in respect of citizenship except in certain circumstances.”*

*These ‘certain circumstances’ are then described as follows:*

*“Whereas a foreign woman married to a Tanzanian man acquires citizenship automatically (subject to denouncing her former citizenship, as required by law) a foreign man marrying a Tanzanian woman does not enjoy the same rights.”*

The Government then concludes that “[t]his position regarding citizenship has not caused problems.” This conclusion is not tenable. The applicant in

this case is in Court precisely because this legal position “regarding citizenship” has “caused problems” for her and her family. The conclusion then must be that contrary to the Republic’s assertions in its CEDAW report “men and women in Tanzania” do not have “equal rights in respect of citizenship.” This violates both the provisions of the Tanzanian Constitution and Tanzania’s obligations under CEDAW.

This is easier clarified by looking at section 12 (1) of the Constitution again. That section proclaims that “all human beings are born free and are *all equal*.” Equality as used in this provision means either one or all of the following things.

First, *that likes should be treated alike*. The relevant question is whether two individuals are in fact alike. The principle of equal treatment, it has been said “requires that all individuals be treated similarly to the extent that they are the same and treated differently to the extent that they are different.”<sup>54</sup> A difference is relevant “if, but only if, it bears an empirical relationship to the purpose of the rule.”<sup>55</sup> The threshold issue for a court, then, is what characteristics the state should take into account in making a decision whether any two individuals are *relevantly* alike. Since 1948 international human rights instruments have ordained that individuals cannot be treated unequally only on account of differences based mainly or wholly on characteristics such as “race, sex, religion, colour, ethnic or national origin or political opinion.” Read this way, section 12 (1) means that Tanzania cannot, in terms of its own Constitution, bar its female citizens from conferring citizenship on their alien spouses.

But equality of treatment need is not the only requirement inherent in the idea of equality protected by section 12(1). Consider a second notion of equality implicit in that section. Tanzania has argued to the CEDAW committee that women and men in the Republic are treated alike. If we accept this argument, implausible as it seems in light of the clear provisions of the *Citizenship Act*, we must conclude -given the evidence of this case- that even though men and women are treated equally, the results of that treatment is inequality of rights between Tanzanian men and women. For, if it is true that men and women are treated equally, why is it that the result of that treatment is that men can confer citizenship on their alien spouses but women cannot?

The conclusion, then, must be that Tanzania has violated the provisions relating to equality either because 1) it is treating women and men differently

<sup>54</sup> See Note: The Structure of Equal Protection Review in Stone, Seidman, Sunstein & Tushnet, Constitutional Law at p. 536

<sup>55</sup> *id.* at p. 537

and thus violating the requirement that *likes should be treated alike* or 2) it is treating men and women in a formally equal manner but that this treatment is resulting in substantive violation of the woman's right to equality by denying her a benefit that is given to men *qua* men by the *Tanzanian Citizenship Act*. Under whichever of these two readings of section 12(1) we take, the Citizenship Act has violated the Constitution and must to that extent be void. Reading section 12(1) this way gives "legal recognition to the realisation that apparently equal treatment could entrench disadvantage."<sup>56</sup> Putting the matter this way shows up the arbitrariness of the violation in particularly sharp relief: Tanzanian men are able to confer citizenship on their alien spouses *only because they are men*. Women are not able to do so *only because they are women*.

In the event that the court is unsure as to the contents of the concept of equality protected by section 12(1), that doubt can be removed by interpreting that section in light of the obligations that Tanzania has under the human rights instruments that it has ratified, in particular CEDAW and ICCPR. The South African Constitutional Court has used precisely this approach when faced with gaps in the Constitution or a dearth of local judicial authorities on particular provisions. This use of international law has been justified on the grounds that to grant "individuals the full measure"<sup>57</sup> of the bill of rights, it is necessary to interpret the rights therein generously. In South Africa customary international law and self-executing international treaties are binding yet the Constitutional Court has ruled that even those treaties that are not binding -because not enacted by Parliament- "may be used as tools of interpretation."<sup>58</sup> The rationale for this as explained by the Court is that:

*"International agreements and customary international law.... provide a framework within which [the bill of rights] can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments such as the United Nations Committee of Human Rights, the Inter American Commission on Human Rights, the Inter American Court of Human Rights, the European Commission on Human Rights and the European Court of Human Rights and, in appropriate cases, Reports of specialized agencies such as the International Labour Organisation may provide guidance as to the correct interpretation of the provisions of [the bill of rights]."*<sup>59</sup>

The Constitutional Court was not only willing to borrow this international jurisprudence for the purpose of giving life to the bill of rights, it was prepared

<sup>56</sup> See Sandra Fredman, *Combating Racism with Human Rights in Discrimination and Human Rights: The Case of Racism*, ed. Sandra Fredman.

<sup>57</sup> See *Minister of Home Affairs (Bermuda) v. Fisher* [1980] AC 319 at 328-329. Quoted in *State v. Makwanyane*, *infra*, note 40.

<sup>58</sup> *The State v. Makwanyane*, CCT/3/1994.

<sup>59</sup> Chaskalson J, *id.* at para. 35.

to go even further. Chaskalson J argued that even experiences from other countries with a longer history of rights jurisprudence would be invaluable in interpretation of the bill of rights in the South African Constitution. He had not doubt that:-

*“[C]omparative bill of rights jurisprudence will no doubt be of importance, particularly in the early days of the transition where there is no developed jurisprudence in this branch of law on which to draw.”<sup>60</sup>*

But even if I am wrong in urging the Tanzania High Court to read section 12(1) of the 1977 Constitution in this way, the Tanzania Government would still not be out of the woods and the *Citizenship Act* would still be unconstitutional on the basis of other provisions of the Constitution. Let us consider the ramifications of the equal protection clause of Section 13. The relevant sub-section says that “[a]ll persons *are equal before the law* and are entitled, without any discrimination, to *protection and equality before the law*.” The general principle the courts in India have held is that “equal protection of the laws means the right to equal treatment in similar circumstances.” Under equal protection, certain types of discrimination may be permissible if they are rationally related to a legitimate state objective. The key test under these conditions is “reasonableness.” The test applied in India is a modification of the test that the US Supreme Court has applied in cases as *Frontiero* and *Reed* cited above.

The Government of the Union may argue that American and Indian cases are no use in interpreting particular sections of the 1977 Constitution. But such an argument would not end the enquiry. As pointed out earlier, Tanzania has entered no reservations to CEDAW or to any other of the relevant human rights instruments. Even if the Republic rejected American and Indian cases referred to here, it cannot as easily wish away the specific obligations that it has acquired by voluntarily ratifying these instruments.

Let us evaluate the extent of the obligations imposed by these instruments. So far as is pertinent to this case, the relevant obligation is in Article 16 read together with the undertaking in Article 2. Under Article 16, State Parties undertake to ensure equality of rights between men and women with reference to marriage and family. The states commit themselves to taking all “appropriate measures to eliminate discrimination against women in all matter relating to marriage and family relations.” In particular, they promise to “ensure on a basis of equality” that men and women shall have the same

<sup>60</sup> id. para. 37.

<sup>61</sup> Art. 16 1(a)



rights 1) “to enter into marriage”<sup>61</sup>; 2) “to freely to choose a spouse and to enter into marriage with their free and full consent”<sup>62</sup>; 3) “and responsibilities during marriage and at its dissolution”<sup>63</sup>; 4) “and responsibilities as parents, irrespective of their marital status, in matters relating to their children”<sup>64</sup>; 5) “to decide freely and responsibly on the number and spacing of their children and to have access to information, education and means to enable them to exercise these rights”<sup>65</sup>; 6) “and responsibilities with regard to guardianship, ward-ship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation”<sup>66</sup> 7) “personal rights as husband and wife, including the right to choose a family name, a profession and an occupation”<sup>67</sup> and 8) “for both spouses in respect of ownership, acquisition, management, administration, enjoyment and disposition of property.”<sup>68</sup>

The provisions of the *Citizenship Act* disabling women from conferring citizenship on their non-Tanzanian spouses not only violate Tanzania’s undertaking in Article 2 and Article 16 1(a) but also provisions of the 1977 Constitution. Collaterally, the effect of the Act is to impose additional burdens on the women with regard to their married life. The Act erects barriers to what a family can do together. The applicant’s family must face burdens arises from the fact that the Tanzanian Citizenship Act has chosen to treat Tanzanian women differently from the men. This differential treatment of women is based solely on the fact that they are women. On this reading, there is little doubt that Sion Gabriel’s rights to equality and equal protection under sections 12(1) and 13 (1) and various provisions of CEDAW have been violated. What remedies can the court give given this conclusion? Before taking up that issue, however, I would like to return to an issue that I raised before.

I argued earlier on that Sion Husband’s constitutional rights have also been violated. What is the legal basis for that assertion? In which particular ways has that right been violated?

The Applicant has been married to her husband for nearly 30 years now. One could argue that 30 years and two children later is a compelling reason by itself for naturalizing the man as a citizen of Tanzania. However, in light of the fact that his applications for naturalization have so far been denied, such an argument will not persuade the registration authorities. His claim to citizenship by naturalization must, therefore, be founded on law.

<sup>62</sup> Art. 16 1(b)

<sup>63</sup> Art. 16 1(c)

<sup>64</sup> Art. 16 1(d)

<sup>65</sup> Art. 16 1(e)

<sup>66</sup> Art. 16 1(f)

<sup>67</sup> Art. 16 1(g)

<sup>68</sup> Art. 16 1(h)



The entry point is, once again, the 1977 Constitution. Like many other constitutions, that of Tanzania makes a crucial distinction between the rights and freedoms of “every citizen” and the rights and freedoms of “every person.” The rights to vote<sup>69</sup>, to move into and live in any part of Tanzania,<sup>70</sup> to information<sup>71</sup>, to take part in the governance of the country<sup>72</sup>, to participate in decisions affecting him or her<sup>73</sup>, to equal opportunity to hold any office<sup>74</sup> and the duty to protect the independence and sovereignty of Tanzania<sup>75</sup> belong to “every citizen.” All other rights, including the right to equality before the law,<sup>76</sup> the right to personal freedom,<sup>77</sup> the right to privacy and personal security,<sup>78</sup> the right to enforce fundamental rights,<sup>79</sup> the freedom of expression,<sup>80</sup> the freedom of association,<sup>81</sup> the freedom of religion,<sup>82</sup> the right not to be discriminated against<sup>83</sup> and the right to take legal action to ensure protection of the constitution<sup>84</sup> are all rights that the Constitution grants to “every person.”

The distinction between rights that belong to “every citizen” and those that belong “to every person” has special application to this opinion. We must keep in mind that the immediate trigger for the Applicant’s suit is the persistent refusal by the Tanzanian Government to naturalize her husband as a citizen of the Union. In coming to its decision, the Union Government has relied on powers given by the *Tanzania Citizenship Act*. It is important to review that Act in light of the bill of rights.

Two of its provisions are relevant: section 22, 23 and 11. Section 22 says that every application for naturalization under the act must be made to the Minister.<sup>85</sup> The next section, 23, says that the Minister “shall not be required to assign any reason for the grant of refusal to grant any application under this Act and the decision of the Minister on any application under this Act shall not be subject to appeal to or review in any court.”<sup>86</sup> Section 11 is the provision most directly in issue in this case. It says, so far as is relevant, that

<sup>69</sup> supra note 23, section 5, Constitution of the United Republic of Tanzania, 1977

<sup>70</sup> id. section 17(1)

<sup>71</sup> id. section 18(2)

<sup>72</sup> id. section 21(1)

<sup>73</sup> id. section 21(2).

<sup>74</sup> id. section 22(1).

<sup>75</sup> id. section 28(1).

<sup>76</sup> id. section 13(1)

<sup>77</sup> id. section 15(1)

<sup>78</sup> id. section 16(1)

<sup>79</sup> id. section 30(3)

<sup>80</sup> id. section 18(1)

<sup>81</sup> id. section 20(1)

<sup>82</sup> id. section 19(1)

<sup>83</sup> id. section 13(2)

<sup>84</sup> id. section 26(2)

<sup>85</sup> see section 22, Tanzania Citizenship Act.

<sup>86</sup> id. note 30, section 23.

“a woman who is married to a citizen of the United Republic shall at any time during the life-time of the husband be entitled, upon making an application in the prescribed form, to be naturalized as a citizen of the United Republic.”<sup>87</sup>

As already argued, section 11 clearly violates the applicant’s rights to equality and to equal protection of the laws by denying her a benefit that would automatically be available to a similarly situated man. What is easy to overlook is the fact that section 23 of the act violates many more sections of the constitution. Let us see why.

It is beyond argument that in light of the clear language of the constitution, residents of Tanzania have legitimate constitutional rights that can be enforced by the courts. The substantive rights that person in Tanzania enjoy have been detailed above. But the Constitution does not merely give rights, it provides an effective machinery for their enforcement. Section 13(3) is a general declaration of the entitlement to a judicial remedy. It provides that “[t]he civil rights, duties and interests of *every person* and community *shall be protected and determined by courts of law* and other state agencies or under the law.”<sup>88</sup> In the context of the right to equality and to equal protection, the Constitution obligates the state under section 13(6) to make “make procedures” that ensure that “when the rights and duties of *any person* are being determined by the court or *any other agency*, that person shall be entitled to a *fair hearing* and to the *right of appeal* or other legal remedy against the decision of the court or *the other agency* concerned.”<sup>89</sup> For the avoidance of doubt, section 29 (1) emphasizes that “*every person* in the United Republic has the right to enjoy fundamental human rights and the benefits of the fulfillment by *every person* of his duty to society.”<sup>90</sup> Among the duties vested in *every person* in Tanzania is the duty to obey the laws of the land under section 26(1). Under sub-section (2) of that section there is a collateral right vested in *every person* “to take legal action to ensure the protection of this constitution and the laws of the land.”<sup>91</sup> As to who may bring cases to court, section 30(3) gives a plenary right to seek redress in broad and generous terms. It says:

*“any person alleging that any provision in this part of this chapter or in any law concerning his right or duty owed to him has been, is being or is likely to be violated by any person anywhere in the United Republic, may institute proceedings for redress in the High Court.”*<sup>92</sup>

<sup>87</sup> id. section 11,

<sup>88</sup> Section 13(3), Constitution of the United Republic of Tanzania, 1977

<sup>89</sup> id. section 13(6)

<sup>90</sup> id. section 29 (1)

<sup>91</sup> id. section 26(2)

<sup>92</sup> id. section 30(3)

There are several remarkable things about these provisions. First, they offer a comprehensive range of judicial remedies to “every person” in the Republic, not merely to citizens. Secondly, they obligate the state to facilitate the “fair hearing” and “appeals” on matters relating to the enforcement of the rights of *every person* by making the necessary procedures. Thirdly, the enforcement section makes it possible to redress both actual as well as anticipated violations.

With this in mind, let us return to section 23 of the *Citizenship Act*. That section says that the Minister need not give any reasons for his decision and that his decision cannot be challenged in court. That section is unconstitutional on the face of it and is discriminatory in a manner prohibited by the 1977 Constitution as applied. On the face of it, that section flatly contradicts both section 30(3) - *governing the right of redress* - and section 13(6) - *obliging the state to make procedures for the redress of violations of rights and imposing a duty to a fair hearing*<sup>93</sup> and a *right of appeal*. As applied, this section must inevitably burden non-nationals than nationals. Only non-nationals are ever likely to apply for citizenship by naturalization. Therefore the ouster of jurisdiction from the courts to adjudicate decisions of the minister must inevitably deny non-nationals the opportunity to have their rights adjudicated by the courts in Tanzania. In short, the *Citizenship Act* makes a distinction between nationals and non-national by eroding an alien’s right to litigate matters arising under the act. But as we have seen, the Constitution does not itself make this distinction. To my mind, as applied, section 23 of the Act is a form of discrimination on the basis of nationality prohibited by section 13(1), (2) and (5) of the 1977 Constitution.

In rounding off this discussion, the argument could be made- as in Nigeria- that as a matter of international law “ it is generally accepted that a state has the right to exclude from citizenship anyone who it wishes (provided this does not entail stripping existing citizens of their right to a domicile).”<sup>94</sup> But the same answer given in the case of Nigeria to the same argument applies with equal force here.

To this point, the following conclusions- much as those in the case of Nigeria- can be made: 1) Tanzania is obliged by customary international law (the Charter and Universal Declaration of Human Rights) to outlaw sex discrimination and to repeal laws whose effect is to disadvantage women *qua* women; 2) The Republic has voluntarily undertaken, through CEDAW

<sup>93</sup> The standard elements of a fair hearing are that 1) the person or authority making a decision must be impartial, that is, that he has no personal interest in the outcome; 2) a decision should not be taken until the person affected by it has had an opportunity to state his case; 3) the person or authority making the decision must give reasons for the decision. Section 23 of the Citizenship Act violates all three requirements.

<sup>94</sup> Sandra Freedman, *supra* note. 38 at p.16.

and ICCPR and the African Charter to eliminate sex discrimination both in its Constitution and in its practice. Indeed the provisions in its own constitution enforcing equality and mandating equal protection of the laws have this very effect; 3) The *Tanzania Citizenship Act* violates both the provisions of the 1977 Constitution and obligations under CEDAW and other Human Rights Instruments.

Given these conclusions, the question is how can CEDAW, Other human rights conventions and the 1977 Constitution be used to get the remedies that Sion Gabriel now seeks? There are two preliminary considerations.

First, it is important to note that the Tanzanian Constitution does not have an explicit supremacy clause. This, however, is not fatal. The constitution is fundamental law even without a supremacy clause. If there is a conflict between an obligation imposed by the Constitution and a competing obligation imposed by statute, the statutory obligation must yield. Moreover, as a canon of interpretation the court must read the provisions of the Constitution in manner that a) ensures overall coherence of the Constitution and the freedom and equality values for which it stands and b) is consistent with Tanzania's on-going obligations under international law generally and under CEDAW in particular.

Secondly, although CEDAW has not been re-enacted as a statute of the Tanzanian Parliament, as is the practice within the British Commonwealth, it has legal consequences. Those consequences are threefold. One, CEDAW may be used to settle disputes before the court. If the dispute involves a statute and the statute does not itself provide standards by which it is to be interpreted, the court can and should formulate standards from CEDAW or from any other applicable international human rights treaty. Two, CEDAW has application in relation to legislation. When Parliament enacts new legislation on any matter, it shall legislate consistent with the Tanzanian Constitution and, to the full extent possible, consistent with the Republic's continuing obligations under international human rights law. Three, CEDAW and other human rights conventions may be used to resolve inconsistencies within the Constitution or between statutes.

### **3. Kenya: Horizontal Application of Human Rights Law to Fill Sex Discrimination Gaps in the Constitution**

The Kenyan case is a sexual harassment suit filed against a private hotel which sacked a woman employee who resisted the sexual advances of her supervisor. It raises the question whether Sexual Harassment by a private company amounts to Sex Discrimination under International Law and the Kenyan Constitution. The legal issue arises from the fact that Section 82(1) and (2) of the Kenyan Constitution are ambiguous since they appear to be

narrowly focussed on discrimination by public authorities. In order to conform to international standards in the area of sex discrimination and sexual harassment against an employee, the case urges the Court to interpret this section broadly to include private discrimination. The national law should be developed so as not only to prohibit private hotels and related establishments from discriminating in the way they regulate physical access but, more generally, as barring sex discrimination in those establishments altogether.

The expert opinion developed for AHRAJ drew from international and comparative jurisprudence to 1) offer the definition of sexual harassment; 2) demonstrate how section 82 of the Kenya Constitution could be expanded to private actors; 2) provide a basis for the application of CEDAW and other human rights instruments in Kenya and 4) underline the liability of companies for the sexual harassment conduct of their supervisory staff.

#### i. Definition of Sexual Harassment

Although there are no international human rights instruments, including the Convention for the Elimination of all forms of Discrimination Against Women, CEDAW, that specifically define sexual harassment, language in the Human Rights Conventions is broad enough to cover sexual harassment. Under Article 11 of CEDAW state parties are obliged to “take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure on a basis of equality of men and women, the same rights...”<sup>95</sup> The International Covenant on Economic, Cultural and Social Rights, ICESCR, is arguably more direct. In matters of employment, it enjoins state parties to ensure “equal opportunity for everyone to be promoted to an appropriate higher level, subject to no consideration other than those of seniority and competence.”<sup>96</sup>

It may be objected that these provisions merely prohibit sex discrimination and that this is still a step away from sexual harassment, which on some accounts may not be discrimination at all. That objection can be met in two related moves: first, by scrutinizing the type of conduct that is covered under sexual harassment and secondly, by analysing comparative case law dealing with sexual harassment as a species of sex discrimination.

To start off, what is sexual harassment? Though there is no codified definition, there is a comprehensive body of international and comparative opinion which unambiguously makes it clear what sexual harassment is. We start with Article 11 of the 19th General Recommendation of the Committee on

<sup>95</sup> Article 11, Convention for the Elimination of all forms of Discrimination Against Women, CEDAW

<sup>96</sup> Art. 7(c) International Covenant on Economic, Cultural and Social Rights, ICESCR. The African Charter on Human and Peoples Rights is the weakest in this regard. It states rather tersely in Article 15 that: “Every individual shall have the right to work under equitable and satisfactory conditions and shall receive equal pay for equal work.”

the Elimination of All Forms of Discrimination against Women. Article 11 of this 1989 Recommendation noted that ‘equality in employment can be seriously impaired when women are subjected to gender-specific violence, such as sexual harassment in the work place’. Elaborating its understanding of sexual harassment the Committee said:

*“Sexual harassment includes such unwelcome sexually determined behaviour as physical contact and advances, sexually coloured remarks, showing pornography and sexual demand, whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment, including recruitment or promotion, or when it creates a hostile working environment.”<sup>97</sup>*

This definition contains the core components of sexual harassment as understood by courts in different jurisdictions where sexual harassment cases have been adjudicated. In the US, the courts have defined sexual harassment in this same way, implicitly basing their decisions on the Guidelines issued by the Equal Employment Opportunity Commission (EEOC), a statutory body that sees to the implementation of the 1964 Civil Rights Act. Though the Guidelines are without statutory force they have been highly influential in the evolution of sexual harassment jurisprudence in the US. The EEOC says that sexual harassment violates Section 703 of Title VII of the *Civil Rights Act*.<sup>98</sup> As with the CEDAW Committee the EEOC guidelines define sexual harassment thus:

*“Unwelcome sexual advances, requests for sexual favours, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.”*

<sup>97</sup> This definition also comports with the UN’s own internal definition: According to the UN sexual harassment occurs when: “any unwelcome sexual advance, request for sexual favours or other verbal or physical conduct of a sexual nature, when it interferes with work, is made a condition of employment or creates an intimidating, hostile or offensive work environment. It is particularly serious when behaviour of this kind is engaged in by any official who is in a position to influence the career or employment conditions (including hiring, assignment, contract renewal, performance evaluation, working conditions, promotion) of the recipient of such attentions.”

<sup>98</sup> Title VII of the Civil Rights Act of 1964 makes it “an unlawful employment practice for an employer...to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual’s race, colour, religion, sex, or national origin.”

Even in countries where there is neither a statutory definition of sexual harassment nor a body corporate that monitors equal sex treatment in the workplace, this definition has been broadly accepted. For instance, in the 1991 Swiss case of *Pfleger v. Muhleback, S.A.*, a Geneva court defined sexual harassment as follows:

*“Persons who in their position of employer, supervisor, or collaborator, take advantage of their position or influence in an enterprise to harass an employee or a job applicant of the same sex or of the opposite sex, by unwelcome propositions, immoral comments, images, objects, gestures or undesired behaviour...with the goal of directly or indirectly obtaining sexual favours in making understood either verbally or tacitly that the acceptance or refusal of such favours should or could constitute a decisive criterion for the signature, content, means of application or the continuation of an employment contract, or ...with the goal, or with the result, of poisoning the existing or future work environment.”*

It may be churlishly argued that these definitions have been formulated for advanced societies in which traditional customary bonds have dissolved and rule of law has taken root. To purge that heresy, I include a definition of sexual harassment from a court in the developing world. The Supreme Court of India has defined sexual harassment. In the case of *Vishaka v. State of Rajasthan*, it said:

*“Sexual harassment includes such unwelcome sexually determined behaviour as physical contacts and advance, sexually coloured remarks, showing pornography and sexual demands, whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment, including recruiting or promotion, or when it creates a hostile working environment.”*

In other words, the Indian Supreme Court has incorporated the CEDAW Committee definition into Indian jurisprudence without amendment.

A common thread running through these definitions is that sexual harassment has two limbs: *quid pro quo* sexual harassment, the nub of which is a demand for sexual favours on the pain of career failure and harassment that arises from a supervisor creating for an employee a sexually hostile working environment that has the effect of “unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.”<sup>99</sup>

<sup>99</sup> See *Meritor Savings Bank, FSB v. Vinson et al*, 477 US 57 (1986)



In complainant's case, both types of harassment are implicated and they should form the basis of alternative causes of action. I now turn to a more detailed discussion of the main aspects of the two forms of sexual harassment through a survey of comparative jurisprudence: Australia, the United States and India. I begin with *quid pro quo* sexual harassment and later move onto hostile environment variety.

## ii. *Quid pro quo* Sexual Harassment

This happens when “someone with authority to control employment opportunities, such as promotions and salary increases, tries to get a subordinate employee to grant sexual favours in order to obtain or retain that employment opportunity.”<sup>100</sup> *Quid pro quo* sexual harassment was in issue in the Australian case of *Aldridge v. Booth*.<sup>101</sup> Lynette Jane Aldridge was employed at “The Tasty Morsel” cake shop from January 1985 to January 1986. She claimed that during her year of employment, her employer Grant Rodney Booth made repeated unwelcome sexual advances: touching her bottom and breasts, kissing her neck and lips, pulling her hair and rubbing his hand up and down her legs. He repeatedly requested sexual favours and threatened her with termination if she resisted his advances. In her pleadings she named at least 20 times that he had engaged in sex with her at the cake shop. Eventually, she terminated her employment.

Though the court expressed some reservations “as to the black and white nature of [Aldridge's] assertion that [Booth's] conduct was invariably and entirely unwelcome” it had no doubt that “the conduct engaged in by Mr. Booth” amounted to “sexual harassment” and that it went on as long as it did “because of the fear of Miss Aldridge of losing her job.”

To establish a claim for *quid pro quo* sexual harassment a complainant must prove the five elements that have been identified by the courts as the basis for liability in such cases. She must prove that: 1) She is a member of a protected group; 2) She was subjected to unwelcome sexual advances; 3) She has suffered an adverse employment action; 4) Both that the sexual advance was made because of her gender and that her reaction to the sexual advance affected a tangible aspect of her job; and 5) the employer is responsible.

A niggling question remains: what role, if any, does the complainant's consent to sexual acts with the defendant play? In *Aldridge* that issue arose collaterally. Mr. Booth had characterized intercourse with the Aldridge as “reasonably

<sup>100</sup> Barbara Lindeman & David D. Kadue, PRIMER ON SEXUAL HARASSMENT 22 (1992) quoted at note 125, Hiroko Hoyashi, Sexual Harassment in the Workplace and Equal Employment Legislation, St John's Law review; Symposium: Women Rights as International Human Rights, vol. 69, 1995 no. 1-2 at p.55

<sup>101</sup> 80 A.L.R. 1 (Fed. Ct. 1988).



spontaneous.” Though the Court thought Mr. Booth’s account of the relationship “inherently improbable” it did not speak to the impact of consent to a sexual harassment claim. The US Supreme Court considered the issue in passing in leading case of *Meritor Savings Bank, FSB v. Vinson*.<sup>102</sup> Though it was no part of the Court’s decision in the case, its pronouncements are instructive. In the District Court, the court of first instance, the judge had argued that if the complainant and her supervisor had engaged “in an intimate or sexual relationship...that relationship was a voluntary one.” This seemed to imply that voluntary surrender somehow impugned a sexual harassment claim. The Supreme Court rejected that conclusion. Speaking for the Court, Chief Justice Rehnquist, said:

*“...[T]he fact that sex-related conduct was “voluntary” in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit....the gravamen of any sexual harassment claim is that the alleged advances were unwelcome.....The correct inquiry is whether the respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in the sexual intercourse was voluntary.”*

Thus *quid pro quo* sexual harassment. Next we consider the elements of a sexually hostile working environment.

## **ii. Sexually Hostile Work Environment.**

As defined by Lindemann and Kadue a sexually hostile working environment is one that “unreasonably” interferes with “an individual’s work performance” or creates “an intimidating, hostile, or offensive working environment.” The two Supreme Court cases referred to in this opinion-*Meritor Savings Bank, FSB v. Vinson* and *Harris v. Forklift Systems, Inc.* were litigated under the sexually hostile work environment limb of sexual harassment.

*Harris* highlights the circumstances under which a sexually hostile work environment claim could arise. For two years, April 1985 to October, 1987, Teresa Harris was a manager at Forklift Systems Inc., an equipment rental company. Charles Handy was Forklift’s President. Throughout her time at Forklift Handy often insulted Harris and made her the target of unwanted sexual innuendos. Several times, in front of other employees he told her, “you are a woman, what do you know?” “We need a man as the rental manager.” At another time, that she was “a dumb ass woman.” Once he even offered, in front of other employees, that she and he “go to the Holiday

<sup>102</sup> Supra note 5; 477 US 57 (1986)

Inn to negotiate [her] raise.” She complained to him that she found his behaviour offensive. He stopped for a while but was soon at it again. Finally Harris quit. She then sued Forklift Systems, Inc., claiming that Handy’s conduct had created an abusive work environment for her because of her gender. The District Court found that some of Handy’s comments “offended Harris and would offend the reasonable woman but nonetheless held that these comments were not:-

*“so severe as to be expected to seriously affect [Harris’] psychological well-being. A reasonable woman manager under like circumstances would have been offended by Handy, but his conduct would not have risen to the level of interfering with that person’s work.”*

Rejecting the District Court’s test which seemed to imply that offensive conduct was not actionable unless it seriously affected the plaintiff psychological well-being, the Supreme Court formulated a different test. Speaking for the Court, Justice Sandra Day O’Connor stated that the proper standard “takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury....” Saying that the anti-discrimination clause of the Civil Rights Act comes into “play before the harassing conduct leads to a nervous breakdown” the court lamented that relying on the District’s Court’s putative test would “needlessly focus the fact-finder’s attention on concrete psychological harm, an element [the statute] does not require.” As the Court noted, the determination of what constitutes a sexually hostile environment cannot be “a mathematically precise test.”

There is reason in O’Connor’s statement. There will be case, such as *Vishaka v. State of Rajasthan*, where the matter is beyond dispute. In *Vishaka*, the sexual harassment claim arose from the brutal gang rape of a social worker in a village in Rajasthan in India. The rape incident then became the subject of two separate cases: a criminal action and a sexual harassment class action under Article 32 of the Constitution for the enforcement of the constitutional rights of sex equality, life and liberty. So clear were the violations here that in coming to its decision, the Court also formulated sexual harassment guidelines “to fill in the gaps in the legislation” (see *the appendix to this opinion*) and to prevent these sort of egregious abuses from happening again.

But few cases are as clear as *Vishaka*. It would seem, then, that the appropriate judicial response is a case by case analysis as proposed by O’Connor in *Harris*.

*“..[W]hether an environment is ‘hostile’ or ‘abusive’ can be determined only by looking at all the circumstances. These may include the*

*frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere performance. The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required."*

Having determined the relevant heads of a possible sexual harassment claim, I will now address two threshold questions: What is the scope of the prohibition of sex discrimination under international and Kenyan law? And, is section 82 applicable to this case at all and to what extent? The answer to this question will foreground the all important issue in this opinion, namely, whether sexual harassment is a form of sex discrimination prohibited under international law and the Kenyan Constitution? But that question will be taken up later. To get there, we first need to understand the scope of the sex discrimination prohibition in CEDAW and in Kenya Law.

## **Definition and Scope of Sex Discrimination under International and Kenyan Law**

The inquiry must start with the definition of sex discrimination under the relevant international instruments and Kenyan Law. Do the definitions offered explicitly or implicitly outlaw sexual harassment?

Article 1 of CEDAW states that for the purposes of the Convention:-

*"the term 'discrimination against women' shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."*<sup>103</sup>

The CEDAW anti-discrimination bar has three components: first, it impugns law or conduct that is discriminatory both in terms of its effects and of its purposes. Second, "discrimination against women" can be perpetrated both by the state and by private actors. But complainant's case turns on whether the CEDAW definition squares with the definition in section 82 of the Constitution of Kenya. Or, alternatively, it may turn on whether that section, by itself, has sufficient gravitational pull to draw the case at the bar into its orbit. Let us scrutinize section 82, then. Though the section has 9 sub-parts,

<sup>103</sup> Art. I.

only 4 are relevant to this opinion: (1), (2), (3) and (7). The substance of these sections is reproduced here so far as is relevant. The marginal note to 82 is “protection from discrimination on the grounds of race etc.”<sup>104</sup> Both sub-section (1) and (2), outlawing discrimination, are subject to a range of exceptions. Laws are not discriminatory under the Constitution if they relate to the status of non-citizens;<sup>105</sup> concern matters of personal and customary law;<sup>106</sup> cover issues of adoption, burial, divorce, marriage and succession;<sup>107</sup> set criteria for recruitment into the public service or the armed forces;<sup>108</sup> govern the initiation and stopping of civil and criminal cases by the Attorney General<sup>109</sup> and involve the enforcement of exceptions to other rights in the Constitution<sup>110</sup>. None of these exceptions are implicated in the complainant’s case.

With that caveat and the exceptions in mind, we turn to an analysis of section 82(1). It says that “...[N]o law shall make any provision that is discriminatory either of itself or in its effect.” Sub-section (2) provides that “....[N]o persons shall be treated in a discriminatory manner by a person acting by virtue of any written law or in the performance of functions of a public office or a public Authority.” ‘*Discriminatory*’ is then defined, in sub-section (3), as “affording different treatment to different persons attributable *wholly or mainly* to their respective descriptions by race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.” (*emphasis added*).

Sub-section (7) bars discrimination in facilities that, though open to the public, are not necessarily owned by the state. It says that “no person shall be treated in a discriminatory manner in respect of *access* to shops, hotels, lodging houses, public restaurants, eating houses, beer halls or places of public entertainment or in respect of *access* to places of public resort maintained wholly or partly out of public funds or dedicated to the use of the general public.” (*emphasis added*)

These definitions raise three different but related questions. First, what is the full scope of sex discrimination under both-CEDAW and the Constitution of Kenya? Second, is a CEDAW-based sexual harassment claim possible in Kenya? Three, is sexual harassment within the meaning of sex discrimination as defined in both the Constitution and CEDAW?

<sup>104</sup> p. 56, Constitution of Kenya, rev. ed. (1998), 1992.

<sup>105</sup> id sec. 82(4a)

<sup>106</sup> id sec. 82(4c)

<sup>107</sup> id sec. 82(4b)

<sup>108</sup> id sec. 82(5)

<sup>109</sup> id sec. 82(9)

<sup>110</sup> id sec. 82(8)

## i) The Scope of Sex Discrimination under CEDAW and the Constitution of Kenya

On the face of it, CEDAW and the Constitution of Kenya begin from two very different assumptions about discrimination. CEDAW takes discrimination against women as given and then makes the elimination of that discrimination its *raison d'être*. For this reason, CEDAW imposes an *affirmative obligation* on state parties “to adopt”<sup>111</sup>, “to embody,”<sup>112</sup> “to establish”<sup>113</sup> “to take all appropriate measures”<sup>114</sup> to eliminate this discrimination. The Constitution of Kenya assumes that discrimination does not exist. To stop discrimination from happening it erects two barriers: the first, in sub-section 1, stops the state from making discriminatory laws and the second, in sub-section 2, stops state officials from making decisions that are discriminatory. The Constitution therefore imposes a *negative duty* on the state not to make laws that provide for discrimination and asking public officials *to refrain from* discriminatory practices in their work.

Section 82 (1) and (2) do not, unlike CEDAW, explicitly prohibit private discrimination. They only appear to stop the state or its functionaries from discriminating. However, sub-section (7) prohibits places of entertainment, whether these are private or public, from discriminating among members of the public. Is the language in sub-section 7 broad enough to cover discrimination against employees working in these establishments? The Constitution uses the word ‘access’ and it is not clear what the precise scope of the term is. Under one reading, the obvious one, a hotel violates section 82(7) if it denies someone entry and service because he is, say, Asian. But does it violate the Constitution if the hotel admits the Asian and sells him beer a higher price than other customers? Does ‘non-discriminatory access’ include charging ‘non-discriminatory prices?’ More problematically, does ‘non-discriminatory access’ to a hotel or other public places include ‘non-discriminatory employment?’ Is a hotel prohibited by clause 82(7) from discriminating among its workers on the basis of race? If a worker is fired because she is Asian, can she maintain an anti-discrimination claim against the hotel on the basis section 82(7)?

These question are not as frivolous they look at first sight. To see this, lets look at section 82 carefully. Sub-section 2 bars anyone who holds legal power or public office or who works in a public authority from engaging in discriminatory practices. Under the laws of Kenya, the Government of Kenya is an investor, owning such enterprises as Telkom (K) Ltd or the Kenya

<sup>111</sup> CEDAW Art. 2(b).

<sup>112</sup> Art. 2(a).

<sup>113</sup> Art. 2(c).

<sup>114</sup> Art. 2(e) and (f).

Tourist Development Corporation, KTDC. Pick one example, say KTDC. KTDC, a statutory corporation, owns shares in many hotels in Kenya. Add to that reality the fact that under section 82(2), any corporation acting under colour of law is plainly barred from discriminating against anyone on the basis of race, sex or other criteria set down in the Constitution.

The practical ramifications of this fact are that a hotel partly owned by Government of Kenya through KTDC, say Mombasa Beach Hotel is prohibited from hiring or firing staff on a discriminatory basis. If we read section 82 as allowing private discrimination, it leads to the conclusion that Reef Hotel, just next door to Mombasa Beach Hotel is free to discriminate where Mombasa Beach could not. This leads to the absurd conclusion that two similarly situated enterprises - say Mombasa Beach and Reef Hotel- are held to different constitutional standards in respect of how they can treat members of the public and their employees. Bluntly put, the argument comes down to this: that the court is powerless under section 82 to stop a persistent pattern of private violation of basic rights and that the Constitution of Kenya imposes no affirmative judicial duty to stop private discrimination even if it is as egregiously flaunted as in this case.

I suggest that the court must be persuaded to avoid this ludicrous outcome. A possible way to obviate such a result is to expand the meaning of the word 'access' in sub-section (7). Without a doubt, those who founded the Republic of Kenya believed that private discrimination in terms of access to places of entertainment was a pernicious evil inconsistent with the multi-racial and non-sexist aspirations of the new Republic. They inserted section 82(7) to buttress that belief.<sup>115</sup> In my opinion, the best reading of the Constitution would be one that reads section 82(7) as not only prohibiting hotels from imposing discriminatory rules regarding physical access but as prohibiting any type of discrimination in the hotels altogether. In my reading, there should be no significant constitutional distinction, as matter of judicial interpretation, between making laws that inflict discriminatory harm - prohibited by section 82(1)- and failing to prevent the infliction of discriminatory harm<sup>116</sup> by private actors –the issue involved in this case and *arguably* barred by section 82(7).

What is the basis for this conclusion? Let us consider the evil that the Constitution's sought to stop by section 82(7). This provision was designed to outlaw the segregationist policies that had been used to impose a colour-bar on the African people's access to places of entertainment open only to whites under colonialism. That constitutional aspiration can, even now, be

<sup>115</sup> It is instructive that the Constitution has not, for instance, sought to bar discrimination in private schools, for example.

<sup>116</sup> Laurence Tribe, *Constitutional Choices* p. 247.

defeated by a narrow reading of section 82(7). Consider the following hypothetical. It is possible to make a hotel single race by the simple expedient of recruiting employees from only one community. Suppose that an investor opens a hotel that recruits only Gujarati-speaking workers. The effect of this would be to filter all but Gujarati-speaking customers from coming to the hotel. Yet the owner of such a hotel may, plausibly, avoid charges of discrimination by *legally* opening his hotel to all members of the public. He may argue that those who avoid his hotel do so due to their own handicap, that is, their inability to speak Gujarati. He would be able to say that *he has not denied access to anyone* in any way prohibited by section 82(7). On a narrow reading of sub-section (7), this constitutional sophistry may even find judicial support. Read widely, the section would bar hotels from discriminating altogether, the real intention of section 82.

But I must assume that the High Court may well refuse to read the Constitution in the flexible and liberal manner I have proposed here. It could disallow applicant's case by arguing that a claim involving the right not to be discriminated against is not available against a private company. But such an argument need not be fatal. CEDAW prohibits both public and private discrimination. Is it possible to make a CEDAW-based claim in this case? In my view it is. The next section considers legal foundations of such a claim.

## ii. Making a CEDAW-based Claim in Kenya Courts: What Avenues exist?

It is possible to make a sexual harassment claim in Kenya Courts rooted in the provisions of CEDAW? I argue that it is. The entry point to my discussion is the combined 3<sup>rd</sup> and 4<sup>th</sup> Report submitted by the Government of Kenya to the United Nations Committee on the Elimination of all Forms of Discrimination Against Women. The Committee circulated this Report on 14<sup>th</sup> February, 2000. In it, the Kenya Government explained its failure to fulfill all its obligations under CEDAW in the following terms:

*“In the common law doctrine which is operational in Kenya, international law does not affect the municipal law of the country unless Parliament has specifically or in some other legislative way incorporated it as the law of Kenya. Under this general doctrine, the Convention [CEDAW] must be given effect through legislative, judicial and administrative measures.” (emphasis added).*

As a general statement of law the Commonwealth this is accurate. But individual countries are, through new provisions in the constitution or through statute, beginning to change the full force of this claim. The traditional basis for this claim was articulated by Lord Atkin in the case of *Attorney General for Canada v. Attorney General for Ontario*. The case turned on the various competencies of the dominion Parliament *vis a vis* those of the Provincial



Parliament. Stating the position then obtaining under British law, Lord Atkin distinguished between the making of a treaty, which is an executive act and the performance of its obligations when changes in law are needed-which is a legislative issue. Said he:

*“The question is not how the obligation [is] formed, that is the function of the executive, but how is the obligation to be performed, and that depends upon the authority of the competent legislature or legislatures.”<sup>117</sup>*

Consistent with the views expressed by the Government of Kenya and Lord Atkin, the ratification of treaties by executives in the Commonwealth have not automatically led to implementation of those treaties in the domestic realm. But this <sup>118</sup>has not meant that ratified treaties have had no legal consequences. There are ways by which international law could have consequences in the domestic sphere even in the absence of re-enactment by statute.

For a start, courts have used values and standards culled from international human rights instruments convention to interpret municipal constitutions and statutes. This application of international law has been justified on the grounds that to grant “individuals the full measure”<sup>119</sup> of the bill of rights it is necessary to interpret the rights therein generously. In South Africa -where customary international law and self –executing international treaties are binding- the Constitutional Court has ruled that even treaties that are not binding -because not enacted by Parliament- “may be used as tools of interpretation.” The Court explicitly stated that:

*“International agreements and customary international law accordingly provide a framework within which [the bill of rights] can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments such as the United Nations Committee of Human Rights, the Inter American Commission on Human Rights, the Inter American Court of Human Rights, the European Commission on Human Rights and the European Court of Human Rights and, in appropriate cases, Reports of specialized agencies such as the International Labour Organisation may provide guidance as to the correct interpretation of the provisions of [the bill of rights].”<sup>120</sup>*

The Constitutional Court was not only willing to borrow this international jurisprudence for the purpose of giving life to the bill of rights, it was prepared to go even further. Chaskalson J argued that even experiences from other

<sup>117</sup> 1937 AC 326 quoted in Malcolm N. Shaw, International Law 4th edition, 1997.

<sup>118</sup> The State v. Makwanyane, CCT/3/1994.

<sup>119</sup> See Minister of Home Affairs (Bermuda) v. Fisher [1980] AC 319 at 328-329.

<sup>120</sup> Chaskalson J, id. note 24 at para. 35.



countries with a longer history of rights jurisprudence would be invaluable in interpretation of the bill of rights in the South African Constitution. He had not doubt that:-

*“[C]omparative bill of rights jurisprudence will no doubt be of importance, particularly in the early days of the transition where there is no developed jurisprudence in this branch of law on which to draw.”<sup>121</sup>*

This approach comports with the Kenya Government’s own recognition, highlighted in its 3<sup>rd</sup> and 4<sup>th</sup> CEDAW Report that “the Convention [CEDAW] must be given effect through legislative, *judicial* and *administrative* measures.” This is a clear official concession that the responsibility to implement CEDAW does not lie with Parliament alone. There is a role for administrative and *judicial* measures. (*emphasis added*) In practical terms, this means that the judiciary may deploy the provisions of CEDAW to give meaning to the term ‘sex discrimination’ under section 82(3).

But this does not conclude the matter. Under the traditional doctrine of international law, international obligations became domestic law when those obligations are re-enacted as local law by municipal legislatures. Evolving practice suggests that this approach has been substantially modified. Kenya’s Report to the CEDAW Committee recognises this fact. It points out that “international law does not affect the municipal law of the country unless the Parliament has specifically *or in some other legislative way* incorporated it as the Law of Kenya.” The crucial words are ‘*in some other legislative way*’

Since the Report was submitted, the Parliament has “*in some legislative way*” incorporated international human rights instruments and treaties into the law of Kenya. In my view, *in some legislative way* means that obligations imposed by international human rights law can, for example, be made part of domestic law by reference. The only question is whether that is what the legislature intends. From recent legislation it is clear that the “intention” of the Kenyan legislature is to give effect to human rights instruments ratified by Kenya. On 12<sup>th</sup> March 2003, the *Kenya National Commission on Human Rights Act* entered into force. The Act defines the human rights applicable in Kenya as “the fundamental rights and freedoms of the individual protected under the *constitution* and *any human rights provided for in any international instrument to which Kenya is a signatory*. “International instrument,” is, in turn, defined as “any treaty, convention, declaration or statement of principles relating to human rights adopted by the General Assembly of the United Nations, the Organisation of African

<sup>121</sup> Id. para. 37.

Unity or any other international or regional organisation of which Kenya is a party.

In the body of the act, specifically section 17, the Commission is required- mandatory- to have regard “to all applicable international human rights standards and in particular to the fact human rights are indivisible, interdependent, inter-related and of equal importance for the dignity of all human beings.”

As to the justiciability of these rights, section 25 allows the Commission to “commence appropriate proceedings under section 84(1) of the Constitution for such orders, writs or directions as may be appropriate.” In other words, in enforcing a claim under the act, the Human Rights Commission will proceed as if that case were a claim involving section 70-83 inclusive. If there were any doubt that international human rights instruments are now a part of the bill of rights, this section scotches such heresy.

The act goes further. Under section 25, it allows the Attorney General to prosecute violators of human rights albeit on the recommendation of the Commission. Thus international human rights instruments have not only been domesticated, violation of provisions in those instruments is now a criminal offence.

Only one minor point remains to be cleared. Is section 3 of the *Kenya National Commission on Human Rights Act* sufficient to bring international human rights instruments fully into force? This issue arose indirectly in *Aldridge v. Booth*. A number of provisions in the Australian *Sex Discrimination Act* - sections 9(4), 9(10), 28, 81(1b)(iv) and 106 - were challenged. The context of this challenge was section 3 which stated that one of objects of the Act<sup>122</sup> was “to give effect to certain provisions of the Convention on the Elimination of all forms of Discrimination Against Women.” Though the Act defined the Convention and incorporated it as a schedule, it did not specify the “certain provisions of CEDAW” that it intended to bring into force.

The Respondent argued that the provisions of the act were insufficient to bring CEDAW into force. He challenged the act as *ultra vires* the legislative power of Commonwealth of Australia and contrary to the Constitution.

<sup>122</sup> There were four objects. The other objects (b), (c) and (d) were:-

- a. to eliminate, so far as is possible, discrimination against persons on the grounds of sex, marital status or pregnancy in the areas of work, accommodation, education, the provision of goods, facilities and services, the disposal of land, the activities of clubs and the administration of the Commonwealth laws and programs.
- b. to eliminate, so far as is possible discrimination involving sexual harassment in the workplace and in educational institutions; and
- c. to promote recognition and acceptance within the community of the principle of the equality of men and women.

The Court disagreed arguing that “it is sufficient to give effect to the Convention if an act gives effect to the principles given in the Convention: it is not necessary that the legislation implement an obligation imposed on Australia by its adoption of the Convention.”

This seems to be saying that it is not necessary for an implementing statute to specify all the particular obligations imposed on a country by a treaty in order to give that treaty full domestic force. On this reasoning, all that is needed is statutory clarity that Parliament intends to bring an international obligation into effect. In this regard, section 3 of the Kenya National Commission on Human Rights Act is reasonably clear that it is intended to implement the rights in the Constitution as well as those contained in international instruments to “which Kenya is a signatory.”

To this point, a number of issues have been settled: 1) that there is a widely accepted cross-cultural definition of sexual harassment; 2) that the two types of sexual harassment defined in this opinion can be pleaded in this case; 3) that on a generous reading, section 82 prohibits private discrimination and 4) that even if section 82 did not prevent private discrimination the provisions of that section read alongside those of the Kenya National Commission on Human Rights Act have applied CEDAW and other international human rights instruments to Kenya and that these instruments prohibit private discrimination.

But there are two key issues yet to be settled. One, whether sexual harassment is a form of sex discrimination prohibited by section 82 of the Constitution and applicable international human rights instruments, including CEDAW? Two, Whether a private company, such as Holiday Inn is liable for sexual harassment conduct of its supervisory staff? The next section of this opinion takes up these two questions.

## **Does Sexual Harassment amount to a form of Sex Discrimination Prohibited by CEDAW and the Constitution of Kenya?**

### **i. Sexual Harassment is a Form of Sex Discrimination**

I am unable to find judicial authority for the proposition that Article 1 of CEDAW outlaws sexual harassment as a form of sex discrimination. That absence reflects, to my mind, the infancy of the jurisprudence not, sadly, the dearth of sexual harassment. To find applicable judicial authority, one has to study case-law from countries where statutes outlawing sex discrimination have been judicially considered. We revert once again to *Aldridge v. Booth*.

The Respondent in *Aldridge* queried whether sexual harassment amounted to sex discrimination under the *Sex Discrimination Act*. It was argued on his behalf that sexual harassment was “not discrimination on the basis of sex... but rather the exercise of power by virtue of employer employee relationship (which power may be exercised without any discrimination between the sexes).”

*The Court gave this contention short shrift:*

*“It seems to me plain that sexual harassment is a form of sex discrimination, as a matter of analysis.”*

The Australian Court then quoted with approval the reasoning of the US Court of Appeals in *Barnes v. Costle*. Explaining why sexual harassment is sex discrimination, the Court in *Barnes* said:

*“But for her womanhood.... her participation in sexual activity would never have been solicited. To say then that she was victimised in her employment simply because she declined the invitation is to ignore the asserted fact that she was invited only because she was a woman subordinate to the inviter in the hierarchy of the agency personnel. Put another way, she became the target of her superior’s sexual desires because she was a woman and was asked to bow to his demands as the price for holding her job.”*

In *Aldridge*, the Court thought the reasoning in *Barnes* unanswerable and added that a woman is subjected “to that conduct because she is a woman and a [similarly situated] male employee would not be so harassed.”

It may be objected that the decision of the Australian Court was inevitable in light of section 28 which specifically prohibited sexual harassment. It may be argued that by proscribing sexual harassment, the act drove the Court, ineluctably, to conclude that sexual harassment was a type of sex discrimination. Such an objection superficially plausible would actually be spurious. Sexual harassment need not be outlawed in statute for Courts to rule it a form of sex discrimination. In *Barnes*, the US decision cited in *Aldridge*, there was no statutory prohibition of sexual harassment. At issue were provisions of Civil Rights Act, 1964 that did not even mention sexual harassment. Likewise, in the leading of *Meritor Savings Bank, FSB v. Vinson*, the Supreme Court was clear that:

*“[W]ithout question, when a supervisor sexually harasses a subordinate because of the subordinate’s sex, that supervisor discriminates on the basis of sex.”*

As in *Barnes*, *Meritor* implicated Title VII of the Civil Rights Act of 1964 which does not specifically outlaw sexual harassment. It says, so far as is

relevant, that it is “an unlawful employment practice for an employer... to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, colour, religion, sex or national origin.” This is the typical formulation of a standard anti-discrimination clause. It makes no reference to sexual harassment at all. Nonetheless, the Court has had no difficulty over the years concluding holding that sexual harassment is a form of sex discrimination prohibited by Title VII.

Based on the authorities, the dispositive issue is whether a person receives unwanted sexual advances because of her sex. If the answer is yes, then a sex discrimination claim lies. In this case, there can be no doubt that similarly situated male employees of the hotel company were not treated the way the complainant was. And the differential treatment is or can be wholly attributed to her sex. This, in my view, is all that is needed to trigger a sex discrimination claim under section 82 and the provisions of CEDAW. I conclude, based on the authorities reviewed so far, that the complainant has a viable sex discrimination claim founded on the sexual harassment conduct of her supervisor.

But this still leaves open the question of the hotel company’s liability for unlawful actions of its manager. The answer to that question follows.

## **ii. The Scope of a Company’s Liability for Sexual Harassment Claims against its Supervisory Staff: Holiday Inn is Liable**

The question whether a company should be held liable for sexual harassment claims involving its supervisory staff was directly in issue in *Meritor*. To see the issue clearly, it is important to know the facts of *Meritor*.

Michelle Vinson, the Respondent in the Supreme Court, met Sidney Taylor, then a Vice President of the Petitioner Bank in 1974. She sought employment at the Bank. Taylor gave her an application which she completed and returned the next day. Later the same day, Taylor gave her a call and told her that she had been hired. With Taylor as her supervisor, she started off as a teller trainee, was subsequently promoted to teller, head teller and eventually to assistant branch manager. She worked at the branch for four years and it was undisputed that her rising through the ranks was based on merit alone. In September 1978, she notified Taylor that she was taking sick leave for an indefinite period. On 1<sup>st</sup> November, the Bank discharged her for excessive use of that leave. She then sued Taylor and the Bank, claiming that during her four years at the Bank she had “constantly be subjected to sexual harassment by Taylor.” She sought injunctive relief, compensatory and punitive damages and costs against Taylor and the Bank.

At trial the parties gave conflicting testimony about Taylor's behaviour. Michelle said that before her confirmation Taylor treated her in fatherly manner but upon employment as teller his behaviour changed. He invited her to dinner and during the meal suggested that they go to a motel to have sex. At first she refused but fearing for her job, she finally agreed. Thereafter, she said, Taylor made repeated demands, fondled her in front of other employees, followed her into the women's toilets, exposed himself to her and even raped her on a number of occasions. She estimated that during that time she had sex with him some 40 or 50 times. These activities stopped after 1977 when she started going out with a steady boyfriend.

Taylor denied these allegations. He contended instead that Michelle made these accusations arising from a business dispute. Meritor Bank also denied the allegations arguing that any sexual harassment by Taylor was unknown to them and was done without its consent or approval.

The District Court denied relief but did not resolve the conflicting testimony about a sexual relationship between the two. On the bank's liability the District Court noted the Bank's express policy against discrimination. It observed that neither the Respondent nor any other employee had ever lodged a complaint about sexual harassment by Taylor. On the basis of this the District Court concluded that "the Bank was without notice and cannot be held liable for the alleged actions of Taylor.

The Court of Appeals reversed and then remanded the case for further hearing in accordance with its directions. On the Bank's liability the Court of Appeals held that an employer was absolutely liable for sexual harassment practiced by its supervisory staff, whether or not the employer knew or should have known about the misconduct. The Court of Appeals held that a supervisor is "an agent" of his employer. This is so even if he lacks the authority to hire, fire or promote, since 'the mere existence- or even appearance- of a significant degree of influence in vital job decisions gives any supervisor the opportunity to impose on employees."

A subsequent application for a full bench by Meritor in the Court of Appeals was denied and the case went to the Supreme Court. Though the Court declined to make a definitive rule on employer liability, it nonetheless held Meritor Bank liable. More pertinently, the Court said that the "absence of notice to an employer does not necessarily insulate that employer from liability." As regards the Bank's argument that it had a grievance procedure in place and that that should be enough to insulate it from liability the Court accepted that though those facts were "plainly relevant" they were not "dispositive." It noted that:

*"[P]etitioner's general non-discrimination policy did not address sexual harassment in particular and thus did not alert employees to their*

*employer's interest in correcting that form of discrimination. Moreover the Bank's grievance procedure apparently required an employee to complain first to her supervisor, in this case Taylor. Since Taylor was the alleged perpetrator, it is not altogether surprising that Respondent failed to invoke the procedure and report her grievance to him. Petitioner's contention that Respondent's failure should insulate it from liability might be substantially stronger if its procedures were better calculated to encourage victims of harassment to come forward."*

Though the view of Supreme Court in this case has much to commend it, it does not go nearly as far as it should. In my view, the decision of the Court of Appeals in the earlier case of *Tidwell v. American Oil Company*<sup>123</sup> is more attuned to the realities of sexual harassment in the modern work place. In *Tidwell* the Court explained that a company should be liable because:

*"[T]he modern corporate entity consists of individuals who manage it, and little, if any progress in eradicating discrimination in employment will be made if the corporate employer is able to hide behind the shield of individual employee action."*

This, too, was the view of the concurring judgement of Justice Marshall (joined by Brennan, Blackmun and Stevens) in *Meritor* itself. Said Marshall:

*"[A]n employer can only act through individual supervisors and employees; discrimination is rarely carried out pursuant to a formal vote of a corporation's board of directors."*

Explaining why he would hold a company responsible for the sexual harassment conduct of its supervisory staff, he added:

*"[I]t is the authority vested in the supervisor by the employer that enables him to commit the wrong: it is precisely because the supervisor is understood to be clothed with the employer's authority that he is able to impose unwelcome sexual conduct on subordinates....there is therefore no justification for a special rule....that sexual harassment does not create employer liability until the employee suffering the discrimination notifies other supervisors."*

The Australian Court has endorsed the approach in *Tidwell* and being a British Commonwealth decision, it is, arguably, more persuasive than the American cases. According to the Court in *Aldridge*:

<sup>123</sup> 332 F. Supp. 424 (1971)



*“It is for an employer or principal to establish all reasonable steps to be taken by that employer or principal to prevent acts constituting unlawful conduct. The discharge of this onus, of course, depends on the particular circumstances of the case, but it is seriously to be doubted that it can be discharged in circumstances of mere ignorance or inactivity.” (emphasis added)*

Read in the context of these authorities, the provisions of CEDAW and of section 82 of the Constitution require the Holiday Inn Hotel to create an environment free of sexual harassment for its women workers. That requirement is coterminous with a duty to provide an effective and usable complaints’ mechanism. This is an affirmative duty and, as the Australian Court says, it cannot be discharged by feigning ignorance or inaction.

On a review of the authorities and the relevant statutes and conventions, this opinion has concluded that sexual harassment is a type of discrimination outlawed both by CEDAW and the Kenya Constitution; that the provisions of CEDAW are applicable to Kenya through section 82 and the *Kenya National Commission on Human Rights Act*; that under both CEDAW and the Kenya Constitution private discrimination is prohibited and that private companies can be held liable for sexual harassment conduct engaged in by their supervisory staff.

## **B. Part Two: Discrimination Based On One’s Medical Condition- The Case Of Hiv/Aids**

In this case, the issue for decision is whether there are any human rights claims under international human rights conventions and Nigerian law for an employee - dismissed from private employment on the basis of an erroneous diagnosis of HIV/AIDs arising from an employer’s mandatory testing. There are three legal questions involved: 1) Are compulsory employer mandated HIV/ AIDs tests permissible under human rights treaties to which Nigeria is a signatory and are these applicable to private companies as opposed to officials acting under colour of law? 2) Does the Nigerian Constitution implement or recognize those human rights standards? 3) What remedies exist for an employee who has been dismissed on the basis of a false HIV positive result?

The answer to these questions rest on at least two different rights<sup>124</sup>, both protected by international human rights conventions and by the Nigerian Constitution. These are: 1) the right to privacy and 2) the right not to be

<sup>124</sup> I leave open the larger argument that imposing burdens on people merely because they are infected with the HIV virus actually violates many more rights than the ones I specify in this opinion. Here I deal only with what may be considered core violations. It might be said, for instance, that it violates the following freedoms: 1) privacy and the freedom and security of person. This includes the right to control one’s body and not to be subject to medical procedure without one’s informed consent. This means that one could not be forced to have an HIV test; 2) the right to informational privacy. This means that one would have the right to keep his or her HIV status confidential; 3) the freedom of expression and access to information. This means that employees have a right to proper information



discriminated against. Scrutinizing the Conventions, this part argues that international human rights impose on states a dual obligation: *a negative duty* not to interfere with rights and *a positive duty* to enact laws that outlaw horizontal violations of rights by private individuals.<sup>125</sup> What matters, legally speaking, is the gravity of the threat to liberty and integrity not where the threat comes from, states or private individuals. The second part analyses the relevant articles of the Nigerian Constitution and shows that these are, in words and obligations imposed, consistent with the relevant human rights conventions. The third part considers the actions available to the applicants in this case.

## **Compulsory Pre-Employment Medical Testing: The Nature Of The Human Rights Questions Involved**

International human rights law bars arbitrary intrusions into privacy. Such intrusions may, of course, be obviated by consent. The term ‘privacy’ is broad enough to protect one from medical and other physical tests and examinations. But even if consent is given and such tests are then conducted, human rights law regulates how such tests may be used. Such results may not be used, for example, in a discriminatory manner in the allocation of burdens and benefits. Below I elaborate on each of these legal propositions as they apply to this case. I begin with the right to privacy. On a plain reading of the relevant conventions, compulsory pre-employment HIV/AIDS tests of the type that the applicant was required to take are clearly illegitimate. First, they invade a clearly protected realm of privacy. Secondly, they involve a degree of coercion wholly inconsistent with the dignity and integrity of the individual. As I conclude part one, I will also argue that it is illegitimate to use medical results to hire or fire an employee unless the medical condition at issue is a relevant and bona fide employment qualification. I argue that the applicant’s status in this case would not qualify as a bona-fide employment qualification for job that he was being hired for. This analysis leaves aside, for the moment, the very grave fact that the results of the HIV/AIDS test on Johnson was, in any case, erroneous. This fact gives rise to other claims that will be considered later.

### **a. The Right to Privacy**

The foundations the right to privacy is Article 12 of the Universal Declaration of Human Rights<sup>126</sup>, which is in its terms very much like article 37 of the Nigerian Constitution. Article 12 states that “no one shall be subjected to

on HIV and AIDS and access to medical records held by a hospital and 4) the freedom and right to a trade, occupation and profession. This means that one can choose the kind of work they want to do on a non-discriminatory basis.

<sup>125</sup> F. Michelman, *Liberties, Fair Values, and Constitutional Method*, in: G. Stone, R. Epstein and C. Sunstein, *The Bill of Rights in the Modern State* (Chicago 1992).

<sup>126</sup> The argument used to be made that the Universal Declaration of Human Rights has no legal force. But see earlier parts of this chapter quoting the US Court of Appeals for the Second Circuit.

arbitrary interference with his privacy, family home or correspondence, nor to attacks upon his honour or reputation. Everyone has the right to the protection of the law against such interference.”

This right and the obligation imposed are re-iterated in Article 17 of the International Covenant on Civil and Political Rights, ICCPR which states that:

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family home or correspondence nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

As both articles 12 of UDHR and 17 of the ICCPR make clear, this right can be violated in at least two ways. First, it is violated, in the talismanic case, where the state actually interferes with the privacy of an individual. Secondly, and as importantly, it is violated if the state fails- administratively and judicially- to provide mechanisms, under sub clause 2, to protect privacy. The duty in sub-clause 2 is a specification of the more general duty imposed on state parties by article 2(2) of the ICCPR. That article says that:

*“Where not already provided for by existing legislative and other measures, each state party to the present covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognised in this Covenant.”*

As to the proper scope of the state’s specific duty regarding article 17 of the ICCPR, the Human Rights Committee in its General Comment number 16<sup>127</sup> on the interpretation of this article says that:

*“In the view of the Committee this right is required to be guaranteed against all... interferences and attacks whether they emanate from State authorities or from natural or legal persons. The obligations imposed by this article require the State to adopt legislative and other measures to give effect to the prohibition against such interferences and attacks as well as to the protection of this right.”*

And further that

<sup>127</sup> See General Comment No. 16: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Art. 17) made at the Thirty-second session, 1988

*“States parties are under a duty themselves not to engage in interferences inconsistent with article 17 of the Covenant and to provide the legislative framework prohibiting such acts by natural or legal persons.”*

At the regional level, the African Charter on Human and People’s Rights, ACHPR, does not have the equivalent of article 12 of the UDHR or article 17 of the ICCPR.. Yet the liberty and autonomy interests protected by the right to privacy are clearly taken care of by article 4. That article is unequivocal that “human beings are inviolable” and that “every human being shall be entitled to respect for his life and integrity of his person.” It concludes with the injunction that “no one may be arbitrarily deprived of this right.” As we shall see shortly, the values of inviolability and integrity are core to the notion of private life as protected by the other human rights instruments. And like these other instruments, the African Charter protects individuals from both state and private violations.

There is, then, to this point no reasonable contrary argument: the Universal Declaration, the African Charter and the ICCPR prohibit interferences with privacy and personal integrity irrespective of whether these come from the state or private persons. However, that does not settle the question in this case. The central issue here is whether this right is sufficiently broad to protect individuals from compulsory medical tests. The answer turns on whether there is a human rights definition of privacy and private life. Though judicial opinion on the proper scope of the right to privacy is thin, the emergent jurisprudence of the European Court of Human Rights where the matter has received attention is, to my mind, apposite and very persuasive.

To put the matter in context, we must begin with the provisions of the European Convention on Human Rights. The relevant right in the Convention is article 8. That article has two parts which state that:-

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The nature of the duty imposed on by this article is framed, especially in sub-clause 2, much more narrowly than it is in the Universal Declaration and the ICCPR. It seems to suggest that interferences by private individuals are not covered. But, though important, this framing does not affect the meaning or the scope of the right to privacy and private life protected in sub-clause 1.

In a number of leading cases, the Court of Human Rights has refused to construe this right narrowly. In the seminal decision in *Niemetz v. Germany*<sup>128</sup> the Court refused to define privacy arguing that it did not “consider it possible or necessary to attempt an exhaustive definition of the notion of private life.” However, it stated, it “would be too restrictive to limit the notion to an ‘inner circle’ in which the individual may live his own personal life as he chooses and to exclude there from entirely the outside world not encompassed within that circle.” The Court had no doubt that private life was broad enough to include “activities of a professional or business nature.” Ten years later, in *Pretty v. United Kingdom*,<sup>129</sup> the Court considered that the notion of private life included “the physical and psychological integrity of a person” and that some of the protected elements of the private sphere were “gender identification, name and sexual orientation.” More important, for our purposes, the Court had no doubt that “the notion of personal autonomy is an important principle” underlying the right protected in article 8.

Scouring through the cases, article 8 jurisprudence has congealed into five protective limbs.<sup>130</sup> These are, respect for an individual’s 1) physical and moral integrity; 2) personal identity; 3) personal autonomy and sociability; 4) sexual orientation, identity and relations and 5) privacy and the prevention of intrusive publications or communications. The applicant’s case here falls under the first head, respect for the physical, mental and moral integrity of the individual. As the cases have developed, they have progressively identified what amounts to illegitimate intrusions into privacy under this article. From these cases<sup>131</sup> individuals have the right not to be subjected “to compulsory physical interventions and treatments, such as blood<sup>132</sup> and urine<sup>133</sup> tests, forced gynaecological examination,<sup>134</sup> corporal punishment, forcible examination in hospital<sup>135</sup> or administration of an injection or treatment..” As already noted, there is an important distinction between article 8 of the European Convention and the right to privacy under other international human rights conventions. Article 8(2) makes it clear that the object essentially to protect “the individual against arbitrary interference by public authorities.” Yet even in light of the explicit language of article 8(2) the Court of Human Rights has held that this right does not:

<sup>128</sup> (1992) 16 EHRR 97, especially para 29-30

<sup>129</sup> (2002) 35 EHRR I.

<sup>130</sup> Identified in *infra* note 8 at p.271

<sup>131</sup> See Lord Lester of Herne Hill and David Pannick, Human Rights Law and Practice, Note that I have kept all the footnotes from the original quote.

<sup>132</sup> See *X v. Austria*, 18 DR 154(1979) E. Com HR (involving paternity proceedings.)

<sup>133</sup> *Peters v. Netherlands*, 77-A DR 75 (1994) E Com HR (Compulsory random drug testing by urine sample in prisons found to be an interference yet complain was held inadmissible because it was justified with reference to art. 8(2))

<sup>134</sup> *YF v. Turkey* 22nd July 2003, ECt HR.

<sup>135</sup> *Matter v. Slovakia* (2001) 31 EHRR 783.

*“merely compel the state to abstain from [arbitrary] interference: there may, in addition to this primary negative undertaking, be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of relations of individuals between themselves.”*<sup>136</sup>

To this point, the relevant international human rights instruments and the jurisprudence of the European Court of Human Rights affirm the following conclusions, all of them relevant to the Taire Johnson case. *First*, individuals have a right to privacy. This right includes freedom from arbitrary interference with their physical and mental integrity. Compulsory medical tests not germane to a legitimate purpose are violations of this right. *Secondly*, even where the right appears to protect individuals only against interference by public officials, as in Europe, the Court has been ready to read a positive obligation on the state to provide protection against horizontal violations of this right by private individuals. *Thirdly*, the Universal Declaration, the African Charter and ICCPR are explicit that all forms of interference with this right whether by government or private individuals are illegitimate.

Only one question now remains to be settled. Could it be argued that the applicant consented to the medical examination and that therefore the employer is absolved from any liability for violation of rights? I answer that question in two steps. First, can there be said to be consent in a case such as this? As was said in a different context in the old case, *Re Bethany*, “necessitous men are not, truly speaking, free men.” In the context of high unemployment in Nigeria there is an element of coercion involved whenever an employee is subjected to requirements that he would not voluntarily abide by if he or she did not desperately need the job. Secondly and more important, can a prospective employer impose conditions that violate basic rights in the absence of a truly compelling public interest argument? I argue that on the authorities he cannot. Conditioning a contractual benefit on the waiver of basic rights and freedoms is a threat of the type that has been ruled in case after case as contrary to public policy. To see that this is so, it is necessary to consider the notion of coercion as known to the law of contract.

As G.H. Treitel<sup>137</sup> points out, a requirement does not give rise to actionable threat or duress in law unless such a requirement is illegitimate in one of three ways. First, it may be that the threat itself is a legal wrong, as for example when a trade union threatens to induce breach of contract in order to prevent a ship from leaving port. Secondly, the threat may be wrongful as in the case of a blackmailer who threatens to reveal his victim’s behaviour to third parties.

<sup>136</sup> See *Stubbings v. United Kingdom*, (1996) 23 EHRR 213 quoted in Lester and Pannick *infra*.

<sup>137</sup> Guenter H. Treitel, *The Law of Contract*, 11th edition pp. 405-408.

Thirdly, the threat may be contrary to public policy. It is this third limb of coercion that is involved here. Private requirements that condition employment on surrender of basic human rights are precisely the type of illegitimate impositions that constitutions and human rights instruments are designed to outlaw. Even where such requirements are not criminalized they should not be allowed to stand as a matter of public policy. The issue for the High Court in Nigeria may then be framed as follows: any requirement that conditions hiring on an employee's readiness to surrender his constitutional rights, such as compulsory pre-employment HIV/AIDS testing, is a coercive requirement contrary to public policy. To argue otherwise would mean that rights and liberties secured by international conventions and guaranteed by municipal constitutions could be clawed back through contract.

That is one approach. But suppose the High Court holds that the applicant here did in fact consent to the medical test? That would not, in my view, conclude the matter. As noted, the right to privacy protects an individual from invasive medical procedures. But if such procedures are held lawful, the right not to be discriminated against regulates how the results from such procedures may be used. There are legitimate and illegitimate ways of using information arising from medical tests. I would argue that using the results of a HIV/AIDS test to fire an employee is discriminatory on the basis of one's health status. This type of discrimination is barred by international human rights conventions. It is to this issue that I now turn.

## **b. The Right not to be Discriminated Against**

There is, as yet, no specific human rights instrument that prohibits discrimination on the basis of an employee's HIV status. This surely must be due to the fact that HIV/AIDS is a recent medical condition. However, differential treatment of a person based solely on his or her medical condition is presumptively illegal. This can be properly inferred from anti-discrimination provisions of all the relevant human rights conventions. There is, in any event, a rapidly sedimenting international opinion against stigmatization and discrimination on account of one's HIV status. The starting point is the Universal Declaration, UDHR. The Declaration was, at least in part, a reaction against the soporific ideology of European fascism and the egregious human rights violations that it permitted. The Declaration is a deeply anti-discriminatory instrument in spirit. In it, the members of the UN re-affirm their faith in "fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women" and their determination "to promote social progress and better standards of life in larger freedom."<sup>138</sup> Under article 2, "everyone entitled to all the

<sup>138</sup> Para. 5 of the Preamble of the Universal Declaration of Human Rights.

rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or *other status*.”<sup>139</sup>

These obligations are amplified in subsequent United Nations instruments, in particular the International Covenant on Civil and Political Rights ICCPR and the International Covenant on Economic, Social and Cultural Rights, ICESCR. In the ICCPR, states reiterate their commitment to ensure that covenant rights will be respected and protected without “distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or *other status*.”<sup>140</sup> Under the ICCPR the general duty not to discriminate rests on the recognition that “these rights derive from the inherent dignity of the human person.”<sup>141</sup> Likewise state parties to ICESCR undertake to “guarantee that the rights enunciated in the present covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or *other status*.”<sup>142</sup>

As applied in the Taire Johnson case, the human rights instruments appear to articulate a triple obligation. First, there is a *negative duty* on the state to refrain from discriminating on the basis of any of the proscribed grounds. Secondly, there is a *positive duty* to enact laws that bar or remove those that allow discrimination. Thirdly, there is an administrative and judicial duty, categorically required by both CERD and CEDAW, to scrutinize employment laws and practices for indirect or “constructive discrimination.”

On the face of it, these instruments do not bar discrimination against a person on the basis of his or her HIV status. But surely- as a matter of legal interpretation- the term *other status* -prominent in all the instruments referred to here- is broad enough to include a person’s medical or physical status. As a matter of practice, there is now a growing international recognition of the pernicious consequences of discrimination on the basis of one’s HIV/AIDS. Not only has such discrimination sundered state efforts to fight the disease, it has also legitimized widespread social stigmatization and made it hard for infected people to live normal lives.

The point is that these international activities are a good guide as to the emerging global consensus. Though the activities and practices have not coalesced into international custom, they are persuasive enough for a court to consider them in assessing whether the conventions should be read to

<sup>139</sup> id.Art. 2.

<sup>140</sup> ICCPR, article 2(1).

<sup>141</sup> International Covenant on Civil and Political Rights, ICCPR, para. 2 of the Preamble.

<sup>142</sup> Article 2(2).



include HIV/AIDS. I now turn to an analysis of some of these emerging practices. The most important of these is the work of the International Labour Organization, ILO. ILO has identified a set of good practices relative to HIV/AIDS. It is likely that eventually these good practices will congeal into some sort of treaty or convention in the not too distant future. The practices, termed the Code of Practice on HIV/AIDS and the World of Work are formulated as guidelines to address HIV/AIDs in the workplace. The areas identified as requiring action are: prevention of HIV/AIDS, management and mitigation of the impact on work; care and support for workers infected and affected and elimination of stigma based on real or perceived HIV status.

The Code recognizes the cross-sectoral nature of HIV/AIDS and outlines the rights and responsibilities of different stakeholders: governments, employers, employers' organizations, workers and workers organizations in the development of workplace based policies and programmes. Governments and employers must provide information, education programmes and take practical measures that support behaviour change. Of immediate application to this opinion, the Code discourages testing in the workplace. Instead it supports voluntary counselling and testing. It also discourages testing as a condition for eligibility for national social security schemes and general insurance policies. Though it makes provision for testing for surveillance purposes, it requires such testing to comply with the ethics of scientific research. We must keep in mind that these provisions are merely supplemental to the general non-discriminatory obligation imposed by the human rights instruments already considered.

Given the fact that the ILO guidelines have not crystallized into a fully fledged international instrument, the Court in Nigeria should consider comparative law and practice. In this regard, South Africa is a good starting point. The decision of the South African Constitutional Court in *Hoffman v South African Airways* sets down the proper human rights approach to issues of HIV/AIDS.<sup>143</sup> In this case, South African Airways refused to employ someone on the basis of his HIV status. The Court held that this employment bar was inconsistent with the equality provisions of the Constitution. Though the case was brought before the enactment of the *Employment Equity and the Promotion of Equality and Prevention of Unfair Discrimination Act*, the Court nonetheless ruled that discrimination on the basis of HIV-status was neither justifiable nor fair in terms of the Constitution or according to the available medical evidence. The Court also said that people living with HIV 'enjoy special protection in our law'. The Court then ordered SAA to employ the appellant as a cabin attendant.

<sup>143</sup> 2000 (11) BCLR 1211 (CC)



The holding of the case subsequently found a statutory basis in the *Employment Equity and the Promotion of Equality and Prevention of Unfair Discrimination Act*. The case and the statute are supplemented by a Code of Good Practice on Key Aspects of HIV/AIDS and Employment issued by the Department of Labour pursuant to the Act.

The dual purpose of the Code is 1) to eliminate unfair discrimination based on HIV status in the workplace and 2) to promote a non-discriminatory workplace that allows people living with HIV/AIDS to be open about their HIV status without fear of stigma or rejection.

The key features of the Code include: a) promoting a non-discriminatory work environment, b) the elimination of discrimination in employment practices and policies, and c) the adoption of measures to ensure that employees with HIV and AIDS are not unfairly discriminated against and are protected from victimization. These goals are supplemented by a prohibitory ban on discrimination in the allocation benefits and dismissals on the grounds of HIV status. As regards testing for HIV/AIDS, the Code prohibits testing unless authorized by the Labour Court under defined circumstances. Testing is permissible if it is initiated by the employee and includes informed consent as well as pre- and post-test counselling. Surveillance and epidemiological testing is allowed so long as it is undertaken in accordance with ethical and legal principles governing research. But research results may not be used to unfairly discriminate against individuals or groups. The Code also protects the privacy rights of all persons living with HIV/AIDS.

In Canada the courts have reached the same conclusion as the South African Court even though from a slightly different legal route. Discrimination on any of the prohibited grounds, including one's HIV/AIDS status, may be allowed if the person who wants to discriminate can demonstrate that the discriminatory criteria is a *Bona Fide Occupational Qualification*, BFOQ. But before this exception can kick in, the employer must 'reasonably accommodate the interests of the employee.' This approach complements that of the South African Constitutional Court. Using the Canadian approach, the South African constitutional court said, in effect, that given the level of scientific knowledge, one's HIV status was not a bona-fide employment qualification for the job of airline cabin crew. All things considered, one could be an effective member of the cabin crew even if he or she was HIV positive.

The leading comparative authority for the definition of the BFOQ exception is *Ontario Human rights Commission v. Etobicoke (Borough)*.<sup>144</sup> At issue was whether a requirement that firefighters compulsorily retire at age 60

<sup>144</sup> [1982] 1 SCR 202

constituted discrimination on the basis of age prohibited by the Human Rights Act. The employer argued that this was a *bona fide occupational qualification*, the older one got the less well they performed as a firefighter. The Supreme Court said.

*“To be a bona fide occupational qualification... a limitation, such as mandatory retirement at a fixed age, must be imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interest of the adequate performance of the work involved with all reasonable dispatch, safety and economy and not for ulterior or extraneous reasons aimed at objectives which could defeat the purposes of the [human rights] code. In addition, it must be related in an objective sense to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public.”<sup>145</sup>*

Applied to the applicant’s case, it is clear that he was in perfect health. There was no claim by the employer that even if he was HIV positive he was incapable of performing the job at hand. Indeed in this case the matter is beyond doubt, given the fact that he was, in fact, not HIV positive. But we shall come to this issue later. But first we turn to the provisions of the Nigerian Constitution.

## The Provisions of the Federal Constitution of Nigeria

Nigeria has ratified or acceded to all the relevant instruments mentioned in this opinion. However, other than the African Charter, it has not enacted any of these instruments as local legislation. Does this mean that these instruments have no provenance?

In Nigeria, as with other countries in the Commonwealth, the general position is that international treaties do not have domestic application unless re-enacted as local statutes. Article 12(1) of the Federal Constitution says that “no treaty between the Federation and any other country shall have the force of law [except] to the extent to which any such treaty has been enacted into law by the National Assembly.” Yet as practice from the Commonwealth shows, few courts have ever accepted the robust form of this argument, namely, that ratified treaties which have not been enacted are legally irrelevant to the settlement of disputes in municipal courts. Far from it, Commonwealth Courts have drawn upon ratified but un-enacted international treaties and conventions again and again to resolve municipal disputes. There have done so in two ways: by using international law and

<sup>145</sup> *ibid.* at p.208.

comparative practice as persuasive sources of law and through the doctrine of legitimate expectations.

### i. International Law as Persuasive Authority

International treaties which have not been incorporated can be used as a persuasive authorities if domestic legislation is silent, ambiguous or uncertain. Domestic law may be silent or uncertain if the question before the court is of recent provenance such as HIV/AIDs or, say, the internet. If so, the court may then fall back on international law if it is clear and does not obviously contradict local law. Domestic law may also be uncertain in other ways. Suppose that there is a law regulating a certain matter say, as in this case, privacy but there is doubt whether the right to privacy also includes the right not to be subject to invasive medical procedures. In the absence of local jurisprudence, superior courts should look at international law for illumination. This was the conclusion of the House of Lords in the case of *Brind v. Home Secretary*.<sup>146</sup> In *Derbyshire County Council v. Times Limited*<sup>147</sup> the Court of Appeal was willing to go much further than the House of Lords was prepared to go in *Brind*. *Derbyshire* arose from a *Times Newspaper* story alleging that a local Council had misused its employees pension fund. On the basis of these allegations, the Council sued in libel. In coming to its decision, the Court of Appeal accepted that the European Convention on Human Rights was not a part of English domestic law (and the 1998 English *Human Rights Act* had not come into force) but it was nonetheless willing to consider the human rights case law from the European Court in order to settle the issue before it. Based on this case law, the Court of Appeal held that the libel action was an unnecessary restriction on the freedom of expression.<sup>148</sup>

### ii. The Doctrine of Legitimate Expectations

In addition to using international law as persuasive authority to fill gaps and clarify ambiguities and uncertainties in local legislation, Courts may also use the doctrine of legitimate expectations as articulated by the Australian High Court in the case *Minister of State for Immigration and Ethnic Affairs v. Ah Hin Teoh FC*.<sup>149</sup> Such an argument is consistent with the intentions of the drafters of the Nigerian Constitution. Article 19 is clear that “the foreign policy objectives” of the Nigerian state shall include “respect for international law and treaty obligations.” On the face of it, this declaration must surely mean that it is not the intention of Nigeria to renounce its international obligations merely because treaties it has ratified have not been domesticated.

<sup>146</sup> [1991] 1 All ER 720, HL

<sup>147</sup> [1993] 1 All ER 1011.

<sup>148</sup> Though the case went to the House of Lords, the Lords did not consider the provenance of the European Court's decisions on the question, preferring to decide the case on other grounds.

<sup>149</sup> No. 95/013, 7th April 1995: Lexis Transcript.

One objection may be raised against this reading of article 19. It may be argued that this article is merely a Directive Principle of policy not a prescriptive source of normative obligation. Such directive principles are, by the explicit terms of the Federal Constitution itself, incapable of enforcement in the Courts. This is true but it does not settle the issue. Even presumptively declaratory and non-binding directives of policy, such as this one, have been used by courts in Ireland and India to interpret the proper scope of the rights of citizens and the powers of government. In Ireland, the High Court considered this issue in the case of *Murtagh Properties v. Cleary*.<sup>150</sup> The question here was the reach of Directive Principle number 2(i) in the Irish Constitution. This principle required state to direct its policies towards ensuring “that the citizens (all of whom, men and women equally, have the right to an adequate means of livelihood) may, through their occupations, find the means of making reasonable provision for their domestic needs.”

As in Nigeria, the Irish Constitution explicitly states that Directive Principles are guides to Parliament only and are not cognisable by any Court under the provisions of the Constitution. Notwithstanding this injunction, the Irish High Court was prepared to say that directive principle 2(i) created a constitutional right to equality in employment. The Court read this directive in this way in order to foil men employees who had picketed an employer’s premises in order to induce the sacking of women workers.

### iii. The Right to Privacy under the Federal Constitution

This much, then, is clear: both international law and comparative jurisprudence have relevance to the question whether the applicant’s rights have been violated. This jurisprudence can be used to clarify, supplement or define the proper scope of the right to privacy explicitly protected by the Nigerian Constitution. Under article 37, the Constitution says that “the privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected.” Unlike other rights in the Federal Constitution, there are no exceptions to this right. This right is worded in precisely the same manner as the corresponding right in the Universal Declaration of Human Rights. More important, like the ICCPR, the ICESCR and the African Charter and unlike the European Convention on Human Rights, the right in the Federal Constitution is available against interferences by the state and *by whomever else*.

Other provisions of the Constitution support this conclusion. Article 46 makes remedies available for all violations of rights, whether these violations come from officials acting under colour of law or from private individuals. Article 46 says that “any person who alleges that any of the provisions of this

<sup>150</sup> [1972] 1 I.R. 330 (high court)

Chapter has been, is being or likely to *be contravened in any State* in relation to him may apply to a High Court in that State for redress.”

The relevant words are *contravened in any state*. The Constitution does not say *contravened by any state*. On reflection, it is obvious why the Constitution specifies the locus of the violation rather than the actual violator. That purpose is evinced in the clause “*may apply to a High Court in that State for redress*.” The clause discourages forum shopping: applications for the enforcement of constitutional rights must be made, in the first place, in the territories where the violations happened. This clause does not in any way identify the duty bearer, that is, the person against whom remedies may be available. In other words, the Federal Constitution recognizes that all persons -public or private- are duty bearers and can violate rights but it designates the High Court in the State where the violation happened as the court of first instance.

## ii. What of the Right to be free of Discrimination under the Federal Constitution?

The second limb of the human rights claim available to the applicant rests on the anti-discrimination law. Does the Nigerian Constitution recognize the anti-discrimination principle? The relevant clause is article 42. Its three sub-sections state that:

- (1) A citizen of Nigeria of a *particular community*, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person:-
  - (a) be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religion or political opinion are not.
  - (b) be accorded either expressly by, or in the practical application of, any law in force in Nigeria or any such executive or administrative action, any privilege or advantage that is not accorded to citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions.
- (2) No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth.
- (3) Nothing in subsection (1) of this section shall invalidate any law by reason only that the law imposes restrictions with respect to

the appointment of any person to any office under the State or as a member of the armed forces of the Federation or member of the Nigeria Police Forces or to an office in the service of a body, corporate established directly by any law in force in Nigeria.

Unlike the Human Rights Conventions, the Federal Constitution does not appear to outlaw discrimination based on one's status. On a cramped reading, this may be said to exclude HIV or other medical status from the purview of constitutional scrutiny. However, on a more liberal reading, the word "*community*", highlighted above may be interpreted in a way that expands the categories of discrimination covered by the Nigerian Constitution. On such an expanded reading, people infected with the HIV virus could plausibly argue that they are sufficiently numerous to form a *constitutionally relevant community*. On such a reading, singling out people living with HIV for burdens merely because of their medical status would then be constitutionally impermissible.

But the argument can also be rooted in a purposive reading of article 42. The makers of the Nigerian Constitution surely did not intend to permit all forms of discrimination that they did not explicitly specify in that article. For example, one could not reasonably argue that article 42 allows the state to bar blind students or citizens with other disabilities from running for office or from admission to schools and hospitals. Yet on the face of it the article appears to permit the use of disability as a basis for precisely that type of discriminatory exclusion.

We could overcome this ludicrous conclusion by falling back on our earlier argument: where there is a gap or an ambiguity in local law, the court should look at international and comparative practices to the extent that these do not unambiguously contradict local law. In this way then, it is arguable that the anti-discrimination principle secured by the human rights convention is part of Nigerian law. At the very least, the anti-discrimination principle should be used to interpret and extend the reach of article 42 of the Federal Constitution to the extent that that article is clearly under-inclusive.

I have proceeded in this analysis as if the applicant was HIV positive and have defended his human rights claims on that basis. There is a sound reason for this. But for the *employers' belief that Johnson was infected, he would not have suffered any of the losses and borne any of the burdens that he has suffered and borne*. Even if the court rules that there are no privacy interests violated by compulsory pre-employment HIV testing, it must not be deflected from the discrimination argument. An argument could be made that *since Johnson is not, objectively, HIV positive, he could not have been discriminated against on the basis of that status*. Legally speaking, it is the *belief of the discriminator and the causal relationship between that belief and the loss* suffered by the applicant Johnson that is controlling in this case.

But in the very unlikely event that the Court rules out the human rights claims, the applicant has other causes of action that are relevant. Two are especially important: a wrongful dismissal action and a supplemental claim for damages for psychological anguish caused by the stigmatization associated with HIV/ AIDs in Nigeria and a tort claim of wilful, reckless or negligent infliction of emotional distress arising from an erroneous finding that he was HIV positive.

#### i. Wrongful dismissal and damages for psychological anguish

The traditional common law position established in the case of *Addis v. Gramophone Co Ltd*<sup>151</sup> was that “damages for intangible losses are never recoverable in wrongful dismissal cases.” The law up to that point was that recovery was limited to actual loss associated with the dismissal. Consequential loss associated with the psychological debilitation that may thereby arise was considered non actionable. But subsequent developments in the Commonwealth have departed from this rule arising from a recognition that the distress associated with job loss may, under certain circumstances, give rise to serious loss and harm beyond the financial.

However, it is important to understand the difficulties that an applicant will encounter if his claim includes damages for mental distress arising from wrongful dismissal. He or she must 1) show proof of mental distress; 2) establish causation between the wrongful action complained of and the resulting distress and 3) persuade the court that there is no remoteness of damage.

On the basis of Canadian authorities, it would seem that if the employer’s wrongful dismissal is one of the “*operative factors*” contributing to the employee’s mental distress, aggravated damages may be recoverable. One leading commentator has described the purposes of such damages as follows:

*“Their purpose is to soothe a plaintiff whose feelings have been wounded by the quality of the defendant’s misbehaviour. They are essentially applicable where feelings are wounded by the defendant’s manner and state of mind. In essence, aggravated damages comprise a balm for mental distress- a solatium for such feelings as humiliation, indignation, outrage and fear of repetition.”*<sup>152</sup>

#### ii. Wilful, reckless or negligent infliction of emotional distress

In tort, it may be possible for a plaintiff to claim damages for the tort of wilful, reckless or negligent infliction of emotional distress. This is a distinct

<sup>151</sup> [1909] A.C. 488, HL

<sup>152</sup> K.D. Cooper-Stephenson & I.B. Saunders, *Personal Injury Damages in Canada* (1981) p.55

<sup>153</sup> See for example *Bohemier v. Storwal Int. Limited* (1982) 142 DLR(3d) (Ont. H.C.J.); *Fitzgibbons v. Westpres Publications Ltd* (1983) 3 D.L.R. (4th) 366 (B.C.S.C.) and *Vorvis v. Ins. Corp. of British Columbia* (1984) 4 C.C.E.L. 237 (B.C.C.A) affirmed in 58 D.L.R. (4th) 193 (SCC).



tort in the US and a number of courts in Canada have agreed that such a tort does exist.<sup>153</sup> It may be that the Nigerian High Court will be particularly reluctant to accept this argument, fearing that they are thereby creating a new tort. However, there is a deep personal wrong and hurt that arises from a false diagnosis of HIV and AIDS in many parts of Africa where one's status can lead to severe stigma. This then might be that rare and exceptional case that the calls for judicial innovation.

### **C. Part 3: The Right To Information And Discrimination On The Basis Of One's Social Economic Status And Race- Where Local Law Offers More Protection Than International Human Rights Standards**

The last case is a civil action for the horizontal enforcement of provisions of the bill of rights against a private company, Nedbank, in the South Africa. It raises two questions: 1) What is the scope of the right of access to information under international law and the South African Constitution? In particular, can this right support a claim by a borrower for information held by a private bank? 2) What challenges can be mounted against a private bank's internal lending policies where those policies appear to erode the effective realization of the right to housing, a protected right? In this case, does Nedbank's policy of redlining – the designation of certain zones and areas as too risky for making housing loans- amount to a violation of the right to housing protected by both the international covenants and the South African Constitution?

This case presents a situation, altogether too rare, where national law offers more protection for a right than international human rights instruments. After analysis, I conclude that the applicant's case is strongest under municipal law. In summary, the key legal propositions developed in this opinion are: 1) A borrower's right of access to information held by a bank is, subject to permissible exceptions, enforceable as such being information collected under contract; 2) In addition, and more instrumentally, the borrower may, in this case, be entitled to information because she needs it in order to effectively exercise the right to housing; 3) Similarly the right to housing is enforceable as such but the more compelling argument in this case, I would think, would be that Nedbank's red-lining policy has a disproportionate impact on the poor and, perhaps also, on black people.

### **The Right of Access to Information under International Human Rights Law**

Rights are hostage to information. But the relationship is interdependent and complex. If individuals do not know what rights they have, those rights become vulnerable to invasion and attack. Yet without rights the ability to gain access to information is ruinously diminished. The UN General Assembly has recognised this mutual re-inforcement between rights and information. In its very first Session on the 14<sup>th</sup> of December 1946, it declared that "freedom of information is a fundamental human right" and it is "the touchstone of all the



freedoms to which the UN is consecrated.”<sup>154</sup> In 1998, the UN General Assembly returned to this theme, adopting the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms. Article 6 of that Declaration recognized that information was essential to respect and enforcement of human rights. It stated that everyone has the right, “to know, seek, obtain, receive and hold information about all human rights and fundamental freedoms, including having access to information as to how these rights and freedoms are given effect in domestic legislative, judicial or administrative systems.”

The recognition that access to information is central to the protection of human rights infuses all the key human rights instruments. Article 19 of the Universal Declaration of Human Rights (UDHR), states that “everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and *to seek, receive* and impart information and ideas through any media and regardless of frontiers.”<sup>155</sup> [Emphasis added]

The right and obligations imposed by article 19 are elaborated in the International Covenant on Civil and Political Rights, ICCPR. Article 19 of the ICCPR says that:

1. Everyone shall have the right to freedom of opinion.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
  1. For respect of the rights or reputation of others;
  2. For the protection of national security or of public order (*ordre public*), or of public health or morals.

Whereas the UDHR and the ICCPR treat the right of access to information as an adjunct to the freedom of expression and opinion, article 9 of the African Charter on Human and People’s Rights treats the right of access to information as distinct from the right to hold and express opinions. Article 9 says:-

<sup>154</sup> Resolution 59(1) of 14th of December 1946

<sup>155</sup> Article 19, Universal Declaration of Human Rights, 1948.

1. Every individual shall have the right to receive information.
2. Every individual shall have the right to express and disseminate his opinions within the law.

What exactly is the scope of the right protected by article 19? The ICCPR Human Rights Committee first considered this question in its General Comment on the article in 1983. At that time, however, Committee limited itself to violations of article 19 by the state and did not consider at all whether the article could be enforced horizontally against private violators. It revisited the issue in a more general form in its 80<sup>th</sup> Session held on the 26<sup>th</sup> of May 2004.<sup>156</sup> At that Session the Committee was concerned about the nature of the general duty to implement the Covenant under article 2. Saying that reservations to article 2 were incompatible with the objects of the Convention within the meaning of the Vienna Convention on the Law of Treaties, the Committee said:

- 6 The legal obligation under article 2, paragraph 1, is both *negative* and *positive* in nature. States Parties must refrain from violation of the rights recognized by the Covenant, and any restrictions on any of those rights must be permissible under the relevant provisions of the Covenant.

But as the Committee saw it, there was a positive duty in article 2 requiring states to make laws to protect individuals from private violations. In the Committee's own words:

8. he article 2, paragraph 1, obligations are binding on States [Parties] and do not, as such, have direct horizontal effect as a matter of international law. ....the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, *not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities* that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. *There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.* .....The Covenant itself envisages in some articles certain areas where there are positive obligations on States Parties *to address the activities of*

<sup>156</sup> See General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant, Human Rights Committee, Eightieth Session.

*private persons or entities.* For example, the privacy-related guarantees of article 17 must be protected by law. *In fields affecting basic aspects of ordinary life such as work or housing, individuals are to be protected from discrimination* within the meaning of article 26. (emphasis added)

Though the General Comment seems clear enough that Covenant rights are, to the extent possible, horizontally enforceable there is a dearth of international and comparative jurisprudence on the exact balance to be drawn between the requirements of the right of access to information and the exceptions that human rights laws permit.

The European Court of Human Rights has considered this question in a line of access to information cases: *Gaskin v. United Kingdom*<sup>157</sup>, *Leander v. Sweden*<sup>158</sup> and *Guerra and Others. v. Italy*.<sup>159</sup> Unfortunately, these cases have little comparative value since the European Convention on Human Rights, ECHR is protects this right from “interference by public authority and regardless of frontiers.”<sup>160</sup> Indeed in *Leander v. Sweden*, the ECHR appeared to place the matter beyond doubt when it said:

*“[T]he right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him. Article 10 does not, in circumstances such as those of the present case, confer on the individual a right of access... nor does it embody an obligation on the Government to impart... information to the individual.”*<sup>161</sup>

This holding reflects the orthodox view in relation to the specific wording of that Regional Instrument. Traditionally, the obligations of the bill of rights have been seen as limits on public power. For this reason, the jurisprudence of horizontal enforcement is a novelty. Yet the global burgeoning of private power have impressed courts with the need to outline some public law limits to what private actors can do. For instance, in the US, the bill of rights applies, at least formally, only to state action. Yet in a series of decisions - *Shelly v. Kraemer*,<sup>162</sup>

<sup>157</sup> (1989) 12 EHRR 36, [1990] 1 F.L.R. 167, Ect. HR.

<sup>158</sup> (1998) 26 EHRR, 357, 4 BHRC 63, Ect. HR.

<sup>159</sup> (1987) 9 EHRR 433, Ect. HR.

<sup>160</sup> Article 10(1), The European Convention on Human Rights, ECHR

<sup>161</sup> The circumstances of *Leander* were that the applicant was fired from a job with the Swedish government on security grounds. He applied and was refused access to the private information that was said to have justified his sacking. The court settled the issue not on access to information grounds but on article 8 privacy argument. It said that the actions of the Swedish government had breached the right to respect for private life. This interference was, however, ruled justifiable as a matter of national security. A decade later *Leander's* lawyer finally got access to *Leander's* files and it turned out, much to chagrin of Swedish government, that *Leander* had never been a security risk.

<sup>162</sup> (1948) 334 U.S. 1.

*Marsh v. Alabama* and *Burton*<sup>163</sup> v. *Wilmington Parking Authority*<sup>164</sup> the Supreme Court has been willing to apply the obligations of the bill of rights where the private actor “performs a public function”<sup>165</sup> In Canada, the bill of rights applies to organs of the state but not the judiciary. Yet provincial and national legislation regulating private relations must square with the obligations in the bill of rights. Trawling through the authorities one comes to the following conclusions: 1) None of the major international covenants protects the right of access to information as a stand-alone guarantee. Of the regional instruments only the African Charter protects this right as an adjunct to the freedom of expression and opinion; 2) Though the obligations imposed by UDHR and the ICCPR are, on the authority of the Human Rights Committee, horizontally enforceable, there is a dearth of authoritative case-law on this question. To the extent that comparative case-law has any provenance, it speaks in uncertain and conflicting voices. 3) Where the court is most active, that is, within the 43 member states of the Council of Europe, the right of access to information under article 10 of the Convention principally prohibits interferences by public authorities.

Though these conclusions are sufficient to support an arguable case against Nedbank, the provisions of the South African Constitution are more explicit and thus preferable. I shall come to this question presently. But first, I must turn to the question of the right to housing.

## The Right to Housing under International Law

Under the UDHR the right to housing is part of the guarantee of a minimum standard of life protected by article 25. That article promises to everyone “a standard of living adequate for the health and well-being of himself and his family.”<sup>166</sup> Included in that omnibus entitlement is food clothing, housing, medical care, necessary social services and a right to security in the event of “unemployment, sickness, disability, widowhood or other lack of livelihood in circumstances beyond his control.” These entitlements are then set down in greater detail in the International Covenant on Economic, Social and Cultural Rights, ICESCR. Even there, though, the right to housing is not itemized as a discrete entitlement. The relevant provision is article 11(1) which states that:

*“the state parties to the present covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The state parties will take appropriate steps to ensure the realization of this right...”*<sup>167</sup>

<sup>163</sup> (1946) 326 U.S. 501.

<sup>164</sup> (1961) 365 U.S. 715.

<sup>165</sup> Justice Black in *Marsh v. Alabama*.

<sup>166</sup> See article 25(1) of International Covenant on Economic, Social and Cultural Rights, ICESCR

<sup>167</sup> *id.* 11(1).

The Covenant is unclear about the specific mechanisms through which these rights will be enforced. Under article 2 the obligation is “to take steps, individually and through international co-operation, especially economic and technical, to the *maximum of its available resources*, with a view to *achieving progressively* the full realisation of the rights recognised in this Covenant by all *appropriate means*, including particularly the adoption of legislative measures.” [emphasis added].

The Covenant is full of hedge words: it leaves open many crucial questions. Is there a minimum entitlement? What is considered an effective remedy against violations of rights in the Covenant? Are Covenant rights horizontally enforceable?<sup>168</sup>

As with the right of access to information, there is scanty case-law on the enforcement of the rights in the ICESCR. In comparative terms, the development of case-law has been stunted by injunctions in the constitution that economic and social rights are intended to guide parliament not independent sources of enforceable rights. This is the case in the Constitution of Ireland, India, Uganda and Italy.

Given the text of the Covenant and comparative jurisprudence, this is a case where the South African Constitution offers more protection than international instruments. I turn now to the provisions of the South African Constitution.

### **The South African Constitution: Application of the Bill of Rights**

The South African Constitution is unique in that it makes no distinction between economic, social and cultural rights and civil and political rights. The obligations imposed by both sets of rights are subject to the same general conditions. These are stated in article 8:

8. (1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.
- (2) A provision of the Bill of Rights binds *a natural or a juristic person* if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.
- (3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court - in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right;

<sup>168</sup> Article 5 seems to incorporate a negative duty on the part of everyone to refrain from destroying or limiting the rights in the Covenant. But is it the State only that bears the duty of progressive realisation?

and may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).

- (4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.

No distinction is made between vertical and horizontal application of social welfare rights. The only limitations that the Constitution countenances are those ones relating to all rights in general and those that are internal to a particular right arising from *the nature of that right* and the *nature of the duty that it imposes*. This means that to determine whether a right imposes a particular obligation or not, one must scrutinize its provisions and assess what interest that right protects and how fundamental to an open and democratic society that right is. This analysis, in turn calls into question, the nature and extent of limitations proposed to a right. Sometimes this can be discerned by scrutinizing the language of the Constitution and sometimes by carrying out a more purposive inquiry. To fix ideas, I look at both the right of access to information and the right to housing.

#### i. The Right of Access to Information

Unlike the international covenants but more like the African Charter the Constitution of South Africa splits the right of access to information from the freedom of expression. The right of access to information is article 32. It says:-

32. (1) Everyone has the right of access to -
  - a. any information held by the state; and
  - b. any information that is held by another person and that is required for the exercise or protection of any rights.
- (2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.

On a plain reading, the Constitution makes a distinction between information held by the state and information held by other persons. Information held by the state is available as such. Information held by other persons is available instrumentally, that is, if needed for the exercise and protection of a right. Article 32 requires a law to be enacted and potentially imposes certain additional restrictions on the right of access by permitting “reasonable measures” to alleviate “the administrative and financial burden on the state.” Pursuant to this power the South African Government enacted the *Promotion of Access to Information Act*, 2000. According to the preamble the legislation rests on recognition that South Africa suffered a secretive culture in “public and *private bodies* which often led to an abuse of power and human rights

*violations.*<sup>169</sup> Though one of the stated objects of the act is to give effect to the constitutional right of access to information, it allows limitations “aimed at reasonable protection of privacy, commercial confidentiality and effective, efficient and good governance.”<sup>170</sup>

The claim in this case is that information is needed in order to effectively exercise the right to housing. Whether Nedbank has a duty to release this information or not depends on the nature and extent of the request. As a matter of contract law, if the applicant wants information relating to himself as a borrower, that should be relatively straightforward. But if what he wants is information relating to himself or on other borrowers caught by Nedbank’s redline? There may be complications. I will first consider the provisions of the Act that Nedbank might use to resist such a request.

First, Nedbank may argue that the information on which its redlining policy rests is “commercial information of a private body” within the meaning of the act. Such information is protected if a) contains trade secrets<sup>171</sup>, 2) contains financial, commercial or technical information<sup>172</sup>-which is not a trade secret-but whose disclosure may harm the financial or commercial interest of the company 3) contains information which, if disclosed, would put the company in a contractual disadvantage<sup>173</sup> or prejudice in commercial competition<sup>174</sup> or 4) is a computer program owned by the company.<sup>175</sup> It is likely that the company could find a plausible basis for fitting its red-lining policy in one of these exceptions to disclosure.

Alternatively, Nedbank may fall back on section 69. This section protects information collected by a company conducting research. Such a company may refuse to disclose information if the information consists of research results which, if disclosed, would expose to serious disadvantage 1) the company;<sup>176</sup> 2) a person carrying out research on behalf of the company<sup>177</sup> or 3) subject matter of the research.<sup>178</sup> Nedbank might argue that its redlining policy is based on research results which have commercial value. Releasing this information, the argument could be made, could place it a competitive disadvantage.

To my mind these arguments are plausible but not decisive. Both the preamble to the Act and the provisions of the bill of rights suggest that the court must err on the side of disclosure. As pointed out earlier, the over-riding issue is:

<sup>169</sup> See Preamble, Promotion of Access to Information Act, 2000

<sup>170</sup> id. Section 9(b)(i)

<sup>171</sup> Section 68(1)(a)

<sup>172</sup> Section 68(1)(b)

<sup>173</sup> Section 68(1)(c)(i)

<sup>174</sup> Section 68(1)(c)(ii)

<sup>175</sup> Section 68(1)(d)

<sup>176</sup> Section 69(2)(a)

<sup>177</sup> Section 69(2)(b)

<sup>178</sup> Section 69(2)(c)



what are the interests protected by the right of access to information? How have those interests been sundered by the limitation proposed? If the seriousness of the limitation “is completely disproportionate to any benefits ensuing from [it]”<sup>179</sup> then the limitation must give way to the right. This is clearly the intent of section 70 of the Act. That section mandatorily requires information held by a private company to be disclosed if that disclosure would reveal 1) substantial contravention of the law<sup>180</sup> or imminent and serious public safety or environmental risk<sup>181</sup> or 2) where the public interest in disclosure outweighs the harm that would be caused the company.<sup>182</sup>

These provisions suggest two possible arguments: First, it could be argued that in this case the public interest in disclosure far outweighs the harm that Nedbank would suffer and second, that the policy of red-lining constitutes, in terms of its impact, discrimination prohibited by the Constitution.

## ii. Redlining, The Public Interest and the Right to Housing

The right to housing is protected by article 26 of the Constitution in the following terms:-

26. (1) Everyone has the right to have access to adequate housing.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the *progressive realisation* of this right.
- (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

Sub-clause 2 imposes a positive duty on the state to ensure progressive realisation of this right. What obligations does this article impose on private companies and individuals? Under international human rights laws and the South African Constitution, Nedbank is free to choose not to lend to the housing market. However, if it chooses to lend money for housing, it may not do so on a discriminatory basis since the anti-discrimination clause is horizontally applicable.

There are at least two ways in which an anti-discrimination claim attached to the right to housing may be made in this case.

First, the redlining policy may be based on a reasonable economic risk culled from actuarial analysis of ability and willingness to pay of those who live in

<sup>179</sup> See Rautenbach & Malherbe, Constitutional Law. p. 316

<sup>180</sup> Section 70(a)(i)

<sup>181</sup> Section 70(a)(ii)

<sup>182</sup> Section 70(b)



the affected neighbourhood. But that does not settle the matter. If the implementation of the redlining policy overwhelmingly affects one racial group or class of people and not another, it may be struck down for discriminatory impact. This principle was settled by the US Supreme Court in *Gregg v. Duke Power*.<sup>183</sup> In that case, the employer had replaced its policy of not hiring blacks with a requirement that job-seekers have a high school certificate or pass a literacy test. But neither requirement was a bona fide occupational qualification. The jobs advertised did not require it. Moreover, discrimination against blacks in schools had led to a situation where few had the requisite qualifications. Thus although blacks and whites were being subjected to the same tests, blacks were routinely failing to qualify and Duke Power's workforce was therefore overwhelmingly white. The Supreme Court recognized what was going on and held that equal treatment could be discriminatory if the result was that fewer blacks could qualify.

If *Duke Power* is to apply in this case, one must be prepared to collect results showing that red-lining is overwhelmingly discriminatory in the allocation of housing loans.

In the second place one might attack red-lining without attacking its discriminatory impact. We assume, of course, that it has any discriminatory impact. It could be argued that to the extent that the effect of red-lining is deny people in certain neighbourhoods access to housing credit, to that extent does red-lining impair the right to housing. On this view even if Nedbank could not be compelled to lend to people that it considers a commercial risk, it may still have a duty under the promotion of access to information act to release the information on which it has based its red-lining policy. The information on which the policy rests is useful to the exercise of the right to housing in at least two ways. One, it helps the right-holder know what behavioural or living arrangements he must make if he or she wants to be eligible for a housing loan. Two, at a municipal level it helps the local authorities determine the infrastructure needs it must put in place in order to assist in the "progressive realisation" of the right to housing.

On both accounts, the exceptions in section 70 of the Promotion of Access to Information Act apply and Nedbank would be required to reveal the information on which its red-lining policy is based.

As indicated from the onset, this case presents the unique situation where local law offers more opportunities than international human rights law. For this reason, it is a case in which the role of the national lawyer and the

<sup>183</sup> 401 US 424 (1971)

international expert are reversed. To the extent that there may be unique local remedies these ought to be pursued. More generally, the following orders are possible in such a case:

1. If the applicant has been denied access to his own records, an order that such a denial is unlawful. There may be compelling arguments for protecting third party information but there is none for denying one any information relating to him.
2. A Declaration that the information used by Nedbank to draw its red-line is information needed by the applicant for the exercise of a constitutional right, namely, the right to housing and that Nedbank's refusal violates both the Constitution and the Promotion of Access to Information Act.
3. A Declaration the Nedbank's red-lining policy impairs the right to housing by:-
  - a. Disproportionately, under the *Duke Power* test, affecting people living in very poor neighbourhoods, a majority of whom are blacks.
  - b. Rendering ineffectual the ability of residents in red-lined neighbourhoods to enforce the right to housing. Unaware why their neighbourhoods cannot qualify for housing loans, they are at a loss as to what changes they need to make in their neighbourhoods in order to become more attractive borrowers.

## CONCLUSION

The cases considered in this chapter illuminate the challenges of adopting human rights standards to a variety of legal and political contexts. The lesson to be drawn from the cases is that litigation lawyers need to have a good grounding in, or at the very least reasonable access to, international and comparative human rights jurisprudence if they are to make of the laws of their countries the best that these can be. Sometimes the challenges will be constitutional, as in Nigeria, sometimes they will be statutory, as in Tanzania. At other times the challenges come from the fact that there are serious gaps in local law, as in Kenya or from the fact that the facts of the case relate to a new problem on which there is little jurisprudence, as in the case of HIV/AIDs. Yet whatever the challenge, international human rights law is sufficiently flexible to accommodate a variety of fact situations in different and complex legal environments.

An abiding lesson from AHRAJ's involvement in these cases is that orthodox arguments about applicability of human rights treaties; the debates about monism and dualism and the arguments over the provenance of comparative case law in resolving local problems are important but not dispositive. There is a growing body of jurisprudence that sublates the conventional dualities of the municipal and the international to give life to people's basic rights. AHRAJ supports this jurisprudence and would like to see it take root and flourish. It is the reason for supporting the cases in this chapter.



## CHAPTER 3

### ANALYSIS OF LABOUR RIGHTS\*

#### PART ONE:

##### 1.0 Are labour rights human rights?

Labour rights as human rights have a collective dimension. The right of freedom of association features in both of the UN International Covenants<sup>1</sup>, and had already been embodied in one of the most important International Labour Organisation Conventions.<sup>2</sup>

Indeed, rights, which appear at first sight to be individual, such as hours of work or social security, are in fact meaningful only when exercised in the collective context of union activity.

Recent proposals to adopt conventions that protect collective rights such the rights of peoples, the right to development, the rights of mankind, and so on, were foreshadowed by recognition of collective rights in the labour field. Many of the themes that have long been areas of debate such as the separation of economic and political rights first arose in ILO conventions.

#### The evolution of International labour standards and civil and political rights

Although it might appear that international labour standards emanate from economic and social rights, their impact on human rights has in fact been equally important, in the sphere of civil and political rights. In particular three major spheres of labour standards: the abolition of forced labour, freedom of association and the elimination of discrimination clearly demonstrate the role of international labour standards in this realm.

In 1930, a first Convention (No. 29) prohibiting forced labour led the way in the protection of individual freedoms, particularly in the overseas colonial and

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<sup>1</sup> The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights The International Labour Organization (ILO) is the source of international labour law that is embodied in its Conventions and Recommendations, and the documents that emanate from the supervisory mechanisms responsible for the application of those international labour standards.

<sup>2</sup> The ILO's Conventions are international treaties, subject to ratification by ILO member States.

trustee territories of the period. Following the Second World War, an International Labour Organisation (ILO) Special Committee conducted enquiries from 1951 onwards by a joint UN-ILO Committee, and subsequently a new Convention (No. 105) on the abolition of forced labour was adopted in 1957 to combat particular forms of forced labour that had been identified during the course of the enquiries. These Conventions, widely ratified, generated a new spirit of freedom and offered substantial protection against forced labour. This was a reaction to coercive labour practices, sweatshop economics and increasingly reprisals against workers for taking collective action to confront unconscionable labour repression. The rights recognized by these conventions were reinforced by the International Covenant on Civil and Political Rights at Article 8, which also prohibited forced or compulsory labour.

Freedom of association was the second major area of worker protection to be taken up by the ILO and, this too, spans across the artificial categories of political and civil rights and economic and social rights. Protection of associational rights rest on the idea that workers cannot effectively protect their interests unless they can organize collectively. Nonetheless, opposition from various sources blocked the adoption of an ILO instrument on freedom of association during the inter-war period. It was not until shortly after the end of the Second World War that the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), was finalized and adopted. It has subsequently been ratified by 120 States over the course of 50 years and has secured for workers the basic guarantee and mean to protect their interests. Some 20 years later, provisions relating to freedom of association, of a more general nature, were incorporated in the two UN Covenants, although couched in different terms. Over and above the general procedures for monitoring compliance with Conventions, a special mechanism was set up whereby workers' or employers' organizations might submit complaints, even against States that have not ratified Convention No. 87. This is made possible by the fact that freedom of association is embodied in the Preamble of the ILO Constitution.

Finally, the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), and the accompanying Recommendation (No. 111), prohibits any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin. A detailed programme specifically to eradicate *apartheid*, which the ILO naturally condemned, was drawn up in 1964 and subsequently strengthened. The matter of racial discrimination was likewise raised by the United Nations, most prominently in a Declaration of 1963 and a Convention of 1965.

These are the three major spheres in which ILO standards have contributed most extensively to protecting civil and political rights. It should also be noted that the scope of this protection is not confined merely to proclaiming the rights in question, but also involves procedures relating to compliance. This

includes both general application mechanisms and special procedures such as, for instance, those set up in connection with freedom of association.

### *International labour standards and economic and social rights*

Regarding labour rights specifically, the similarities between international labour standards and human rights are especially apparent in the International Covenant on Economic, Social and Cultural Rights, and include equal remuneration for men and women<sup>3</sup> occupational safety and health<sup>4</sup>, weekly rest, limitation of hours of work and holidays with pay, the right to social security<sup>5</sup>, maternity protection<sup>6</sup>, protection and assistance for children and young persons<sup>7</sup>.

Overall, it might be said that the international labour Conventions provide, in a more specific and detailed manner, for the practical implementation, at the national level, of the series of principles embodied in more general terms in the International Covenant on Economic, Social and Cultural Rights.

### **The International Labour Organisation**

The International Labour Organisation (ILO) formulates international labour standards in the form of Conventions and Recommendations setting minimum standards for labour rights: freedom of association, the right to organize, collective bargaining, abolition of forced labour, equality of opportunity and treatment, and other standards regulating conditions across the entire spectrum of work related issues.<sup>8</sup> The ILO was created to adopt international standards to improve situation of workers. It adopts Conventions that are binding on the countries that ratify them.<sup>9</sup>

The International Labour Organisation is one of the oldest UN- organizations dealing with human rights.<sup>10</sup> The ILO was established in 1919, around the

<sup>3</sup> Compare ILO Convention No. 100 and Article 7 of the ICESCR.

<sup>4</sup> A number of ILO Conventions and Article 7 of the ICESCR

<sup>5</sup> Several ILO Conventions and Article 9 of the ICESCR

<sup>6</sup> Several ILO Conventions and Article 10 of the ICESCR

<sup>7</sup> Several ILO Conventions and Article 10 of the ICESCR

<sup>8</sup> See <http://www.ilo.org/public/english/about/> Accessed on 15th October 2005

<sup>9</sup> Even before a country ratifies an ILO standard, it is likely to be subject to a range of regulatory activity by the ILO. This includes negotiation and discussion between ILO officials and representatives of countries including Ministers responsible for labour matters, and senior officials of relevant government departments. This might occur, for example, within the framework of the campaign to promote ratification of the ILO's core labour standards, or in other contexts. This 'informal' aspect of ILO regulatory activity, while well known within certain circles has not, as far as we know, been the subject of major academic study. For brief consideration, see K. Panford, *African Labour Relations and Workers' Rights*, Connecticut, Greenwood Press, 1994, pp. 130-141.

<sup>10</sup> See *International Labour Organisation and Human Rights Access to the ILO* by Lee Swepston, *International Human Rights Monitoring Mechanisms* ed. Grimheden, Ramcharan, de Zayas, Martinus Nijhoff Publishers, London, p. 485



same time as the League of Nations. The establishment of the ILO was influenced to a large extent by the industrial revolution and the First World War. The ILO survived the outbreak of the Second World War and was re-energized with the adoption of the Declaration of Philadelphia in 1944, which expanded its field of action to economic, social and financial implications on labour. The Declaration includes recognition of rights accruing to all human beings on a basis of equality and without discrimination. It states, “all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, or economic security and equal opportunity.”<sup>11</sup> The wording is very similar to the United Nations Declaration on Human Rights that was to be adopted later in 1948.

### 1.3 Overview of African Labour practices

The genesis of labour laws in Africa can be traced to the advent of colonialism and to a great extent most of the labour laws that exist today are part of this colonial heritage. The colonial governments introduced codified labour laws mainly as a way of sanctioning forced labour among natives and to ensure adequate supply of cheap labour to service the emerging enterprises in agriculture, industry and in the service sector.<sup>12</sup> Invariably, the bulk of labour laws were introduced during this period. In East Africa, this was reflected in such laws as the *Workman's Compensation Ordinance introduced in 1949* and the *Trade Union Ordinance in 1937*.

During the colonial period, labour law in Africa was principally used to organise and control the ‘native’ labour force.<sup>13</sup> Particularly before the Second World War, many colonial territories had labour laws that applied specifically to the (black) African populations. These were generally related to the systems of temporary labour migration, and included a range of criminal penalties, in much the same fashion as Masters and Servants legislation throughout the British common law world.<sup>14</sup> The labour laws in force during the colonial period ‘gave more priority to economic exploitation and control than to an integrated socio-

<sup>11</sup> ILO Declaration, Declaration of Philadelphia, II (a)

<sup>12</sup> It was these kind of policies and practices of the colonial period that were envisaged under the provisions of the 1930 ILO Convention concerning Forced or Compulsory Labour which provided that: ‘Forced or compulsory labour enacted as a tax and forced or compulsory labour to which recourse is had for the execution of public works by chiefs who exercise administrative functions shall be progressively abolished.

<sup>13</sup> To date we have given limited consideration to the regulation of labour by customary African law. It is briefly considered by T. Elias (Nigeria), and J. Lawrence (the Iteso), in contributions to E. Cotran and N. Rubin, *Readings in African Law*, London, Frank Cass & Co. Ltd, 1970, pp. 223 and 227. It would appear that to the extent that customary law was permitted to continue during the colonial period, it would have covered labour matters where they arose between two Africans, and were not otherwise covered by the colonists’ law: T. Elias, *The Nature of African Customary Law*, Manchester, Manchester University Press, 1956, pp. 6-7.

<sup>14</sup> See Major. G. St. J. Orde Browne, *The African Labourer*, London, Oxford University Press, 1933.

economic development.<sup>1</sup> Following the Second World War, with pressures for decolonisation, changes in production methods, and the experiences of many Africans of different types of work at higher wages, labour market regulation altered somewhat. Among the changes was the introduction of new provisions for the establishment of trade unions, as a means of channeling workers dissent.

Post independence Africa has also seen the enactment of labour laws as well as ratification of international labour instruments by most states. In recent years, attempts have been made at labour law reform, taking into account, among other things, international economic developments. Thus, during the last 15 years, many African states have been through one or more rounds of labour law reform: South Africa (1995 to present), Lesotho and Namibia (1992 and 2004); Swaziland (1998); Botswana (1992 and in progress); Tanzania and Zanzibar (in progress); and Zimbabwe (1996 and 2000). In many cases these reforms have been significantly influenced by the ILO.

One thing most African countries have in common is that labour rights issues are not treated as human rights issues. For example, in a Kenyan High Court decision<sup>15</sup> discussed later in this chapter, the constitutional court declined to adjudicate on a matter involving trade union rights arguing that that the matters raised were not constitutional as they concerned the situation between an employer and employee. The court in effect refused to consider the matter on its merits on the basis that there were other lawful avenues open to the applicants' and the applicants' were free to pursue these other avenues rather than in the constitutional court. (The Kenyan Court of Appeal however later set aside this ruling and stated that the matters did concern fundamental human rights as contained in the Constitution and as such were properly laid before the constitutional court.)

Even where labour laws are promulgated, their implementation is patchy. Courts have played a relatively limited role in the development of labour law in the region. There is a tendency amongst governments in the region, even with the advent of democracy, to suspend the labour laws (or at least to turn a blind eye to their not being implemented) in the pursuit of rapid industrialisation.

Many African States have ratified international human rights instruments and more specifically international labour rights instruments. This therefore imposes an obligation on them to comply with the standards set out in these instruments. This duty rests both on government, meaning the executive and parliament, and on the judiciary.

<sup>15</sup> Rashid Aloggoh & 245 Others vs Haco Industries Appln. 1520 before the High Court of Kenya at Nairobi

## Can human rights and international labour standards be considered to be definitive systems?

The international labour Conventions and Recommendations have been forged during the course of almost eighty years, and the Universal Declaration of Human Rights was adopted over fifty years ago. It is fair to question whether they offer a comprehensive and consistent body of mutually complementary standards. To answer unequivocally in the affirmative would fail to allow for the important law of evolving needs and concepts. It is true that the crux of what is today considered as constituting core labour and human rights is contained in ILO standards and in the Covenants and Conventions of the United Nations and in comparable regional instruments. However, conditions and concepts evolve; some standards lose their relevance, and new needs emerge.

### International Labour Standards under the United Declaration of Human Rights (UDHR)

Article 23 of the UDHR provides that everyone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment. It goes on to state that everyone has the right to a standard of living adequate for the health and the well-being of himself and his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age and other lack of livelihood in circumstances beyond his control. The realization of these rights is progressive and depends on the economic situation of each state. The UN Committee has however stated that this progressive realization is not a judicial doctrine but an obligation of the State.

The Universal Declaration holds a special place of importance in relation to the International Labour Organisation (ILO) in its work for promotion and defence of human rights. This is evinced by a 1997 declaration by the ILO's Committee of Experts on the Application of Conventions and Recommendations:

*"The Universal Declaration ... is generally accepted as a point of reference for human rights throughout the world, and as the basis for most of the standard setting that has been carried out in the United Nations and in many other organizations since then. ... The ILO's standards and practical activities on human rights are closely related to the universal values laid down in the Declaration, ... [T]he ILO's standards on human rights along with the instruments adopted in the UN and in other international organizations give practical application to the general expressions of human aspirations made in the Universal Declaration, and have translated into binding terms the principles of that noble document."*<sup>16</sup>

<sup>16</sup> ILO: Report of the Committee of Experts on the Application of Conventions and Recommendations: General Report and Observations concerning particular countries, Report III ( Part 1A), International Labour Conference, 86th Session, 1998, Geneva, pp 16-17, paras. 56-58.

## International Labour Standards under the ICCPR & ICESCR

In 1966, the United Nations codified the principles laid down in the Declaration in the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Both Covenants came into force ten years later once they had received a sufficient number of ratifications; they are the most influential international human rights instruments of broad coverage. They also followed the earlier ILO provisions on freedom of association. Article 22 of the International Covenant on Civil and Political Rights (ICCPR) is its only detailed article on freedom of association. The first paragraph of that Article is an almost exact restatement of Article 23(4) of the Universal Declaration. The second paragraph states that no restrictions may be placed on the exercise of this right “other than those which are prescribed by law and which are necessary in a democratic society” and allows “lawful restrictions on members of the armed forces and of the police in their exercise of this right”. The third paragraph reads as follows:

*“Nothing in this article shall authorise the States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organise (Convention No. 87) to take legislative measures which would prejudice, or apply the law in such a manner as to prejudice the guarantees provided for in that Convention.”*

Entire legislative conformity is guaranteed with Convention No. 87 in this remarkable provision, which was incorporated in the other Covenant as well.

The International Covenant on Economic, Social and Cultural Rights contains a more detailed treatment of the same subject, in Article 8 it states that:

The States Parties to the present Covenant undertake to ensure:

1. (a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organisation concerned, for the promotion and protection of his economic and social interests. No restriction may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
- (b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organisations;
- (c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are

necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others; Development of freedom of association through ILO supervision 173

- (d) The right to strike provided that it is exercised in conformity with the laws of a particular country.
- 2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.
- 3. Nothing in this article shall authorise the States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organise to take legislative measures which would prejudice, or apply the law in such a manner as to prejudice the guarantees provided for in that Convention.

## Regional Protection of Labour Rights

The *African Charter on Human and Peoples Rights*<sup>17</sup> does not contain a direct provision on freedom of association but at Article 10 contains a general assertion that everyone has “the right to free association provided that he abides by the law”; and at Article 11, the right to freedom of assembly.

The *European Convention* adopted in 1950 provides for freedom of association and protection of the right to organise in similar terms with the ICCPR adopted later in 1966. The *European Social Charter (1961)* adopts a similar approach to ILO standards. Article 5 of the Charter details the right to organise and Article 6 the right to bargain collectively. The Charter is the first international instrument to expressly authorise the right to strike.<sup>18</sup> The Appendix to the Charter further contains the following provision:

*“It is understood that each Contracting Party may, insofar as it is concerned regulate the exercise of the right to strike by law, provided that any further restriction that this might place on the right can be justified under the terms of Article 31.”*

Article 31 of the Charter provides as follows:

*“The rights and principles set forth... and their effective exercise... shall not be subject to any restrictions or limitations not specified...except such as are prescribed by law and are necessary*

<sup>17</sup> Adopted by the Organisation of African Unity (now known as the African Union) on 27th June 1981. Entered into force on 21st October 1986.

<sup>18</sup> Article 6, paragraph 4 of the European Social Charter

*in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health or morals.”*

The *American Convention on Human Rights*<sup>19</sup> provides for freedom of association in its Article 16. The *Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights* at Article 8 closely resembles provisions of the International Covenant on Economic, Social and Cultural Rights. It contains a provision not found in any of the standards examined previously. The Protocol affirms that no one may be compelled to belong a trade union. This effectively means that trade union security clauses or practices would be contrary to the protocol.

It emerges from the provisions of different international instruments that provisions on the right to organize and bargain collectively are closely related to the text of the Universal Declaration.

## ILO Conventions

The ILO Conventions are international treaties subject to ratification by ILO member states. Recommendations are non-binding instruments though they also deal with the same issues set out in the different Conventions. These recommendations set out guidelines, which guide national policy and actions. The governing body of ILO decided that eight conventions are to be regarded as fundamental to the rights of human beings at work and they should be implemented and ratified by member states. These fundamental ILO Conventions are:

- a) Freedom of Association and protection of the right to organize<sup>20</sup>,
- b) The right to organize and collective bargaining,<sup>21</sup>
- c) Forced Labour, 1930,<sup>22</sup>
- d) Abolition of forced labour,<sup>23</sup>
- e) Discrimination (employment and occupation),<sup>24</sup>
- f) Equal remuneration,<sup>25</sup>
- g) Minimum Wage,<sup>26</sup>
- h) Worst form of Child Labour, 1999 C no. 182<sup>27</sup>

<sup>19</sup> Adopted on 22nd November 1969, entered into force on 18 July 1978.

<sup>20</sup> ILO Convention concerning Freedom of Association and Protection of the Right to Organise, 1948 (No. 87)

<sup>21</sup> ILO Convention concerning the Right to Organise and Collective Bargaining, 1949 (No. 98)

<sup>22</sup> ILO Convention concerning Forced or Compulsory Labour

<sup>23</sup> ILO Convention concerning the Abolition of Forced Labour, 1957 (No. 105)

<sup>24</sup> ILO Convention concerning Discrimination in Respect of Employment and Occupation, 1958 (No. 111)

<sup>25</sup> Equal Remuneration for Men and Women for Work of Equal Value, 1951, (No. 100)

<sup>26</sup> ILO Convention concerning Minimum Wage

<sup>27</sup> ILO Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, 1999 (No. 182)

The international labour standards are universal in character. The drafters' intent was for all countries to ratify and implement them regardless of the country's stage of economic development or social economic system. To meet this aspiration, standards are often written with flexibility in their obligations. As a consequence of that fact, several very important standards set only goals and broad frameworks for national actions.

In 1998, the ILO issued a landmark declaration stating that all member states, even if they have not ratified the ILO Conventions, had an obligation to respect, promote and realize the principles set forth in various ILO Conventions. The Declaration reads in part<sup>28</sup>:

*'All members, even if they have not ratified the Conventions in question, have an obligation, arising from the very fact of membership in the Organization, to respect, to promote and to realize in good faith and in accordance with the Constitution [of the ILO], the principles concerning fundamental rights which are the subject of those Conventions...'*

### Implementation of ILO standards

Most ILO conventions envisage domestic implementation of the labour standards and rights they lay out within the domestic legal systems of States that have ratified these conventions. Under International Law, when a member state ratifies a Convention, it assumes a binding obligation to implement its provisions in domestic legislation and in practice. However even in *the absence* of ratification, a Convention may serve as a yardstick for law and practice.

The ILO emphasis is on Labour Relations and Rights at the Workplace with the right to organize, collective bargaining, rights of indigenous workers, freedom of association for workers and child labour issues taking centre stage. In this respect the main ILO conventions that must constitute a reference point for this chapter are:

- ❑ ILO Convention 87 Freedom of Association and Protection of the Right to Organize.
- ❑ ILO Convention 98 Right to Organize and Collective Bargaining

<sup>28</sup> See ILO, Declaration on Fundamental Principles and Rights at Work and Its Follow-Up, adopted by the International Labour Conference at its Eighty-sixth Session, Geneva, 18 June 1998,p.7.



## PART TWO:

### Application of International Standards/ assessment of cases

In this section, judicial treatment of labour issues in Africa is analysed in a number of selected cases from Uganda, Kenya, South Africa, and Nigeria as well as decisions from international bodies.

#### 2.1 The right to Collective Bargaining

Collective bargaining is usually perceived as a process of reaching ‘collective agreements’ or ‘labour contracts.’ The *Right to Organize and Collective Bargaining Convention 1949, No 98* was adopted in 1949. 139 countries have ratified it.

This Convention deals with two different aspects of freedom of association. First, it seeks to protect the workers’ right to organize vis-à-vis employers; it also seeks to protect both workers; and employers’ organizations from interference by the other.<sup>29</sup> Secondly, to ensure the promotion of collective bargaining, the Convention emphasizes the autonomy of the parties and the voluntary nature of negotiation (Article 4). Therefore, while the Freedom of Association and Protection of the Right to Organize Convention No. 87 is concerned with the free exercise of the right to organize in relation to the State, Convention No. 98 is designed mainly to protect workers and their organizations in their dealings with employers. Article 5 of the Convention No. 98 leaves it to national legislation to decide whether it applies to the armed forces and the police. On the other hand, unlike Convention No. 87, which applies to workers in both the private and public sectors, without distinction, and accordingly also to public servants, Convention No. 98 excludes some categories of public servants from its scope, by providing in Article 6 that it “...does not deal with the position of public servants engaged in the administration of the State...”<sup>30</sup>

Article 1, paragraph 1, stipulates in general terms that “workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment”. The scope of this protection is made explicit in paragraph

<sup>29</sup> Articles 1-3 (inclusive) Right to Collective Bargaining Convention

<sup>30</sup> The ILO’s supervisory bodies have endeavoured to set limits to this exclusion. They have stated that while the concept of public servant may vary to some degree under the various national legal systems, the exclusion of persons employed by the State or in the public sector, but who do not act as agents of the public authority, is contrary to the meaning of the Convention. The distinction must therefore be drawn between civil servants employed in various capacities in government ministries or comparable bodies, as well as ancillary staff who may be excluded from the scope of the Convention, and all persons employed by the government, by public undertakings or by autonomous public institutions, who should benefit from the guarantees provided for in the Convention.



2 which states that: “Such protection shall apply in respect of acts calculated to (a) make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership; (b) cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours”.

The right to join a trade union is mentioned in article 23, sub-section 4 of the UDHR, and today a government-imposed ban on joining a union is generally considered a human rights violation. The UDHR also states in article 20, subsection 2 that “*No one may be compelled to belong to an association*” and so compulsory state-enforced union membership would be violation.

The right to join or form a trade union has been described as a fundamental right brooking no derogation under international law. In 1975, the ILO’s Committee on Freedom of Association determined that member countries are “bound to respect a certain number of general rules which have been established for the common good . . . among these principles, freedom of association has become *a customary rule above the Conventions*.”<sup>31</sup> Responding to requests from the World Trade Organization (WTO), the Organization for Economic Cooperation and Development (OECD) and other international bodies to identify “core” labor standards among its more than 180 conventions, the ILO in 1998 adopted the landmark *Declaration of Fundamental Principles and Rights at Work*<sup>32</sup>. The declaration covers freedom of association, forced labor, child labor, and discrimination. The Declaration expressly states:

*“All members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization, to respect, to promote, and to realize, in good faith and in accordance with the [ILO] Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely: (a) freedom of association and the effective recognition of the right to collective bargaining; . . . (d) “the elimination of discrimination in respect of employment and occupation.” [emphasis added]*

<sup>31</sup> See Fact Finding and Conciliation Commission on Chile, International Labor Organization, Geneva, Switzerland (1975), para. 466 (emphasis added).

<sup>32</sup> The text of the Declaration of Fundamental Principles and Rights at Work is available online at: [http://www.ilo.org/dyn/declaris\\_DECLARATIONWEB.static\\_jump?var\\_language=EN&var\\_pagename=DECLARATIONTEXT](http://www.ilo.org/dyn/declaris_DECLARATIONWEB.static_jump?var_language=EN&var_pagename=DECLARATIONTEXT). Accessed on 10th March 2005.

The content of trade union freedom divides into a series of corollaries: the positive freedom to form a union or join an existing one, the negative freedom not to join any or a particular union, the right to bargain and the right to strike.

## 2.2 The right to Strike

A strike or perhaps more appropriately, ‘industrial action’ is a collective withdrawal of labour. The ‘right to strike’ is not considered to be a fully-fledged human right within the realm of labour rights. The typical aim of a strike, or any other form of industrial action, is to counteract the power held by employers in the employment relationship by demonstrating the potential of labour to inflict economic harm. Workers are often reluctant to take such action, since the withdrawal of labour usually involves a loss of wages and risks to jobs.<sup>33</sup> All the same, the threat of recourse to such action is often the sole bargaining tool, which workers have. It is for this reason that the right to strike is widely regarded as one of the essential means through which workers and their organisations may promote and defend their economic and social interests.’

Article 8 (1) (d) of the International Covenant of Economic, Social and Cultural Rights (ICESCR) provides that the States Parties to the Covenant shall undertake to ensure: ‘the right to strike, provided that it is exercised in conformity with the laws of the particular country.’ Article 2 (1) of the Covenant provides:

*“Each State Party to the present Covenant undertakes to take steps... with a view to achieving progressively the full realization of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of the legislative measures.”*

With regard to the right to strike, ILO Conventions No. 8<sup>34</sup> and 98<sup>35</sup> make no express reference to the right but a long tradition of ILO jurisprudence has established the right to strike as an essential component of collective bargaining. This right has been considered one of the essential attributes of the ‘core’ rights embodied in these two Conventions and as an essential means available to workers and the trade unions to promote and protect labour rights and interests. Furthermore, even though neither Convention refers explicitly to a right to strike, it has been recognized as essential to collective bargaining. Any limitation on it, other than those permitted by the Conventions,<sup>36</sup> are

<sup>33</sup> A.T.M Jacobs, “The Law of Strikes and Lock-Outs”, in R. Blanpain and C. Engels (eds.), *Comparative Labour Law and Industrial Relations in Industrialised Market Economies*, Deventer: Kluwer, 1993, pp 441-445

<sup>34</sup> ILO Convention concerning the Freedom of Association and Protection of the Right to Organize, 1948

<sup>35</sup> ILO Convention concerning the Right to Organize and Collective Bargaining, 1949

<sup>36</sup> See L. Sweptson, ‘Human rights law and freedom of association: Development through ILO supervision’, *ILR*, Vol. 137, 1998, p. 181. Members of the police and armed forces, and other categories of public servants ‘exercising authority in the name of the State’ and in ‘essential services’ may also be excluded.

impermissible. Although not spelled out, this right has been developed as a kind of ‘case law’ drawn from the implicit assumptions of the meaning of freedom of association and collective bargaining – an intrinsic corollary of the right to organise – and has been affirmed in resolutions of International Labour Conferences, including regional conferences, as well as by other international bodies. Procedural requirements before strike action, such as giving prior notice, secret ballots and recourse to mediation have been accepted by the ILO Experts as consistent with C87.<sup>37</sup>

Other international instruments that provide explicitly for the right to strike include the European Social Charter, the Charter of the Organisation of American States<sup>38</sup>, the First Protocol to the American Convention on Human Rights<sup>39</sup> and the Inter-American Charter on Social Guarantees.<sup>40</sup> Several jurisdictions, including India, have also recognised this right. In *BR Singh v Union of India*,<sup>41</sup> the Indian Supreme Court observed:

*“ The Trade Unions with sufficient membership strength are able to bargain more effectively with the management than with individual workmen. The bargaining strength would be considerably reduced if it is not permitted to demonstrate by adopting agitational (sic) methods such as ‘work to rule,’ ‘go-slow,’ ‘absenteeism,’ ‘sit-down strike,’ and ‘strike.’ This has been recognised by almost all democratic countries.”*

The right to strike includes the basic provision that the contract of employment is suspended for the duration of the strike, that a striker has not broken his contract of employment by striking, and that those on strike may not be penalised for striking. This is not an absolute right. It needs to be balanced against other compelling social interests. This is especially so where public employees are providing essential services, the disruption of which may threaten the life, health and safety of the population. Fire fighters, for example, are prohibited from striking in some countries.

However, even when no compelling public interest is involved, governments have attempted to hinder the right to strike. Some countries, for example, adopt

<sup>37</sup> Gernigon, A. Odero and H. Guido, ‘ILO principles concerning the right to strike’, ILR, Vol. 137, 1998, p. 441. The European Court of Human Rights and the Supreme Court of Canada have not accepted this inference; on the other hand, many others, including Ireland and Germany, have. The distinction may be said to be a matter of legal pedantry. (A.J.M. Jacobs, ‘The Law on Strikes and Lock-outs’, in R. Blanpain and C. Engels (eds.), *The ILO and the Social Challenges of the 21st Century*, The Hague, London, Kluwer Law International, 2001.) A number of countries, e.g., Austria, UK and Denmark, provide for freedom to strike rather than the right to strike.

<sup>38</sup> Article 43 (2) (c)

<sup>39</sup> Article 8 (1) (b)

<sup>40</sup> Article 27

<sup>41</sup> [1990] Lab I.C. 389 (396) (S.C.)

a permanent replacement doctrine whereby striking employees are replaced by new employees loyal to the employer who then vote the union out of existence. It is important to note that such practices contravene international law. Under United States of America Labour Law, for example, employers can hire new employees to permanently replace workers who exercise the right to strike. This doctrine runs counter to international standards recognizing the right to strike as an essential element of freedom of association. Considering the US rule, the ILO Committee on Freedom of Association determined that the right to strike 'is not really guaranteed when a worker who exercises it legally runs the risk of seeing his or her job taken up permanently by another worker, just as legally' and that permanent replacement 'entails a risk of derogation from the right to strike which may affect the free exercise of trade union rights.'<sup>42</sup>

As with collective bargaining, however, governments everywhere establish conditions that limit or constrain the right to strike. Conceptually, the right to strike is a negative right - workers can freely exercise the right to strike if the state does not restrict their behavior. So an assessment of compliance must begin by examining whether a government bans strikes outright or uses military or police force to break strikes. The assessment of compliance must then move into consideration of how the state conditions the exercise of the right and deal with less settled questions about whether the treatment of actions such as 'protest strikes,' 'sympathy strikes,' or 'go slow' strikes are consistent with compliance.

The right to strike needs to be protected by a written, secure and enforceable constitution. What happens in cases where it is not? In such situations, it would be dependent on the interpretation that the courts give to the relevant local laws, having regard to the spirit and intention of International Law - specifically the express mention of the right in the Universal Declaration and the UN Conventions as well as the ILO Convention on the Freedom of Association and protection of the Right to Organize and Collective Bargaining.

In Nigeria, the right to form and join a trade union is guaranteed under the Constitution and under statute. In *Anigboro v. Sea Trucks (Nig) Ltd*<sup>43</sup> the Nigerian Court of Appeal considered the question of a worker's right to join a trade union. A number of workers in Sea Trucks Nigeria Ltd decided to join the National Union of Petroleum and Natural Gas Workers (NUPENG) instead of the Nigerian Union of Seamen and Water Transport Workers, which their employer (Sea Trucks (Nig) Ltd) considered to be more appropriate. After unsuccessful efforts were made to resolve the issue, the Sea Trucks (Nig) Ltd

<sup>42</sup> See International Labour Organisation, Committee on Freedom of Association, Complaint Against the Government of the United States presented by the American Federation of Labour and Congress of Industrial Organizations (AFL-CIO), para. 92, Report no. 278, Case No. 1543, 1991.

<sup>43</sup> [1995] N.W.L.R. (pt. 399) p. 35

locked out the militant workers from their premises and put up a notice at their gate announcing that all the workers had been summarily dismissed. There was a subsequent announcement that workers who returned to work or before a specified date would be rehired on new terms. Some workers returned, others did not. It is from this group of workers those that did not return that the *Anigboro* case arose. The dismissed workers filed an application in the High Court under the Fundamental Rights (Enforcement Procedure) Rules 1979. The claim was that the summary dismissal is a breach of the fundamental right of the plaintiff to belong to an association of his own- National Union of Petroleum and Natural Gas Workers – a right protected by Section 37 of the Constitution of Nigeria (1979). In his judgment, the trial judge held that the action was statute barred and accordingly struck it out. He however considered the merits of the case in the event that he was wrong on the issue of limitation. He found the summary dismissal of the appellant unconstitutional rendering it null and void. He therefore held that but for his conclusion on the issue of limitation he would have ordered reinstatement.

It is worth contrasting this case with an example from the European Court on Human Rights. In a landmark case<sup>44</sup> the Court held that unions must be free to organise industrial action to persuade an employer to enter into collective bargaining. Employees must be free to instruct their union to make representations to their employer or take action in support of their interests. The court recognised this right as fundamental.

The circumstances of this case date back to the late 1980s and concerned the treatment of Mr. David Wilson by Associated Newspapers Ltd and of Mr. Terrence Palmer and others by Associated British Ports. Briefly, the employees, who were members of their respective unions, refused to enter into individualized contracts outside the framework of a collective agreement. These contracts had collateral clauses that required those who signed to forego the entitlement to be represented by a union in all or some of their dealings with the employer. Those employees who took up the new contracts received a one-off payment (in the case of Associated Newspapers) and higher pay and benefits thereafter (in both cases). In effect, the two employers each derecognised the relevant union.

The Court found that Convention rights had been violated. It stated:

*‘If workers are prevented from so doing, their freedom to belong to a trade union, for the protection of their interests, becomes illusory. It is the role of the State to ensure that trade union members are not*

<sup>44</sup> The judgment was issued on 2 July 2002 and, in full, concerned the applications of Wilson & The National Union of Journalists; Palmer, Wyeth and others & the National Union of Rail, Maritime & Transport Workers; Doolan and Others v The United Kingdom (Application Nos 30668/96, 30671/96 and 30678/96)

*prevented or restrained from using their union to represent them in attempts to regulate their relations with their employers’.*

UK law therefore breached the Convention because it allowed employers to treat less favourably employees who were not prepared to renounce a freedom that was an essential feature of union membership: namely collective bargaining. UK law permitted an employer to act in this way with the aim of bringing an end to collective bargaining. This allowed UK employers to undermine or frustrate a union’s ability to strive for the protection of its members’ interests. By permitting employers to use financial incentives to induce employees to surrender important union rights, the UK violated Article 11 of the Convention<sup>45</sup> and breached the rights of the trade unions and their members.

### **Exploitative Labour Contracts**

In the case *Alogohh & 245 Others vs Haco Industries*<sup>46</sup>, an Appeal was made against the Ruling and Orders made by the High Court of Kenya in *Misc. Civil Application Number 1520 of 1999*. The 246 Applicants had filed an Originating Motion under Sections 84 (1) and (6) of the Constitution of Kenya seeking Declaratory Orders that their rights under the Constitution and, more specifically, their right to form or join trade unions and their rights not to be subjected to inhuman and degrading treatment and not to be held in slavery and servitude were being violated by Haco Industries, their employer. The main grounds were that the employer had kept them as casual workers even though they had been in employment for periods ranging from two to fifteen years. Casual workers are statutorily defined as those people who work for periods not exceeding 24 hours and are paid at the end of the day. The Applicants argued that the employer had so retained them for exploitative reasons, that is, keep wages repressed and avoid paying benefits that go with permanent employment. The Appeal was filed against the ruling of the High Court of Kenya sitting as a Constitutional court, which ruled that the matter did not raise constitutional issues as there was legislation that under which the issues could be resolved under. The High Court in effect refused to consider the matter on its merits and on the basis that there were other lawful avenues open to the applicants and that the applicants could go and ventilate their grievances elsewhere rather than in a constitutional court. The Court of Appeal in a judgment delivered on 2<sup>nd</sup> July 2004 however reversed the order and stated that the issues raised were properly matters for the constitutional court and should have been heard on the merits. The Court of Appeal then ordered that the matter be re-heard before the Constitutional court. The matter is still pending before the court. Should the applicants’ case prove unsuccessful, they still have recourse before the ILO tribunal.

<sup>45</sup> Article 11 of the European Convention on Human Rights guarantees the freedom of association and mentions expressly the right to form and join trade unions as an expression of this freedom.

<sup>46</sup> Civil Appeal No. 110 of 2001 (Nairobi).

What then are the issues that arise? One of the orders sought by the applicants was:

*“... a declaration that the applicants right to associate guaranteed under Section 80 of the Constitution of Kenya is being and has been contravened by the refusal of the Respondent to issue the Applicants with letters of appointment.”*

Casual workers are contracted on a daily basis and cannot under existing legislation in Kenya form trade unions because the law on trade unions does not recognize them as employees. The applicants' contention is that they had been casual employees for periods ranging between five to fifteen years and could therefore be termed as 'regular casuals'. This situation, the applicants claimed, amounted to a deprivation of their right to associate with others in matters of trade unions and that the practice contravened provisions of the Bill of Rights securing the freedom of association under Art. 80. This constitutional provision is buttressed by legislation. Under the Kenyan *Employment Act* the "casual employee" is "an individual the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time". This category of workers enjoy to a large extent the same rights as other employees, but may be excluded from many benefits, such as leave, medical cover or housing and as mentioned above, the right to unionise. Nevertheless, this provision is hardly ever adhered to by employers and the practice in Kenya has been that many employers recruit workers as casuals even though the work is not of a periodic or seasonal nature. Often workers can serve casually for as long as 15 years. When they are finally released, they have no terminal benefits.

In this case, if the court were to find that the applicants were in fact not casual laborers under Kenyan law, then it would have to rule on whether the defendant company had infringed on their constitutional right to join a trade union by declaring them casual employees. This case also highlights an important aspect of the right to collective bargaining. Kenya's legislation prevents casual employees from joining trade unions. Is it permissible for Kenya to exclude certain categories of workers from joining trade unions? In international law, the only permissible exception to this right relates to the police and armed forces who may be prevented by national law from joining or forming professional associations.

Casual workers are highly vulnerable. Surely, ILO Convention no. 87 which asserts the rights of workers and employers to establish and join organisations and to be free to elect representatives and draw up rules and constitutions as they wish without the interference of public authorities must have been intended, at a minimum, to protect the most vulnerable of workers.



## Undocumented Workers

Undocumented workers are workers who are employed, on oral contracts and on an informal basis and not disclosed as workers for taxation and other statutory purposes. Officially, undocumented workers lack proper records and are only de facto employees. According to reports of the Platform for Labour Action, a Ugandan NGO, approximately 70 percent of Ugandan workers are non-unionized and often undocumented; as such, they are deprived of even the meager protections prescribed by relevant legislation and government regulations. For many, work is characterized by unsafe and unhealthy conditions, unfair dismissals, employers cheating workers on overtime and inadequate protection of pension contributions. The government's inability to assure compliance with labor legislation is a growing problem. The ministry responsible for the enforcement and inspection of the workplace is constrained in enforcing legal compliance by lack of facilities and tools for inspection. Inadequate enforcement is compounded by problems in Uganda's labor unions, including insufficient transparency and accountability, persistent leadership problems, the unions' representation of only a small fraction of Ugandan workers, and the absence of other organizations committed to the effective protection and promotion of workers' rights. Many employers use undocumented workers to avoid any obligation to recognise workers' rights of organization and collective bargaining.

In a case handled by the Platform For Labour Action, the defendant company entered into an agreement with the Trade Union acting on behalf of the workers to govern the relations between the company and its employees. However the company did not employ the plaintiffs according to the terms and conditions set out in the agreement. The applicants were underpaid, they were denied leave allowances and at termination they were also denied terminal benefits. The applicant's claim was primarily based on unfair termination but they also argued that they were denied these entitlements because they were undocumented workers.

Are undocumented workers entitled to the same treatment as other workers officially recognised under law? This distinction between documented and undocumented workers is a de facto one with legal implications for workers who cannot evidence their employeehip contracts and accrued entitlements. They face de jure discrimination because the law does not recognize their de facto existence. Under international law in the context of the principle of equality before the law embodied in Article 7 of the Universal Declaration, Article 26 of the ICCPR, and Article 19 of the African Charter, any measures that promote a harmfully different treatment for persons or groups of persons amount to discriminatory treatment. The main standards protecting undocumented workers come from the International Labour Organization (ILO). The ILO has two legally binding instruments relating to undocumented migrant workers:



Convention No. 97 of 1949 (C97) concerning Migration for Employment and Convention No. 143 of 1975 (C143) concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers. Both are complemented by non-binding recommendations. Nations cannot, therefore, authorize or permit unjustified discrimination against undocumented workers within the meaning of these conventions.

In *Hoffmann Plastics v the National Labour Relations Board*<sup>47</sup>, the issue was whether undocumented workers were entitled to the same benefits as other workers. The background of the case is as follows: the petitioner illegally fired several workers in retaliation for their attempts to organize a union. Finding multiple unfair labour practices, the National Labour Relations Board ordered its traditional remedy, reinstatement with back pay, for all discharged employees. When the Board learned that one affected employee was an undocumented alien, it refused to reinstate him and terminated back pay from the date that they discovered that he was undocumented. The workers filed a case which eventually came before the Supreme Court. In a majority decision, the Court ruled that when employers illegally fire undocumented workers for union activities, the workers generally cannot get the basic remedy of back pay for the period after they were fired. However four justices, backed by federal labour and immigration agencies, dissented. They were of the opinion that granting undocumented workers the theoretical right to organize unions, but then denying them the remedy needed to make that right effective, would cut against the policy not only of labour laws, but also of immigration laws, by making it more attractive for employers to hire undocumented workers. The Supreme Court had earlier ruled in *Sure-Tan v. NLRB* (1984) that undocumented immigrants employed in the United States are protected under the NLRA. As the Court argued: “Application of the NLRA helps assure that the wages and employment conditions of lawful residents are not adversely affected by the competition of illegal alien employees who are not subject to the standard terms of employment.” What this means is that firing an undocumented alien worker in retaliation for union-related or other protected activities is illegal under the US law. However the *Hoffmann Plastics* decision means that undocumented alien workers have been barred from enjoying their rights and effectively, this has weakened the right and ability of all employees to unionise by allowing an employer the double benefit of hiring of undocumented alien workers whilst controlling their ability to unionise by having the discretion to fire them for doing so.

The Inter-American Court of Human Rights has issued an advisory opinion on undocumented workers. The court has held that all workers, regardless of immigration status, must be treated equally once employed. Here the court is dealing with immigration status as well as documentation status, since both

<sup>47</sup> Hoffman Plastic Compounds, Inc. v. NLRB, 535 US 137 (2002).

are categories of the same distinction. After all, being a migrant alien usually entails being without proper documentation. In its view, States may, under their laws, accord a different treatment to undocumented workers whose situation is irregular. However, under no circumstance are they allowed to discriminate with regard to the enjoyment and protection of internationally recognized human rights.

The Ugandan case is hence based on the adverse consequences already suffered by the workers as a result of being undocumented. They have been discriminated against in their entitlements to wage protection, job security, equal pay and employment benefits upon termination. Had they been documented they may not have been similarly treated, but even if they were, they would have recourse to the courts under the law. That is the insidious thing about the undocumented workers, that they are discriminated and cannot seek the protection of the law as a safeguard. The law has no safeguards for categories of workers who find themselves vulnerable as a result of the nature of their employment contracts. For Uganda to fully comply, the court would have to order the abolition of the system of undocumented labour. However, this is a decision which in practice would be rendered futile and unenforceable, unless the state could back it with enforced legislation. Ultimately, through this case, the law could be developed to offer undocumented workers the same remedies they would obtain as though they had been documented.

### **2.3 Elimination of discrimination in respect of employment and occupation**

The general duty not to discriminate is expressed by the International Covenant on Civil and Political Rights (ICCPR) in its preamble, which states that ‘these rights derive from the inherent dignity of the human person.’ Article 2 of the Convention requires state parties to ensure the rights provided for without distinction as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>48</sup>

Ratifying States are required by ILO Convention No. 100 to take measures to promote and ensure the application of the principle of equal remuneration for work of equal value. Convention No. 111 requires ratifying States to promote equality of opportunity and treatment by means of policies aimed at ending all forms of discrimination in employment and occupation on grounds of *race, colour, sex, religion, political opinion, national extraction or social origin*. The above list is by no means exhaustive and may be liberally interpreted as including other variants such as an employee's HIV status. In the Nigerian Case *Taire Johnson v Brooks Industries Ltd and King Solomon Hospital* the victim's claim

<sup>48</sup> Article 2 (1), ICCPR

is based on discrimination on grounds of testing positive for HIV, the virus that leads to AIDS.

While there is no specific human rights instrument that expressly prohibits discrimination on the grounds of an employee's HIV status, this prohibition can be inferred from a number of instruments such as the UDHR and the ICCPR, which provide a general duty not to discriminate. There is a growing international recognition that this kind of discrimination exists and the ILO has developed a Code of Practice on HIV/AIDS and the World of Work. It identifies the following areas as requiring action: prevention of HIV/AIDS, management and mitigation of the impact on work, care and support for workers infected and affected and lastly the elimination of stigma based on real or perceived HIV status. In June 2001, 189 Heads of State adopted the UN Declaration of Commitment on HIV/AIDS and committed themselves to "By 2003, develop a national legal and policy framework that protects in the workplace the rights and dignity of persons living with and affected by HIV/AIDS and those at greater risk of HIV/AIDS, in consultation with representatives of employers and workers, taking into account established international guidelines on HIV/AIDS and the workplace".

### **Discrimination on the Basis of HIV/AIDS Status<sup>49</sup>**

Africa is experiencing an HIV/AIDS epidemic of enormous proportions. The workplace, like all the other sectors, is adversely affected. The tendency of a significant proportion of employers has been to discriminate against employees and job applicants living with HIV/AIDS through use of HIV testing to exclude those that are HIV-positive. Though there is a dearth of international human rights instruments prohibiting discrimination of persons with HIV/AIDS, the ICCPR states that rights should be enjoyed without any distinction of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or *other status*<sup>50</sup>. The latter definition can be inferred to include disabilities, illness such as HIV/AIDS.

The United Nations has more recently adopted the Declaration on Commitment on HIV and AIDS<sup>51</sup>. The Declaration states that member states "should enact, strengthen or enforce as appropriate legislation, regulations and other measures to eliminate all forms of discrimination against and to ensure the full enjoyment of all human rights and fundamental freedoms by people living with HIV and AIDS." The Declaration is not a legally binding document. However, it is a clear statement by governments concerning that which they have agreed

<sup>49</sup> See supra note 59; Legal Opinion on Case 83- Human Rights and Compulsory Pre- Employment HIV/AIDS Tests

<sup>50</sup> ICCPR Article 2 (1)

<sup>51</sup> Adopted at the United Nations General Assembly Special Session dedicated to HIV/AIDS, held in June 2001.

should be done to fight HIV/AIDS and that which they have committed to doing, often with specific deadlines. As such, the Declaration is a powerful tool with which to guide and secure action, commitment, support and resources for all those fighting the epidemic, both within and outside government.

The ILO Convention Number 158 on the Termination of Employment has a number of provisions geared towards prevention of discrimination in the workplace against persons infected with HIV/AIDS. In light of these provisions the ILO and the World Health Organisation have jointly stated that ‘HIV’ is not a cause for termination of employment and that infected persons pose virtually no risk to other employees and that people should not be screened before employment.

On the other hand if we argue that HIV/AIDS as an illness falls into the category of disability (the Supreme Court of United States of America in *Bragdon v Abbot* viewed HIV infection as a disability” that is, “a physical ... impairment that substantially limits one or more of [an individual’s] major life activities.”<sup>52</sup>, international law also prohibits discrimination based on disability. Article 4 of the ILO Convention 159<sup>53</sup> seeks to promote special protective measures, such as workplace accommodation and transfers, to enable people with disability to continue earning a living until such time as their disability affects their capacity to perform a particular kind of work.

A Nigerian woman was dismissed from employment after a mandatory test ordered by her employer, a private company, showed her as being HIV positive. Sometime after her dismissal, a second test showed her to be negative. The first test proved to be erroneous and its result was rescinded by the medical centre carrying out the test. The case raises interesting issues, such as whether the mandatory test violates an employee’s right, whether an employee’s contract can be terminated merely because of a test showing HIV positive status, as well as issues of medical confidentiality and negligence.

By dismissing the employee, the employer was motivated by concern and even prejudice or fear of the employee’s HIV status and its implications within the workplace. The employer’s policy was to not hire employees who were HIV positive and to dismiss those who proved to be positive. This policy may have been known to employees who submitted to mandatory tests with or without consent, but at any rate in order to secure their employment. They had little option but to submit to tests and hope for the best. In many cases, employees submit to all sorts of tests and endure anxiety whilst seeking employment. In this case, woman X probably submitted to other medical tests in addition to the HIV test, and any other test whose results the employee did not like would

<sup>52</sup> SC 502 U.S 624 (1998)

<sup>53</sup> Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1933 (No. 159)

have meant loss of employment. The test for HIV Aids by itself, even though mandatory, is a test the employee could have refused to submit to, even at the risk of not getting the job she desired or keeping it.

The employer's prejudice against HIV positive employees is a peculiar prejudice. The question is whether it is an irrational one, that is prohibited by the constitution of Nigeria. On one hand, both the constitution and international human rights standards prohibit unfair discrimination, and prejudice. On the other hand, the Nigerian constitution and international human rights law do not have horizontal application as between ordinary citizens for their acts in the private sphere.

Consider if the discriminating employer was a state owned or subsidized outfit. Perhaps then the discrimination would have amounted to a violation of a discrimination prohibiting clause in the constitution. This was the case in *Hoffman v South African Airways*<sup>54</sup>, where the South Africa Constitutional Court found the state subsidized South African Airways to have discriminated against a potential air steward merely on account of his HIV positive status. The Court found prevailing social prejudice against people with HIV/AIDS to "render any discrimination against them as a fresh instance of stigmatization; and an assault on their dignity." Concerning SAA allegations that hiring HIV positive persons would harm its public image and favour its competitors, the Court added:

*"Legitimate commercial requirements are, of course, an important consideration in determining whether to employ an individual. However, we must guard against allowing stereotyping and prejudice to creep in under the guise of commercial interests. The greater interests of society require the recognition of the inherent dignity of every human being, and the elimination of all forms of discrimination. Our Constitution protects the weak, the marginalised, the socially outcast, and the victims of prejudice and stereotyping. It is only when these groups are protected that we can be secure that our own rights are protected...."*

The court subsequently ordered the airline to employ the complainant as a flight attendant. The court knew that the state subsidized airline could be addressed through the Bill of Rights for its acts in a private sphere. The same line has been used against purely private entities that discriminate others on prejudice, on the ground that they are registered by the state, and that the state by licensing such outfits is condoning the discriminatory practice in the private sphere. That is another matter. Part of the costs borne by the negative

<sup>54</sup> Hoffman v. South African Airways [2001] IS.Afr.L.R. 1 (S.Afr.Const.Ct), at para. 28.

costs borne by the South African airline in the event it lost custom out of its recruitment of a known HIV positive flight attendant could arguably be offset in state subsidy. Hence, it was not purely rational market driven choices at play here, since in South Africa at least, the commitment to eradicate prejudice in both public and private spaces, after apartheid, is a constitutional obligation of the state in all its manifestations.

If the dismissal was based on an open policy not targeting the employee specifically, but bringing her into an unfortunate class of people who were not fit for hire, the question is if it matters at all that she was in a position to work. Who can determine the fitness of a person to work better than her employer? In Hoffman and as we see in Namibia, the court dealt with the question of the quantity of antibody that needs to be present in a human body so that the person is not physically fit to work. Isn't this arbitrary as much as the employer's fit for purpose rule? Even medical testimony would show that the quantity of HIV after a particular level was prohibitive of physical work due to onset of disease and so on, but how rapidly that state was reached, and with what catalyzing or slowing down factors was only a matter of conjecture, different in all individuals. It also does not address for example the question whether person was fit on mental or psychological grounds for instance.

A more rational approach is therefore needed in building arguments against dismissal and discrimination at the workplace based on HIV status. In the Nigerian case, a prejudice that materialized following a test result can only prove its rationality of the employee was reinstated after revelations that the test result was actually fake. That is there was never any basis for the prejudice, and that while the test presents the masquerade of a rational test, it was in fact never so. It would be the same thing if a person who was actually positive returned a negative test and was retained in employment. The rational point would be to get rid of the test as a basis for rationalizing a choice, and to require if the test is maintained, additional safeguards in favour of the employee, and which protected the employer from exercising his prejudice haphazardly.

Yet as shown by the following cases, the conjunction between international human rights protection and HIV status re-littered with preoccupation with testing.

***South Africa, PFG Building Glass (PTY.) LTD. V Chemical Engineering Pulp Paper Wood & Allied Workers' Union & Others*<sup>55</sup>**

PFG Building Glass, with the informed consent of its employees, wished to perform an anonymous HIV test on them to determine the incidence of the virus amongst its staff. It applied to the Court to carry out this exercise because

<sup>55</sup> Labour Court (J90/03),(2003) 24 ILJ 974 (LC).

section 7(2) of the Employment Equity Act (EEA) of South Africa prohibits the HIV testing of an employee unless the Labour Court determines it justifiable. The Court ruled that, since the employees had voluntarily given their informed consent to being tested for HIV, there was no need for an application to the Labour Court to determine the justifiability of the test. However, the Court stressed that, if employees refuse to consent to HIV testing or consented without being fully informed, an application to the Labour Court to determine the justifiability of the test would be necessary. This judgment is interesting because it places the evaluation of the justifiability of a HIV test in a constitutional setting. The Court found that an HIV test, since it affects the fundamental rights to people's physical and psychological integrity, must meet the requirement of the Constitution. It must be balanced against the right to integrity and all other rights in order to give effect to the values of an open and democratic society based on human dignity, equality and freedom. The Court stressed that the testing may not in any way be discriminatory:

*The first constitutional rights and value against which the application for testing must be assessed is whether it is unfairly discriminatory on any grounds and specifically in relation to any aspect of employment ... (If it is found) to be discriminatory, then it will be automatically unjustifiable. That is the end of the enquiry. The prohibition against testing that is unfairly discriminatory is absolute in terms of the EAA and the Constitution... If the testing is not unfairly discriminatory, only then may the Labour Court continue to balance other rights and values against the limitation.*

### **Namibia**

In Namibia, there is a National Code on HIV/AIDS and Employment in place. The Code, which was adopted under the Labour Act, 1992, outlaws discrimination in employment on the basis of HIV/AIDS; prohibits direct or indirect HIV testing of workers or job applicants; guarantees confidentiality regarding HIV/ AIDS and the workplace; and encourages the implementation of workplace HIV prevention and education programmes. In the following case, *Namibia, N. v Minister of Defence*<sup>56</sup> the Minister of Defence was sued by a potential recruit whose application to join the Namibian Defence Force (NDF) was refused on the sole basis of his HIV-positive status. The Court ruled that the NDF may not exclude any person from joining the Namibian military only because the person, who was otherwise fit and healthy, had tested HIV positive. The Court found that the NDF had to determine to what extent a potential recruit's HIV-positive immune system had been damaged and how far the HIV infection had developed. It found that an HIV test alone would not achieve

<sup>56</sup> Haindongo Nghidipohamba Nanditume v. Minister of Defence, Labour Court of Namibia, delivered 10 May 2000, Case No. LC 24/98.



the purpose of assessing fitness for employment and could thus only be undertaken as part as a broader assessment of physical fitness. This judgment represented a step forward in the fight against discrimination but, unfortunately, the National Assembly subsequently approved a Defence Amendment Act, 2002, that appears to require the Namibian Defence Force to exclude people solely on the basis of their HIV status.

### **Canada**

Comparative jurisprudence illustrates that courts treat discrimination on the basis of ones HIV status as a violation of fundamental rights. In Canada, *Thwaites v Canada (Canadian Armed Forces)*<sup>57</sup> Mr. Thwaites, a master seaman of the Canadian Armed Forces (CAF), filed a complaint against the CAF alleging that it discriminated against him by terminating his employment and restricting his duties and opportunities because of his disabilities, i.e. because he was HIV-positive. The Canadian Human Rights Commission found that Mr. Thwaites had been discriminated against because of his disability. It found that the military failed in its legal duty to accommodate him and to individually assess his capabilities in the context of the potential risk he posed to himself and others. It also held that the increased risk posed by retaining a disabled person in the Forces had to be more than minimal risk before the Forces could justify outright dismissal. It is worth citing the Commission's strong statement concerning these last points:

*The importance of searching for reasonable alternatives or accommodating the individual to permit him or her to do the job or to lessen any risk (if risk is a factor) is now the bedrock of human rights law in this country. Indeed without reasonable accommodation, the protection given by the Canadian Human Rights Act (CHRA) to certain groups, the disabled in particular, would be quite illusory... It is of critical importance that the accommodation of persons with disabilities be approached on an individual basis. Disabilities differ dramatically, one from another. There are also great individual variations within the same disability group... It should be acknowledged that this may add some risks and make matters somewhat more burdensome for employers but this is a small price to pay for the higher value that society places on equal opportunity... An employer cannot rely on undue hardship unless it would be forced to take action requiring significant difficulty or expense which would clearly place upon the business enterprise an undue economic or administrative burden."*

This decision was upheld on review by the Federal Court. However, shortly after the *Thwaites* decision, the Federal Court of Appeal took a step backward in deciding two subsequent cases<sup>58</sup> that the military could release or refuse to hire

<sup>57</sup> [1993] CHRD No. 9 (7 June 1993); affirmed *Canada (Attorney General) v Thwaites*, [1994] 3 FC 38 (TD)

<sup>58</sup> *Robinson v CAF*. The Supreme Court of Canada refused an application of leave to appeal the two cases.

a person if retaining that person posed any greater risk than retaining an able-bodied member, regardless of how small that increase in risk might be.

It is important for the legal practitioner to note that while Government action is essential to implement the obligations of international human rights treaties, courts and the judicial officers have pivotal roles in ensuring that the legal framework is applied fully, justly and evenly, and benefits all individuals equally. Proper application of the legal framework can only be achieved where decision makers are aware of, or sensitive to, the realities of the lives of those who seek the protections and remedies that the law offers. Judicial decisions can be based upon a restrictive interpretation of the domestic law or be approached in an expansive and creative way that will truly provide justice to all. International human rights law, and particularly the principles of the international human rights, can provide the background and framework for such judicial decision-making.

## CONCLUSION

It is difficult to assess the precise impact of human rights and international labour standards because they frequently involve areas where the effect of these standards does not lie solely, or even principally, in these legal instruments but also, and primarily, in practice. It is, however, clear that, while the application of these rules may frequently leave much to be desired and even reveal major shortcomings, overall progress has undeniably been made.

Human rights have now entered the universal consciousness to the extent that any violation sparks a reaction in public opinion similar to that produced by a criminal act or infringement of a moral or legal code. It is true that prominent international human rights bodies may nuance their criticism for political reasons, but their own credibility suffers as a result in the eyes of an increasingly sensitized public. Overall, the identification by international bodies of human rights violations seriously damages the reputation and international credibility of the States responsible. The same holds for international labour standards. Consequently, freedom of association has been restored in a number of countries with the democratization of authoritarian regimes of the right and left for example in Spain and in Poland; forced labour has been eliminated or reduced with the end of colonialism and of other systems of forced labour mobilization; and the extreme violation of international standards on discrimination in the form of *apartheid* in South Africa has been eliminated with the early condemnation and subsequent assistance of the ILO.

Litigation is an effective way of implementing human rights norms at the domestic level. The notion of human rights is not new to the African legal profession. African lawyers have some record in lobbying and challenging

government legislation that is incompatible with human rights norms and seeking to redress human rights violations. However, the level of awareness on human rights is still low among the legal profession and the public in general. There is a need for the litigation lawyer to refer to regional and international human rights treaties before national judicial bodies. This could stimulate the national judiciary to become familiar with and to take human rights norms seriously. Lawyers and judges need to take serious steps to familiarize themselves with regional and international human rights treaties.

### **Litigating labour rights as human rights**

It must be recognised that labour and employment issues are central to socio-economic rights and that a large percentage of the African population is employed in the informal labour market (that is, the non-state sector). This is the area where litigation is most difficult. However, with growing international acceptance of the horizontal enforcement of rights there has been a diffusion of human rights from the public sphere to the private sphere. The realization that if unchecked private companies capacity will infringe human rights has driven a paradigm shift in rights conceptualization. Most international human rights instruments deal primarily with obligations of State but these rights are applicable to all actors.

The challenge lies in identifying areas in which the domestic law does not incorporate international labour standards and using the judiciary to interpret these laws in a way that applies international human rights standards. For example, although the African Charter states, “every individual has the right to work” this right is not fully respected in many African countries. For instance:

- In Ethiopia, public servants cannot be unionised;
- In Tanzania, the right to freedom of association is restricted. The Bill of Rights provides that people only have the right to associate in a registered trade union, to which everyone must belong;
- In Ghana, the Constitution only guarantees the conditions as opposed to the right to work in safe, satisfactory and healthy conditions.

### **Filing Complaints before the ILO**

How about transnational enforcement of rights where domestic remedies are unavailing? Trades unions and employers’ organizations can make complaints and submissions to the ILO supervisory machinery. Representations may be filed by any national or international employers’

or workers' organization whenever they believe that a country, is not 'securing its effective observance'. The Governing Body of the ILO sets up a committee of its members to examine the case.

In addition there is a Special Procedures on Freedom of Association. Freedom of Association is viewed as the basic pre-requisite for any democratic society and enjoys the special attention in the ILO supervisory bodies. Complaints alleging infringement of freedom of association may be made by national or international organisations of employers or workers or governments. Such complaints may be made regardless of whether a country has ratified any of the Conventions related to freedom of association since freedom of association applies to all member States by virtue of membership.

## CHAPTER 4

### RIGHT TO LAND - RIGHT TO HOUSE AND ADEQUATE STANDARD OF LIVING\*<sup>1</sup>

#### SECTION 1

##### Right to Land and Right to House in African Countries

###### 1.1 ANALYSIS OF THE ISSUE

Before examining specifically the issue of land dispossession, it is important to explain briefly the particular conception of land among indigenous peoples. Many indigenous communities in Africa have the concept of collective ownership of the land. Despite the introduction and adoption of modern land tenure systems, which lay emphasis on individual ownership with the concomitant notion of absolute and exclusive use and access to land by the individual owner, African customary law, which governs many ethnic groups, recognizes a particular kind of land tenure, the **communal land tenure**: land and whatever is attached thereto does not belong to a single individual but to the whole community. For indigenous peoples, land is not only a means of production or a possession, it is part of the total environment in which they live. They do not own the land but the land (the 'Mother Earth') owns them and gives birth to them. The value of land and environment is based on a holistic, meta value vision of their territory where the entire animal and vegetal world acquires particular meaning, a value that is fundamental for the reproduction of life. In this sense, indigenous communities do not conceive of land as a tradable good and do not hold legal title proving their individual property, but they use it in common.

Unfortunately, the concept of collective rights is one of the more confusing ones in international law. It is very difficult to discern its various aspects, since it is linked with such questions as the definition of peoples, the right to self-determination and autonomy. Some scholars tend to distinguish the concept of collective rights in two different ways: group's rights and peoples' rights. The first regards the rights pertaining to the group as such and are exercised by the group itself or by its members. The origin of these kinds of rights is the realm of work, as realized through trade unions and labour organizations.

<sup>1</sup> Clara Polsinelli, MA Comparative Law; Laura International University

Most of these rights are now contained ILO documents<sup>2</sup>. The second ‘division’ of collective rights regards the rights of peoples, in particular the right to self-determination and other rights called ‘third generation rights’ or ‘solidarity rights’, as the right to development, the right to peace, the right to a healthy environment and the right to the control and enjoyment of national resources. These rights see the collectivity, that is, the people, as the vehicle through which individuals can enjoy rights. It is these rights that have most provenance to indigenous peoples and their relations with land.

On a general point of view, the adoption of individual tenure systems and the concomitant diminution of communal rights has meant that group rights have become increasingly vulnerable with modernization and free-market economics. On the downside the fact that groups lack formal legal title and their tenure systems are not recognized has given states a colourable excuse for expropriating indigenous communities of their lands and evicting them from their homes.

This chapter distinguishes between different types of dispossessions. Such distinctions are critical: international law does not protect people from all land dispossessions. It is therefore important to appreciate the principles that undergird international protection. In order to offer to practitioners a quick overview as to how to apply international land rights standards to actual cases, the key concepts presented here are summarized in the GREY BOX at the end. Then, a TABLE OF REFERENCES provides links to judicial precedents or cases’ examples that represent concrete applications of the theoretic principles examined, is found in the appendix.

## Land Dispossessions

In case of land’s dispossession, it is crucial to define if the dispossession happened during colonization period, as a consequence of colonial administration of the African countries, or if it has been carried out more recently by the new states after independence.

### 1) Historical dispossessions

Many of the issues concerning possession of land by indigenous peoples today are the result of global processes, which are rooted in the colonial age. During colonial times, lands were seized, peoples forcibly uprooted and settled elsewhere and many usually mistreated. Sophisticated, if dubious, legal theories were elaborated to justify such actions: one was the doctrine

<sup>2</sup> In the same way, also the instruments regarding women and children can be understood in this sense. The biggest evolution regarding group rights is maybe the field of minorities, where both art. 27 of the ICCPR and the Minorities Declaration of 1992, foresee the group component in the exercise of the rights set down.

of '*terra nullius*' (i.e. empty land), according to which the land not occupied or not rationally exploited could be expropriated. The second method of expropriation involved the imposition of notions of private property. In the comment of the UN Special Rapporteur A. Daes in 1999<sup>3</sup>:

The doctrines of dispossession that emerged in the subsequent development of modern International law, particularly "*terra nullius*", and "discovery", have had well-known adverse effects on indigenous peoples. The doctrine of *terra nullius* as it is applied to indigenous peoples holds that indigenous lands are legally unoccupied until the arrival of a colonial presence, and can therefore become the property of the colonizing power through effective occupation. In the seventeenth, eighteenth, and nineteenth centuries, the doctrine of "discovery" gave to a discovering State an inchoate title to that new land that could be perfected through effective occupation within a reasonable time. The doctrine, as it has come to be applied by States ... gives to the "discovering" colonial power free title to indigenous lands subject only to indigenous use and occupancy, sometimes referred to as aboriginal title".

The clearest example is in Australia, where during colonization, no aboriginal title over the land was recognized. Instead, the land was defined as '*terra nullius*' and assumed to belong to no one. The British Crown assumed title over the land, which it disposed of as it saw fit. With the loss of their lands, Aboriginal peoples also lost livelihoods, graves and other sacred sites, history (for history was written on the landscape) and much of their religion.

After independence, indigenous peoples have begun to re-assert their rights to traditional homelands and have challenged the assumptions and mechanisms that resulted in their dispossession. There have been two ways of facing the problems caused by historical dispossessions during colonial times.

1.A) In some cases, the new governments have formally recognized the rights of indigenous peoples over the land before colonization and they have enacted laws protecting and restoring the rights of indigenous peoples. In South Africa and in Australia these rights are entrenched in the new Constitutions. The independent Australian Government, for example, has granted the Aboriginal people the legal property of the land that was expropriated during colonial time.

Indeed, in case of historical dispossession, indigenous land rights violations, together with the violations of more fundamental human rights (life,

<sup>3</sup> EC.4/Sub.2/1999/18 COMMISSION ON HUMAN RIGHTS, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Fifty-first session. HUMAN RIGHTS OF INDIGENOUS PEOPLES Indigenous people and their relationship to land, Second progress report on the working paper prepared by Mrs. Erica-Irene A. Daes, Special Rapporteur.



freedom, etc...), are strictly entrenched in the history and development of each state. IL does not aim at redressing historical past wrongs, but, better, to protect indigenous rights in the future. Furthermore, since it is not possible to apply international treaties retroactively, historical wrongs are not covered under the new rules protecting indigenous rights.

- 1.B) In other cases, the newly formed states have taken a different approach and preferred not to recognize the special link of indigenous peoples with their land. After independency, in countries like Kenya, Tanzania, the Congo, Botswana, the new governments didn't acknowledge the indigenous customary rights to the lands dispossessed during colonization, but rather declared all the lands as '*state lands*', that is land belonging to the state. In Tanzania, for example, with decolonization all the lands have been declared '*state lands*' and used for the prominent national interests. In Kenya the independent government allocated the territories handed over by the British administration to single privates or foreign industries, rather than to the indigenous communities, who were traditionally occupying it.

In such cases, international law is rarely applicable: usually the resolution of historical claims lies within the domain of the national sovereign. However, in resolving the issue, a state may fall back on persuasive principles drawn from international human rights principles. After independence, the former colonial states had two options. The first option would be to recognize the indigenous peoples' customary rights and proceed to land restitution to the communities who were traditionally occupying it before colonization. This rarely happened. The second option would be to treat the territories held over from the colonial administration as land for public interest. This was the preferred approach. However, it meant that many pre-colonial claims of indigenous communities dispossessed by colonial occupation would never be fully redressed.

## 2) Contemporary dispossessions carried out after independence

Removal of peoples from their lands and territories is not merely a historical anomaly, many of the most serious case of contemporary injustice entail dispossessions of land. The interests of the indigenous communities over their land are usually in conflict with new international economic imperatives compounded by pressure generated by growing populations, market led development programmes and keen competition over resources. Oil and gas exploration and exploitation, geothermal energy development, mining, dam construction, agriculture, ranching and other forms of economic activity in the national interest, are have an adverse impact on local peoples. Some States consider the removal of indigenous peoples from their lands an appropriate solution to promote State interests in these lands, territories and over resources therein.

Typically, we can distinguish two different circumstances under which dispossessions could be effected:

2.A) Dispossession carried out by the State itself or state bodies in the name of the national interests. The difference between such dispossessions, termed takings in some context, and those of the colonial era is that these are justified on the basis of a compelling public purpose. There is a countervailing fact in the international recognition of the rights of indigenous peoples'. This means that expropriations such as those that happened during colonial time can no longer be justified. This implies that even when the state exercises the right to take property for public interest, it must do so consistently with the widest possible respect for the rights of indigenous peoples. The government must inform and consult with the indigenous community living on the territory, provide alternative resettlement, and pay compensation for the eventual economic loss.

In terms of the applicable principles in such cases, the crucial question is whether the takings are carried out (and the laws authorizing them) are consistent with international law standards or not. It is important to specify that international standards recognize the validity of *indigenous customary rights; hence the procedures and standards established at international level are applicable even in case the local community does not hold a formal legal title over the land.*

Even in such cases, the question is whether the internal state rules are consistent with the international standards on indigenous peoples' rights in force in the specific Country. In case expropriations are carried out (by the State or corporation) outside any provisions of law, they should be considered arbitrary and therefore illegal *tout court*.

2.B) Dispossession carried out by the State or by private individuals on the basis of discriminatory practices. Discriminatory dispossession may be based on sex (inheritance rights, family law regulating communal ownership between spouses, etc...); religion and ethnicity; citizenship (difference between aliens and citizens). In such cases, we are outside the domain of land rights to enter in the sphere of protection against discrimination.

In these types of cases, the international law standards against discrimination on women, discrete and insular racial and ethnic groups, minorities are applicable. The challenge is to see whether the provisions of law allowing such dispossessions are consistent with international standards or not. In case expropriations are carried out outside any provisions of law, they should be considered arbitrary and therefore illegal.

## Forced Evictions: Housing rights

Though they are conceptually related to land rights, *housing rights are nonetheless independent human rights* and are implicated in cases of forced evictions. The practice of forced evictions involves the removal of persons from their homes, directly or indirectly done under colour of law. It entails removing an individual or group living in a particular house, residence or place, with or without the provision of resettlement of evicted persons or groups to other areas. Tolerated in most societies and officially encouraged in many, forced evictions dismantle the dwellings and human settlements, destroying the livelihood, culture, community, families and homes of millions of people throughout the world every year.

In recent years, there has been marked international recognition of the negative impacts of forced evictions and there is an emerging global consensus on the unacceptability of forced evictions. The human costs of forced evictions are substantial and involve a wide range of additional negative impacts on the lives and livelihood of those affected. Evicted people not only lose their homes and neighborhoods, in which they have often invested a considerable proportion of their incomes over the years, but are also often forced to relinquish their personal possessions, since usually no warning is given before bulldozers or demolition squads destroy their settlements. Evictees also may lose their sources of livelihood and the complex reciprocal relationships which provide a network of protection against vulnerabilities. The United Nations Special Rapporteur<sup>4</sup> has emphasized that *“the issue of forced removals and forced evictions has in recent years reached the international human rights agenda because it is considered a practice that does grave and disastrous harm to the basic civil, political, economic, social and cultural rights of large numbers of people, both individual persons and collectivities”*. Furthermore, as pointed out in a report by the Secretary-General to the Commission on the Status of Women, resettlement and evictions usually increase the vulnerability of women and children, because women bear the brunt of traumatized and dislocated communities<sup>5</sup>.

International law classifies forced eviction as a gross violation of human rights, depriving women, men and children of the human right to adequate housing. It doesn't matter whether forced evictions are carried out by the State or private persons. International law establishes clearly a set of standards that should be respected in any case of forced evictions. In particular, the right to housing guarantees *security of tenure* and *legal protection* against forced eviction for all people and laws that inconsistent with such standards should be considered a violation of the international obligations. It is a violation, as with land disposessions, even if the evictees have only customary rights to the house and do not therefore possess a formal, registered legal title.

<sup>4</sup> (E/CN.4/Sub.2/1993/8, paragraph 21)

<sup>5</sup> (E/CN.6/1994/3, paragraph 5)

## Summary of basic concepts on land's dispossession and forced eviction

**LAND DISPOSSESSION** can be historical or contemporary: it is historical, if it is traceable to colonial times, and it is contemporary, when done in recent years by independent states

- **Historical Disposessions:** International law does not redress historical wrongs, thus it is usually not applicable unless the dispossession that was carried out during colonial time had continued after independence.
- **Contemporary Disposessions:** There is international recognition of indigenous peoples' rights and arbitrary expropriations of the type that happened under colonialism can no longer be justified.
  - If expropriations done by the State for public interest, the state laws authorizing the dispossession should conform to the international standards.
  - Where expropriation is done by private corporations that for size and power have the character of public bodies these should be treated under the same principles as expropriations by the state.
  - In case state laws do not take into consideration customary rights, there is a presumption that they are in conflict with international rules, since these rules recognize and protect indigenous land rights even if not formally registered.
  - If expropriation is done under discriminatory rules or practices, the issue is one of discrimination and international standards against discrimination are applicable.

**HOUSING RIGHTS** are independent human rights and come into question in case of forced evictions, which is the removal of peoples from their houses, directly or indirectly attributable to the state. There is an emerging global consensus on the unacceptability of such practices. Under international law forced evictions are always seen as a human rights violation, whether or not the evictee rights are based on customary law and he or she does not have a formal legal title.

## 1. COMPARATIVE PRACTICES

How have the principles and rights discussed above played out in comparative jurisprudence? In general, upon independence, some countries sought to right the historical land disposessions wrought by colonialism. In a few cases, states enacted laws to protect the indigenous people's rights to natural resources and land. However, in most cases, the independent states merely took control of the lands handed over by the colonial administration and ostensibly held them in trust for the public. In the post-independence period, the challenge has been one of finding a balance between the rights of indigenous groups and pressure to exploit land for development. The result at the national and international level has been the emergence of a mixed jurisprudence: in some cases the rights of indigenous communities have been recognized, in others the state's legitimate interest in fostering development has won the day. In such cases, communities have had to make do with some form of compensation.

The jurisprudence on forced evictions has been more stable: international bodies and commissions have almost unanimously condemned these evictions. However, the challenge has been legislative, a few states have enacted laws to protect housing rights.

### ★ South Africa

As part of the post-apartheid transformation, the right to land and the restoration of expropriated lands to dispossessed communities were paramount considerations for new South African government. For this reason, the interim South African Constitution specifically provided in section 25(7) that *"a person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices, is entitled, to the extent provided by an Act of Parliament, either to restitution of that property, or to equitable redress"*. In applying this principle the Department of Land Affairs embarked on an ambitious program of land reform and undertook sweeping measures to redistribute, reform tenure arrangements and restore dispossessed communities to their former lands. These measures included:

- *The Restitution of Land Rights Act 22 of 1994*. The objective of this law was restitution of land to persons dispossessed after 1913 as a result of racially discriminatory legislation. The general right to restitution is that *"a person should be entitled to restitution of a right in land if: it is a community or part of a community dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices..."* It is important to underscore that under the Restitution Act- and consistent with global best practice- a right in land is defined as *"any right in land whether registered or unregistered and may include ... a customary law interest"*.

- *The Development Facilitation Act* 67 of 1995. The purpose of this law was to ensure quicker and cheaper planning and development approaches. It provides for a) registration or upgrading existing land rights and b) for registration of initial ownership where the process of development and land surveying has not been finalized. This provisional ownership may be mortgaged; other interests and easements may be created on it even though full ownership does not vest until final survey has been done and development requirements have been fulfilled. These provisional measures enable owners to obtain financial assistance at a much earlier stage.
- *The Land Reform (Labour Tenants) Act* 3 of 1996. This law covers issues relating to the security of housing, grazing rights, and cultivation interests and rights of labor tenants;
- *The Communal Property Associations Act* 28 of 1996. This allows for communal ownership by allowing members of a community to create associations to own, control, and deal with communal or common property. The law ties the benefits derived from land to the welfare of the whole community and may then obviate, in some instances, the need to individualize land-use rights.
- *The Extension of Security of Tenure Act* 62 of 1997 protects the rights of laborers other than labor tenants in rural areas;
- *The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act* 19 of 1998 enacts measures to protect vulnerable occupiers and squatters.

These laws are now bedrocked on a wide ranging policy document, the *White Paper on South African Land Policy* of 1997. Among its key human rights are the following pronouncements.

- Land rights vest in the people who are exercising the rights and not in institutions such as tribal or local authorities. In some cases, the underlying rights belong to groups of people and in other cases to individuals or families. Where the rights to be confirmed exist on a group basis, the rights holders must have a choice about the system of land administration that will manage their rights.
- In situations of group-held land rights, the basic human rights of all members must be protected, including the right to democratic decision-making processes and to equality. Government must seek the views of members of group-held tenure systems in order to ascertain their views and wishes in respect of proposed development projects and other matters pertaining to their land rights.
- Systems of land administration that are popular and functional should continue to operate. They provide an important asset given the breakdown of land administration in many rural areas. The aim is not to destroy or harm viable and representative institutions. Popular and democratic tribal systems are not threatened by the proposed measures.

South Africa marks one of the few examples in which an effort has been made to deal with historical violations of indigenous people's land rights. However, there are still many implementation difficulties and there is a persistent conflict between registration and customary systems. The South African deeds registration system is rather exclusive—a large part of the population, notably people in informal urban settlements and in rural areas where a system of communal property still prevails, are altogether excluded from the deeds registration system. The main reason is either that the land in question is not properly surveyed or that individualization of land-use rights in communal property is not possible at present. In the case of indigenous communal property, the proposed system of registering an individualized right to land-use can function properly only if these rights are exercised within an existing system of group rights. A model of fragmented use-rights that can exist simultaneously over the same property granted and protected by legislation seems to be the most logical model in a country like South Africa, where there are so many different kinds of land-use to be reckoned with. Indeed, it has been proven in several legal systems in Africa that the total abolishment of indigenous systems is not recommended since it results in disruption of traditional rules, values, and customs that governed the use of land and that had built-in conflict-resolution mechanisms.

## ★ AUSTRALIA

At the onset of colonial occupation, all the lands in Australia were considered '*terra nullius*' and consequently declared Crown lands. Aboriginal communities were evicted from their territories and their rights ignored. The post-independence government tried to repair some of the historical wrongs by recognizing the customary rights that Aborigines had over natural before colonization.

From the early 1970s the Australian Government started buying private land in rural Australia for the benefit of the indigenous communities. The Federal and State Governments also began to legislate to return certain Crown lands to Indigenous communities and to allow claims to other Crown land. The most important Acts in this regard are: 1) *the Aboriginal Land Fund Act (1974)*, which enables incorporated Indigenous organizations to acquire interests in land; 2) *the National Parks and Wildlife Act, (1974)*, which states: '*nothing prevents Aborigines from continuing in accordance with Law, the traditional use of an area of Land or water for hunting or food gathering (otherwise than for purposes of sale) and for ceremonial and religious purposes*' and 3) *the Aboriginal Land Rights (Northern Territory) Act 1976*. This third law resulted in nearly 50 per cent of land in the Northern Territory being owned by indigenous people. It establishes Land Trusts, Land Councils and an Aboriginal Land Commission in the Northern Territory and provides for the leasing of Aboriginal lands as national parks. It also provides for indigenous people to make claims on reserve and vacant Crown lands to which traditional attachment can be proven.



A 1993 law, the *Native Title Act (1993)* establishes a framework for the protection and recognition of native title where: *“the rights and interests are possessed under traditional laws and customs that continue to be acknowledged and observed by the relevant Aboriginal or Torres Strait Islanders by virtue of those laws and customs, the Aboriginal or Torres Strait Islanders have a connection with the land or waters the native title rights and interests are recognized by the common law of Australia”*. The Native Title Act sets up processes to determine where native title exists, how future activity impacting upon native title may be undertaken, and provides for compensation where native title is impaired or extinguished. The Act gives Indigenous Australians who hold rights and interests, or who have made a native title claim, the right to be consulted on, and in some cases to participate in, decisions about activities proposed to be undertaken on the land. Indigenous Australians have been able to negotiate for benefits for their communities.

The Government has also supported the operations of the Aboriginal and Torres Strait Islander Land Fund (the Land Fund) and the Indigenous Land Corporation (ILC) which assist Indigenous communities to acquire and manage land, in recognition of the fact that many have been dispossessed and dislocated from their traditional lands and are unable to assert native title rights.

#### ★ South America (Guatemala & Chile)

Guatemala and Chile also provide examples of historical land dispossessions by Spanish colonial settlers. However, unlike Australia and South Africa, where some efforts have been made to right historical wrongs, in Guatemala and Chile have persisted with the patterns of historical dispossessions and deprivations first wrought by Spanish conquistadors. Only in recent years, under international pressure have the Guatemalan and Chileans governments started on some measures to right the historical wrongs suffered by the indigenous communities.

**Guatemala:** Since the Spanish occupied Guatemala, there have been severe inequalities in the distribution of land in the country. Today, 85% of the nation's land is owned by less than 2% of the population. After independence, the Guatemala persisted in discriminating against indigenous peoples. The Guatemalan Constitution manifested a “vast legal ignorance” of Mayan and indigenous law. In addition, the construction of roads, the development of large cattle ranches and agro-businesses, and the formation of the Guatemalan Biosphere Reserve have contributed to force indigenous communities off their native lands. The landless peoples have either moved deeper into the dense forests or escaped to refugees' camps in Mexico.

In 1996, representatives from indigenous communities marched on Guatemala City to speak with Guatemalan president elect Alvaro Arzu. This event was

the first time an indigenous people's organization in Guatemala sought formal recognition and started a process of recognition of indigenous peoples' rights and identity. According to a recent peace accord, the Mayans and their descendents will be given land in which to live. There are also moves to change article 203 of the Guatemalan Constitution in order to recognize the customary law of Mayans and thus legally anchor their land rights.

**Chile:** At the time of their arrival in Chile, Spanish had their main headquarters in South America in the Viceroyalty of Cuzco, Peru. In 1541 Santiago, Chile's capital, was founded as a staging point for the conquest of the South. They begun by first invading Mapuche land, enslaving the inhabitants, raping women, and pillaging the communities and inflicting inhuman treatment to the ones who tried to resist or to escape from the work in the mines or 'encomiendas'. As a result, the Mapuche territory was reduced from 31 million to 10 million hectares.

The subjugation of the Mapuche people continued even after Chile obtained independence from Spain in 1820. The Mapuche were settled in 'reducciones', small reserves. The process continued until 1929, when 3.078 reserves were created for a total of only 525.000 hectares, issuing 'títulos de mercede' for the lands considered communal and as a concession of the State to the Mapuche. Usually the land assigned for this programme was infertile and in harsh environments and represented the 6.18% of the ancestral lands. In 1972, the leftist Popular Unity government of Salvador Allende tried to resolve the Mapuche land question. It issued *Law 17.729*, the first legislation favourable to Mapuche:

*"Quite the opposite of the earlier legislation, this provided not for the division of lands but for consolidation and increase in size of Mapuche land and holdings and the confirmation of communal ownership. Indians are defined both as the owners or occupiers of lands and referred to in the relevant legislation (since 1860) and also as those who speak an indigenous language and maintain distinctive cultural practices. The Indians are presumed to be the owners of their lands and various procedures are spelled out for the recovery of formerly usurped Indian lands. That was to mean not only lands which had been part of the original 525.000 hectares titled since the 1880's, but also for progressive increase of Indian territory as the agrarian reform would continue to expropriate lands in excess of the established limit."*

The law provided credit, cancellation of debts and repeal of all the decrees that had expropriated Mapuche lands. Future divisions Mapuche lands had to have an absolute majority of the community members. No taxes were to be imposed on Mapuche lands which were now inalienable as were the forests in them.

After the military coup of 1973, all the Mapuche gains under Law 17.729 were reversed by the new regime and the lands were expropriated again. In 1979, *Decree Law 2.568* returned things as they were previously and in fact even made matters worse. The very title of the law evinced its purpose which was “*For the Indian, Indian lands, the Division of the Reserves and the Liquidation of the Indian Communities*”. Indigenous people were no longer defined in terms of different languages or cultures. Mapuche lands could now be divided at the request of only one person, who need not even be a Mapuche. A request could be made by an occupant or a usurper of the land. There could be no appeal against a decision to sub-divide land and upon division lands were no longer considered indigenous.

The victory of the opposition against the military regime in a 1988 plebiscite subsequently led to a democratic transition under President Aylwin. In the meantime, a big debate was taking place on recognition of the different indigenous peoples living in Chile. In 1989, with the *Acuerdo de Nueva Imperial*, principles for mutual recognition and new forms of relationship aimed at development were fixed. Those principles were translated into Law n. 19.253, known as *Ley Indígena*, published in October 1993. In 1994 different decrees fixed the criteria for the recognizing the constitution of indigenous communities and for the organization and management of a Public Record of Indigenous Lands and Waters. Article 12 identified indigenous lands and exempted them from paying taxes. Article 13 forbids the sale, rent or alienation of indigenous land if not done by the indigenous communities or indigenous persons themselves. But sale of indigenous lands must be approved by the National Corporation of Indigenous Development, CONADI. Nevertheless such sales would be invalid if they included the home of the indigenous family and the land necessary for family’s survival.

As regards the right to housing is concerned, only few countries have adopted specific laws to protect the right. Philippines and South Africa have constitutional provisions that stipulate that protect the right to housing and a jurisprudence that protects urban or rural poor dwellers from eviction except in accordance with the law and in a just and humane manner. The Interim Protection of Land Rights Bill currently pending in the South African Parliament would also protect farm workers from arbitrary eviction by farmers. Draft housing law in Namibia recognizes the right of every citizen to a place to live, a right that may not be violated by forced removal or arbitrary eviction. The National Housing Policy in India (1994) provides that the central and state Governments will take steps to avoid forcible relocation or “dehousing” of slum dwellers and encourage *in situ* upgrading, slum renovation and progressive housing development. Governments have a duty to confer occupancy rights wherever feasible, and if relocation is necessary in the public interest, to only undertake such relocation with the affected community’s involvement.

The jurisprudence of treaty bodies within the United Nations system, as well as of bodies responsible for monitoring regional human rights instruments, is unanimous in recognizing forced evictions as a gross violation of human rights. The statements in appendix 1 below are taken from the Resolutions and Concluding Observations adopted by relevant United Nations Committees that monitor compliance with the international covenants and conventions. The concluding observations and resolutions are the decisions the Committees issue following an analysis of the human rights situation in specific country. These are the most important statements that these bodies make about a country's compliance with its legal obligations. . Although these observations and comments are addressed to an individual State, they have broader provenance as statements germane to the interpretation of treaty provisions. They constitute international jurisprudence and represent the authoritative view of the international body officially entrusted by States to monitor the standards set by an international Covenant or Convention. Amongst those bodies, the Commission on Human Rights is the world's most important human rights body; while resolutions adopted by this body are not *per se* legally binding on governments, they are considered important normative standards.

## SECTION II – APPLICATIONS

### 1. HISTORICAL DISPOSSESSIONS

It remains to consider how the principles so far discussed are applied in practice. We begin with South Africa's and Australia's efforts to deal with historical disposessions. We have noted that international law usually does not have a solution to these problems, leaving them to the sovereign decision of individual countries. In the first two cases, Alexkor and Mabo, indigenous peoples' rights have been restored by the government of South Africa and Australia. After independence, the two states enacted laws to restore indigenous peoples' rights. In Alexkor and Mabo cases, the Court had only to interpret and apply the relevant statutes. The third case concerns dispossession in Tanzania. Here, the independent government did not resolve the question of historical expropriation. Rather, it merely declared all land in the Country 'state lands' and indigenous peoples occupied different territories with the informal consent of the government. In the case presented here, the historical dispossession have been aggravated by contemporary practices as the indigenous community involved has additionally been dispossessed of the land they were occupying, on the grounds that they had no formal legal title over the land. The case is pending before the High Court in Dar es Salaam and is supported under the Africa Human Rights and Access to Justice Program, AHRAJ.

## Alexkor V Richtersveld Community (South Africa)

This case involves 3,000 Richtersveld people who live in Northern Cape Province. They had always lived in the area called Richtersveld until they were evicted in 1950s to make way for a diamond mine, now owned by the South African government. The background to the case is important.

In 1847 the British Crown annexed a large part of Namaqualand, including the Richtersveld, which was inhabited by the community involved here. Although the Crown had sovereignty over the annexed land, the scope of private rights in these lands was not clear. The area remained lightly populated and the Richtersveld Community continued to herd their animals and hunt and gather food. They continued to exercise beneficial occupation of the land and could exclude and lease land to others. Upon the discovery of diamonds in the lands in 1925, the government changed its approach. As interest in alluvial digging increased, the government claimed that the Richtersveld land was unalienated Crown land which then entitled the Crown to award rights to diamond prospectors. The rights of Richtersveld people were correspondingly eroded and access to parts of it traditional uses was restricted. In 1994, ownership rights to the land were vested in Alexkor a diamond mining company owned by the government.

In 2000, the representatives of the Richtersveld Community filed a claim in the Land Claims Court of South Africa seeking restitution under the new Restitution Act. The Richtersveld Community claimed that it was the victim of dispossessions after 19<sup>th</sup> June 1913 on the basis of racially discriminatory laws and practices. The Land Claims Court (LCC), dismissed the case. On appeal, the Supreme Court of Appeal (SCA) found that the state's dispossession of the land rights of the Richtersveld Community occurred in the 1920s after diamonds were discovered on its land, and that this dispossession was the result of racially discriminatory laws or practices. On this reasoning, the claims of the Richtersveld community satisfied the statutory test. Alexkor was granted leave to appeal to the Constitutional Court; it contended that the SCA erred in finding: (1) that the Community's right survived annexation by the British Crown in 1847; (2) that the Richtersveld Community had a right in the land as at 1913; and (3) that the Community was dispossessed of the land through racially discriminatory laws or practices. The Richtersveld Community argued that these were all questions outside of this Court's jurisdiction and in the alternative that the SCA's decision was correct. A late application for special leave to appeal by the Government was granted.

On 14 October 2003, the Constitutional Court of South Africa ruled that an indigenous people had both communal land ownership and mineral rights over their territory. Laws, which tried to dispossess them, were '*racial discrimination*'. The decision of the Constitutional Court is that indigenous

people who own land under their unwritten laws have the right to have their claims upheld even if other legal systems have subsequently imposed by the state. In the words of the Court:

*“[34] Courts in other jurisdictions<sup>6</sup> have in recent times been faced with the complex and difficult problems of dealing, after the event, with the injustices caused by dispossessions of land, or rights in land, from indigenous inhabitants by later occupiers of the land in question. These later occupiers claimed political and legal sovereignty over the land, and such dispossessions invariably took place in a racially discriminatory manner. They often occurred centuries ago, when the legal norms and principles of the later occupiers differed substantially from those of today...”*

*The Community contended that it possessed these rights under indigenous law and, after annexation, under the common law of the Cape Colony and international law which protected the rights acquired under indigenous law. The nature and the content of the rights that the Richtersveld Community held in the subject land prior to annexation must be determined by reference to indigenous law. That is the law, which governed its land rights. Those rights cannot be determined by reference to common law...While in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common law, but to the Constitution. The courts are obliged by section 211(3) of the Constitution to apply customary law when it is applicable, subject to the Constitution and any legislation that deals with customary law. In doing so the courts must have regard to the spirit, purport and objects of the Bill of Rights”.*

With regard to jurisdiction, the Court found that the case raised constitutional issues since it related to the interpretation of a law mandated by the Constitution. The Court largely confirmed the SCA order, holding in the Community's favor on all three issues raised by Alexkor. Finally, the state was criticized for its delay in seeking special leave to appeal to the Constitutional Court.

<sup>6</sup> See, for example, *Calder v Attorney-General of British Columbia* (1973) 34 DLR (3d) 145 (SCC); *Hamlet of Baker Lake v Minister of Indian Affairs and Others* (1979) 107 DLR (3d) 513 (SCC); *Mabo and Others v The State of Queensland (No. 2)* (1992) 175 CLR 1 (HCA); *R v Adams* (1996) 138 DLR (4th) 657 (SCC); *R v Van der Peet* (1996) 137 DLR (4th) 289 (SCC); *Delgamuukw and Others v British Columbia and Others* (1997) 153 DLR (4th) 193 (SCC); *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58.



South Africa represents a Country where the land dispossessions that happened during apartheid are being addressed by the post-apartheid government. In the Alexkor case, the Court's decision was based only on SA law and hence there was no need to apply of international human rights standards. It is significant that the Court recognized that there are rights capable of enforcement based on '*indigenous peoples' unwritten laws ... in spite of other legal systems which are subsequently imposed by the State*'.

### (Mabo & Ors V Queensland (Australia))

The 1992 decision by the High Court of Australia in the case of *Mabo v Queensland (No 2)* was a watershed in Australian law. In that case, the issue for decision was the land rights of the Meriam people of the Murray Islands in the Torres Strait. The High Court held that the common law of Australia recognized a form of native title to be determined in accordance with Indigenous traditional law and custom. In doing so, the Court rejected the notion that Australia was *terra nullius*, that is, land belonging to no one, at the time of British settlement.

*"The Court ruled that native title existed over particular kinds of unalienated Crown Land, national parks and reserves, overriding the doctrine of terra nullius. According to the court "Aboriginal peoples are the original occupants of this land and possessed a complex system of land tenure that has always existed in this country". As to terra nullius the High Court decried this "unjust and discriminatory doctrine ...[that] can no longer be accepted".*

The Court noted that native rights and interests were based on laws and customs that pre-dated the British occupation. By this decision, Customary law rights have been put at par with written law, inalienable other than by surrender to the Crown. These rights range from access and usage rights to exclusive possession.

As with South Africa, the *Mabo case* represents Australia's effort to deal with land dispossessions that happened during colonial times. The reasoning of the Court rested on provisions of Australian domestic law which permit restitution of land expropriated to local communities. Thus, even here there was no need to seek interpretive support from international human rights law. More important, the Court rejected the doctrine of 'terra nullius', which justified colonial era expropriations and found that '*aboriginal peoples ... possessed a complex system of land tenure*'. As in Alexkor, the Court recognized the validity of indigenous peoples' title over land resting on traditional laws and customs.



## **Tanzania Portland Cement Corp. V Boko villagers, Yoice Gwaicu & Ors. V Nafco, Aku Gembul & Ors. V Nafco (Tanzania, ICJ case no. 109-110-111)**

The Defendants are local communities, who were evicted from their traditional lands during colonial time. When Tanzania achieved independence, the new government classified these expropriated lands as 'state lands', without taking into consideration the rights and needs of previous native inhabitants. As squatters, the Defendants continued to occupy different government lands for more than 20 years tacitly with the government consent. Eventually, the state decided to allot these lands to private corporations, which are now suing the squatters for trespass.

This case underscores a deeply felt problem in much of Africa generally and in Tanzania, in particular. Under the colonial administration the lands that were traditionally occupied by indigenous communities were alienated for European settlers. Like many other post-independence governments in Africa, at independence, the Government of Tanzania took no action to address the plight of dispossessed communities. By designating all lands 'state lands', Tanzania denied indigenous peoples any reversionary rights on the lands they formerly occupied.

The poignant fact is that in this and similar cases indigenous peoples cannot hope to recover the full ownership of the lands they used to occupy centuries ago. However, state recognition of their rights would allow for adjustments, some form of in kind compensation or where feasible restitution. Moreover, in this example, the violation of international law consists in the fact of the Tanzanian Government refusing to recognize indigenous peoples' lands rights, their notion of collective ownership and failing to provide the means to register indigenous peoples customary land rights. The plaintiffs' situation is the result a state policy of neglect.

ILO Convention No. 169 calls upon governments to take steps as necessary to identify the lands of indigenous peoples and to effectively protect their rights of ownership and possession. Security of tenure is one of the leading principles of the Convention. Governments should also establish adequate procedures within the national legal system to resolve land claims by the indigenous peoples and people must be consulted in development plans that affect them and their lands. Unfortunately, Tanzania is not a signatory to the ILO Convention No. 169. However, local communities can be considered ethnic minorities under Article 27 of the ICCPR. The Human Rights Committee's General Comment no. 23 has sanctioned the use of this article in the protection of ethnic minorities. Tanzania acceded to the International Covenant on Civil and Political Rights on the 11<sup>th</sup> of September 1976. The Covenant was therefore in force in Tanzania at the time of the violation.

The case also points to a violation of Article 21.2 of the African Charter. That article provides that in case of removal, the affected peoples are entitled to adequate compensation. The article requires that general principles of international law be applied in the event that local peoples' resources are to be disposed of. Among the important principles of international law applicable here is that of non-discrimination and of adequate compensation in case of expropriation. The African Charter was ratified and entered into force in Tanzania on the 16<sup>th</sup> March 1983.

These international instruments are supplemented by local law. Article 24 p 2 of the revised Constitution of Tanzania provides that “*..it shall be unlawful for any person to be deprived of property for the purposes of nationalization or any other purposes without the authority of law which makes provision for fair and adequate compensation*”. This means that the government may take land for public purposes, but it must pay compensation. It is clear that the decision of the Tanzanian Government to seize plaintiffs' traditional lands without adequate compensation to the community violates not just international law but also the Constitution. It may be argued that at the time when these lands were taken this constitutional provision was not in force as these were inserted in 1988).

Of particular importance, Article 1 Part 1 of the Constitution explicitly recognizes the binding force the Universal Declaration of Human Rights. It states “*the object of this constitution is to facilitate the building of the United Republic of Tanzania as a nation of equal and free individuals... Therefore the State authority and all its agencies are obliged to direct their policies and programmes towards ensuring:...that human dignity is preserved and upheld in accordance with the spirit of the Universal Declaration of Human Rights...*”. Though the Universal Declaration of Human Rights does not specifically mention the rights of peoples over land or natural resources, as a general provision “*Everyone is entitled to ... rights ... without distinction of any kind, such as race, colour, sex, language... national or social origin ... or other status.... Everyone has the right to a standard of living adequate for the health and well-being of himself and his family...*” (Art 2, 4, 23, 25). Tanzania is in breach of its own Constitution when as a result of official policy fails to provide suitable land for settlement to the indigenous community.

Tanzania a case where colonial era dispossession carried is not addressed by the State after independence. Among the applicable conventions, the most directly applicable is ILO Convention no. 169. It requires states to recognize indigenous peoples rights over natural resources but unfortunately this treaty is not in force in Tanzania.

However, the dispossessed community can still base their claims on violations of ICCPR, and African Charter, all of which have been ratified in the Country and were in force at the time of the violation. This case also represents a violation of the Constitution itself, which requires adequate compensation is

such instances and applies the principles of the Universal Declaration of Human Rights, UDHR, as directly applicable in the Country.

## 2. CONTEMPORARY DISPOSSESSIONS

So far we have considered state responses to historical disposessions. It remains to consider present day disposessions. It is to these that we now turn. The next four cases involve post independence disposessions. These are the Endorois case; the Lubicon case; the Hopu case and the Lansman case.

### **Endorois Community V. State Of Kenya, (Kenya, ICJ Case No 71)**

In the early seventies, following an agreement between the Endorois community and the Government of Kenya, the lands occupied by Endorois community were set aside for Lake Hannington Game Reserve (now Lake Bogoria Game Reserve), against the payment of a compensation to the representatives of the Endorois community. The Kenyan government also provided alternative lands for the resettlement the Endorois. The current claim is brought by the representatives of the Endorois community reclaiming ownership of their former territories and seeking benefits from the revenues of the reserve.

The case was first filed in the Nakuru High Court, Kenya, as Miscellaneous Civil Application No. 214 of 5<sup>th</sup> August 1997. Leave was granted and the substantive application, High Court Miscellaneous Civil Application No. 522 of 1998, was filed by way of originating summons, but this application was been rejected on procedural grounds. The Applicants sought fresh leave with the High Court Miscellaneous Civil Application No. 159 of 1999. Leave was granted and Miscellaneous Civil Case No. 183 of 2000 proceeded to the High Court of Kenya at Nakuru on 19 August 2000. Judgment was given on 19 April 2002, dismissing the Applicants on the base that *“all necessary provisions of law had been adhered to when the disputed land was set aside for use as a game reserve”*. The Applicants appealed against this judgment and a notice of appeal was lodged with the Court of Appeal of Kenya on 2 May 2002. However, despite the Applicants’ efforts, the Court has failed to issue the necessary documents required to file the substantive appeal. The Applicants have now submitted a communication before the African Commission on Human and Peoples’ Rights, alleging the violation of Art 14, 16, 17, 21, 22 of the African Charter on Human and Peoples’ Rights (right to property and disposal of natural resources). Since the treaty was ratified after the violation, the Endorois community invokes the exception to the principle of non-retroactivity of international treaties, when, after the entry into force of the treaty, the violation continues or there are effects which constitutes by its own a violation of the Charter. In fact, according to the Applicants, as a direct effect of the expropriation of their land, the Endorois people are presently denied meaningful access to, use of, and participation in decisions concerning their ancestral land, resulting in violations of the African Charter.

In this case, there was a transaction between the State and the Endorois community; the Endorois community agreed to transfer their land against the payment of compensation and the provision of territories to resettle. Stricto sensu then, this case cannot be defined as land dispossession against the will of the community, but a commercial transaction between the indigenous community and the State of Kenya. The question then turns on three points 1) whether the transaction was equitable; 2) if the compensation paid was adequate and 3) the alternative land suitable.

At international law level, there are defined standards for the concept of 'adequate compensation.' International law leaves this question to the State as it does the decision as to what lands to give disposed communities. As for the African Charter on Human and Peoples' Right, Article 21 recognized the right of all people to natural resources and at par 2 consider the case of spoliation: *'in case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation'*. Unfortunately, the African Charter does not specify further the content of the concept of 'adequate compensation', neither does it mention any obligation to relocate or else.

Another difficulty posed by the case relates to time lapse: the land transfer occurred in the early seventies, and the reserve was established in 1973. The case was filed on the 5<sup>th</sup> of August 1997, more than 24 years later. This action is surely very late and, if accepted, it raises the spectre that any community could legitimately seek restitution for transactions done by their ancestors that they deem retrospectively unfair.

Lastly, it is uncertain whether the right to worship ancestors is actually violated in this case. In Kenya there is a difference between national parks and national reserves. No settlement is allowed in national parks. Local communities are denied even temporary access to the parks. In national reserves, matters are different. The local communities are allowed access to water and pasture in the purposes.

**Application of international principles:** In this case international law does not seem applicable. It is not a case of dispossession, since compensation has already been paid against the transfer of land. All international texts protecting indigenous land rights do not quantify the compensation to be paid in case of such takings as this. Only the African Charter mentions that the compensation should be adequate, but, unfortunately, the African Charter was not in force in the Country at the time of the expropriation and, in our opinion, considering the case a continuous violation, it could be argued to be prejudicial as it might trigger retroactive application of the Charter.

## Lubicon Lake Band V Canada (Canada)

The second case, *Lubicon Cree Lake Band v. Canada* represents a mixture of historical and contemporary expropriations. The lands of the Lubicon Lake Band were greatly reduced under colonialism. After independence, the new Government continued these dispossessions. The community was not consulted or compensated. In contrast to the Tanzanian case, the indigenous community here can claim violation of ICCPR which was in force in Canada at the time of the latter day expropriations.

The Lubicon Lake Band is a Cree Indian community that lives Alberta. They are a relatively autonomous, socio-cultural and economic group whose members have, for years, continuously inhabited, hunted, trapped animals and fished in a large area encompassing approximately 10,000 square kilometres in northern Alberta. After independence, the Lubicon Lake Band tried, unsuccessfully, to register their territories as indigenous land, under the provisions of the Canadian law. Instead, the government of Alberta expropriated for the lands for the exploitation of gas and natural resources. Starting in 1975, the representative of the Band made different attempts to file caveats with the Registrar of the Alberta (Provincial) Land Registration District, to give notice parties dealing with the land that they were asserting aboriginal title to land under the Provincial Land Title Act. Before the caveat was registered in 1976, the provincial Attorney General filed an application for a postponement, pending resolution of a similar case. Subsequently, in March 1977 the Attorney General introduced an amendment to the Land Title Act precluding the filing of caveats. This amendment was passed and given retrospective effect to beginning of 1975. This meant that the amendment predated the filing of the Lubicon Lake Band's caveat. In effect, the Province of Alberta could expropriate the Lubicon Band lands.

After several attempts to have their rights restored, the Lubicon Lake Band submitted a communication to the Human Rights Committee, citing the violations of several ICCPR provisions. In particular, the Band alleged that the State party, through actions affecting the Band's livelihood, created a situation which *"led, indirectly if not directly, to the deaths of 21 persons and [is] threatening the lives of virtually every other member of the Lubicon community. Moreover, the ability of the community to [survive] is in serious doubt as the number of miscarriages and stillbirths has skyrocketed and the number of abnormal births ... has gone from near zero to near 100 per cent"*. Moreover, it added, the appropriation of the Band's traditional lands, the destruction of its way of life and livelihood and the devastation wrought to the community constituted cruel, inhuman and degrading treatment.

The Human Rights Committee found that the application was admissible insofar it might raise issues under Art 27 or other articles of the ICCPR. The

Committee accepted many of the applicants' arguments saying that challenges actions threatened the way of life and culture of the Lubicon Lake Band, and constituted a violation of Art 27 as long as they continued. In terms of a remedy, the Committee accepted that the national interest asserted by Alberta was legitimate. Instead of restitution, it ordered for indemnity. Particularly important is the fact that this decision held that the right to natural resources is enforceable under art 27 of the ICCPR.

**Application of international standards:** This case represents a concrete application of the ICCPR to resolve historical and contemporary expropriations. In the post independence period, lands owned by the Lubicon Lake Band were expropriated under colour of laws enacted by the Province of Alberta. The HRC declared such acts as inconsistent with the ICCPR. In that sense then, this case represents conflict between domestic law and Canada's international obligations.

There are two important points to underscore. One, the fact that for the first time the right to natural resources was been declared enforceable under Art 27 of ICCPR. Two, the fact that having held that there was a compelling national interest implicated in the dispossessions, the HRC decided to order indemnity rather than restitution as a remedy for the Lubicon Lake Band.

## HOPU ET AL. V FRANCE (FRENCH POLYNESIA)

The case *Hopu et al. v. France* was been decided in 1997 by the HRC. Two indigenous Polynesians, residing in Tahiti (French Polynesia), filed a petition against the building of a hotel complex in an area that contained an ancestral cemetery that pre-date the arrival of Europeans in Tahiti. They claimed that the building of the complex violated various articles of the ICCPR, among which arts. 17.1 (right to privacy), 23.1 (right to family) and 27 (natural resources).

French law did recognise neither indigenous peoples nor indigenous rights. Under the principle of equality enshrined in the French Constitution all French citizens have equal rights, and distinctions based upon race or ethnicity is unconstitutional. The French government has even registered reservations to minority rights provisions in human rights treaties using this principle as justification.

On these facts, the HR Committee was unable to base its decision on article 27 because of reservations entered by France over this article . The reservation says that "*in the light of article 2 of the Constitution of the French Republic, ...article 27 is not applicable as far as the Republic is concerned.*" But the Committee accepted the petitioners' argument as related to articles 17.1 and 23.1. In its decision, the Committee said that:

*“...the objectives of the Covenant require that the term ‘family’ be given a broad interpretation so as to include all those comprising the family as understood in the society in question. It follows that cultural traditions should be taken into account when defining the term ‘family’ in a specific situation. It transpires from the authors’ claims that they consider the relationship to their ancestors to be an essential element of their identity and to play an important role in their family life. This has not been challenged by the State party; nor has the State party contested the argument that the burial grounds in question play an important role in the authors’ history, culture and life”.*

Thus, for the first time, the HRC interpreted the term ‘family’ in article 23 in the broad sense comprising also the relationship to the ancestors and the right to land for ancestor worship.

**Application of international standards:** As in the Lubicon case, the issue here also involves, at least in part, conflict between internal law and international obligations. ICCPR was in force in the Country at the time of the violation and was thus legally binding. The HRC could not apply Art 27, as in Lubicon case, since, during ratification, the State of France has made a reservation to the applicability of this Article.

However, the HRC interpreted Covenant Art 17 and 23 in the broad sense comprising also the relationship to ancestors and the right to land for worship ancestors and considered that building a hotel complex on plaintiff’s traditional land would undermine this right.

### **Lansman et A. V. Finland (Finland)**

The authors of the communication in the case of *Länsman et al. V Finland*<sup>7</sup> were members of a Sami Herdsmen’s Committee that traditionally occupies an area officially administered by the Central Forestry Board of Finland. The Board signed a contract with a private company for the extraction of stone from the flank of a mountain which used to be a sacred place of the old Sami religion, and also for the transportation of the stone through Sami reindeer herding territory. After exhaustion of local remedies, the members of the Sami committee seized the HRC claiming the violation of ICCPR Art 27.

In its decision, the Human Rights Committee affirmed that the quarrying of the slopes of Mt. Riutusvaara in the amount that had already taken place had undermined the Sami’s reindeer herding activity in the area. The HRC however noted the consultations that had been held with the Sami people during the activities of the Finnish government. Therefore, it decided that while article 27

<sup>7</sup> Lansman V Finland (HRC Communication 671/1995)



had not been violated if the scope of mining activities in the area were expanded to a large scale that could well constitute a violation of the Sami's right under article 27. It is important to note that the Sami people did not hold a formal legal title over the disputed lands, but were occupying the territories on the base of traditional customary rights.

**Application of International Law:** Here, once again, there is conflict between municipal law and international obligations. But given the background of the case, the HRC exhorted the Finland State to respect the procedures set up in the ICCPR, in particular the consent of local community in case of expropriation. More important in terms of Sami rights, The HRC recognized the legitimacy of Sami people land rights even though these rights were not formally registered but were, instead, based on traditional customs.

## 2. FORCED EVICTION

We now turn to forced evictions. The case below, from Ghana, represents a violation of the right to housing as defined in international instruments: local peoples were forcibly evicted from their villages by a private multinational with the consent of the government. They were not consulted or offered alternative land for resettlement or compensated. The case is pending before the High Court in Accra, Ghana, and it is supported by the ICJ – Africa Human Rights and Access to Justice Initiative.

### **B. Kakraba & O. V. Goldfields Ltd, N. K. Karikari & O. V Goldfields Ltd, P. Kowfie & O. V Goldfields Ltd (Ghana, ICJ cases 132-133-134)**

The plaintiffs are residents and owners of buildings and crops in several villages in the Western region of Ghana. The Defendant is a Mining Company incorporated under the Laws of Ghana. The Defendant demolished buildings belonging to the plaintiffs situated on a tract of land. This land is subject of a mineral concession granted to the defendant by the Government of Ghana. There has been no compensation or resettlement of the affected communities. The facts of the case unite private and state action: Goldfields, the defendant company and the State's have acted jointly to affect the housing rights of the applicants. The government of Ghana granted Goldfields Ltd a regular mining concession and consequential permission to demolish structures owned by the plaintiffs.

International human rights law condemns forced eviction and protects the right to housing. Ghana, as a member of the UN and party to multiple human rights conventions is bound by these general principles. As the Vienna Declaration and Programme of Action (1993), states: *“while development facilitates the enjoyment of human rights, the lack of development may not be invoked to justify the abridgement of internationally recognized human rights.”*

This means that the pressure to generate economic development does not of itself offer justification to violate civil and political rights. Thus the importance of development projects does not trump the rights that communities and individuals to be free of “*arbitrary or unlawful interference*” with their homes.

Article 25 paragraph 1 of the UDHR (right to adequate living standard and housing) envisions that where forced evictions are necessary, procedural due process is imperative and adequate alternative housing for evictees must be provided. Article 14 par 2 (h) of CEDAW requires States to eliminate discrimination against women in rural areas and to ensure to such women the right “*to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply*”. Article 27 of the Convention on the Rights of the Child, CRC reads: “*State Parties in accordance with national conditions and within their means shall take appropriate measure to assist parents and others responsible for the child to implement this right and shall in the case of need provide material assistance and support programmes, particularly with regards to nutrition, clothing and housing*”. Forced evictions also violate, directly and indirectly many of the rights protected by the African Charter, especially, article 12 (rights to freedom of movement and to choose one’s residence); article 6 (right to security of the person); article 17 (right to education); article 14 (right to property); article 15 (right to work); article 18 (right to family life); and article 22 (right to economic, social, cultural development).

All the instruments cited here were binding on Ghana at the time of the violations. Demolitions activities of the Goldfields Ltd started in the early ‘90s: UDHR is now customary international law in force in all the UN member Countries; CEDAW entered into force in Ghana in 1986; the CRC 1990 and the African Charter in 1989. 01/03/89.

The facts of the case indicate further violations of rights protected by the ICESCR especially article 11 (right to housing) as well as provisions of the ICCPR including in particular article 9 (liberty and security of person); article 12 (liberty of movement and freedom to chose his residence); and article 17 (interference with privacy, family, home). Unfortunately, these conventions were not in force in Ghana at the time of the violation: ICCPR was ratified in 2000 and the ICESCR in 2003. Nevertheless, ICESCR and ICCPR may be applicable as interpretive guides and could be dispositive of the case if violations have continued since the conventions have come into force.

**Application of International Law:** The State’s responsibilities are plain in the light of international law and relevant international treaties protecting housing rights. To the extent that the government and goldfields are acting under the authority of local laws such laws are inconsistent with Ghana’s international obligations relating to the protection of housing rights. The case represents, in our view, a clear violation of international law; violations that are cognizable by municipal courts as well as international judicial bodies.

## SECTION III – CONCLUSIONS

We have considered the various ways in which dispossessions and evictions impinge on the twin rights to land and housing and specified the responses of international law to violations of these rights. In this section we summarize the essential ingredients of requirements of a claim resting on violation of land and housing rights under international law. We also provide some references to main international documents on the issue.

### 1. ESSENTIAL REQUIREMENTS

Is the relevant treaty or Convention in force against the offending country? The principal requirement needed to sustain an international law claim is that there be a violation of a treaty or convention that is in force in the Country and valid at the time of the violation. The first part of this Chapter explored this issue. The key question is the relationship between international law and municipal law? Are they in conflict? Is municipal law ambiguous? If the treaty is not enforceable can it nonetheless be used as an interpretive guide by the courts? How open are the courts to such an approach? These are important considerations many cases are usually dismissed only because the relevant treaties were not ratified at the time of the violation.

#### **Instruments protecting land and housing rights:**

We have already presented in Section I the main international documents concerning indigenous peoples' land rights and housing rights, against dispossessions and forced evictions. Below we summarize them. Ideally, these instruments should be interpreted in the light of the relevant judicial precedents and comments from treaty bodies with a remit to oversee implementation of individual treaties.

- **International treaties of general application:**
  - Universal Declaration of Human Rights
  - International Covenant on Civil and Political Rights
  - International Covenant on Economic, Social, Cultural Rights
  - Convention on the Elimination of All Forms of Racial Discrimination
  - Convention on Elimination of Discrimination Against Women
  - African Charter on Human and Peoples' Rights
  - ILO Convention no 169
  - Convention on the Right of the Child

- Texts concerning land and housing rights in specific circumstances or concerning particular categories of peoples:
  - Agenda 21
  - World Bank Operational Directive 4.20
  - International Convention Relating to the Status of Refugees
  - ILO Convention No. 161 Concerning Occupational Health Services
  - ILO Convention No. 117 Concerning Social Policy (Basic Aims and Standards)
  - ILO Convention No. 110 Concerning Plantations
  - ILO Convention No. 82 Concerning Social Policy (Non-Metropolitan Territories)
- Texts applicable in particular geographic regions, excluding Africa:
  - European Convention on Human Rights and Fundamental Freedoms
  - European Social Charter
  - European Community Charter of Fundamental Social Rights
  - American Declaration on the Rights and Duties of Man
  - Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights
  - Charter of the OAS
- They are also other instruments-in-the-making of declarations that have no independent legal force but are important as signals of the direction of international legal opinion. Among the most important of these are:
  - Draft Declaration on the Rights of Indigenous Peoples
  - Inter-American Declaration on the Rights of Indigenous Peoples.
  - Declaration on Social Progress and Development;
  - Declaration of the Rights of the Child
  - Vancouver Declaration on Human Settlements
  - UNESCO Declaration on Race and Racial Prejudice
  - Declaration on the Right to Development
  - UNHCHR Forced Evictions and Human Rights Fact Sheet no. 25

Such texts are useful instruments for interpreting treaties and conventions.

- ii. Examination of the case: what is the exact point of law involved in the violation?

Once the preliminary point of the applicability of the treaty is settled, it is important that the point of law at issue be very precisely defined and the exact nature of the violation be specified. For example, in *Endorois Community v. State* case, the issue is not dispossession. Endorois land

was transferred to the State with the consent of the community, upon payment of compensation and with some form of resettlement for the community. This then is a case of expropriation by the State for, ostensibly, a national interest.

International principles on dispossession may not be applicable; international law does not define the parameters of adequate compensation; the African Charter was not in force in Kenya at the time when the transaction occurred. So there are challenging issues of substance and of interpretation in this case.

Once the point of law has been clarified, then one must consider forum issues: appropriate courts; nature of the remedy to be sought; the strategic impact of the litigation and other related questions.

### iii. Land dispossessions requirements

Fashioning a remedy for dispossessions involves taking into account a range of factors: economic, social and political. International tribunals are sympathetic to compelling public interest arguments advanced by governments relating to dispossessions. For example, in the Lubicon Lake Band case, even though the HRC recognized the rights of the Lubicon Band over their traditional territories, it also considered Alberta's legitimate interest in extracting oil from their land. Therefore, rather than order the remedy of restitution against Alberta, the HRC ordered compensation.

As to historical dispossessions, international law has usually left those questions to the government of the independent state. For example, in the case *Y. Gwaicu V Nafco, Tanzania*, the fact that the independence government chose to nationalize all lands does not amount by itself to a violation of international law. Such a decision represents a legitimate political choice left to the state. Compensation for dispossession would then have to be considered in the context of local law. Procedurally, there may be an interpretive question whether applicable local laws violate key principles of international law such as the bar against racial or sex discrimination.

### iv. Forced evictions requirements

As far as forced evictions are concerned, international law is much stricter and less lenient towards arguments relating to political choice. As a general principle, General Comment to ICESCR no 4 states: *"... all persons should possess a degree of security of tenure which guarantees legal protection*

*against forced eviction, harassment and other threats. States parties should consequently take immediate measures aimed at conferring legal security of tenure upon those persons and households currently lacking such protection, in genuine consultation with affected persons and groups*”. International law treats forced evictions a gross violation of human rights. In consequence, international law offers more protection against violations related to forced evictions than to disposessions.

First, international law ordains that forced evictions should always be avoided. General Comment no 7 notes that “*instances of forced eviction are prima facie incompatible with the requirements of the [International Covenant on Economic, Social and Cultural Rights] and can only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law*”. Given this bar, forced evictions can only be justified in exceptional circumstances and the burden to “fully justify” the evictions and demolitions rests with the Government. This means that forced evictions carried out outside the parameters of General Comment no 7 are illegal.

Second, even in those exceptional cases where there is no alternative to eviction, General Comment to ICESCR no. 7 requires specific procedural protections:

- a. Genuine consultation with evictees;
- b. Adequate and reasonable notice;
- c. Government officials or their representatives should be present during an eviction;
- d. Persons carrying out the eviction should be properly identified;
- e. Evictions should not take place in particularly bad weather or at night;
- f. Legal remedies should be available to evictees.
- g. Legal aid should be available to those in need of it to seek redress from the courts.

Any evictions carried out without these specific procedural protections are violations of international law.

Lastly, the Committee on Economic, Social and Cultural Rights has stated that no matter the cause “*Evictions should not result in rendering individuals homeless or vulnerable to the violation of other human rights*” (Gen Comm. 7 Par 17). This means that States are obliged to ensure that individuals or families are not rendered homeless as a result of the eviction. In turn,

where those affected are unable to provide for themselves, the State must take all appropriate measures to ensure 1) adequate alternative housing, 2) resettlement and 3) access to productive land.

#### **v. Customary and collective rights**

From the case-law so far considered, International law protects indigenous peoples' rights over natural resources even when these rest on customary law systems. This recognition makes it incumbent upon government to ensure that they set up registration procedures for the formal recognition of such rights. South Africa and Australia represent good examples where customary rights of indigenous peoples have been put at par with statutory rights.

IL recognizes also the collective character of land ownership among indigenous communities. Several international texts, such as ILO 169, ICESCR and the African Charter, all mention the right of "peoples".

This means that in cases of land expropriation and forced evictions, states' cannot claim as justification that the dispossessed community did not hold formal or individual legal titles over their lands or houses.





## CHAPTER 5

### FREEDOM OF EXPRESSION AND REGULATION OF THE MEDIA, THE PLACE OF INTERNATIONAL HUMAN RIGHTS STANDARDS IN DOMESTIC LITIGATION: THE CASE OF ZIMBABWE AND GAMBIA\*<sup>1</sup>

The rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society.

Article XXVIII of the American Declaration of the Rights and Duties of Man

“If liberty means anything at all, it means the right to tell people what they do not want to hear.”

George Orwell, preface to *Animal Farm* (1946)

#### Introduction

Freedom of expression is recognized as a basic civil liberty and guaranteed by many national Constitutions and international conventions. There are many theories that have been advanced seeking to justify the right. In part, the justification for freedom of expression is a general liberal or libertarian presumption against coercing individuals from living how they please and doing what they want. However, a number of more specific justifications are commonly proposed. It has been for instance suggested that Freedom of speech is crucial for discovering the truth, it advances autonomy of the individuals and promotes tolerance. Justice McLachlan of the Canadian Supreme Court identified the following in *R. v. Keegstra*, a 1990 case on hate speech: (1) free speech promotes “The free flow of ideas essential to political democracy and democratic institutions” and limits the ability of the state to subvert other rights and freedoms; (2) it promotes a marketplace of ideas, which includes, but is not limited to, the search for truth; (3) it is intrinsically valuable as part of the self-actualization of speakers and listeners; and (4) it is justified by the dangers for good government of allowing its suppression.

\*<sup>1</sup> Authored by Benson Ngugi, LL.B University of Nairobi, Advocate of the High Court of Kenya., legal officer AHRAJ.

Freedom of Expression like most other freedoms is however not absolute and faces some limitations that are recognised under the International Human rights regime. Article 19 of the ICCPR for instance limits that the freedom of expression thus

3. *The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*
  - (a) For respect of the rights or reputations of others;
  - (b) For the protection of national security or of public order (ordre public), or of public health or morals.<sup>2</sup>

From the premise that freedom of expression in its individual dimension goes further than the theoretical recognition of the right to speak, or to write, and that it also includes and cannot be separated from the right to use whatever medium is deemed appropriate to impart ideas it is then a fact that the expression and dissemination of ideas and information are indivisible concepts. This means that restrictions that are imposed on dissemination represent, in equal measure, a direct limitation on the right to express oneself freely.

This chapter therefore seeks to assess what are the limits of the freedom of expression under International law. The chapter is however limited to one corollary of freedom of expression – ‘Press freedom’ with particular reference to the requirement of mandatory licensing for journalist and other legislation developed to control the media. The analysis is based on the assessments of two cases one from Gambia and one from Zimbabwe<sup>3</sup> that AHRAJ has supported, and international and comparative law practises including decisions and statements of international bodies and national appellate courts, as well as practice in national jurisdictions – relevant to the question of licensing journalists.

The Zimbabwean case sought to challenge the validity of Sections 79,80,83 and 85 of the Access to Information and Protection of Privacy Act (Chapter 10:27) (AIPPA) in light of international and constitutional guarantees of freedom of expression. These sections sought to establish a mandatory licensing system for individual journalists, prohibiting anyone from engaging in journalism unless they have been granted a license by the Government-controlled Media and Information Commission (Commission).

<sup>2</sup> Suffice it to note that The UDHR and the ACHPR do not place any limitation on the freedom of expression.

<sup>3</sup> Association Of Independent Journalists & Ors V The Minister Of State For Information & Ors, (Zimbabwe) Gpu And Others Vs. National Media Commission And Others (Gambia)

The Gambian case on the other hand sought to challenge Sections 8(b)-(e), 13,15,16,29,30,33 and 34 of the national Media Commission Act, 2002, as amended by the National Media Commission (Amendment) Act, 2003(Act) in light of international and constitutional guarantees of freedom of expression. These sections subject media practitioners and organizations in the Gambia to a system of registration, and content and practice regulation under the supervision of a body that lacks independence from Government.

It is our submission that both of these laws exceeded the limitations of the freedom of expression as contemplated by Art. 19 of the ICCPR<sup>4</sup>. Gambia ratified the ICCPR on the 22<sup>nd</sup> of March 1979 while Zimbabwe ratified it on the 13<sup>th</sup> of May 1991 both countries have an obligation to give effect to the provisions of the convention.

## 1.0 The Zimbabwean Law

Section 79 of the AIPPA created a system for licensing journalists who wish to practice in Zimbabwe. Individuals must apply to the Commission for a license which may be granted if they fulfill the three conditions set out in section 79(5). The first two of these require the Applicant to have complied with the prescribed formalities and to possess the prescribed Qualifications, which are to be set by the Minister, pursuant to section 91(2) (p). No one who is not either a citizen of Zimbabwe or a permanent resident may obtain a full license, although foreign journalists may be licensed for a limited period. Pursuant to section 84, the license must be renewed annually. Section 85 mandates the Commission to develop and apply a code of conduct for journalists. Journalists who breach this code may, among other things, have their license suspended or revoked. Section 79(1) states that no journalist shall benefit from the rights attributed to journalists pursuant to section 78 without being licensed while section 83(1) provides: No person other than an accredited journalist shall practice as a journalist nor be employed as such or in any manner hold himself out as or pretend to be a journalist. Pursuant to section 79(6), news agencies that operate in Zimbabwe – whether they are domiciled within or outside the country – are prohibited from employing non-licensed journalists. Section 80 of the Act makes it an offence to contravene any provision of the Act, including those related to licensing. Offenders are liable to a fine of up to 100,000 Zimbabwean dollars (approximately USD 1800) or to a term of imprisonment of up to two years.

<sup>4</sup> Supra

## The Media and Information Commission

The Commission is established by section 38 of AIPPA. Section 40 provides for a governing board of 5 to 7 members, all of whom are appointed by the Minister, after consultation with the President. At least three members of the Board need to be nominated by an association of journalists and an association of media houses. The Fourth and Fifth Schedules give the Minister broad powers over members, including the power to set the terms of office, as well as other terms and conditions, including allowances, and to remove a member on a number of grounds, some of which are highly subjective. The Minister also appoints both the chair and the vice-chair of the Board. The Media and Information Commission is responsible, pursuant generally to sections 39(i), (j) and (n) of AIPPA and specifically pursuant to sections 79, 82 and 85, amongst other things, for administering the licensing system and for regulating the conduct of journalists and applying disciplinary measures.

### Section 20 of the Constitution of Zimbabwe

Section 20 of the Constitution of Zimbabwe guarantees freedom of expression in the Following terms:

- (1) Except with his own consent or by way of parental discipline, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence.
- (2) Nothing contained in or done under the authority of any law shall be held to be in contravention of subsection (1) to the extent that the law in question makes

Provision -

- (a) In the interests of defence, public safety, public order, the economic interests of the State, public morality or public health;
- (b) For the purpose of –
  - (i) The protection of reputations, rights and freedoms of other persons or the Private lives of persons concerned in legal proceedings;
  - (ii) Preventing the disclosure of information received in confidence;
  - (iii) Maintaining the authority and independence of the courts or tribunals orParliament;
  - (iv) Regulating the technical administration, technical operation or general efficiency of telephony, telegraphy,

- posts, wireless broadcasting or Television or creating or regulating any monopoly in these fields;
- (v) In the case of correspondence, preventing the unlawful dispatch therewith of any other matter; or
- (c) that imposes restrictions upon public officers; except so far as that provision or, as the case may be, the thing done under the Authority thereof is shown not to be reasonably justifiable in a democratic society.

## THE CASE

AIPPA provided for a system for the accreditation of journalists. Sections 80(1)(a) and (b) criminalised certain abuses of journalistic privileges where information had been falsified and falsehoods published whilst s 80(1)(c) criminalised the conduct of freelance journalists who collected or disseminated information without the permission of his employer. The practice of journalism without accreditation was outlawed. AIPPA also provided for the development of a Code of Conduct by the Media Commission ('the Commission') in consultation with interested parties, together with conferring on the Commission disciplinary powers and providing guidelines on sanctions for misconduct.

J, a membership association of journalists, together with M and K, newspaper editors, applied for a declaration that ss 79, 80, 83 and 85 of the Act breached their rights to receive and impart information and ideas without hindrance or interference as guaranteed by s 204 of the Constitution. In particular, the applicants maintained that the print media, in contrast to the electronic media, should only be subject to self-regulation and not a statutory licensing regime and that the impugned sections did not fall within the ambit of permitted exceptions contained in s 20(1). They also alleged that s 79 was impossibly vague conferring too much discretionary power on officials and the Minister, when read with s 915 of the Act, whilst at the same time contravening s 18(9) of the Constitution by depriving them of the right to be heard before a decision affecting their rights was made. J, M and K also alleged that s 85 conferred too much power on the Commission to interfere with journalists' freedom of expression, thereby reducing their right to a privilege. In addition, J, M and K submitted that the Commission was insufficiently independent of government. The Minister maintained that accreditation was a world wide practice, which was primarily meant to ensure two main objectives, i.e. accountability of the journalist to society and ensuring easy access to events.

In declaring s 79, subsection (1)(d) and (2) of s 80 and ss 83 and 85 constitutional, but s 80(1) (a), (b) and (c) unconstitutional (Sandura JA dissenting in part), it was held that:

- (1) Freedom of expression as enshrined in s 20 of the Constitution includes freedom of the press. Indeed, the significance and importance of the press to a proper functioning democracy is clear. However, this does not mean the press is above the law and cannot be required to operate within a legal framework.
- (2) Indeed, by challenging some sections of the Act and not challenging others, J, M and K tacitly concede the constitutionality of the unchallenged sections. Inherent in this tacit concession is the proposition that it is constitutionally permissible to enact laws that regulate the licensing and the functioning of the media or press provided that such enactments are within appropriate constitutional limits. Enactments that unduly undermine the independence of the press will not pass the constitutionality test
- (3) Moreover, there is nothing in principle to suggest that such regulation should only apply to the electronic and not the print media. This is based on the fact that whilst s 20 of the Constitution guarantees an individual's right to freedom of expression it does not expressly guarantee the exercise of that right through the means of one's choice including working as a journalist. Nor does s 20, either expressly or implicitly, prohibit preventive restriction of that freedom including the licensing of journalists<sup>5</sup>
- (4) Whilst the practice of journalism is different from other liberal professions, such as law and medicine, in that it involves the exercise of freedom of expression, including the receiving and imparting of information, this distinction should not place journalism beyond the control of statutory regulation provided any provisions accord with the constitutional requirements of s 20.
- (5) Section 79 providing for the licensing of the media falls under the exception in s 20(1) providing for the maintenance of public order. Nor is the provision in any way vague or unambiguous since it states in very clear terms the requirement for accreditation and the appropriate procedure to be complied with. The use of the word 'may' in s 79(5), enabling the Commission to accredit a journalist if it is satisfied that he comes within the parameters of the statute, does not in the ordinary sense of the word confer a discretion on the body to deny accreditation at a whim. This cannot have been Parliament's intention. Instead, it lends protection to an applicant who has complied with the prescribed formalities that no one will be deprived of accreditation for reasons other than those stated

<sup>5</sup> Schmidt v Costa Rica, Advisory Opinion on Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism of the Inter-American Court of Human Rights, OC-5/85, Series A No 5 distinguished).



- (6) In this context it will only be the relevant statutory instruments or regulations determining the qualifications for accreditation rather than the substantive provision that may breach the Constitution if they are too onerous, e.g. requiring a University degree instead of literacy. However, a perusal of the Regulations contained in Statutory Instrument 169C of 2002 reveal nothing patently unconstitutional, save for Form AP3 in the Second Schedule to the Regulations which requires approval of accreditation by the Permanent Secretary and Minister. This bears the hallmark of unconstitutionality but since J, M and K have not challenged this provision or any others the only reasonable inference to be drawn is that they do not believe they have a basis for such a challenge.
- (7) Nor can s 79 be challenged on the basis of it conferring too much power on a Minister when read with s 91 of the Act. Whilst s 91 confers authority on the Minister to make regulations under the Act it does not give him a blank cheque to do so. Any regulation will be subject to the same constitutional scrutiny as any other law.
- (8) Given that s 40 of the Act is the provision which provides for the appointment and composition of the Commission, J, M and K should have challenged its constitutionality when questioning the latter's independence. In any event, the Broadcasting Authority has already been held to be sufficiently independent
- (9) Ultimately, any interference by s 79 with s 20(1) is saved by s 20(2) as being reasonably justifiable in a democratic society since its objective, which is the maintenance of public order, is sufficiently important, the measure designed to meet the objective, accreditation, is at the centre of the licensing process, and the means used are no more than is necessary to accomplish the objective since it is essentially an enabling
- (10) The issues raised in relation to s 83 are identical to s 79 and it is therefore also constitutional.
- (11) Criminalizing the abuse of a privilege, as s 80(1)(a) and (b) seek to do in relation to journalists, is patently oppressive and is a cause for concern. In any event freedom of expression is a constitutionally guaranteed right and not a privilege. These provisions create strict criminal liability and are so broad in their sweep that they are undoubtedly unconstitutional and ultra vires s 18 of the Constitution. However, they are not in breach of s 20 since falsehood is not information and there is no intrinsic value in the falsification or fabrication of information or the publication of falsehoods to warrant constitutional protection.

- (12) It is seriously doubtful whether s 80(1) (c) can be said to fall within the public order exception of s 20(1). Even if it does it would not pass the reasonable justification test since its objective is obscure and its matters are best left to the domain of contractual relationship between employer and employee. Criminalising such conduct has a chilling and intimidating effect on journalists and is accordingly unconstitutional.
- (13) Section 85(2) is again essentially an enabling provision setting out what the Commission can do as opposed to what it should do. By challenging this provision it is suggested that journalists should not be sanctioned for violating the Code of Conduct as such sanctions would be unconstitutional. Such an argument is not persuasive. Nor can it be held that the involvement of the Commission in developing such a Code in line with s 85(1) or the mechanisms to be followed in misconduct proceedings as provided for by ss 85(3)-(7) are unconstitutional.

**Per Sandura JA dissenting in part:**

- (1) Whilst it is agreed that s 80(1)(a)-(c) are unconstitutional and s 85(1) and (3)-(7) are not, it is submitted that ss 79, 80(1)(d), 80(2), 83 and 85(2) are in breach of s 20(1).
- (2) There is no doubt that s 79 imposes a restriction on freedom of expression given that it is intertwined with the practice of journalism (*Schmidt v Costa Rica* applied). The journalist has to apply for accreditation and pay application and accreditation fees. In addition, the accreditation is not a mere formality. Therefore, it falls to be considered whether such interference can be reasonably justified.
- (3) In this context, the Minister has failed to state how requiring journalists to be accredited would fulfil the scheme's one stated objective in relation to compulsory accreditation (given that easy access to events only pertains to voluntary accreditation schemes), namely the accountability of the journalist to society. Even if he could demonstrate the link, such an objective is insufficiently important to justify limiting freedom of expression given its significance. Furthermore there are existing common and criminal law provisions which ensure accountability without the drastic measures proposed by the Act.
- (4) Nor can s 79 be justified on public order grounds since licensing journalists undermines the very principles of democratic public order on which fundamental rights are based <sup>6</sup>

<sup>6</sup> Ibid *Schmidt v Costa Rica*

- (5) Subsections 80(1)(a) and (b) contravene s 20(1) simply because it protects the publication of false statements given that such statements can sometimes have value and the difficulty of conclusively determining total falsity (6) Since s 79 is unconstitutional ss 80(1)(d), 80(2) and 83 must also be in breach of s 20(1).
- (7) Subsection 85(2) by empowering the Commission to penalise journalists not only for contravening the Code of Conduct but also ‘any provision of the Act’, including those which are unconstitutional, would punish them in certain circumstances for doing what they are entitled to do in terms of s 20(1). For that reason s 85(2) is also in breach of s 20(1).

## 2. The Gambian Law

On 25<sup>th</sup> July, On 25 July 2002, the Gambian legislature approved a Bill creating a National Media Commission. The Bill conferred quasi-judicial powers to the Media Commission and it imposed mandatory licensing conditions on individual journalists. The inauguration of the National Media Commission took place in June 2003.

With a President of the commission firstly named by the President of the Republic, provision later amended to nomination by the President of the Supreme Court, the Commission main job was to rule on complaints against journalists and the media. It had powers to summon journalists to reply to accusations and order them to reveal their sources. It was also mandated to draw up a code of conduct for the media and accredit journalists and press organisations. No media outlet was to be allowed to operate without an annually renewable licence, which the Commission can suspend or cancel. It can also close down media and impose fines of at least 10,000 dalasis (•610).

The 1997 Constitution of the Republic of The Gambia includes a number of provisions which are Relevant to this case. Section 17(1) provides for the responsibility of the Government to Respect and uphold the rights and freedoms guaranteed, as follows:

The fundamental human rights and freedoms enshrined in this Chapter (Chapter IV: Protection of Fundamental Rights and Freedoms] shall be respected and upheld by all organs of the Executive and its agencies, the Legislature and, where applicable to them, by all natural and legal persons in The Gambia, and shall be enforceable by the Courts in accordance with this Constitution.

Section 25, part of Chapter IV, protects, among other things, the right to freedom of expression, providing, in part:

- (1) Every person shall have the right to -
  - (a) freedom of speech and expression, which shall include freedom of the press and other media;...
- (4) The freedoms referred to in subsections (1) and (2) shall be exercised subject to the law of The Gambia in so far as that law imposes reasonable restrictions on the exercise of the rights and freedoms thereby conferred, which are necessary in a democratic society and are required in the interests of the sovereignty and integrity of The Gambia, national security, public order, decency or morality, or in relation to contempt of court.

Section 25 thus stipulates that freedom of expression and of the press is guaranteed, and that these rights may be restricted by law, but only where the restriction is reasonable and necessary in a democratic society. Furthermore, the only aims which a restriction may serve are those listed, namely national security (including the sovereignty and integrity of the country), public order, decency or morality, or the administration of justice (contempt of court). More detailed and specific provisions relating to the media are found in sections 207-210, part of Chapter XIX of the Constitution, entitled The Media. These provide, in relevant part:

- 207(1) The freedom and independence of the press and other information media are hereby guaranteed.
- (2) An Act of the National Assembly may make provisions for the establishment of the press and other information media.
- (3) The press and other information media shall at all times be free to uphold the principles, provisions and objectives of this Constitution, and the responsibility and accountability of the Government to the people of The Gambia.
- 209 The provisions of sections 207 and 208 are subject to laws which are reasonably Required in a democratic society in the interest of national security, public order, publicMorality and for the purpose of protecting the reputations, rights and freedoms of others.
- 210 An Act of the National Assembly shall within one year of the coming into force of this Constitution make provision for the establishment of a National Media Commission to establish a code of conduct for the media of mass communication and information and to ensure the impartiality, independence and professionalism of the media which is necessary in a democratic society.

Both section 25 and section 207(1) of the Constitution explicitly guarantee media freedom and, to the extent that they differ, the relationship between them is not clear. The test for restrictions found in section 25(4) is a little bit different from that found at section 209. The former refers to laws that are reasonable and necessary in a democratic society, while the latter uses the phrase “Reasonably required in a democratic society”, but this is probably of little consequence. The list of grounds for restricting this right also differs slightly. Section 207(1) guarantees not only the Freedom but also the independence of the media, an important addition.

### **The National Media Commission Act**

A National Media Commission Bill was first published in 1999. It was met with massive protests from within and outside The Gambia and was revised and reissued in 2001. It was passed into law by the National Assembly in 2002 and received Presidential assent the same year as the National Media Commission Act No.7 of 2002. The original Act was amended by the National Media Commission (Amendment) Act No. 13 of 2003.

The National Media Commission Act, 2002, as amended by the National Media Commission (Amendment) Act, 2003, provides, as its title suggests, for a National Media Commission. In Terms of scope, it defines media as ‘all forms of mass communication’, while a media organization is defined as ‘an organization engaged in transmitting news and information to the Public and includes a media house, association, club and company engaged in the business of mass communication’ (section 2). These would appear to be very broad definitions, encompassing the Internet and even NGOs and private bodies which engage in publication activities. Part II of the Act establishes the National Media Commission as a body corporate, composed of eleven members. The Commission was inaugurated in 2003. The main income of the Commission appears to be a direct appropriation by the National Assembly, although it may also receive other types of funding (section 10). The Act lists generally a range of functions for the Commission at section 8, including:

- ensuring the impartiality, professionalism and independence of the media;
- maintaining a register of media practitioners and organisations – newspapers, magazines, journals and broadcasters – in accordance with the Constitution;
- providing for a code of conduct for media practitioners; and
- setting standards regarding the content and quality of media output and promoting the highest standards in the media.

Part VI of the Act, consisting of section 13, provides for registration of both media practitioners and media organisations, as well as for the allocation of

licences to those who are registered. Registration lasts for one year and may be renewed. Failure to register constitutes an offence subject to a fine of not less than 5000 dalasis, and failure to pay the fine within 30 days will result in suspension of the licence and registration.

The Act, as amended, also provides for complaints regarding the media, including by any person aggrieved by anything published or broadcast, or done in respect of that person by a media practitioner or organization (section 16). Section 29 provides that where a court is satisfied that anything published or broadcast is not in conformity with the code of conduct, or the conduct of a media practitioner is either not in accordance with the code of conduct or 'blameworthy', it may order one of a range of sanctions. Section 15 of the Act provides for mandatory disclosure of confidential sources of information in certain contexts, and for the imposition of the section 29 penalties in case of a refusal to disclose.

Section 33 of Act makes it an offence, punishable by a fine of not less than 5000 dalasis, to use Derogatory or insulting language, while section 34 makes it a fine, with the same sanction, to Publish material which is false in any material respect. Pursuant to section 40, the Secretary of State is empowered to make regulations providing for a Code of Conduct for media practitioners and organisations, as well as for the fees to be paid for registration.

## THE CASE

The Gambian case had sought to challenge Sections 8(b)-(e), 13,15,16,29,30,33 and 34 of the national Media Commission Act, 2002, as amended by the National Media Commission (Amendment) Act, 2003(Act) in light of international and constitutional guarantees of freedom of expression. These sections subject media practitioners and organizations in the Gambia to a system of registration, and content and practice regulation under the supervision of a body that lacks independence from Government.

the Gambia Press Union (GPU), together with the Media Foundation for West Africa (MFWA) and other international human rights organisations, led a sustained campaign of protests and court challenges, for a repeal of the obnoxious Act. The GPU insisted that journalists should be allowed to constitute their own, self-regulatory, mechanism as envisaged by the 1997 Constitution of the country. On October 20, 2004, the Minister for Information and Communication, Dr. Amadou Janneh, announced that the controversial NMC Act would "shortly" be repealed by parliament.

On December 13 2004, the National Assembly finally repealed the NMC Act. But, there is still no respite for the media. The National Assembly, on the same day, passed into law legislation entitled the "Newspaper Amendment Act 2004".

The Act effectively nullifies the existing registrations of all media establishments in the country, and requires them to make fresh registrations with the Registrar General's office within two weeks of the coming into force of the law. At the same time, all private media houses are required to post a 500,000 dalasis (about US\$16,665) bond, an increase of 400 percent from the previous 100,000 dalasis. This new law, coupled with the imminent passage of the Criminal Code (Amendment) Bill, effectively derogates from all the gains made for media freedom and freedom of expression in The Gambia and West Africa as a whole. Then case is worth considering in this chapter, having been funded by AHRAJ an opinion having been developed and a lot of work having been done towards litigating the case before it was ultimately withdrawn after the Government repealed the Act.

### 3. Freedom of Expression under international Law

*"The absence of a free press and the suppression of people's ability to speak to and communicate with each other directly impoverish human freedom and impairs development."*

Amartya Sen Indian Nobel Laureate.

#### The Universal Declaration of Human Rights:

Under Article 56 of the UN Charter, Zimbabwe and Gambia have 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." This responsibility includes adherence to the rights enumerated in the Universal Declaration and elaborated in other UN sponsored covenants and declarations over the years.

The UDHR at Article 19 states that:

*"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, to receive and impart information and ideas through any media and regardless of frontiers."*

Though the provisions of the UDHR are not necessarily binding, they are now considered to be an authoritative guide to human rights and are widely held as having acquired legal force as customary international law. Most states have subscribed to the Charter of the United Nations and make an effort to try and adhere to it. Even the few remaining non-member states have nevertheless acquiesced to the principles it establishes.



Various national courts and international human tribunals have declared the freedom of expression as a fundamental right, the cornerstone of democracy. For instance, the Indian Supreme court said the following concerning the freedom of expression<sup>7</sup>:

*“Freedom of expression, one of the most precious of all the guaranteed freedoms, has four broad special purposes to serve: 1) It helps the individual to obtain self fulfilment, 2) it assists in the discovery of truth; 3) it strengthens the capacity of an individual to participate in decision making and 4) it provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change.”*

### **The International Covenant on Civil and Political Rights (ICCPR)**

The right to freedom of information is an important aspect of the international guarantee of freedom of expression that includes the right to seek and receive as well as to impart information. The right is proclaimed in Article 19 of the Universal Declaration of Human Rights and protected in international human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and People’s Rights. Article 19 of the ICCPR is in the following terms:

*“19 1. Everyone shall have the right to hold opinions without interference.  
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”*

### **African Charter on Human and People’s Rights**

Zimbabwe and Gambia ratified the Charter in 1986. The Charter provides for the freedom of expression under Article 9 (1) stating *inters alia* that ‘every individual shall have the right to receive information.’ The African Commission on Human and People’s Rights meeting in its 32<sup>nd</sup> Ordinary Session in 2002 adopted the Declaration of Principles on Freedom of Expression. The Declaration affirms the fundamental importance of the freedom of expression as an individual human right and as a cornerstone of democracy and it in particular recognises the key role the media and other means of communication play in ‘ensuring full respect for freedom of expression, in promoting the free flow of information and ideas and in assisting people make informed decisions and in facilitating and strengthening democracy’.<sup>8</sup>

<sup>7</sup> See *Indian Express Newspapers (Bombay) v Union of India* (1985) 2 SCR 287

<sup>8</sup> Preamble to the Declaration of Principles on Freedom of Expression. 32<sup>nd</sup> Session, 17 - 23 October 2002: Banjul, The Gambia.

The ACmHPR is set up under Art. 30 of the African Charter with a mandate to promote Charter rights and ensure their protection. The Commission may “take into consideration, as subsidiary measures to determine the principles of law,” various other human rights agreements to which African Union (AU) member States are parties, together with “African practices consistent with international norms on human and peoples rights, customs generally accepted as law, general principles of law recognized by African states as well as legal precedents”<sup>9</sup>

Thus, in interpreting and applying the Charter, the Commission has a broad mandate to draw on a vast body of law which Articles 60 and 61 incorporate by reference into the Charter. The Commission is granted an invaluable tool capable of ensuring that the interpretation of the Charter will keep up with the growth of general international law of human and people’s rights.

### Freedom of Expression and the Media

The guarantee of freedom of expression applies with particular force to the media. The African Commission on Human and Peoples’ Rights has highlighted:

*“... the key role of the media and other means of communication in ensuring full respect for freedom of expression, in promoting the free flow of information and ideas, in assisting people to make informed decisions and in facilitating and strengthening democracy.”*<sup>10</sup>

Similarly, the European Court of Human Rights has consistently emphasized the “Preeminent role of the press in a State governed by the rule of law.”<sup>11</sup>

It has further stated:

*“Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society.”*<sup>12</sup>

Additionally, the United Nations Human Rights Committee has stressed, a free media is essential in the political process:

<sup>9</sup> Article 61 of the African Charter

<sup>10</sup> Declaration of Principles on Freedom of Expression in Africa, African Commission on Human and Peoples’ Rights, 32nd Session, 17-23 October 2002: Banjul, The Gambia.

<sup>11</sup> *Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para. 63.

<sup>12</sup> *Castells v. Spain*, 24 April 1992, Application No. 11798/85, para. 43.

*“[T] he free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion.”<sup>13</sup>*

Moreover, Article 2 of the ICCPR places an obligation on States to “adopt such legislative or other measures as may be necessary to give effect to the rights recognised by the Covenant.” This means that States are required not only to refrain from interfering with rights but also to take positive steps to ensure that rights, including freedom of expression, are respected. In effect, governments are under an obligation to create an environment in which a diverse, independent media can flourish, thereby satisfying the public’s right to know.

The African Charter echoes the same obligations vis-à-vis its Member States, providing that “Member States of the Organisation of African Unity [now African Union] Parties to the present Charter shall recognise the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them.”<sup>14</sup> A crucial aspect of this ‘positive obligation’ is the need to promote pluralism within, and ensure equal access of all to, the media.<sup>15</sup>

The UN Human Rights Committee has stressed the importance of a pluralistic media in nation-building processes, holding that attempts to straight-jacket the media to advance ‘national unity’ violate freedom of expression:

*“The legitimate objective of safeguarding and indeed strengthening national unity under difficult political circumstances cannot be achieved by attempting to muzzle advocacy of multi-party democratic tenets and human rights.”<sup>16</sup>*

In order to promote pluralism and protect the right to freedom of expression, it is thus imperative that the media is permitted to operate independently from government control. This ensures the media’s role as public watchdog and that the public has access to a wide range of opinions, especially on matters of public interest. The AIPPA is one way in which the Zimbabwean government is trying to control the media and by imposing stringent licensing requirements, for example, it is to a large extent exercising massive control

<sup>13</sup> UN Human Rights Committee General Comment 25, issued 12 July 1996.

<sup>14</sup> Article 1, African Charter

<sup>15</sup> See Informationsverein Lentia v. Austria, 24 November 1993, Application Nos. 13914/88, 15041/89, 15717/89, 15779/89 and 17207/90, para. 38 (European Court of Human Rights).

<sup>16</sup> Mukong v. Cameroon, 21 July 1994, Communication No. 458/1991, para. 9.

over the media. The Gambian National Media commission Act also seeks to subject the media to a system of registration and to content control, this is a direct form of governmental control.

## The Fundamental Nature of Freedom of Expression

The overriding importance of freedom of expression – including the right to information as a human right has been widely recognized, both for its own sake and as an essential Underpinning of democracy and a means of safeguarding other human rights. At its very first session in 1946 the United Nations General Assembly declared:

Freedom of expression is a fundamental human right and...the touchstone of all the freedoms to which the United Nations is consecrated.

These views have been reiterated by all three regional judicial bodies dealing with human rights. The African Commission on Human and Peoples' Rights noted, in respect of Article 9 of the ACHPR: The European Court of Human Rights (ECHR) has also recognized the key role of freedom of expression:

*“Freedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of every man...it is applicable not only to “information” or “ideas” that are favorably received...but also to those which offend, shock or disturb the State or any other sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no “democratic society.”*

Similarly, the Inter-American Court of Human Rights, in a case that challenged to constitutionality of a mandatory licensing system for journalists, stated:

Freedom of expression is a cornerstone upon which the very existence of a democratic society rests.<sup>17</sup>

These views have been reiterated by numerous national courts around the world, Including the Zimbabwean Supreme Court and the Gambian supreme court<sup>18</sup>

## Restrictions on Freedom of Expression, International Standards.

Every system of international and domestic rights recognizes that freedom of expression is not absolute. Some carefully drawn and limited restrictions on freedom of expression may be necessary to take into account for the values of

<sup>17</sup> Ibid note- Schmidt vs. costa rica

<sup>18</sup> See Zimbabwean case and Gambian case

individual dignity and democracy. However, under international human rights law, national laws that restrict freedom of expression must comply with the provisions of Article 19(3) of the ICCPR, which states:

The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights and reputations of others;
- (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

Restrictions must meet a strict three-part test. First, the restriction must be provided bylaw. Second, the restriction must pursue one of the legitimate aims listed in Article 19(3);this list is exclusive. Third, the restriction must be necessary to secure that aim. International jurisprudence makes it clear that this is a strict test, presenting a high standard that any restriction must overcome.

### National Standards

National constitutions, like international law, normally permit restrictions on freedom of Expression but only if they meet a strict test, commonly set as a requirement that they are ‘Reasonably justifiable in a democratic society. National courts have elaborated a test For assessing whether a restriction is reasonably justifiable. In 1986, the Canadian Supreme Court set out what has come to be known as the “Oakes Test”, accepted as the standard since that time<sup>19</sup>

To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be “of sufficient importance to warrant overriding a constitutionally protected right or freedom. The standard must be high...It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial.... Second...the party invoking [the limitation] must show that the means chosen are reasonable and demonstrably justified. This involves “a form of proportionality test.

This test has been affirmed by the UN Human Rights Committee.<sup>20</sup> The same test is applied by the ECHR.<sup>21</sup> This test has been followed in substance in a number of other jurisdictions, including Zimbabwe and Gambia. The similarity

<sup>19</sup> R.v. Big M Drug Mart Ltd., supra, at p.352.

<sup>20</sup> See Mukong v. Cameroon, 21 July 1994, Communication No.458/1991, para.9.7.

<sup>21</sup> The SundayTimes v. United Kingdom, 26 April 1979, 2 EHRR 24, para. 45.

between this test and the test under international law may be noted. Both permit only restrictions that are set out clearly in law, that pursue objectives or aims of sufficient importance to warrant limiting a fundamental right and that meet a test of necessity and proportionality. Lord Wilberforce, writing as a member of the Privy Council, has noted that international human rights law is a relevant guide to interpreting domestic constitutional provisions.<sup>22</sup> Similarly, the High Court of Australia has noted that 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 right<sup>23</sup>

### 3. Issues.

*“The most stringent protection of free speech would not protect a man falsely shouting fire in a theater and causing a panic. [...] The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.” Justice Oliver Wendell Holmes Jr., 1919*

It is my submission that the mandatory licensing of Journalist introduced by AIPPA in Zimbabwe, and the regulatory system of Media practitioners that was contemplated in the Gambia represent a limitation of the freedom of expression well outside the ambit of international standards.

The main issue for consideration therefore would be to what extend is the Gambian law and the Zimbabwean law compatible with international standards: A hybrid of the international and national test would dictate an analysis to see if the Zimbabwean law and Gambian law:

1. Met the “objective test” – were they of sufficient importance to override specific constitutional provisions in both countries/
2. Met the ‘proportionality test’, - was the means chosen reasonable and demonstrably justified.
3. Met the exceptions allowable under Article 19 (3) of the ICCPR- Is the restriction authorised by law does it serve to maintain respect of the rights and reputations of others; or ) For the protection of national security or of public order or of public health or morals.

From the analysis of both laws above, it is clear that the laws fail on all counts, however, it is important to note that In truth, not every breach of Article 19 of the ICCPR constitutes an extreme violation of the right to freedom of expression,

<sup>22</sup> Lord Wilberforce comment

<sup>23</sup> Australian court

which occurs when governmental power is used for the express purpose of impeding the free circulation of information, ideas, opinions or news., any governmental action that involves a restriction of the right to seek, receive and impart information and ideas to a greater extent or by means other than those authorized by international law, would also be contrary to it. This is true whether or not such restrictions benefit the government.

A restriction of the right to freedom of expression may or may not be a violation of international law, depending upon whether it conforms to the terms in which such restrictions are authorized by Article 19(3) of ICCPR and international and comparative jurisprudence. It is consequently necessary to analyze the question relating to the compulsory licensing of journalists and systems of content control like the one in Gambia in light of the three part test outlined above.

In Zimbabwe for instance, AIPPA provided that the compulsory licensing of journalists can result in the imposition of liability, including penal,<sup>24</sup>. It follows that this licensing requirement constitutes a restriction on the right of expression for those who are not 'licensed to practise journalism. This same situation would have maintained in Gambia in under the national Media commission act as far as licensing of media houses is concerned. This conclusion makes it necessary to determine whether the laws are based on considerations that are legitimate under the international Law and, consequently, compatible with it.

Accordingly, the question is whether the ends sought to be achieved fall within those authorized by the International law, that is, whether they are "necessary to ensure: a) respect for the rights or reputations of others; or b) the protection of national security, public order, or public health or morals"(Art. 19(3)- ICCPR. On this, I wish to quote from Schmidt vs. Costa Rica where the court noted

*'..., the concept of public order in a democratic society requires the guarantee of the widest possible circulation of news, ideas and opinions as well as the widest access to information by society as a whole. Freedom of expression constitutes the primary and basic element of the public order of a democratic society, which is not conceivable without free debate and the possibility that dissenting voices be fully heard. In this sense, the Court adheres to the ideas expressed by the European Commission of Human Rights when, basing itself on the Preamble of the European Convention, it stated*

*that the purpose of the High Contracting Parties in concluding the Convention was not to concede to each other reciprocal rights and obligations in pursuance of their individual national interests but... to establish a common public order of the free*

<sup>24</sup> S. 80 provides for a fine of upto 100,000 Zimbabwean dollars and imprisonment for upto two years for offenders.



*democracies of Europe with the object of safeguarding their common heritage of political traditions, ideals, freedom and the rule of law. ("Austria vs. Italy," Application No. 788/60, 4 European Yearbook of Human Rights 116, at 138 (1961).*

*It is also in the interest of the democratic public order inherent in the American Convention that the right of each individual to express himself freely and that of society as a whole to receive information be scrupulously respected.*

Any attempts to control the practise of journalism, like is the case in Zimbabwe and Gambia would therefore be hard pressed in getting a justification in the concept of public order. This is buttressed by the fact that both countries have libel laws that can take care of any threat to public order.

While it can be argued that other professions are controlled through licensing regimes, this would not hold true for journalism. Within this context, journalism is the primary and principal manifestation of freedom of expression of thought. For that reason, because it is linked with freedom of expression, which is an inherent right of each individual, journalism cannot be equated to a profession that is merely granting a service to the public through the application of some knowledge or training acquired in a university or through those who are 'licensed by the government.

In recent history there has been vast case law against obligatory membership of associations or mandatory licensing, stemming from the advisory opinion of the Inter-American Court of Human Rights. Among these, noteworthy is decision No. 2313-95 of the Constitutional Chamber of the Supreme Court of Costa Rica of May 12, 1995, which declared Law 4420 requiring licensing of journalists to be unconstitutional. Elsewhere, The Constitutional Court in Colombia on March 18, 1998, repealed and quashed enabling legislation for Law 51 of 1975, which regulated the practice of journalism. Previously, in 1989, the Dominican Republic Supreme Court had declared as unconstitutional the requirement that journalists must belong to the local colegio as stipulated in Law 148 creating the Dominican Journalists Colegio. Some time earlier, in 1938, the United States Supreme Court (in *Lovell vs. City of Griffin*) had ruled that "Whatever the motive which induced [ordinance's] adoption, its character is such that it strikes at the very foundation of freedom of the press by subjecting it to license and censorship."

In conclusion therefore, it is submitted that compulsory licensing of journalists is, in itself, incompatible with international law, any such regulation, even though it only consists in a formality available to any person who wishes to practice journalism, without the need for any other requirement is still an infringement since Freedom of expression is a basic right that every individual possesses by the simple fact of his existence, whose exercise cannot be restricted nor conditioned to the fulfilment of previous requirements of any nature that he cannot or does not wish to fulfil.

## CONCLUDING OBSERVATIONS

### Zimbabwe

The highly repressive nature of the AIPPA in relation to the print media is only fully revealed when the controls and restrictions upon newspapers and journalists are considered as a whole. The combined effect of these controls is to introduce a highly restrictive system that goes way beyond simply requiring journalists to be accredited and newspapers to be registered. This Act has understandably been vehemently attacked by human rights activists in Zimbabwe and internationally. It violates the rights of freedom of expression, in particular the right of the media to gather and transmit information and imposes a whole series of totally unreasonable restrictions upon the practice of journalism within Zimbabwe.

The Declaration of Principles of Freedom of Expression in Africa was adopted in October 2002 by the African Union's Commission on Human and People's Rights, the document affirms "the fundamental importance of freedom of expression as an individual human right, as a cornerstone of democracy and as a means of ensuring respect for all human rights and freedoms". The Declaration also provides that the "the right to express oneself through the media by practicing journalists shall not be subject to undue legal restrictions". There can be no doubt whatsoever that the myriad restrictions upon newspapers and journalists in AIPPA and the completely partisan way in which the Act has been applied amount to undue and unjustifiable restrictions upon the practice of journalism.

It is my opinion that AIPPA introduces a system of stifling government controls over the operations of newspapers and the practice of journalism in Zimbabwe. This system is completely incompatible with democratic notions of freedom of expression, free flow of information and freedom of the press.

### Gambia

The Gambian Act aimed at increasing government influence over media regulations. The recognition of this right — to be informed and to form and express opinions — presupposes the recognition of the right to information that every member of society has. It is not a matter of a right of those who actively seek information, but also a right of those who hope to receive it through those divulging the information. There is no justification for imposing upon news media and journalists regulations on how they should do their work or on news content. As a way forward,

self-regulation combined with the voluntary pursuit of high professional standards is the ideal form of regulation of the private print media.

A good press law can, instead of *regulating and constraining* the press, work to *ensure genuine press freedom*. A good press law should, for instance, prohibit prior censorship, protect the confidentiality of sources, protect the independence of journalists' associations and ensure access for the press to the workings of government and to the judicial process.

Any form of media regulation ought to reflect an understanding and respect of international standards on press freedom and freedom of expression. Self-regulation has been the preferred mode of regulation in most democratic countries.

### Key elements of self-regulation

- The system should not be controlled by the state or statute
- It should be independently funded, preferably by the industry, without strings.
- Self-regulation should be voluntarily delivered by universal industry itself
- The code of conduct should be written and approved by the industry itself
- It should reflect the national culture
- It should protect the rights of the individual
- It should uphold freedom of expression and the public's right to know and the press's right to publish without prior restraint
- It should provide quick, free and easy resolution of complaints
- While pursuing the principles of natural justice, it should not be over legalistic or bureaucratic
- There should be significant lay membership, independently selected, on adjudication panels.

A free press means a free people. To this end, the following principles, basic to an unfettered flow of news and information both within and across national borders, deserve the support of all those pledged to advance and protect democratic institutions<sup>25</sup>.

1. Censorship, direct or indirect, is unacceptable; thus laws and practices restricting the right of the news media freely to gather and distribute information must be abolished, and government authorities, national

<sup>25</sup> Quoted from provisions approved by journalists from 34 countries at the Voices of Freedom world conference on censorship problems in London, Jan. 16-18, 1987. <http://www.wpfc.org/CharterForAFreePress.html>

- or local, must not interfere with the content of print or broadcast news, or restrict access to any news source.
2. Independent news media, both print and broadcast, must be allowed to emerge and operate freely in all countries.
  3. There must be no discrimination by governments in their treatment, economic or otherwise, of the news media within a country. In those countries where government media also exist, the independent media must have the same free access as the official media have to all material and facilities necessary to their publishing or broadcasting operations.
  4. States must not restrict access to newsprint, printing facilities and distribution systems, operation of news agencies, and availability of broadcast frequencies and facilities.
  5. Legal, technical and tariff practices by communications authorities which inhibit the distribution of news and restrict the flow of information are condemned.
  6. Government media must enjoy editorial independence and be open to a diversity of viewpoints. This should be affirmed in both law and practice.
  7. There should be unrestricted access by the print and broadcast media within a country to outside news and information services, and the public should enjoy similar freedom to receive foreign publications and foreign broadcasts without interference.
  8. National frontiers must be open to foreign journalists. Quotas must not apply, and applications for visas, press credentials and other documentation requisite for their work should be approved promptly. Foreign journalists should be allowed to travel freely within a country and have access to both official and unofficial news sources, and be allowed to import and export freely all necessary professional materials and equipment.
  9. Restrictions on the free entry to the field of journalism or over its practice, through licensing or other certification procedures, must be eliminated.
  10. Journalists, like all citizens, must be secure in their persons and be given full protection of law. Journalists working in war zones are recognized as civilians enjoying all rights and immunities accorded to other civilians.

In a nutshell, it should be emphasised that, freedom of expression and of the press must not be subject to the whim of authorities or of the written law. If freedom of expression and of the press were to be established only in current laws, their content and protection would have a precarious basis. In noting the inalienable character of this right, the action of authorities that deny it or the existence of contradictory legislation amount

to violations of a superior juridical order — whether based on concepts in natural law, on international norms and principles enshrined in treaties or declarations or international customary law.

- “*The principle of free thought is not free thought for those who agree with us but freedom for the thought we hate.*” US Supreme Court Justice Oliver Wendell Holmes in *United States v. Schwimmer* (1929).



## Chapter 6

### ABOLITION OF THE DEATH PENALTY IN AFRICA\*<sup>1</sup>

#### Introduction

Currently more than half the countries in the world have abolished the death penalty in law or practice. The death penalty is however still practiced and legal in twenty-three<sup>2</sup> African Countries despite the global move toward the abolition. Angola, Cape Verde, Cote D'voire, Djibouti, Guinea Bissau, Liberia, Mauritius, Mozambique, Namibia, Senegal, Seychelles and South Africa have all abolished the death penalty.<sup>3</sup> Algeria, Benin, Burkina Faso, Central African Republic, Gambia, Kenya, Madagascar, Malawi, Mali, Mauritania, Morocco, Niger, Swaziland, Togo and Tunisia<sup>4</sup> are considered abolitionist de facto states<sup>5</sup>. At least 2,258 prisoners in 37 countries were known to have been executed in 1998 and 4,845 persons in 78 countries were known to have received death sentences. According to Amnesty International, at least 7,395 persons were sentenced to death in 64 countries in 2004 and at least 3,797 prisoners were executed in 25 countries in the same year<sup>6</sup>. These numbers reflect only cases reported; actual numbers are probably higher<sup>7</sup>. In 1998, 86 per cent of all known executions took place in China, the Democratic Republic of Congo, the USA and Iran.<sup>8</sup>

Comparative international law jurisprudence contests the legality of the death penalty viewing it as an act that violates the right to life, human dignity and is cruel, inhuman treatment.<sup>9</sup>

It has been argued in the past that the death penalty is a deterrent to crime though recent studies have however shown that there is still an increase of crimes that are punishable by death hence it does not serve as an effective

\*<sup>1</sup> Authored by Grace Maingi-Kimani, Legal Officer, ICJ Kenya. LLB Law (Hons) University of Leicester, UK.

<sup>2</sup> Botswana, Burundi, Cameroon, Chad, Comoros, Democratic Republic of Congo, Egypt, Equatorial Guinea, Eritrea, Ethiopia, Gabon, Ghana, Guinea, Lesotho, Nigeria, Rwanda, Sierra Leone, Somalia, Sudan, Tanzania, Uganda, Zambia and Zimbabwe. Source – Amnesty International, Abolitionist and Retention Countries.

<sup>3</sup> Amnesty International, Abolitionist and Retention Countries.

<sup>4</sup> Amnesty International, Abolitionist and Retention Countries.

<sup>5</sup> Countries that retain the death penalty for ordinary crimes but have not executed anyone during the past ten years or more are considered abolitionist de facto.

<sup>6</sup> Amnesty International, "The death penalty worldwide: developments in 2004"

<sup>7</sup> Amnesty International.

<sup>8</sup> University of Alaska Anchorage – Justice Centre. The Death Penalty :The International Context.

<sup>9</sup> Winluck Wahiu – AHRAJ Legal Opinion Case 16.



deterrent. A comparative study carried out in Nigeria by a law and criminology professor on the statistics on murders and executions between 1967 and 1985, observed that “*the number of murders had regularly increased during most of this period*”, even though murder was punishable by the death penalty. The professor concluded that the studies conducted in Nigeria “*had clearly demonstrated that the use of the death penalty was not an effective deterrent*” for murder and armed robbery.<sup>10</sup>

Professor Roger Hood, an expert on the death penalty, has examined the various studies on the death penalty’s deterrent effect. He concluded that: “*Research has failed to provide scientific proof that executions have a greater deterrent effect than life imprisonment and such proof is unlikely to be forthcoming. The evidence as a whole still gives no positive support to the deterrent hypothesis...*”<sup>11</sup>

Opponents of the death penalty premise their arguments on ethical parameters, arguing that since the aim of all forms of punishment is either punitive, retributive, corrective or deterrence, the execution of criminals does not serve any of these purposes. Life, they argue is an inherent human right possessed by all human beings and nobody, therefore, can claim to have the right to end it.<sup>12</sup> The death penalty has also been rejected as a form of punishment as innocent persons maybe killed for a crime they did not commit. Once a person is executed that is the end of it however an innocent person serving a life sentence can be released and compensated once found innocent.

Certain proponents for the death penalty have based their belief in the death penalty on religious teachings. It is however clear that not all religions advocate for the death penalty. In Islamic law the death penalty and its application into criminal and political field have had a long and contradictory history, mostly because of the overlapping of religious society and political society and because of the variety of historical periods.<sup>13</sup> The Koran provides the retaliation law for the murderers, the death penalty for the adulterous women but it also teaches that God prefers forgiveness<sup>14</sup>. In Islam, murder can be punished by death, or - if family members don’t insist on death as retaliation - payment of “blood money” to the family. “This is a merciful dispensation from your Lord,” the Koran says. “He that transgresses thereafter shall be sternly punished” (2:178-179). The same punishments apply to the death of an unborn child in the commission of a crime toward the mother.<sup>15</sup>

<sup>10</sup> West Africa time to abolish the death penalty, Amnesty International.

<sup>11</sup> Roger Hood, *The Death Penalty, A Worldwide Perspective*, Clarendon Press, Oxford, 1996. Para. 328.

<sup>12</sup> Capital Punishment: Texas to Kenya - Robert Oduol

<sup>13</sup> Death Penalty - When Life Generates Death (Legally)

<sup>14</sup> “Eye for an Eye” Challenges Faithful By: Caryle Murphy, Washington Post Staff Writer.

<sup>15</sup> Religion far from unified on executions – National coalition to abolish the death penalty

The Old Testament of the Bible preaches that imposition of death on those who have committed certain crimes is acceptable. Leviticus 24:17 states that “If anyone takes the life of a human being, he must be put to death.” Other crimes punishable by death were working on the Sabbath, making a sacrifice to another God, witches and cursing against God. Also in Genesis 9:6, God speaks to Noah before the flood and says: “He who sheddeth a man’s blood, by man shall his blood be shed.”

The Old Testament teachings of ‘an eye for an eye’ have been contrasted with the teachings of Jesus Christ, which advocate for forgiveness. Matthew 5:38-40 which is part of Jesus’ famous Sermon on the Mount states that “You have heard that it was said, ‘An eye for an eye and a tooth for a tooth.’ But I tell you, do not resist an evil person. If someone strikes you on the right cheek, turn to him the other also.”

The Catholic Church does not exclude death penalty if it is the only way to defend lives against a perpetrator, but non-lethal means are “more in keeping with the common good and more in conformity with the dignity of the human person.”<sup>16</sup> Buddhists believe that all have potential to commit crimes, a tendency not overcome by executing people. Capital punishment is a severe form of punishment that deprives a person of the opportunity to change or compensate<sup>17</sup>. The Church Of Jesus Christ Of Latter-Day Saints believe that capital punishment is an appropriate penalty for murder, but proper only after an offender is found guilty in a lawful public trial<sup>18</sup>.

The Lutheran-Missouri Synod believes that capital punishment is in accordance with the Scriptures. Government has the authority to apply the death penalty. Christians should exert a positive influence on the government’s responsibility to “bear the sword.”<sup>19</sup>

The Central Conference of American Rabbis (CCAR) and the Union for Reform Judaism (URJ) are formally opposed to the death penalty. The CCAR says the death penalty is not an effective deterrent to crime. URJ believe that there is no crime for which the taking of human life by society is justified, and that it is the obligation of society to evolve other methods in dealing with crime.<sup>20</sup>

Southern Baptists believe there is biblical support for capital punishment. All people are conceived with the right to life, but some forfeit that right.<sup>21</sup> The Unitarian Universalist Association believe that capital punishment is inconsistent with human life, and is retributive, discriminatory and a non-deterrent. “As a community of faith promoting justice, equity and compassion in human relations, we call for an end to the death penalty.”

<sup>16</sup> Catechism of the Catholic Church

<sup>17</sup> Dalai Lama

<sup>18</sup> [www.lds.org](http://www.lds.org)

<sup>19</sup> [www.lcms.org](http://www.lcms.org)

<sup>20</sup> Religious Action Center of Reform Judaism

<sup>21</sup> [www.bpnews.net](http://www.bpnews.net)

One strong argument for the death sentence is the likelihood of escape from prison by the convict. It has been argued that a convicted murderer can escape from prison to commit more crimes more so a convicted murderer may be released by the State before the completion of his/ her sentence and continue with his / her life of crime.

The death penalty is carried out in different forms around the world. Be it by lethal injection, electrocution, shooting, gassing, beheading, stoning or by hanging it is still an inhuman act, which can and has failed in certain circumstances leaving the victim distressed and having to relive the whole experience.

The number of capital crimes in China has more than tripled since the promulgation of the Criminal Law in 1980. Many of the additions relate to non-violent or economic crimes. For example in 1995 serious tax and insurance fraud were added to the list of capital offences.

For many capital offences, the only clarification given on when the death penalty may be used is in relation to crimes “where the circumstances are particularly serious “or the crime is “heinous”. This phrase remains very undefined and has been interpreted very differently in different localities across China, and to fit in with the requirements of periodic crackdowns on crime. Some legal academics in China also consider the trend towards using the death penalty for repeated minor crimes, which alone would not attract the penalty as an abuse of the death penalty.<sup>22</sup>

Under the Criminal Law, and in subsequent legislative and judicial decisions and interpretations on the crime of theft, “particularly serious circumstances” attracting punishment between 10 years imprisonment and death are clarified as stealing exceptionally large amounts of 20-30,000 Yuan (US \$2,409 - \$3,614) and above, with other particularly serious circumstances compounding the seriousness of the crime. In contrast to the criteria set for crimes of theft, “particularly serious circumstances” in corruption cases for which the death penalty is applicable have been established as “involving 50,000 Yuan or more with other particularly serious circumstance to compound the crime<sup>23</sup>.

In Kenya the death penalty is imposed for crimes of murder, robbery with violence, treason, attempted robbery with violence. In the Gambia treason and conspiracy attracts the death penalty. In Singapore drug trafficking, murder and firearm offences carry a mandatory death sentence; the death sentence is also imposed on those who kidnap with the intention of seeking a ransom.<sup>24</sup>

<sup>22</sup> The Death Penalty in China: Breaking Records, Breaking Rules

<sup>23</sup> Ibid

<sup>24</sup> Singapore – The death penalty; a hidden toll for executions - Amnesty International.

## International Human Rights Standards and the Death Penalty

It is recognized that the right to life is the most fundamental and basic of human rights. Indeed, the right to life is the fountain from which all the other human rights spring and it therefore deserves the greatest respect. With the end of the world wars and the beginning of the process of decolonisation, the international community laid the foundation for the promotion and protection of human rights by proclaiming the Universal Declaration of Human Rights. Recognizing the “inherent dignity” and the “equal and inalienable rights of all members of the human family”, the General Assembly of the United Nations enshrined the right to life in article 3 of the Universal Declaration<sup>25</sup> which states that everyone has the right to life, liberty and security of person.

The Universal Declaration was thus the first and crucial step towards a steadily increasing protection of human rights, including the right to life, within the United Nations. The right to life was subsequently entrenched in the International Covenant on Civil and Political Rights<sup>26</sup> at article 6 (1) which states that every human being has the inherent right to life, which shall be protected by law and that no one shall be arbitrarily deprived of this right.

Article 6(2) states “In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.”

Article 6(4) states that “Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases. Article 6(5) goes on to state that the sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

In interpreting the provision of Article 6, the Committee has stated that the right to life is a right that should not be interpreted narrowly<sup>27</sup> and is the supreme right from which no derogation is permitted even in time of public emergency.<sup>28</sup>

<sup>25</sup> Fact sheet no. 11 (Rev. 1), Extra judicial, summary and arbitrary executions.

<sup>26</sup> Ibid

<sup>27</sup> General Comment No. 6; Right to Life (Art 6): (30/04/82)

<sup>28</sup> General Comment No. 14: Nuclear weapons and the right to life (Art. 6): 09/11/84.

While it follows from Article 6(2) to (6) that States parties are not obliged to abolish the death penalty totally, they are obliged to limit its use and, in particular, to abolish it for other than the “most serious crimes”. Accordingly, they ought to consider reviewing their criminal laws in this light and, in any event, are obliged to restrict the application of the death penalty to the “most serious crimes”. The article also refers generally to abolition in terms, which strongly suggest that abolition is desirable.<sup>29</sup> The Committee is of the opinion that the expression “most serious crimes” must be read restrictively to mean that the death penalty should be a quite exceptional measure.<sup>30</sup>

The death penalty remains a regular item on the agenda of the Commission on Human Rights. In views adopted on 20<sup>th</sup> and 24<sup>th</sup> August and 10<sup>th</sup> December 2004, 13 April and 16<sup>th</sup> November 2005,<sup>31</sup> the Committee followed its established jurisprudence in finding violation of the right to life, under article 6 of the ICCPR, by reason of the imposition (and in the cases of Saidov and Khalilova the carrying out) of the death penalty, in circumstances in which the individual’s right to a fair trial was not guaranteed. In views adopted on 7<sup>th</sup> September and 8<sup>th</sup> December 2004 and 25 and 31 October 2005,<sup>32</sup> the committee referred to its established case law that the automatic and mandatory imposition of the death penalty constitutes an arbitrary deprivation of life, in violation of article 6, paragraph 1, of the Covenant, in circumstances where the death penalty is imposed without regard being paid to the defendant’s personal circumstances or the circumstances of the particular offence. The automatic imposition of the death penalty in these cases violated the individual’s right to life under article 6, paragraph 1 of the covenant.<sup>33</sup>

Furthermore in its resolution 2005/59, the Commission called upon all States that still maintain the death penalty to abolish the death penalty completely and, in the meantime, to establish a moratorium on executions; to progressively restrict the number of offences for which it may be imposed and, at the least, not to extend its application to crimes to which it does not at present apply; and to make available to the public information with regard to the imposition of the death penalty and to any scheduled execution.<sup>34</sup> The resolution also urged States, inter alia, not to impose the death penalty for crimes committed by persons

<sup>29</sup> General Comment No. 6; Right to Life (Art 6): (30/04/82)

<sup>30</sup> Ibid

<sup>31</sup> Communication No. 964/001, Saidova v. Tajikistan and Communication No. 1117/2002 Khomidov v. Tajikistan, Communication No. 912/2000, Deolall v Guyana, Communication No. 973/2001, Khalilova v. Tajikistan, Communication No. 907/2000, Siragev v Uzbekistan, Communication No. 985/2001, Aliboeva v. Tajikistan.

<sup>32</sup> Communication No. 1167/2003, Rayos v. Philippines, Communication No. 1110/2002 Rolando v. Philippines, Communication No. 862/1999, Hussain and Hussain v. Guyana, Communication No. 913/2000, Chan v. Guyana.

<sup>33</sup> Promotion and protection of human rights: status of the International Covenants on Human Rights – The question of the death penalty, Report of the Secretary General. 10th February 2006.

<sup>34</sup> Ibid

below 18 years of age, to exclude pregnant women and mothers with dependent infants from capital punishment, and not to impose the death penalty on a person suffering from any mental or intellectual disabilities or to execute any such person.<sup>35</sup>

The maximum penalty for persons convicted of war crimes, crimes against humanity, or genocide by the ad hoc International Criminal Tribunals for Rwanda and Yugoslavia is life imprisonment. The Rome Statute, which establishes the International Criminal Court, follows this trend, so that *de facto* and *de jure* the United Nations is abolitionist.

The **Convention on the Rights of the Child** provides that no child shall be subjected to torture or any other cruel, degrading and inhuman treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for persons under the age of eighteen years. 140 States have signed the Convention on the Rights of the Child.

As a step towards the total abolition of the death penalty, Amnesty International has launched an international Stop Child Executions! Campaign to end its use against child offenders.<sup>36</sup> Amnesty International also reported that four executions of juvenile offenders took place in 2004, and eight in 2005.

### **Safeguards on the application of the death penalty**

In 1984, the UN Economic and Social Council (ECOSOC) adopted nine safeguards with regard to the implementation of the death penalty, the safeguards guaranteeing the rights of those facing the death penalty.<sup>37</sup> The United Nations General Assembly subsequently adopted these safeguards.

The first safeguard states that: In countries which have not abolished the death penalty, capital punishment may be imposed only for the most serious crimes, it being understood that their scope should not go beyond intentional crimes with lethal or other extremely grave consequences.

Article 5 of the ECOSOC Safeguards guaranteeing protection of the rights of those facing the death penalty states that capital punishment may only be carried out pursuant to a final judgement rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in article 14 of the ICCPR, including the right of anyone suspected or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings.

<sup>35</sup> Paragraphs 7(a-c)

<sup>36</sup> ACT 50/015/2004

<sup>37</sup> Resolution 1984/50

In a further resolution ECOSOC has stated that an accused facing the death penalty should be provided with “adequate assistance of counsel at every stage of the proceedings, above and beyond the protection afforded in non-capital cases.

Article 6 of the ECOSOC Safeguards guaranteeing protection of the rights of those facing the death penalty states that anyone sentenced to death has the right to appeal to a court of higher jurisdiction, and steps should be taken to ensure that such appeals should become mandatory.

The safeguards guaranteeing protection of the rights of those facing the death penalty contained in Economic and Social Council resolution 1984/50 of 25<sup>th</sup> May 1984 are summarized below:

- Capital punishment may be imposed only for the most serious crimes.
- The right to benefit from a lighter penalty if, subsequent to the commission of the crime, provision is made by law to this effect.
- Persons below 18 years of age at the time they committed the crime should not be sentenced to death and the death sentence should not be carried out on pregnant women, new mothers, or persons who have become insane.
- Capital punishment may be imposed only when guilt is based upon clear and convincing evidence leaving no room for an alternative explanation of facts.
- The death sentence may be carried out only pursuant to a final judgment rendered by a competent court after a legal process, which gives all possible safeguards to ensure a fair trial, including the right of a defendant to adequate legal assistance.
- The right to appeal against the death sentence to a court of higher jurisdiction must be granted.
- The right to seek pardon or commutation of sentence must be granted.
- Capital punishment shall not be carried out pending appeal or other recourse procedure.
- When capital punishment occurs, it shall be carried out so as to inflict minimum suffering.

## **The Second Optional Protocol to the International Convention on Civil and Political Rights**

The Second Optional Protocol to the International Convention on Civil and Political Rights, aiming at the abolition of the death penalty stands on the principle that the abolition of the death penalty contributes to the enhancement of human dignity and progressive development of human rights. The Second Optional Protocol states that each state party shall take all necessary measures



to abolish the death penalty within their jurisdiction<sup>38</sup>. Article 2 states that no reservation is admissible to the present Protocol, except for a reservation made at the time of ratification or accession that provides for the application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime.

- **Regional Human Rights Standards on the Death Penalty**

### *The African Human Rights System*

The **African Charter on Human and People's Rights** states in Article 4 that human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.

The African Commission for Human and Peoples' Rights is yet to make a substantive determination on the legality of the death penalty under the Charter. However, the Charter only prohibits arbitrary executions. The Commission has nonetheless decided that a constitutional provision does not afford a state a reason for non-compliance with Charter obligations.<sup>39</sup>

During its 38<sup>th</sup> ordinary session in 2005, the African Commission on Human and People's Rights adopted a resolution on the composition and the operationalization of the working group on the death penalty.<sup>40</sup>

### *The American System*

The **American declaration of the rights and duties of man** states in Article 1 that every human being has the right to life, liberty and security of his person. The American Convention on Human Rights was founded on the Universal Declaration of Human Rights and the American declaration of the rights and duties of man. Article 4 of the **American Convention on Human Rights** provides that:

1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.
2. In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime. The

<sup>38</sup> Article I.

<sup>39</sup> Legal Resources Foundation versus Zambia, 1998

<sup>40</sup> Promotion and protection of human rights: status of the International Covenants on Human Rights – The question of the death penalty, Report of the Secretary General. 10th February 2006.



application of such punishment shall not be extended to crimes to which it does not presently apply.

3. The death penalty shall not be reestablished in states that have abolished it.
4. In no case shall capital punishment be inflicted for political offenses or related common crimes.
5. Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women.
6. Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending decision by the competent authority.

**Protocol to the American Convention on Human Rights** to abolish the death penalty is founded on the following principles:

1. Everyone has the inalienable right to respect for his life, a right that cannot be suspended for any reason;
2. The tendency among the American States is to be in favour of abolition of the death penalty;
3. Application of the death penalty has irrevocable consequences, forecloses the correction of judicial error, and precludes any possibility of changing or rehabilitating those convicted;
4. The abolition of the death penalty helps to ensure more effective protection of the right to life;
5. That an international agreement must be arrived at that will entail a progressive development of the American Convention on Human Rights, and
6. That States Parties to the American Convention on Human Rights have expressed their intention to adopt an international agreement with a view to consolidating the practice of not applying the death penalty in the Americas.

Article 1 of the protocol states that the States Parties to the Protocol shall not apply the death penalty in their territory to any person subject to their jurisdiction. Article 2 states that no reservations may be made to the Protocol. However, at the time of ratification or accession, the States Parties may declare that they reserve the right to apply the death penalty in wartime in accordance with international law, for extremely serious crimes of a military nature.

Below is a list of countries that have ratified the Protocol:<sup>41</sup>

<sup>41</sup> Organization of American States treaties list

Country	Signature	Ratification /Accession	Deposit
Antigua & Barbuda	-	-	-
Argentina	-	-	-
Bahamas	-	-	-
Barbados	-	-	-
Belize	-	-	-
Bolivia	-	-	-
Brazil	06/07/94	07/31/96	08/13/96 RA
Canada	-	-	-
Chile	09/10/01	-	-
Colombia	-	-	-
Costa Rica	10/28/91	03/30/98	05/26/98
Dominica	-	-	-
Dominican Republic	-	-	-
Ecuador	08/27/90	02/05/98	04/15/98
El Salvador	-	-	-
Grenada	-	-	-
Guatemala	-	-	-
Guyana	-	-	-
Haiti	-	-	-
Honduras	-	-	-
Jamaica	-	-	-
Mexico	-	-	-
Nicaragua	08/30/90	03/24/99	11/09/99 RA
Panama	11/26/90	06/27/91	08/28/91 RA
Paraguay	06/08/99	10/31/00	12/07/00 RA
Peru	-	-	-
St. Kitts & Nevis	-	-	-
St. Lucia	-	-	-
St. Vincent & Grenadines	-	-	-
Suriname	-	-	-
Trinidad & Tobago	-	-	-
United States	-	-	-
Uruguay	10/02/90	02/08/94	04/04/94 RA
Venezuela	09/25/90	08/24/92	10/06/93 RA

## The European System

**The European Convention for the protection of human rights and fundamental freedoms** was founded on the principles of the Universal Declaration of Human Rights and states in Article 2 that everyone's right to life shall be protected by law and no one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided for in law.

The member states of the Council of Europe expressed a general tendency in favour of the abolition of the death penalty in 1983 and enacted Protocol 6 to the European Court of Human Rights and fundamental freedoms concerning the abolition of the death sentence. **Protocol 6 to the European Court of Human Rights and fundamental freedoms concerning the abolition of the death penalty** provides for the abolition of the death penalty in article 1. Article 2 states that a State may make provisions in its law for the death penalty in respect of acts committed in times of war or of imminent threat of war.

In 2002 the member states of the Council of Europe enacted Protocol 13 in a bid to strengthen the protection of the right to life guaranteed by the Convention for the Protection of human rights and fundamental freedoms. Member states were aware that everyone's right to life is a basic value in a democratic society and that the abolition of the death penalty is essential for the protection of this right and for the full recognition of the inherent dignity of all human beings.

**Protocol 13 to the European Court of Human Rights** was passed in recognition that Protocol 6 to the European Court of human rights and fundamental freedoms concerning the abolition of the death penalty does not exclude the death penalty in respect of acts committed in time of war or imminent threat of war. It was resolved that this was the final step in the abolition of the death penalty. Article 1 states that the death penalty shall be abolished and that no one shall be condemned to such penalty or executed. The protocol does not allow any derogation to be made from the provisions of the articles and or any reservations.

The Council of Europe's Committee of Ministers has continued to monitor capital punishment to ensure compliance with the commitments accepted by all member states of the Council of Europe within the context of its thematic monitoring procedure. The subject continues to be considered at meetings of the Ministers' Deputies at regular intervals "until Europe has become a de jure penalty free zone". In October 2005, the Committee of Ministers adopted a decision in which it called on the Russian Federation to take, without delay, all the necessary steps to transform the existing moratorium on executions into de jure abolition of the death penalty and to ratify Protocol No. 6 to the ECHR. It also encouraged those States, which have not yet signed or ratified Protocol No. 13 to do so rapidly. In May and October 2004 respectively, the Committee

of Ministers submitted, on behalf of the Council of Europe, statements of interest in support of two “amicus curiae briefs” prepared by the European Union for individual death penalty cases<sup>42</sup> in the United States of America.<sup>43</sup>

The European Court of Human Rights has further recognized the considerable evolution with regard to the legal position concerning the death penalty. In the Grand Chamber judgement of 12 May 2005 in *Ocalan v. Turkey*, the Court noted that capital punishment in peacetime had come to be regarded as an unacceptable form of punishment, which no longer permissible under article 2 of the European Convention on Human Rights, guaranteeing the right to life. The Court held that the imposition of the death sentence on the applicant following an unfair trial by a court whose independence and impartiality were open to doubt amounted to inhuman treatment in violation of article 3 of the European Convention on Human Rights.<sup>44</sup>

## The Death Penalty in Zambia – Retentionist Country

The death penalty is both legal and practiced in Zambia. The last execution was held in 1997. In May 2004 President Mwanawasa commuted the death sentences on fifteen prisoners convicted in separate cases of murder and armed robbery. In February 2004 he commuted the death sentences on forty-four soldiers convicted of involvement in a failed coup in 1997, and repeated assurances that there would be no executions during his presidency.<sup>45</sup> Zambia is considered a retentionist state of the death penalty.

The death penalty is enshrined in article 12 (1) of the Constitution of Zambia which states that no person shall be deprived of his life intentionally except in execution of the sentence of a court in respect of a criminal offence under the law in force in Zambia of which he has been convicted. The Constitution goes on to state in Article 15 that no person shall be subjected to torture or to inhuman or degrading punishment or any other like treatment. The grave contradiction is that on one hand the Constitution legalises the death penalty but also speaks out against torture, inhuman and degrading punishment. Many African Constitutions bear the same irony.

<sup>42</sup> The first amicus brief, in May 2004, was in the case of *Roper v. Simmons*, concerning the application of the death penalty in the United States against persons who were below the age of 18 years at the time of the offence. The second, of October 2004, was in the case of *Jose Medelin* and concerns the right of detained foreign nationals to be informed of the right to consular access (art. 36 of the Vienna Convention on Consular Relations).

<sup>43</sup> Promotion and protection of human rights: status of the International Covenants on Human Rights – The question of the death penalty, Report of the Secretary General. 10th February 2006.

<sup>44</sup> Promotion and protection of human rights: status of the International Covenants on Human Rights – The question of the death penalty, Report of the Secretary General. 10th February 2006.

<sup>45</sup> Amnesty International Report 2005.

Under section 201 of the Penal Code, the sentence for murder is death. However, following an amendment in 1990, section 201(1)(b) states that the death penalty need not be imposed where there are “extenuating circumstances”. This is defined in section 201(2) as being “any fact associated with the offence which would diminish morally the degree of the convicted person’s guilt” considering the “standard of behaviour of an ordinary person of a class of the community to which the convicted person belongs”.

The courts have found “extenuating circumstances” in a number of different cases. These have included the fact that the deceased started a fight,<sup>46</sup> the fact that the accused was only 23 years old and had got into a fight<sup>47</sup> and the fact that the murder occurred in circumstances where general drunkenness was prevailing<sup>48</sup>. Automatism, self-defence, infancy, necessity, provocation or witchcraft could amount to extenuating circumstances, apart from being defences to murder. It appears that while the courts have some freedom to consider the individual that is being sentenced, there does not appear to be any defined system in which to decide whether such extenuating circumstances exist or not; in all the above cases the sentence was reduced on appeal, not by the trial court. Consequently, it would appear that the use of the death penalty for murder is conducted in an extremely arbitrary fashion, where it is difficult to ascertain which defendant will receive which sentence, who will live and who will die.<sup>49</sup>

Under section 43(1) of the Penal Code, Chapter 87, Laws of Zambia, the only possible sentence on a conviction for treason is the death penalty. Similarly, the sentence for aggravated robbery while armed with a firearm is also death under section 294 of the Penal Code. Formerly, the penalty applied for aggravated robbery was imprisonment, where the convicted prisoner had to serve not less than fifteen years. Following concern over the frequency of armed robberies, the Penal Code was amended in 1974 to provide for a mandatory death penalty for aggravated robbery with a firearm.<sup>50</sup>

Zambia has signed and ratified the first Optional Protocol to the ICCPR, which gives individuals the right of application to the UN Human Rights Committee.

In the case of *Lubuto v Zambia*, the UN Human Rights Committee was asked to consider a complaint with regard to the fact that the death penalty was the mandatory punishment for armed aggravated robbery, that is, a robbery where the defendant was in possession of a firearm. The Committee found Zambia in violation of the ICCPR in 1995, stating that:

<sup>46</sup> The People v Bunda, Mumba & Kamwata, High Court, 29th January 1992, [1990-92] Zambia Law Reports (Z.R.) 194.

<sup>47</sup> Mwandama v The People, Supreme Court, 9th May 1996, [1995-97] Z.R. 133.

<sup>48</sup> Bwalya v The People, Supreme Court, 7th May 1996, [1995-97] Z.R. 168.

<sup>49</sup> Amnesty International – Zambia, Time to abolish the death penalty.

<sup>50</sup> Ibid

*“Considering that in this case use of firearms did not produce the death or wounding of any person and that the court could not under the law take these elements into account in imposing sentence, the Committee is of the view that the mandatory imposition of the death sentence under these circumstances violates article 6, paragraph 2, of the ICCPR.”<sup>51</sup>*

The death penalty has also been challenged locally in Zambia. A case before the High Court of Zambia challenged the death penalty on the grounds that it is unconstitutional. Two men, Benjamin Banda and Cephas Kufa Miti, who were charged with aggravated robbery on 2 February 1998, filed the appeal. It was alleged that on 12 December 1996, they robbed a man in Lusaka whilst armed. The victim of the robbery attempt chased the two men and shots were fired between them. Consequently, they were found guilty of aggravated robbery and sentenced to death on 13 October 1999.

The two men have petitioned to the High Court of Zambia to reverse their death sentences on the basis that to execute them would be unconstitutional and in breach of international standards on the following grounds:

1. Hanging the appellants would be a breach of Article 15 of the Convention against Torture, which prohibits cruel, inhuman or degrading punishment.
2. The delay, which is likely to occur while they remain condemned, is also a breach of Article 15.
3. The death penalty is in violation of the preamble to the Constitution which declares Zambia a Christian nation.

The other arguments, which were advanced in the appeal, derive from the right to life combined with international law and jurisprudence:

1. The sentence is disproportionate, as they were not convicted of homicide.
2. The arbitrary nature of the mandatory death penalty for aggravated robbery.
3. The death penalty itself is no longer acceptable in a civilised society.
4. Various international treaties prohibit the death penalty.

The High Court heard oral arguments from the petitioners in December 2000. The State was not ready to respond to the argument on that occasion, and the case was adjourned. The Attorney General responded on 5 March 2001, when he stated that Zambia had deliberately chosen not to accede to international treaties abolishing the death penalty, and therefore it was permissible according to the Constitution. He described the petition as “premature” and “incompetent”. The Court has yet to come to a judgment, but it is expected that the matter will go to the Supreme Court of Zambia on appeal.

<sup>51</sup> Amnesty International – Zambia, Time to abolish the death penalty.

## The death penalty in Algeria – De Facto Abolitionist Country

Algeria has acceded to the International Covenant on Civil and Political Rights in 1989 but not to its Second Optional Protocol. Legislation provides for the death penalty for serious crimes concerning state security, terrorism, treason, espionage and murder. In 1993 Algeria decided to stay executions of the death penalty and since then the country has been moving to a progressive suppression of the death penalty. Since 2001 Algeria has been attempting to reduce the categories of crimes punishable by the death penalty. As a first step, the death penalty has been suppressed for economic crimes. Algeria is in the process of revising its domestic legislation, in particular its penal code, and the abolition of the death penalty is envisaged for several crimes. The new legislation in penal matters does not contain the death penalty.

With regard to the safeguards, the legislation provides for fair trial, right to a defence and to recourse in accordance with article 14 of the ICCPR, and to petition for pardon with the President. The legislation also provides various safeguards regarding the carrying out of the death sentence, as specifically included in Law No. 05-04 of 6<sup>th</sup> February 2005, including not carrying out the death sentence until all remedies have been exhausted and the petition for pardon has been refused; the exclusion of a death sentence and a sentence to life imprisonment for a child below 18 years of age; non execution of the sentence on a pregnant woman, nursing mother of a child below the age of 24 months of age, or a person with a mental disorder or serious illness.

With regard to the execution of the sentence, the law includes particular provisions taking into account the dignity of the condemned persons. The sentence could be executed only in a prison and never in public.

### Death Penalty Case Law

The problem of delay on death row has concerned many international courts. It has long been considered that to hold someone under threat of execution for a long period of time is inherently cruel, inhuman, or degrading.<sup>52</sup>

Psychologists and lawyers in the United States and elsewhere have argued that protracted periods in the confines of death row can make inmates suicidal, delusional and insane. Some have referred to the living conditions on death row – the bleak isolation and years of uncertainty as to time of execution – as the “death row phenomenon,” and the psychological effects that can result as “death row syndrome.” The origins of these concepts are often traced to the 1989 extradition hearings of Jens Soering, a German citizen who was charged with murders in Virginia in 1985 and who fled to the United Kingdom.<sup>53</sup>

<sup>52</sup> Ibid

<sup>53</sup> Time on death row – The death Penalty Information Centre.

The European Court of Human Rights considered the same issue in 1989 in the case of *Soering v. UK*. Soering was due to be extradited for murder to West Virginia, where there was the possibility that he would face the death penalty, with an average wait of seven to eight years on death row. The judgment in the case of *Soering* held that such treatment was in violation of the prohibition of cruel and degrading punishment in Article 3 of the European Convention of Human Rights.<sup>54</sup>

Other common law jurisdictions have decided that delays measured in years are not acceptable. The Supreme Court of Zimbabwe ruled that being held for between four and six years under sentence of death constituted “inhuman or degrading punishment.”<sup>55</sup>

In the case of *Pratt and Morgan v Attorney General for Jamaica*, [1994] 2 A.C. 1, the Judicial Committee of the Privy Council held that holding a convicted prisoner on death row for 14 years amounted to inhuman or degrading punishment in violation of Section 17(1) of the Constitution of Jamaica. It concluded that: “in any case in which execution is to take place more than five years after sentence there will be strong grounds for believing that the delay is such as to constitute ‘inhuman or degrading punishment or other treatment.’” The committee’s seven Law Lords did not find the death penalty itself to be illegal. But “there is an instinctive revulsion against the prospect of hanging a man after he has been held under sentence of death for many years,” they wrote “what gives rise to this instinctive revulsion? The answer can only be our humanity. We regard it as an inhuman act to keep a man facing the agony of execution over a long extended period of time.”<sup>56</sup> The decision, known as the Pratt and Morgan ruling, resulted in the commutation of scores of death sentences in Jamaica, Bermuda, Barbados and Trinidad and Tobago, cutting the death row population of English-speaking Caribbean nations by more than half.<sup>57</sup>

In the South African case of *State v Makwanyane (1995) 1 LRC 269* the court declared capital punishment unconstitutional. The court held “The constitution prohibited cruel, inhuman or degrading treatment or punishment but provided no definition of those terms. The court therefore had to give meaning to these words the death sentence was undoubtedly a cruel, inhuman and degrading punishment, the question was whether it was so within the meaning of the constitution, the section was not to be construed in isolation but in its context. It also had to be construed in a way, which secured for individuals the full measure of its protection. In the context of the constitution as purposively construed and giving words the broad meaning to which they

<sup>54</sup> Series A, No. 161; (1989) 11 EHRR 439.

<sup>55</sup> Catholic Commission for Justice & Peace in Zimbabwe v. Attorney General, 14 Hum.Rts.L.J. 323 (1993).

<sup>56</sup> Pratt and Morgan v Attorney-General for Jamaica, [1994] 2 A.C. 1

<sup>57</sup> The Miami Herald, September 8, 1998



were entitled... the death penalty was indeed to be categorized as a cruel, inhuman and degrading punishment.”

Justice Chaskalson, then president of the Court, held that the death penalty violated human dignity and that the lengthy incarceration on death row prior to execution also violated human dignity although imprisonment *per se* did not. In addition, the respected judge found that although the court is charged with stipulating punishment, it is not an open ended charge but it is limited by the end result of preserving human dignity. Hence, judicially sanctioned corporal punishment is unconstitutional nevertheless because it is an affront to human dignity. The Constitutional Court of South Africa in *Makwanyane* declared the imposition of the death penalty by the Criminal Procedure Act unconstitutional after pursuing a liberal, non-legalistic reading of the Constitution bearing in mind international standards. The decision in *Makwanyane* reflects the increasing influence of international human rights law in African criminal justice systems.

In the Tanzanian murder case of *Mbushuu & Anor vs. Republic (1995)*, although judicially sanctioned execution was held to be consistent with the constitutional guarantee of the right to life, it was held that hanging was inherently cruel, inhuman and degrading punishment. In reaching the decision, the court followed the United States Supreme court decision in *Furman v Georgia (1972)*.

*Furham vs. Georgia* abolished the death penalty in the US in 1972, but it was reinstated in 1977. Today, the inter American Convention precludes member states from reintroducing the death penalty. This case considered the particular aspects of state death penalty practices and found that they violated respect for human dignity. Since then the abolition argument has considered philosophical and ethical-moral arguments in favour or against the abolition of the death penalty.

Recently, the Supreme Court of Canada has decided that it is not permissible to extradite someone to the United States without an assurance from the US that the death penalty will not be sought. One of the reasons is the “death row phenomenon”, together with fear of executing the innocent, which would mean that to extradite them without assurances would be a breach of the Canadian Charter of Fundamental Rights.<sup>58</sup>

The death penalty not only deprives the prisoner of all vestiges of human dignity, it is the ultimate desecration of the individual as a human being, and it is the annihilation of the very essence of human dignity.<sup>59</sup>

<sup>58</sup> United States v. Burns, 2001 SCC 7.

<sup>59</sup> International Human Rights Standards. Making a case for Kenya's ratification of optional protocols. Unconstitutionality of the death sentence by Priscilla Nyokabi, ICJ Kenya.

The length of time that United States inmates spend on death row has gotten increasingly longer in recent years, and raises questions about the constitutionality of this added punishment. Although the U.S. Supreme Court has not addressed this issue, it has been cited as a serious concern by death penalty experts in the U.S. and by courts outside the U.S. Shortening the time on death row would be difficult without either a significant allocation of new resources or a risky curtailment of necessary reviews.<sup>60</sup>

## **AHRAJ SUPPORTED DEATH PENALTY CASES**

The African Human Rights and Access to Justice Programme (AHRAJ) has supported three death penalty cases in Uganda, Kenya and Botswana. This chapter shall however be analysing the death penalty cases in Kenya and Botswana.

### **CHALLENGE TO THE DEATH PENALTY AND THE RIGHT TO FAIR TRIAL FOR THE CAPITAL OFFENCES OF ROBBERY WITH VIOLENCE AND ATTEMPTED ROBBERY WITH VIOLENCE: KENYA**

#### **Summary of facts**

The AHRAJ Programme supported case 16 from Kenya, Miscellaneous Application No. 520 of 2003, a constitutional application challenging the constitutionality of the death penalty as applied to the offence of robbery with violence by way of an application for constitutional review and for the enforcement of fundamental human rights as enshrined in the Constitution of Kenya.

Case No. 16 arises out of Republic of Kenya Criminal Case Number 1059 of 2002 in which four defendants were charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code Chapter 63 Laws of Kenya and attempted robbery with violence contrary to Section 297(2) of the Penal Code Chapter 63 Laws of Kenya. The said defendants if found guilty were likely to be sentenced to death in pursuance of the aforesaid statutory provision.

The applicants sought the following remedies:

1. A declaration that the death penalty is unconstitutional.
2. Section 71 of the Constitution be declared unconstitutional to the extent that it purports to confer upon courts the power to deprive an accused person the right to life.
3. A declaration that the proviso “save in execution of the sentence of a

<sup>60</sup> Time on death row – The death Penalty Information Centre.

court in respect of a criminal offence under the law of Kenya of which he has been convicted” in section 71(1) of the Constitution is unconstitutional for vitiating and defeating the constitutional protection of the right to life.

4. A declaration that the death sentence under the Kenyan Constitution contravenes its treaty obligations under the African Charter for Human Rights.
5. The mandatory sentence of death provided for under section 296(2) and 297(2) of the Penal Code be declared discriminatory by dint of Section 82 of the Constitution as affording lesser statutory and trial protections as in other criminal cases attracting the same sentence.
6. The sentence of death provided for under sections 40, 204, 296(2) and 297 of the Penal Code be declared unconstitutional as it offends the principle of separation of powers inherent and fundamental to the Constitution.
7. A declaration that retention of the death sentence in the Constitution grossly violates the right to human dignity, which is the foundation of the entire Bill of Rights.

The death sentence is permitted under the Constitution of Kenya at section 71 (1), which states that ‘No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of which he has been convicted.’

Section 296 of the Penal Code of Kenya provides as follows:

- (1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years with corporal punishment not exceeding twenty-eight strokes.
- (2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.

Section 297 of the Penal Code of Kenya provides as follows:

- (1) Any person who assaults any person with intent to steal anything, and at or immediately before or immediately after the time of the assault, uses or threatens to use actual violence to any person or property in order to obtain the thing intended to be stolen, or to prevent or overcome resistance to its being stolen, is guilty of a felony and is liable to imprisonment for seven years together with corporal punishment not exceeding fourteen strokes.

- (2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the assault, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.

### *Analysis*

This case draws attention to a number of issues, namely:

1. The argument that the death penalty amounts to cruel, inhuman and degrading treatment and is therefore unconstitutional and against International Human Rights Standards;
2. The argument that the mandatory sentence of death is unconstitutional as it seeks to take away judicial discretion which is conferred by the Constitution;
3. The argument that the punishment should be proportional to the crime;
4. The death penalty contravenes International Human Rights Standards.

### *Cruel, inhuman and degrading treatment or punishment*

Section 3 of the Constitution states:” This Constitution is the Constitution of the Republic of Kenya and shall have the force of law throughout Kenya and, subject to section 47, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void.” This section of the Constitution deals with the principle of constitutional supremacy and reaffirms that the Constitution is the supreme law of the land.

Chapter 5 of the Constitution seeks to safeguard certain fundamental rights of the citizenry. Chapter 5 of the Constitution is duly titled ‘Protection of Fundamental Rights and Freedoms of the Individual’. Among the protections under chapter 5 are the protection from inhuman or degrading treatment. Section 74 states that: “No person shall be subjected to torture or to inhuman or degrading punishment or other treatment”

The argument herein is that the execution of the death penalty as per the relevant sections of the Penal Code constitutes both inhuman and degrading treatment. Hence those sections of the Penal Code, which mandate the death penalty, are inconsistent with the Constitution and are therefore void as per Section 3 of the Constitution.

Kenya has ratified the Convention Against Torture, Cruel or Inhuman Treatment or Punishment. The ground that hanging is cruel and inhuman having been upheld in Africa is particularly important for Kenya where it is the only legal practice for carrying out civilian executions.

In *Stephen M’Riungu & 3 others v. Republic* (Criminal Appeals No 902, 903, 904 and 905, the High Court held that the death penalty was constitutional because it was lawful on 11<sup>th</sup> December 1963. This decision was upheld by the Court of Appeal, which added that the argument of the High Court was supported by Section 74(2) of the Constitution.

This case can be distinguished on the fact that neither the High Court nor the Court of Appeal had made their findings on the basis of cruel and inhuman treatment and breach of these fundamental rights, which are protected under the Constitution. Also not raised in *M’Riungu* were the international treaties against cruel and inhuman treatment as recognized and some ratified by Kenya. Furthermore the decision in *M’Riungu* cannot apply because at the time it was made the Court of Appeal had no jurisdiction to hear and determine constitutional matters hence the decision was made per incuriam for want of jurisdiction.

The East Caribbean Court of Appeal in *Spence v. The Queen* and *Hughes v. The Queen* 3HCRCD, 130 held that the death penalty was unconstitutional for subjecting prisoners to cruel, inhuman and degrading treatment contrary to the fundamental rights enshrined in the Constitution of St Lucia. This decision was reached despite there being a provision in the Constitution of St .Lucia similar to Section 74(2) of the Kenya Constitution which prima facie appears to authorize the death penalty, the same provision applied to authorize the death penalty in the unfortunate decision reached in *M’Riungu*.

#### Mandatory death sentence vis a vis judicial discretion

Sections 60(1) and 65(2) of the Constitution of Kenya confer certain supervisory and discretionary powers upon the High Court. Section 65(2) states that: “The High Court shall have jurisdiction to supervise any civil or criminal proceedings before a subordinate court or court martial, and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of ensuring that justice is duly administered by those courts”.

The applicants sought to invoke this section of the Constitution to challenge the mandatory nature of the death sentence as provided for under sections 296(2) and 297(2) of the Penal Code. The argument here is that Section 65(2) of the Constitution confers judicial discretion on the High Court and this includes judicial discretion on sentencing. By imposing a mandatory death sentence in the case of robbery with violence the Penal Code purports to take away this constitutionally conferred judicial discretion. Sections 296(2) and (297) of the Penal Code are therefore inconsistent with the Constitution and void under Section 3 of the same.

Section 123(8) of the Constitution states that: “No provision of the Constitution that a person or authority shall not subject to the discretion or control of any

other person or authority in exercise of any functions under this constitution shall be construed as precluding a court from exercising jurisdiction in relation to any question whether that person or authority has exercised those functions in accordance with this Constitution or any other law”.

In *Woodson v. North Carolina* 428 U.S. 280 the US Supreme Court held that a North Carolina statute that made the death penalty mandatory was unconstitutional. In reaching this decision the court recorded the aversion of the American society to automatic death sentences. The applicants should seek to appeal to the constitutional court’s progressive legal thinking by asking it to consider changing societal attitudes which are moving further away from the notion that death sentences should be mandatory for certain offences without considering the severity of the crime and/ or the impact of the offence on the victims.

### **Punishment should be proportional to the crime**

In reaching a determination to apply the death penalty, the court under Section 71 must uphold human rights. The judicial technique in sentencing is to reach a proportionate punishment on the basis of different justifications such as deterrence and retribution. When the end result will violate human rights, the court has a higher duty to the constitution as the custodian of the Bill of Rights. The end result of applying the death penalty can violate rights in two senses, first by destroying the life in which human dignity and other rights exist inalienably. Secondly, because the means of carrying out the execution could themselves constitute violation of human rights.

One may argue that the death sentence as imposed for the offence of robbery with violence by Sections 296 and 297 of the Penal Code Chapter 63 Laws of Kenya constitutes an arbitrary deprivation of an accused of his life. The word arbitrary here is used in the context of the fact that the death penalty, for the offence of robbery with violence, is mandatory. This takes away judicial discretion with regard to sentencing and in so doing denies the Court the opportunity to tailor a sentence befitting the magnitude of the offence. This contention is especially true in light of the fact that the Penal Code fails to clearly measure and clarify the magnitude of violent conduct that is necessary to constitute the offence of robbery with violence as opposed to simple robbery.

The sum total of this lack of definition in the Penal Code is that the mere apprehension of the possibility of violence on the part of the victim is sufficient to constitute the offence of robbery with violence, which attracts a mandatory death sentence. There must surely be a mechanism by which varying degrees of violence used by defendants resulting in varying degrees of physical or psychological trauma on the part of the victims of the crime are punished proportionally. Hence the contention is that the death sentence for robbery with violence under the Penal Code is without any reason or system and thus

constitutes an arbitrary deprivation of the right to life contrary to the African Charter on Human and Peoples Rights to which Kenya is a State Party.

In the US precedent *Gregg v. Georgia* 48 U.S. 153 it was held that a punishment was excessive and unconstitutional if it makes no measurable contribution to acceptable goals of punishment and is therefore nothing more than a purposeless and needless imposition of pain and suffering or is grossly unproportional to the severity of the crime. Although in *Gregg* the death penalty was held not to be unconstitutional by virtue of the aforesaid conditions, in the present case the severity of the offences for which the defendant/applicants are charged with is not sufficient to warrant or justify the imposition of the death penalty.

In *Crocker v. Georgia* 433 U.S.584 it was held that the death penalty was grossly disproportionate to the severity of the crime of rape. In the present case the applicants seek to stress that the death penalty would be too severe especially where the charge of robbery with violence was arrived at due to the mere apprehension of violence on the part of the victims and not the actual use of excessive force and violence on the part of the defendants.

### International Human Rights Standards

Having ratified ICCPR, Kenya is obligated under its Article 6 to take measures to restrict application of the death penalty under its law, even if it does not abolish it *de jure*. Kenya does not deny that in spite of the existing of the penalty, it has not implemented an execution since 1985.<sup>61</sup> Kenya has not ratified the Second Optional Protocol to the International Convention on Civil and Political Rights.<sup>62</sup> Kenya has ratified the African Charter but has not provided through legislation for its effect under her municipal law.

Kenya has ratified the Rome Statute establishing the International Criminal Court. The jurisdiction of the court is limited to war crimes, genocide and crimes against humanity – crimes considered to be the most heinous universally. The punishment meted by the court upon conviction for any of these crimes, which also constitute gross human rights violations, is life imprisonment. By ratifying the Rome Statute, one could argue that the state has implicitly acknowledged that the most serious punishment that should be meted out and restricted under law to the most heinous of crimes is life imprisonment.

The difficulty lies in the fact that the said international covenants are not officially recognized as sources of law under the Judicature Act Chapter 8 Laws

<sup>61</sup> See Rule of Law Report of the Kenyan Section of the International Commission of Jurists, 2002

<sup>62</sup> The Second Optional Protocol obligates a state party to abolish the death sentence under Article 1.



of Kenya. The willingness to recognize the international human rights treaties may ultimately depend on the level of progressive legal thinking among the members of the bench assigned to hear the constitutional application. It must be emphasized that Kenya is party to all these treaties some of which have been officially ratified by the government of which the judicial arm with both original and appellate jurisdiction is the High Court.

## 2 CHALLENGE TO THE CONSTITUTIONALITY OF THE DEATH PENALTY IN BOTSWANA

The AHRAJ programme supported case 121, a challenge to the constitutionality of the death penalty in Botswana in the case of *Republic vs. Maaewe & another*.

### The death penalty in Botswana

According to Ditshwanelo, the leading human rights non- governmental organization in Botswana, 34 people have been executed in Botswana, three being women. The death sentence is imposed on the crimes of treason, murder and assault during piracy. There are no reported cases of death sentences for treason and piracy. In murder, one has to prove extenuating circumstances so as not to receive the death penalty (Section 203 (2) of the Penal Code) the same applies for treason (Section 40 of the Penal Code). Execution is carried out by hanging.

Section 4 of the Constitution of Botswana provides that a sentence of death passed by a court of law is an exception to the protection of life under the constitution. In other statutes, the death penalty is provided for by: -

- Section 25 and 26 (relating to different kinds of punishments), 203 (relating to the punishment of murder) and 34 (relating to treason) of the Penal Code.
- Section 63 (2) of the Penal Code provides for the death penalty for assault with intent to murder during Piracy.
- Section 298 of the Criminal Procedure and Evidence Act deals with the sentence of death upon a pregnant woman.
- Section 299 of the Criminal Procedure and Evidence Act deals with the manner of carrying out death sentences.

Every person charged with an offence has a right of appeal. Also every person charged with an offence for which the penalty is death, is entitled to a state-funded lawyer. Unfortunately the amount paid to these lawyers is minimal and often, the result is that most cases are handled by lawyers who lack the skills resources and commitment to handle such serious matters.



There is greater public support for retaining the death penalty in Botswana. The Government uses this as an argument for the retention of the death penalty in Botswana's Laws.

## **Republic vs. Maaewe & another.**

### **Summary of facts**

In 1997 Thlabologang Maaewe and Gwara Brown Motswetla were charged with the murder of a man from whom they had allegedly stolen an ox. Upon discovery of the theft by the deceased, he confronted the two accused, they then killed him either in self-defence or for fear of being prosecuted over the theft or both. The charge of murder attracts the death sentence under section 203 of the Penal Code of Botswana.

In 1999 Ditshwanelo intervened and was able to obtain a stay of execution for the two men. This stay was confirmed in October 1999 when the Judge presiding over the proceedings declared a mistrial on the grounds that the two men had not received a fair trial.

The main argument of Ditshwanelo in the above case was on the non-arbitrary imposition of the death penalty in that it tends to be imposed on those who are marginalised and or impoverished in society and who do not have access to adequate legal counsel. The range of issues raised in the application included the following:

- That hanging is cruel and unusual punishment prohibited by the Constitution of Botswana
- That the arbitrary imposition of the death penalty under Botswana law did not allow the accused a fair hearing
- That the death penalty is incapable of non arbitrary imposition
- That the applicants were subjected to systematic unfairness in the proceedings by which they were sentenced to death.
- The case raises all the dimensions of constitutionally testing the use of the death penalty in Botswana. It also raises the question of effective legal representation for the poor.

### **Legal Opinion**

The legal opinion developed for this case sought to test the constitutionality of section 203 of the Penal Code with regard not only to the Constitution of Botswana but also in light of international instruments and the wisdom of regional and international case law on the constitutionality of the death penalty. Particular attention was paid to the issue of the disproportionality of the sentence considering its sense of finality and absence of room for the human

margin of error, as well as the aspects of cruelty, inhumane disposition and degrading punishment.<sup>63</sup>

## Constitutionality of the death penalty

The Constitution of Botswana entrenches the protection of the right to life in accordance with international standards particularly the Universal Declaration of Human Rights. The extent of this protection is however limited by Section 4 of the same, which provides that a sentence of death passed by a court of law is an exception to the protection of life under the Constitution.

The Republic of Botswana is a signatory and or state party to several international human rights treaties and instruments, which either expressly or impliedly protect the right to life or prohibit cruel, inhuman or degrading treatment or punishment. Some of these treaties are non-derogable in nature. These include the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Convention Against Torture and the African Charter on Human and People's Rights.

The imposition and execution of the death penalty amounts to cruel, degrading and inhuman treatment. This is visible from a simple analysis of the state of mind of persons facing the death sentence and those charged with executing the sentence. As observed "The death penalty has been described as the premeditated killing of a prisoner for the purpose of punishment while the same purpose can be met through some other less cruel and more reasonable means". Furthermore:" The cruelty of the death sentence is not only in the condemnation itself but the usually long and gruelling period before execution during which the convicted person constantly contemplates his own death. Furthermore the convicts trauma extends to his or her family, correctional facility officials charged with carrying out the execution as well as judicial officers involved in the trial and sentencing"<sup>64</sup>

The assertions hereinabove display the cruelty aspect of the death penalty thus qualifying its inconsistency with international human rights law. Also displayed, to a lesser degree is the disproportionality aspect of the death sentence through it's unfettered cruelty, indecency and derisory effect upon others not even party to the alleged offence(s). Clearly, the execution of the sentence in the case of Republic vs. Maaewe and Another would be disproportionate considering the special circumstances surrounding the alleged offence that is the fact that the alleged act of killing the owner of the Ox was not committed following premeditation of the said act as occurs in most cases of murder but was an act of impulse by the two accused upon panicking on realising that the alleged

<sup>63</sup> The Legal Opinion for case 121 was developed by James Gondi, LLB, Keele University.

<sup>64</sup> AHRAJ Case 16 Legal Opinion Republic of Kenya Civil Application 52 of 2003

theft had been discovered and upon discovery, the Ox owner violently confronted the two accused persons who then acted, possibly in self defence, in reaction to the violent confrontation by the owner of the Ox.

The argument here is that since it cannot be established beyond reasonable doubt that the act was premeditated, and indeed the facts show that the act could not have been premeditated at length, then imposition of the maximum penalty, the death sentence, would be disproportionate considering the comparative analysis of the facts in this case and those of other cases where the malice aforethought has been clearly and unequivocally established. Thus it would be unjust, unreasonable and disproportionate to impose the maximum sentence thus violating the right to life (guaranteed by international law) of the two accused persons where a more reasonable punishment, considering the peculiar circumstances of the present case, could be arrived at.

The African Charter also protects the right to life and condemns cruel and inhuman treatment. At the 34<sup>th</sup> Session of the African Commission of Human and People's Rights, Ditshwanelo (the Botswana Centre for Human Rights) submitted that the clemency procedure of the Republic Botswana, the final local remedy, was slow and tedious thus adding to the cruelty, of the process and denying the accused persons the right to a fair trial in terms of a Communication to the African Commission (which could be recorded under the right to appeal) as all local remedies must be exhausted before a communication is rendered admissible.

In this way the Government of Botswana has already exacerbated the fate of the two accused. Ditshwanelo argued, and should continue to argue at the appeal that the sentence is arbitrary and discriminatory due to the insufficient legal representation at trial level. The Universal Declaration of Human Rights (Article 11), the International Covenant on Civil and Political Rights (Article 14(3) (b), (d), and (5)), the African Charter on Human and People's Rights (Article 7 (1) (a) and (c)) all guarantee the right to a fair trial including the right to counsel. Furthermore the international human rights philosophy detests the discriminatory application of law, particularly sentencing. This point comes to mind upon consideration of the fact that Maauwe and Motswetlwa are both poor and illiterate, the former (poverty) having led them to commit the alleged act of theft in the first instance.

In the South African case of *State vs. Makwanyane*<sup>65</sup>, section 277(1) (a) of the Criminal Procedure Act of South Africa was challenged at the Constitutional Court on the basis that the section which imposed the death penalty was inconsistent with section 11(2) of the Constitution which prohibits "cruel, inhuman or degrading treatment or punishment". In his reflections, Justice Chasklson was simply trying to establish the fact that the circumstances

<sup>65</sup> Case No. CCT/3/94

surrounding persons sentenced to death amount to a depravation of their constitutional rights. It follows therefore that from such a liberal reading, the imposition of the death penalty by the South African Criminal Procedure Act is unconstitutional. The same approach would render the imposition of the death penalty by Section 203 of the Penal Code of Botswana contravenes the constitution of the said sovereign republic. This case is of particular significance considering South Africa's regional proximity to Botswana.

In the US case of *Gregg vs. Georgia* the issue of disproportionality was argued at length. The genesis of these considerations is first, a recognition that the death sentence, even where not expressly found to be unconstitutional is so extreme a punishment that for it to be imposed the Court must be satisfied that the crime committed is so vile that it warrants the maximum sentence. In sum where the death penalty is involved there must exist no disproportionality between the crime and the sentence particularly where there is another sentencing option.

Thus in the case of *Maauwe and Motswetlwa* it may be argued that due to a lack of clear establishment of the malice aforethought element among other peculiar circumstances surrounding the case (particularly the aspect that the act of murder was committed subsequent to an act of theft, and stemmed from the discovery of the theft, rather than a conscious, premeditated scheme to eliminate the deceased) the imposition of the death penalty here may be too heavy a sentence and thus a disproportionate sentence in keeping with the just standards set out by *Gregg-v- Georgia*.

The above case law are not entirely binding upon the Botswana Court of Appeal but offer persuasive value. However, *Makwanyane* is of greater persuasive value than the U.S Supreme Court cases both in a regional and Commonwealth context. The decision to render the death penalty unconstitutional in *Makwanyane* is developing into the foremost liberal legal abolitionist precedent in Africa. *Gregg- vs.- Georgia*, although not binding from a commonwealth perspective, offers great wisdom on the disproportionality argument.

Hence it could be argued that in light of *Makwanyane*, the Southern African region is moving towards liberal abolitionist case law and that the circumstances surrounding the present case should be read in a broader less legalistic way so as to declare Section 203 of the Penal Code of Botswana unconstitutional in keeping with the spirit of the Constitution which abhors cruel, inhuman or degrading punishment and in keeping, also, with the ethos of proportionality in sentencing so as to avoid the injustice of disproportionality as found in the nexus between the offence allegedly committed by the two accused persons<sup>66</sup> and the irreversible, irrevocable and final nature of the death sentence.

<sup>66</sup> An alleged offence which did not clearly and beyond reasonable doubt establish the key ingredient of malice aforethought and may have been triggered by panic over a separate incident thus rendering the killing of the owner of the Ox an act of impulse rather than a clear vile and aggravating act of premeditated murder.

## Conclusion

As the death penalty is still imposed in a number of African Countries further challenges to its constitutionality and deterrent effect must be mounted. Judiciaries in Africa and society at large need to be enlightened on the gross violations the death penalty imposes and propagates. As the rest of the World moves towards total abolition of the death penalty Africa should also move in this direction to protect the most valuable human right, the right to life.

## CHAPTER 7

### RELEVANCE OF RATIFICATION ON DOMESTIC HUMAN RIGHTS PRACTICES REGARDING RIGHT TO FAIR TRIAL AND RIGHT TO ACCESS TO JUSTICE IN AFRICA\*<sup>1</sup>

#### Introduction and background

AHRAJ considers human rights to be legal rights capable of legal enforcement under national and international legal systems that abide by the rule of law. Under this programme, the justification for the rule of law lies in its protection of human rights. AHRAJ is active in Sub Sahara Africa, developing the legal enforcement of human rights, that is, by assisting victims of violations to obtain legal remedies. These remedies must be adequate and effective and they should be available first at the domestic level and, second, if domestic remedies are exhausted, at the international level through the enforcement mechanisms recognised by individual states. It is important that the legal remedies are not just available, but that they satisfy international conditions laid out in the relevant human rights instruments.

Rights are addressed to states and state actors, but, increasingly, also to certain categories of private actors, for instance, in labour relations. In this theme group dealing with the right to fair trial and the right to access to justice, it is the practice of the state that has come under scrutiny, through different actual cases. Judicial decisions in these cases indicate how the rights are construed within the legal system and whether remedies are available, but also the extent to which the state itself is bound by its obligations. Under AHRAJ, these judicial decisions are an important part of the body of human rights law in each state, and hence a means by which international human rights norms can become internalized or domesticated into the national law. AHRAJ involvement in human rights litigation is therefore specific and problem oriented.

At the same time, AHRAJ concerns itself with ensuring that each case can be a vehicle through which remedies for violations conform with international standards, and furthermore, the international standards themselves become consolidated into the national case law. In order for this attitude toward international standards to prevail, lawyers and judges in the national forum

\*<sup>1</sup> Authored by Winluck Wahi, LL.B University of Nairobi, Advocate of the High Court of Kenya.

must share it. AHRAJ assists these national actors through well-argued legal opinions. Often, a legal opinion will substantiate the international law based arguments used in pleadings and submissions in court. The purpose of this casebook, is to consolidate the arguments regarding the relevance and application of international human rights law within actual cases supported under the right to fair trial and right to access to justice themes.

## **Part One; Right to Fair Trial**

### **Nature of the right to fair trial in international law**

#### **Doctrinal value derived from and in turn a justification for the rule of law:**

The right to fair trial is fundamental to the rule of law. It draws its jurisprudential basis from the rule of law, understood as conformity to obligatory universal legal rules that check arbitrary and unaccountable power. Under the Universal Declaration of Human Rights, 1948 (UDHR), now considered *jus cogens*, or peremptory norms of international law, the right to fair trial and rule of law principles are both recognised.

The right to fair trial has firm foundation both in international human rights law and in constitutionalist practice, particularly where it is written as a specific guarantee in the constitution. In all the AHRAJ countries considered here<sup>2</sup>, there is a written constitution wherein this right is guaranteed in language similar to that of the UDHR or the International Covenant on Civil and Political Rights, 1976 (ICCPR). Moreover, all the countries here are parties to the international instruments considered, namely the ICCPR and the ACHPR. Under these instruments, they are all bound therefore to respect, protect, promote, enforce and fulfil the right to fair trial in terms of the maxim *puncta sunt servanda*.<sup>3</sup>

#### **Right is a peremptory norm that underpins the protection of other human rights:**

Failure to observe the right to fair trial undermines all other human rights. The right to a fair trial does not permit the use of amnesty to immunise perpetrators of human rights violations from individual accountability.

The right to a fair trial is a fundamental right of an accused person. If such right did not exist, a person would be subject to punishment merely upon an accusation being raised, without any opportunity to objectively discover the truth as to guilt or innocence. In theory, it should not be necessary to justify the right. It is an obligatory norm and basic condition for the existence of a legal system. The right to fair trial makes particular demands of the system

<sup>2</sup> The Gambia, Senegal, Nigeria, Uganda, Eritrea, Swaziland and Namibia

<sup>3</sup> See articles 26 and 27 of the Vienna Convention on the Law of Treaties

established by society to impose punishment on the individual. Such a drastic sanction, whether forfeiture, fine, imprisonment or the ultimate price, death, it is now accepted, may never be imposed on an individual benefiting from the protection of the state and society, without prior establishment beyond doubt of his individual culpability of the crime concerning which he stands accused.

In other cases, the right to a fair trial is an aspect of the natural justice rule against being condemned without a hearing. For natural justice to be present, it is generally argued that no one should be a judge in his or her own case, and that each party in a dispute has an unalienable right to be heard and to prepare their case thoroughly (the rule of *audi alterem partem*/hear the other side).

The term 'fair trial' is often juxtaposed with 'fair hearing' and being afforded a hearing is not merely a cardinal rule of criminal jurisprudence, but also its basic value and justification. The criminal system exists only to afford those accused of crimes with an opportunity to be heard fairly, and it is only after such a fair hearing and a finding of guilt is made impartially that punishment may be meted out affecting other rights and freedoms enjoyed by the individual.

#### **Relevant for both criminal and civil law proceedings:**

While the right is given strict emphasis in criminal jurisprudence, under international law, it applies with great relevance to the determination of rights in a suit at law. The United Nations Human Rights Committee has even extended it to administrative quasi-judicial proceedings in so far as they affect other rights and obligations, for instance in asylum cases.<sup>4</sup>

The right to fair trial is concerned with both procedural fairness (being informed of charge, speedy trial) as well as substantive fairness (presumption of innocence, right to counsel). It enshrines the values of legality and of a legal system based on rights of individuals to certain treatment by the state. In international human rights instruments, this right is available to persons within the criminal justice system but also to settlement of rights and obligations between individuals within the civil justice system.

This analysis considers compliance with international guarantees in practice and adopts two well known judicial approaches; interpretation regarding whether and how far national practice is in conformity to international standards and declarations of incompatibility drawing specific attention to incompatible practice and domestic law. The analysis is also limited in scope and covers only part of the elements of this expansive right, as applied to a criminal trial process.

<sup>4</sup> See for instance Kwame Williams Adu versus Canada Communication 654/1995 dealing with the author's refugees status application, Report of the HRC Vol II Fifty Second session p 304, the HRC finding the communication inadmissible for non substantiation.



## Scope of right independent of but affected by domestic politico-legal culture:

Within the individual national legal systems considered, the extent of the right even with constitutional guarantees appears to depend on different factors, such as the legal culture, possibility of judicial review and legislated claw backs or limitations. Judicial review in turn appears to depend on the degree of independence of the judiciary and the degree of separation between executive and legislative powers. These local variances are, at least theoretically, overridden by the minimal guarantees recognised by the different countries through processes of ratification of the international human rights instruments dealing with this right.

## Arrangement of case studies:

Cases are considered sub-thematically as follows:

- a) Protection from arbitrary arrest as provided under article 7 of the ACHPR and article 9 of the ICCPR. Cases considered are unlawful arrest in Gambia and the detention of journalists in Eritrea.
- b) Right to speedy trial or trial within reasonable period under article 7 of the ACHPR and article 14 of the ICCPR. Case considered is the holding charge in Nigeria and Senegal and the non-bailable offences decree of Swaziland.
- c) Right to be free from self-incrimination while in police and prison custody under article 7 of the ACHPR and article 9 and 14 of the ICCPR. Case considered is torture of suspects in Uganda
- d) Right to trial before an impartial tribunal under article 7 and 26 of the ACHPR and article 14 of the ICCPR. Case considered is trial of civilian in military tribunal in Uganda.
- e) Right to legal assistance before and during trial. Case of treason suspects in Namibia.

## Major International Human Rights Instruments Legal Provisions on Right to Fair Trial:

The Universal Declaration of Human Rights<sup>5</sup> provides for protection against arbitrary arrest, detention or exile under Article 9 while the right to fair trial is recognized under Article 10, which provides:

*‘Everyone is entitled in full equality to a fair and public hearing by an independent tribunal, in the determination of his rights and obligations and of any criminal charge against him.’*

<sup>5</sup> Adopted by the General Assembly of the United Nations resolution 217 (III) of 10 December 1948. While the UDHR is not itself legally binding, the UDHR is said to enjoy a special legal status, its norms are today widely recognized as general provisions of international law or customary international law.

Moreover Article 11 recognises the right to fair trial as concomitant to the rule of law principle in the following terms:

- (1) 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 guarantees necessary for his defence.
- (2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

Article 9 of the International Covenant on Civil and Political Rights<sup>6</sup> provides:

- (1) Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.
- (2) Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
- (3) Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial are 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 judgement.
- (4) Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
- (5) Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

**Article 14 of the International Covenant on Civil and Political Rights provides:**

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and

<sup>6</sup> Adopted by UN General Resolution 2200 (XXI) of 16 December 1966 and entered into force 23 May 1976.

public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
  - a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
  - b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
  - c) To be tried without undue delay;
  - d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
  - e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
  - f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
  - g) Not to be compelled to testify against himself or to confess guilt.
4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.
5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.
6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice,

the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Article 7 of the African Charter for Human and Peoples' Rights provides:<sup>7</sup>

1. 'Every individual shall have the right to have his cause heard. This comprises:
  - (a) The right to an appeal to competent national organs against acts of violating his fundamental rights as recognised and guaranteed by conventions, laws and customs in force;
  - (b) The right to be presumed innocent until proven guilty by a competent court or tribunal;
  - (c) The right to defence, including the right to be defended by counsel of his choice;
  - (d) The right to be tried within a reasonable time by an impartial court or tribunal.
2. No one may be condemned for an act or omission, which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.

The right to fair trial is also described as the right to fair hearing in the ACHPR applies to both criminal and civil proceedings.

Article 7 is buttressed by Article 26 on the independence of the judiciary and the Resolution on the Right to Recourse Procedure and Fair Trial adopted by the African Commission on Human and Peoples' Rights in Tunis in March 1992. The ACmHPR has also promulgated the Principles and Guidelines on the Right to Fair Hearing.

Article 5 of the European Convention on Human Rights much elaborates the right to liberty and rights of arrested persons:

- (1) Everyone has the right to liberty and security of person. No one

<sup>7</sup> The African Charter for Human and Peoples' Rights was adopted by the Organization of African Unity, now known as the African Union, at the 18th Conference of Heads of State and Government on 27 June 1981 in Nairobi, Kenya and entered into force on 21 October 1986.

- shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
- a) the lawful detention of a person after conviction by a competent court;
  - b) the lawful arrest or detention of a person for non compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
  - c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicions of having committed an offence or fleeing after having done so;
  - d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
  - e) the lawful arrest or detention of a person for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics, or drug addicts or vagrants;
  - f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
- (2) Everyone who is arrested shall be informed promptly, in a language, which he understands, of the reasons for his arrest and of any charge against him.
- (3) 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 authorised 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.
- (4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
- (5) Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

**Article 6 of the European Convention on Human Rights provides for the right to fair trial:**

- 6 (1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but the press and public may be excluded

from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

- (2) Everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law.
- (3) Everyone charged with a criminal offence has the following minimum rights:
  - (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of accusation against him;
  - (b) to have adequate time and facilities for the preparation of his defence;
  - (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
  - (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.
  - (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

The formulation of the right to fair trial is much more elaborated in the American Convention on Human Rights.<sup>8</sup> Article 8 of the Convention provides:

1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labour, fiscal or any other nature.
2. Every person accused of a criminal offence has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled with full equality, to the following minimum guarantees:
  - a) the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court;
  - b) prior notification in detail to the accused of the charges against him;
  - c) adequate time and means for the preparation of his defence;
  - d) the right of the accused to defend himself personally or to be

<sup>8</sup> This Convention was adopted by the Organization of American States on 22 November 1969 and entered into force on 18 July 1978.

- assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;
- e) the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law;
  - f) the right of the defence to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts;
  - g) the right not to be compelled to be a witness against himself or to plead guilty; and
  - h) the right to appeal the judgment to a higher court.
3. A confession of guilt by the accused shall be valid only if it is made without coercion of any kind.
  4. An accused person acquitted by a nonappealable judgment shall not be subjected to a new trial for the same cause.
  5. Criminal proceedings shall be public, except in so far as may be necessary to protect the interests of justice.

### Key elements of right to fair trial

Based on the key international instruments, particularly the UDHR and the ICCPR, as well as the regional conventions, the most important ingredients of the right to fair trial within the criminal process, from the moment of arrest to conclusion of trial, appear to be the following:

- Protection from arbitrary arrest
- Access to court incorporating right, if detained following lawful arrest, to be promptly brought before a judge or judicial officer to face the charge(s) and right to speedy trial or trial within a reasonable time, and in default to release and compensation.
- Legal representation by self or counsel of choice.
- Legal representation at state expense if a person undergoing trial cannot afford legal representation (legal aid).
- Tribunal for the hearing must be independent, impartial and in addition it must be a tribunal established by law (rule of *nemo iudex in causa sua/nobody should judge his own case*)
- Publicity of trial and of judgment
- Right not to self incriminate
- Presumption of innocence (including the rule that the prosecution has the burden of proof)
- Rule of double jeopardy
- No punishment without law and no crime without law (*nulla poena sine lege and nullum crimen sine lege*)<sup>9</sup>

<sup>9</sup> See recent European Court decision in *SW and CR versus United Kingdom* (1995) 21 EHRR 363,

## Relevance of HRC and ACmHPR within AHRAJ

Article 28 of the ICCPR establishes the Human Rights Committee (HRC) to monitor its implementation through the consideration of state reports submitted by state parties and the interpretation or elaboration of Covenant rights through General Comments. The HRC comprises 18 independent experts nominated by state parties and elected in a meeting of state parties, but who serve in an individual capacity. The individual complaints procedure under the ICCPR is established by the Optional Protocol to the ICCPR, concluded on 16 December 1966 and entry into force on 23 March 1976, referred to as First Optional Protocol.<sup>10</sup> The Second Optional protocol, which entered into force on 11 July 1991, abolishes the death penalty.

Ratification of the First Optional Protocol grants the HRC jurisdiction over individual complaints filed against the ratifying state party. After hearing an individual view, in terms of its admissibility conditions and rules of procedures, the HRC expresses what it calls 'views' rather than conventional judgments. In cases where a violation is found regarding specific provisions of the ICCPR, the HRC expresses the view that the State Party will remedy the violation in terms of its domestic law provisions, particularly where monetary and moral compensation is claimed by the author of the communication. The HRC also expresses the view that the State Party will cease the violation and abide by the ICCPR. Finally, the HRC can and often does request the State Party to provide, in its periodic state reports, details of its compliance with the views of the HRC, meaning a verifiable demonstration that it has implemented the findings of the HRC. The state may also report compliance and submits its observations to the HRC within a defined period of time, usually six months.<sup>11</sup> However, compliance is voluntary and the HRC has no independent enforcement power. But emerging practice suggests that more states are paying attention to and complying with decisions of treaty bodies. For instance, Namibia's decision to ratify the First Optional Protocol can be seen to have had a demonstrable effect on state practice and behaviour in at least two instances considered below.<sup>12</sup>

<sup>10</sup> Due to the optional nature of this Protocol, not many African states have ratified it, and those that have retain the possibility to denounce it at any time pursuant to article 12. For more see, *Leading cases of the Human Rights Committee*, Compilation by Raija Hanski and Martin Scheinin, Institute of Human Rights, Åbo Akademi University, Åbo 2003.

<sup>11</sup> Information regarding the procedures and case materials of the HRC can be viewed on the website of the United Nations High Commission for Human Rights <http://www.unhchr.ch> which has a huge treaty body database that includes the jurisprudence and procedures of the HRC under the Optional Protocol I. Frequently, university websites also have useful databases, and particular attention is drawn to the University of Minnesota Human Rights Library at <http://www.umn.edu/humanrts/> which contains a page on the HRC and its case law.

<sup>12</sup> See analysis on Namibia



At the continental level, article 30 of the African Charter on Human and People's Rights, ACHPR establishes the African Commission for Human and Peoples' Rights (ACmHPR) with the functions of promotion and protection of Charter rights and interpretation of the Charter.<sup>13</sup> The ACmHPR also considers individual complaints, which, as in the case of the HRC, are called communications.<sup>14</sup>

However, unlike with the HRC, the ACmHPR examines individual communications submitted under articles 55 and 56 and makes recommendations as part of its Article 45 promotional and protection mandate, rather than on the basis of any explicit provision within the Charter. Consequently, recommendations of the ACmHPR lack real legal compulsion even though some states have paid regard to what the ACmHPR has described as their 'obligations to restore conformity'.<sup>15</sup> For this reason, an African court for human rights has been proposed.<sup>16</sup> All member states of the African Union, which means all African states except Morocco, are *ipso facto* state parties to the ACHPR. Theoretically, any individual who meets admissibility criteria can sustain a communication against any of these states, yet by any measure, the ACmHPR is the least accessible of the existing regional human rights bodies. By far the greatest number of communications decided by the ACmHPR to date, relate to the right to fair hearing particularly within the criminal process, as a result of the propensity of African states to use criminal law to curtail rights.

Both the HRC and ACmHPR are relevant to African human rights practice-and thus to AHRAJ- first as the arenas of legal argument and development of international human rights jurisprudence and norms, and second, as mechanisms to give remedies where violations are found to exist within countries. Beyond this legal development and remedial mandate, both instruments require states to submit periodic reports to the HRC and the ACmHPR, outlining all measures adopted to implement the ICCPR and the ACHPR respectively. Where such state reports are sufficiently detailed, they allow an external, informed and objective examination regarding the status of human rights norms in the national legal setting, and situational analysis of national human rights practices.

<sup>13</sup> Article 45.

<sup>14</sup> For more information on the ACmHPR see its website <http://www.achpr.org>

<sup>15</sup> See for instance Legal Resources Foundation versus Zambia Communication 211/98 where the state implemented the recommendation of the ACmHPR to return expelled citizens and in addition to compensate them. For more on the ACmHPR, see Emmanuel Bello, 'The Mandate of the African Commission on Human and Peoples' Rights', *The African journal of International Law*, Vol. 1, 1988, Evelyn Ankumah, *The African Commission on Human and Peoples' Rights: Practice and Procedure*, 1996; Chdi Odinkalu, 'Individual Complaints procedures of the African Commission on Human and Peoples' Rights: A Preliminary Assessment', *Transnational Law and Contemporary Problems*, Vol. 8, 1998. On the enforcement of the ACHPR, see Makau Mutua, 'The African Human Rights Court: A Two Legged Stool?' *Human Rights Quarterly*, Vol. 21, 1991 pp 342 – 363.

<sup>16</sup> The Protocol to the ACHPR establishing the African Court for Human and Peoples Rights entered into force 24 January 2004. The court itself has not yet been established.

## Considered cases and opinions

In the context of AHRAJ, in all the cases considered below, the Constitutions of each of the countries protected the right to fair trial. These provisions were, again in each case, reinforced by individual ratifications of both the ICCPR and the ACHPR. Indeed in the case of Namibia, the wording of the instruments is reproduced almost verbatim. In the other constitutions, the verbal distinctions between the instruments and the constitution are matters of nuance not of substance. In interpretive terms, where the language of a constitutional provision is similar to that used in the ICCPR, no additional legislation is needed to give effect to the Covenant, the constitution being taken to have given direct effect to the UN Covenant, through a domestication technique referred to as ‘seepage’, i.e. the international text has seeped into the constitution.

Save for Namibia and Senegal, none of the other states considered here had ratified the right to individual petition to the HRC in the First Optional Protocol to the ICCPR.<sup>17</sup> However, all the states had recognised the right to individual complaint under articles 55 and 56 of the ACHPR. It should be noted that the ACmHPR established under article 30 of the ACHPR has elaborated the right to fair hearing under article 7 in terms similar to those of the HRC in its General Comment No.13.<sup>18</sup> Moreover, as identified below, the ACmHPR is aided by article 60 to consider, and in practice the ACmHPR has been acutely attentive, to the general principles of law laid down by organs in other human rights treaties that are ratified by member states of the AU.<sup>19</sup>

From the normative declarations found in constitutions in force today, the different states have adopted different practices leading to the violations that are the subject matter of the considered cases.

In the AHRAJ cases considered, limitations to the right to fair trial arose from a number of factors the most important of which were the following:

- a) Constitutional guarantees were generally rhetorical: All the countries considered here solemnly proclaim their international citizenship and generally proclaim themselves to be faithful to the rule of law. But their actual practices fall far short of proclamation. And whilst all agree that they should be governed by international law, and even concede sovereignty in certain areas, they habitually defend their delinquent performance under the doctrine of margin of appreciation. Perhaps as

<sup>17</sup> See analysis of Senegal and Namibia cases

<sup>18</sup> At its 11th Ordinary Session, 2 – 9 March 1992, the ACmHPR adopted its own Resolution on the Right to Recourse Procedure and Fair Trial as a means of interpreting article 7 of the ACHPR. See 5th Annual Activity Report of the Commission, Annual Activity Reports, Volume 1, 1987 – 1997, ACHPR.

<sup>19</sup> *Infra*

worrying is the frequency of situations where national constitutions adopt the text of international instruments such as the ICCPR, but implementing legislation then claws back the right to a fair trial by failing to provide adequate detail regarding its enjoyment, for instance by making torture a criminal offence or by failing to permit continuing judicial review of decisions to keep accused persons held in lengthy detention before trial. Save for Nigeria, and oddly so, none of the other states had enacted adequate legislation dealing with the impartiality of judicial tribunals, although all have constitutional declarations in defence of the principle. The non-existence or inadequacy of detailed legislation on human rights implementation has created gaps that have opened room for administrative discretion and vested power in the hands of police and other state bureaucrats.

- b) Culture of Impunity: Save for torture, the individual culpability of police officers and state bureaucrats who have violated rights through decision making authority, command structures or execution, was not established by national law in any of the countries.<sup>20</sup> In practice, many individual police officers ignored the law with impunity or did not care about rights of suspects and accused persons before and during trial. They were not individually required to account outside of force regulations and military norms, nor were their supervisors easily amenable to vicarious liability for violations committed by field officers.
- c) Under-developed legal culture: In Swaziland and Senegal, there was hardly any judicial review of state violations mainly due inadequate rights of individual complaint. For instance, in Senegal, the law stipulated the right had to be exercised within a limited period. Moreover, judicial precedent required proof of substantial violation and proof of standing through the rules of *ratio materiae* or *locus standi*. In Swaziland, a category of state actions were above judicial review while in Nigeria, military decrees had ousted the courts' traditional jurisdiction of judicial review and constitutional complaints with regard to a number of state actions. In Uganda, while the constitution seems to entrench rights, violations are compounded by limiting access to courts through procedural technicality. In nearly all these countries, there was little equality of between the prosecution and defence during trial.
- d) Inadequate awareness of human rights: Judges, lawyers and prosecutors were not aware of human rights provisions in instruments ratified by the state; there was no or little human rights training for the police and prosecutors; police officers were not familiar with or else routinely circumvented the legal rules regarding the rights of persons suspected or accused of crime.

<sup>20</sup> For instance under the 1973 King's Proclamation of Swaziland and the 1997 Gambia constitution.

## CASE STUDIES: DETENTION WITHOUT TRIAL IN GAMBIA AND ERITREA

So far we have considered the key principles and challenges of implementing the right to a fair trial in Africa. We now turn to specific case studies to underline the application of the principles.

### A. ABDUCTION IN THE GAMBIAN:<sup>21</sup>

We start with the case of *State vs Ousman Dumbo Saho and Others (2004)*. Some time in June 2000, Mr. Saho, hereinafter ‘S’ was arrested and detained by plainclothes state security agents who refused to identify themselves or to inform him of the reasons for his arrest. He was held incommunicado for three (3) weeks during which period the state publicly denied having him in custody. His family made fruitless enquiries in police stations and prisons. It was not until a writ of *habeas corpus* was filed in the High Court of The Gambia to produce him or his body before the court that the state, in a replying affidavit, admitted having him in custody. The High Court subsequently declared that his arrest and detention was unconstitutional and a violation of his right to liberty. At the time of hearing and determining the writ, there were no charges filed against S. The police did not indicate that they were going to charge him with any offence, nor was he the subject of any pending criminal charge. The court ordered his release. Immediately after his release and while leaving the court precincts, S was arrested by the police and informed that he would be charged with the offence of treason.

At the hearing of the *habeas corpus* application, S’s lawyer argued that The Gambia had violated his rights as guaranteed under the 1997 Constitution of The Gambia and the African Charter for Human and Peoples’ Rights, ACHPR, 1981.<sup>22</sup> The court while not making any decision as to the legal application of the ACHPR within the municipal proceedings nonetheless gave regard to its provisions on the right to fair hearing when making its ruling. The court was prepared to entertain arguments based on the ACHPR even though it was not prepared to treat that instrument as a source of law. Gambia ratified the ICCPR on 22 March 1979 and it entered into force on 22 June 1979. Gambia ratified the ACHPR on 8 June 1983.

### B. DETENTION WITHOUT TRIAL IN ERITREA<sup>23</sup>

In the Eritrea case, 10 journalists were detained in 2001 by security agents and held in undisclosed locations. No charges were brought against them. The arrests and detentions were based on Decree No.90 of 1996, which controlled

<sup>21</sup> AHRAJ Case No.21 by Emmanuel Joof, Gambian lawyer

<sup>22</sup> Disclosures made by Mr. Sarho’s counsel to AHRAJ are on record.

<sup>23</sup> AHRAJ Case by Article 19 Johannesburg

private publications, even though it did not authorise detention without trial. The journalists were initially held incommunicado in non designated detention centres but later held in various prisons. By 2004 no charges had yet been preferred against them and Article 19 filed a communication to the ACmHPR in respect of their continuing detention in that year. In Eritrea their families had apparently filed *habeas corpus* applications unsuccessfully. In 2005, the journalists reportedly went on hunger strike to win their release. Eritrea ratified the ICCPR on 23 January 2002 and it entered into force on 22 April 2002. Eritrea ratified ACHPR on 14 January 1999 and deposited her instruments of ratification 15 March 1999.

## THE ISSUES ARISING

Both cases implicate the right of persons not to be arbitrarily deprived of their liberty. An individual may only be deprived of his or her liberty on grounds and according to procedures established by domestic law, in conformity with international law. (Article 9(1) of the ICCPR, and Article 6 of the African Charter). In both cases, the arrests were unlawful, contrary to domestic constitutional guarantees and contrary also to international human rights law.

In the Gambian case a legal opinion assumed that S was deprived of his liberty by arrest in order to bring him before the authorities “on reasonable suspicion of having committed an offence” or “probable cause”. That assumption is at best dubious. First, there was no disclosure of an arrest, or of the fact that the persons making the \*arrest\* were police or state officers acting under colour of law. Reasons that would ordinarily attach to a formal arrest were not communicated to the complainant. Second, S was apparently not detained at any officially designated police station or detention centre, and, to compound matter, the state even denied having him in custody. Third, S was never arraigned before a court or judicial officer to be charged with any crime. Until the habeas corpus proceedings were filed on his behalf, S had been effectively **disappeared**. What is interesting is that this arrest and detention were illegal under the ICCPR and ACHPR recognised by Gambia as imposing obligations, but also under the state’s own 1997 Constitution.

Under Gambian law, when a *habeas corpus* proceeding is initiated, the detaining authorities must produce the detainee before the relevant court without unreasonable delay. Courts examining the lawfulness of detention must decide “speedily” or “without delay” and must order the release of the detainee if the detention is not lawful. The requirement that a decision must be made speedily applies to the initial decision on whether a detention is lawful and to any appeals against that decision provided for by national law.

Even if the arrests in both cases had been lawful, subsequently they became invalidated. An arrest or detention, which is lawful, 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. In addition, detainees who were initially arrested lawfully, but who are held after their release has been ordered by a judicial authority, are arbitrarily detained. These conclusions have particular force in the Eritrean case.

Unlike in The Gambia, the Eritrean journalists, were arrested and subsequently detained without trial, under pretence of law. The law on the basis of which the arrests were effected was a media decree, not legislation, that was announced by the Eritrean government in 1996. Its scope is ostensibly, prevention of private publication hostile to the government. That means that the arrest and detention were arbitrary in that the media decree took away a legitimate constitutional right, that is, the freedom of expression. It was also overbroad and without a legitimate state objective reasonably justifiable in a democratic society: the journalists were never charged, and thus could not defend themselves against any valid charges laid against them. Since the detention of the journalists was solely intended to give effect to a government media policy that already restricted rights, it was a secondary punitive measure against rights, the restriction on expression being the first, and hence doubly 'against the law' within the meaning of article 9 of the ICCPR. The UN Human Rights Committee has explained that the term "arbitrary" in Article 9(1) of the ICCPR 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.<sup>24</sup>

Moreover, even if the arrest and detention in the Gambia had been lawful (which it was not) as in the Eritrea (which it originally was), the lawfulness of the arrest would be qualified by material facts unfolding subsequently. Arbitrariness of arrest is what the international human rights law seeks to forestall, and an arrest would be arbitrary if, for instance, at the time of carrying it out, a) there was no reasonable suspicion against the person under arrest of having committed an offence known to law, and b) the state had no *prima facie* evidence to sustain a prosecution. To these grounds of arbitrariness the HRC has added a new invalidating ground. In *Celis Laureano versus Peru*<sup>25</sup> it stated that abduction and prevention of contact with the family and the outside world of a person under arrest and detention, constitutes cruel and inhuman treatment and are therefore in conflict with article 7 of the ICCPR.

When carrying out the arrests and detentions, both Eritrea and the Gambia were member states of the AU and signatories to the ACHPR. In addition, The

<sup>24</sup> See Albert Womah Mukong v. Cameroon, (458/1991), 21 July 1994, UN Doc. CCPR/C/51/D/458/1991, p. 12]

<sup>25</sup> Communication 540 of 1993 report of the HRC Vol. II A/51/40 at page 108 – 115

Gambia provided the permanent secretariat of the ACmHPR, whose Ordinary Sessions were routinely held in her capital, Banjul. Obligations of the two states with regard to rights of arrested and detained persons kicked in as soon as the journalists and S were arrested. These obligations lie in articles 1, 2, 3, 6 and 7 of the Charter. Immediately after, during and at all times following arrest, each individual had the right to have his cause heard, to access an impartial judicial tribunal, to benefit from protection of law, to be presumed innocent and to the right to trial within reasonable time before an independent and competent tribunal. These rights are laid out and elaborated in the cases below, among others in the jurisprudence of the ACmHPR.:

- *Amnesty International and Others versus Sudan Communications* 48/90, 50/91 and 89/93, decision of 11 May 2000
- *Amnesty International versus Zambia Communication* 212/98
- *Media Rights Agenda versus Nigeria Communication* 224/98 decided in 2000
- *Amnesty International on behalf of Orton and Vera Chirwa vs. Malawi communication* 78/92
- *Civil Liberties Organization in respect of the Nigerian Bar Association vs. Nigeria communication* 101/93

Immediately following arrest, a number of violations arose and were allowed to continue unabated. These violations must be considered within the obligations imposed by article 1 to recognise, respect, promote and fulfil the rights in the Charter. Under this important article, both countries would be obliged to remedy the violations.

The Gambian and Eritrean cases make certain revelations. However, it must be noted that in both states, the relevance of international law was not at issue. And although the Gambian court commented positively on the ACHPR, there was no similar opportunity in Eritrea since there never was any trial.

First, it would seem that constitutional protections of rights in both Gambia and Eritrea are rhetorical figleaves. Both countries assert but refuse to protect rights contained in their constitutions and in the treaties they have voluntarily signed. In the case of The Gambia, even though the country provides the secretariat to the ACmHPR, it has never implemented any recommendation of that organ in communications wherein the commission has found against the state. Instead, it has usually attempted to refute the very jurisdiction of the ACmHPR. In *Sir Dwada K Jawara versus The Gambia*, the ACmHPR agreed with the ousted Head of State of the Gambia that the abolition of the Bill of Rights of the 1970 Constitution by military decree following a coup, ousting the competence of the Gambia courts to challenge the validity of military decrees, rendered 'the prospect of seizing the national courts, whose jurisdiction have



been ousted by decrees, in order to seek redress, nil.<sup>26</sup> The Gambia government refused to restore the jurisdiction of courts over military decrees. What is interesting is that in *Sir Dawda K. Jawara versus The Gambia*, the state contested the competence of the ACmHPR itself to entertain individual complaints in a quasi judicial proceeding arguing that its mandate was limited in the ACHPR to promotion and interpretation, and to bringing the attention of the Heads of State Assembly only cases where a series of massive and serious violations occurred. Neither the Gambian government nor the ACmHPR in this case, seemed to consider that the abrogation of the Constitutional Bill of Rights was a 'serious and massive violation' of the ACHPR. The ACmHPR resisted the refutation of its mandate by The Gambia, relying on its practices in the past and stating that '...the practice of the Commission has been to consider communications even if they do not reveal a series of serious or massive violations. It is out of such useful exercise that the Commission has, over the years, been able to build up its case law and jurisprudence.'<sup>27</sup>

Under the ACHPR, Gambia has submitted two state reports, a first report in March 1992 and a second report in October 1994.<sup>28</sup> Gambia has only submitted its initial state report under ICCPR in 1983, which was examined in 1984. Subsequently, there are no reports although the sixth report was due on 21 June 2005.<sup>29</sup> Gambia's most recent report was submitted to CEDAW committee in April 2003.

Second, despite constitutional guarantees in both Gambia and Eritrea, violations are sanctioned by officialdom. The 1997 Republican Constitution of Gambia constitution provides total immunity from criminal prosecution or civil action to members of the Armed Forces Provisional Ruling Council (AFPRC) contrary to the ICCPR specifically article 2 and article 9 and 14 in so far as compensation and other remedies are required for violations.

Gambian legal culture and practices shield police from individual culpability. For instance, the government has rejected calls by an independent commission of inquiry to prosecute security officers responsible for the deaths of 14 demonstrators in 2000. While the quasi-judicial proceedings established the actual responsibility of security officers for the deaths, the government announced that no prosecutions would take place in the interest of national reconciliation.

<sup>26</sup> Communication 147 of 1995.

<sup>27</sup> Ibid, paragraph 42.

<sup>28</sup> [http://achpr.org/english/\\_info/status\\_submission\\_en.html](http://achpr.org/english/_info/status_submission_en.html)

<sup>29</sup> <http://www.unhchr.ch>

(7) A person charged with an offence shall be presumed to be innocent, and shall not be punished, unless he is found guilty by a court.

(8) Where an accused is convicted, he shall have the right to appeal. No person shall be liable to be tried again for any criminal offence on which judgement has been rendered."



Third, there are no evident consequences of violations on the state under the domestic law. There is, for instance, no precedents on compensation for unlawful arrest and it is not even clear whether, under the 1997 Constitution, there is a remedy for persons who had been detained against their will by security agents such as S. Both the ACmHPR and the HRC have called for compensation in such cases. While it was possible to secure his release after nearly a month in detention through judicial review proceedings, S was immediately rearrested, perhaps necessitating another cycle of similar proceedings. For the 1<sup>st</sup> unlawful arrest, no compensation was paid, and none, it appears, was sought by S's lawyers. It is not clear whether in practice any compensation payable to persons who had been unlawfully arrested or detained is purely material or whether it is also exemplary or moral damages.

Finally, Gambian ratification of international human rights instruments does not translate into an official commitment to human rights norms and their internationalization. In the CEDAW report submitted in 2003, the Gambian government states at page 4 that *'By ratifying this convention, the Gambia placed itself under an obligation to honour and implement the basic tenets of the convention...Here it is important to note that the convention was ratified without any reservation. This in effect means that the Gambia made an unequivocal pronouncement that she is prepared and willing to honour all the obligations contained in the convention.'* Yet the case of S shows exactly the opposite of these protestations.

In the case of Eritrea, the rights of arrested and detained persons were negated by a decree, inferior even to legislation, notwithstanding the provisions of article 28 of the country's constitution. Similar habeas corpus judicial proceedings failed to have any effect on continuing violations.

On the question of implementing rights, Eritrea's record is mixed. Certain categories of rights have received preferential treatment, even though the country's constitution considers rights to be indivisible and rights-holders to be equal. For instance, Eritrea ratified CEDAW in 1995. In 2002 it submitted a periodic report stating that the state had translated CEDAW into the official language and widely disseminated it throughout the country. Moreover, CEDAW was being implemented in tandem with an official macro-economic policy plan to buttress its provisions. However, periodic reports to the HRC and the ACmHPR detailing implementation of civil and political rights are due but not submitted.

As with the Constitution of the Gambia, the 1997 one of Eritrea constitution has a strong normative commitment to human rights, including a fairly strong provision for the protection of the right to fair trial under article 17.<sup>30</sup>

<sup>30</sup> Article 17 of the Eritrean Constitution 1997 provides as follows: "Arrest, Detention and Fair Trial (1) No person may be arrested or detained save pursuant to due process of law.

It permits limitation of rights under article 26, but makes the usual proviso that limitations under the law must be necessary and justifiable in a democratic society.

It is well worth noting that article 17 recognises the writ of *habeas corpus* as a constitutional right. Any person who, following arrest, has been detained but has not been formally charged beyond a set period or is held without the authority of a court, may file habeas corpus writ to secure his or her release. Through this provision, a judicial procedure settled in international practice and recognised under the ICCPR is internalized within the supreme law of the country, which is superior to the criminal code. In the journalists' cases, writs of habeas corpus were sought in terms of the domestic law on behalf of the detainees by spouses and family members but this was unsuccessful. In addition to the habeas corpus procedures, there is a second constitutional complaint mechanism affecting constitutional rights under article 28.

Article 28 of Eritrea's Constitution of 1997 titled 'Enforcement of Fundamental Rights and Freedoms' provides:

- “(1) Save in so far as it may be authorised to do so by this Constitution, the National Assembly or any subordinate legislative authority shall not make any law, and the Executive and the agencies of government shall not take any action, which abolishes or abridges the fundamental rights and freedoms conferred by this Constitution. Any law or action in violation thereof shall be null and void.*
- (2) Aggrieved persons who claim that a fundamental right or freedom guaranteed by this Constitution has been denied or violated shall be entitled to approach a competent court to enforce or protect such a right or freedom. Where the court ascertains that such fundamental right or freedom has been denied or violated, the court shall have the power to make all such orders as shall be necessary to secure such*

- (2) No person shall be tried or convicted for any act or omission, which did not constitute a criminal offence at the time when it was committed.
- (3) Every person arrested or detained shall be informed of the grounds for his arrest or detention and the rights he has in connection with his arrest or detention in a language he understands.
- (4) Every person who is arrested and detained in custody shall be brought before the court within forty-eight (48) hours of his arrest, and if this is not reasonably possible, as soon as possible thereafter, and no such person shall be detained in custody beyond such period without the authority of the court.
- (5) Every person shall have the right to petition the court for a Writ of Habeas Corpus. Where the arresting officer fails to bring him before the court of law and provide the reason for their arrest, the court shall accept the petition and order the release of the prisoner.
- (6) Every person charged with an offence shall be entitled to a fair and public hearing by a court of law; provided, however, that such a court may exclude the press and/or the public from all or any part of the trial for reasons of morals, the public order or national security, as is necessary in a just and democratic society.

*applicants the enjoyment of such fundamental right or freedom, and where such applicants suffer damage, to include an award of monetary compensation.”*

This article serves two purposes. First, it prohibits enactment of laws and promulgation of executive decrees such as the media decree, which abolish or diminish constitutional rights. The prohibition is theoretical if a constitutional court can not invalidate laws and decrees based on sub article 1 of 28. Secondly, it serves as the basis of a constitutional complaint in respect of any claim of rights. It enables applicants to have recourse to the judiciary to redress violations. This mechanism is broader than the writ of habeas corpus and applies to the entire body of constitutional rights and freedoms, including residual rights read into the constitution.<sup>31</sup> In an article 28 procedure, the court can give any remedy it deems fit. Notwithstanding, the futility of the habeas corpus proceedings, no other domestic proceedings were brought to secure the release of the journalists. Instead, citing exhaustion of domestic remedies in order to meet admissibility conditions, a substantive communication was brought before the ACmHPR citing a violation of article 7 of the ACHPR. This communication is still fresh before the ACmHPR and cannot be discussed here in order not to pre-empt it.

It is clear that the arrest and subsequent detention of the 10 journalists was unlawful in international law, and also contrary to the spirit if not express provisions of Eritrea’s constitution. Here is an example of a practice, which despite the international notoriety surrounding it, has received no satisfactory redress, although it is preventable under the national law, which is in line with Eritrea’s international obligations.

The difference with the Gambia in the journalists case is that Eritrea admitted holding the journalists but insisted they were detained legally following lawful arrests, even though none of them had been charged. If the basis of the arrest and detention was a law valid in Eritrea, then the question is one of its conformity with ICCPR and ACHPR, exempting valid reservations and derogations. The latter instrument does not provide for derogations but permits legislated claw-backs. Both instruments also recognise derogations during states of emergency.

Article 4 of the ICCPR permits state parties derogations of their obligations for the duration of a state of emergency and within a rule of law framework.<sup>32</sup> The derogations are envisaged when a state of emergency has been formally

<sup>31</sup> See article 29 of the Eritrean constitution.

<sup>32</sup> See HRC General Comment No. 29 (2001) and General Comment No.27 (1999) on states of emergency and restrictions respectively.

1. The danger or threat must be actual or imminent

declared, following and for the duration of a threat to the life of the nation, and to the extent strictly necessitated by the state of emergency. Moreover, the state party is restricted in the scope of derogation, firstly for the continuing guarantees of certain non-derogable rights, and secondly in the discriminatory measures that it may take. Eritrea reaffirms this legal position in article 28 of her Constitution. Under article 40 of the ICCPR, a state party is obliged to report its derogations in order to inform other state parties of the derogation, and to supply the reasons therefor. Eritrea, which ratified the ICCPR on 22 June 2002, has not in the relevant period submitted a notification of derogation or reservation to the HRC.

While Eritrea was entitled to exercise its sovereign right to derogate from its obligations under the ICCPR, as well as in terms of its national constitution, these are not defences always ready to hand. Derogation must be consistent with rule of law guarantees. Thus, article 14 guarantees equality before the court and the right to a fair trial before an independent court established by law. Neither rights would be taken away by an emergency. Derogation is not a defence to, nor is it construed as justification for conduct amounting to violation of international human rights law, since the general obligations and objects of the ICCPR under article 1 continue. At any rate, Eritrea never prescribed its media decree, on the basis of which the journalists were detained, as a derogation measure. Nor would it have mattered: derogation would still have been invalid.<sup>33</sup>

The ACHPR does not itself state the effect of actions under national law that violate or infringe Charter rights. But in its preamble, ‘freedom, equality, justice and dignity are essential objectives. The preamble further states that ‘fundamental human rights stem from the attributes of human beings, which justifies their national and international protection...’ and further that ‘the reality and respect of peoples’ rights should necessarily guarantee human rights.’ In its decisions, the ACmHPR has explicitly stated it will not make a determination of the domestic law, that being outside its *ratio materiae* jurisdiction, but it has expressed that the effect of its finding that a national law conflicts with the ACHPR connotes an obligation on the state party concerned to change that law and to bring it into conformity with the ACHPR.<sup>34</sup>

2. It affects or involves the whole nation

3. The continuity of the organised life of the nation is at risk.

4. The danger is exceptional and cannot be countered through normal measures and the restrictions permitted under the Convention for the maintenance of public safety, morality, health and order are inadequate

<sup>33</sup> The decision of the European Court in *Lawless vs Ireland No.3* (1961) 1 EHRR 15 a case concerned with terrorism in Ireland refers. Ireland derogated from article 5 of the European Convention in 1957 in order to permit detention without charge or trial. The applicant in that case was detained for 5 months. He challenged the legality of the derogation in terms of the European Convention, which upheld the derogation for purposes of public emergency. Within the European system, the criteria set out to test the emergency are the following:

<sup>34</sup> Legal Resources Foundation versus Zambia *supra* at footnote 11, *infra* at 32.

The preamble strengthens comparative international human rights law in that state parties reaffirm ‘their adherence to the principles of human and peoples’ rights and freedoms contained in the declarations, conventions and other instruments adopted by the organization of African Unity [African Union], the Movement for Non-Aligned Countries and the United Nations.’ Clearly, the intention of the framers was that all the norms recognized and given effect by the United Nations were assimilated as far as practicable into the Charter and into state practices. These norms would include the rules regarding the interpretation and application of international law. This intent is validated by Article 60 of the Charter, which unlike the preamble is binding.<sup>35</sup> In developing its own jurisprudence, the ACmHPR has called upon the interpretation of principles of laws and provisions in other regional and international instruments.<sup>36</sup>

In deciding the approach to take to interpret a provision of the Constitution of Zambia that contravened the African Charter, the African Commission guided by comparative international human rights law declared:

*‘international treaty law prohibits states from relying on their national law as justification for their non compliance with international obligations. (Art. 27 of the Vienna Convention of the Law of Treaties). Likewise, an international treaty body like the African commission has no jurisdiction in interpreting and applying domestic law. ... In other words, the point of the exercise is to interpret and apply the African charter rather than to test the validity of domestic law for its own sake vide the cases of the Inter American Commission against Uruguay.’<sup>37</sup> (emphasis added)*

Although the case involving the detention of the journalists was brought as a communication before the ACmHPR, it is yet to make its final determination in the matter. From its earlier recommendations, the ACmHPR if it were to find that the media laws permitting the detention without trial are a contravention of Charter rights, would be guided by its authority to consider and to be ‘inspired’ by comparative international human rights law. Of most relevance in this

<sup>35</sup> Article 60: The Commission shall draw inspiration from international law on human and peoples’ right, particularly from the provisions of various African instruments on human and Peoples’ rights, the Charter of the United Nations, the Charter of the organization of African unity [African Union], the universal declaration of Human Rights, other instruments adopted by the United Nations 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 United Nations of which the parties to the present Charter are members.’

<sup>36</sup> See for instance, Civil Liberties Organisation versus Nigeria communication 218/98 where the ACmHPR interprets the inspiration mentioned in Articles 60 and 61 as placing an obligation on the Commission to actually use comparative international human rights law.

<sup>37</sup> Legal Resources Foundation versus Zambia, Communication 211 of 1998 reported in Compilation of Decisions of the African Commission for Human and Peoples’ Rights, Extracts from Reports of Activities, (date) Institute for human Rights and Development in Africa..

analysis is the effect of the media decree as an invalid and impermissible limitation to rights enjoined in the ACHPR and in Eritrea's constitution. In the Eritrean and Gambian cases, delay in bringing the applicants to trial following their arrest was the major basis of one part of the violation, the other part being that no trial or charges were contemplated at the time of arrest, suggesting that the arrests were themselves unlawful.

### **Delay in trial: Holding Charge in Nigeria and Senegal**

A different set of cases involving delay in trial were considered for Nigeria and Senegal whose laws permit detention in custody on the basis of what is described as a 'holding charge.'

In Senegal, AHRAJ case 32 challenged the validity of the holding charge in respect of an accused person facing assault charges. This case, known as *Thiaw vs State* started in July 2000 before the Tribunal Correctionnel de Dakar. Raddho, a national NGO was the applicant asking for a legal opinion on the holding charge. Under the national law of Senegal, the police could hold an accused person indefinitely after the formal charge, without bringing him to trial, ostensibly to complete investigations. The criminal procedure however required that the suspect be arraigned before a local magistrate within a limited period, at which stage the police were required to offer the grounds for his continued arrest and detention. If the magistrate made a conformation order, the suspect remained in police custody, but since subsequent judicial review of the detention was not forthcoming, in effect, the suspect would be held indefinitely until the police either charged him or released him.

In Nigerian cases supported under AHRAJ, the individuals were held in prison custody without trial on a holding charge for different periods, the longest of which was 8 years. Moreover, the holding charge was granted by a magistrate who had no jurisdiction to try the main charges of robbery with violence filed against the detainees. On behalf of the detainees, a national NGO was supported by AHRAJ to bring proceedings challenging first, the holding charge practice, and secondly the granting of a holding charge order by a court that lacked the jurisdiction and competence to try the main charge. The grounds of the challenges were based on Nigeria's Constitution and the ACHPR.

Nigeria ratified the ACHPR on 22 June 1983. It purportedly domesticated the ACHPR by incorporating it entirely into a national statute by virtue of the *African Charter on Human and People Rights (Ratification and Enforcement) Act, 1990*. Nigeria ratified the ICCPR on 29 July 1993.

### **Analysis**

In these cases, which are here analysed jointly since they deal with the same legal principle, two legal opinions developed by AHRAJ in 2004 argued that the

holding charge was a violation of the right to trial within a reasonable period and therefore contrary to international human rights law. The right to trial within a reasonable period is a key ingredient of the right to fair trial in article 14 of the ICCPR as well as the right to be heard in article 7 of the ACHPR.

The unlawfulness of the holding charge as such is not in question. However, it must be noted that a '**holding charge**', here understood as a procedure that commits an accused person to trial but delays the actual commencement of hearing, is not of itself unlawful.<sup>38</sup> It becomes unlawful when it negates or because it has the likely result of negating, rights to liberty and to fair trial.

A basic rule in criminal law is that a person will be arrested only upon reasonable suspicion of having committed an offence, and when the arresting authorities, frequently the police, have sufficient evidence against the person to make out a *prima facie* case at trial.<sup>39</sup> That means that the evidence already obtained at the time of the arrest is by itself sufficient to commit the case to trial, and may be sufficient to hold up a conviction where the defendant is unable to rebut the evidence or in anyway diminish its probative value. A case can therefore be made that a procedure that permits police to arrest and detain a person at the stage in their investigations when they have no evidence against him or her, or the evidence is not sufficient to commit him or her to trial is arbitrary, overbroad, prejudicial or oppressive, hence unlawful.

International human rights law requires that a person who has been arrested and detained must be brought to trial within a reasonable period. Trial commences with a formal charge whether or not a plea is taken at the same time or subsequently.<sup>40</sup> It is nowadays accepted that a person who has been arrested and detained in police custody should be charged within a period of 48 hours, or quite soon thereafter. If not charged, or when the evidence suggests a charge should not be made, the arresting authorities should in all cases set the detainee free, subject of course to police obligations to continue their investigations and to arrest and charge the suspect when finally able to.

<sup>38</sup> For instance, trial hearings may not commence until the jury is appointed in the US federal system and in Scotland. Some countries have a legislated right to speedy trial, for instance Philippines, where the trial must be commenced within 30 days of the arraignment and the entire duration of the trial is fixed to 180 days.

<sup>39</sup> The US Supreme Court has stated: 'To legally arrest and detain, the Government must assert probable cause to believe the arrestee has committed a crime. Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends.' *United States versus Marion*, 404 US 307 (1971), where the appellants claimed that prosecuting them after lengthy delay since commission of crimes violated the Sixth Amendment to the US Constitution, which entitled them to a speedy trial.

<sup>40</sup> This is the common law position for all criminal trials taking place in a magistrate's court. If there is a trial by indictment as in a civil law system or in the common law system for trials in a superior court, trial commences after an indictment.



In some cases, the police may be permitted to arrest and to detain a person pending investigation of the charges contemplated against him or her, in order to prevent him or her tampering with evidence or witnesses. However, there are strict requirements in cases of this nature to guarantee the right of speedy judicial review over the detention, including appeals, and to guarantee continuing judicial supervision of the detention. Cases of detention before trial normally require strict balancing of police interest to investigate and prosecute crime on one hand, and the rights of arrested and detained persons on the other. For the duration of the trial, the only justification for continuing to hold an accused person in detention is to secure their attendance in court. Neither the ICCPR nor the ACHPR stipulate the exact time within which to charge and bring to trial a person who following arrest has been detained. The requirement is that the period should be 'reasonable'. Here, reasonableness will be determined by the circumstances of each case and the jurisprudence of the HRC and the ACmHPR on the reasonableness of time treats each case distinctly.

International law has therefore left it to the domestic law of the state to determine this period for two reasons. First, international law recognises the sovereign power of the state to investigate and prosecute crime committed against its laws, by persons subject to its legal authority, whether or not the crime is committed within the state territory. The decision regarding the procedure for investigation and prosecution of crime falls within the sovereign autonomy of the state. In the case of international crimes and crimes against humanity defined in the Rome Statute<sup>41</sup>, the jurisdiction of the International Criminal Court is only invoked when the state with primary jurisdiction in the matter, is unable to prosecute.<sup>42</sup> Secondly, the state is the best determinant of the length of the period because it is responsible for all aspects of the investigation and prosecution powers and can best estimate the difficulty with which it performs these tasks. In European court terms, international law allows the state a margin of appreciation where the state is the best determinant of the course of action, subject to its continuing obligations to the international community.<sup>43</sup>

In Senegal's case, the holding charge procedure permitted the accused person to be held in prison custody following his indictment for a period that exceeded the custodial sentence set by law as sentence for the crime against which he was charged. This was also true of some of the Nigerian detainees, some of

<sup>41</sup> Rome Statute of the International Criminal Court UN Doc.A/Conf 183, articles 5 - 8

<sup>42</sup> Article 17 *ibid*.

<sup>43</sup> See *Ireland versus United Kingdom*, 2 EHRR 25 (1978) at paragraph 25 (regarding the detention of Irish citizens ostensibly to quell the IRA threat). The margin of appreciation means refers to the state's discretion how best to implement international law given domestic exigencies. It is not a defence to violation or non-implementation akin to those under the cultural diversity limb, but a means to appreciate diversity of means when implementing international law domestically.

who have been in prison awaiting trial for eight years. This result manifests the most oppressive nature of the holding charge, in addition to the unchecked license it allows police and prosecutors.

Within the Senegalese system, the obligations of the police concerning arrested and detained persons awaiting trial are elaborated by the criminal procedure law. To start with, article 55 of Senegal Code of Criminal Procedure, which is in French, provides that a person may be detained ‘only if there is serious and concordant evidence of a nature giving rise to a formal charge.’

Detention following arrests invokes certain obligations on the part of the police, and the code places the responsibility of supervising compliance on a state prosecutor.

The police have the following obligations among others:

- To inform the person concerned of the reason for the detention;
- To immediately inform the Public Prosecutor or his representative of the detention measure;
- To interrupt periods of questioning by periods of rest, all of which must be mentioned in a written record and signed by the detainee, on pain of nullity;
- To apply to the Public Prosecutor’s office for an extension of the detention measure if it will exceed 48 hours;
- To inform the detainee of the extension application and of his right to be examined by a doctor;
- To specify, at the end of the record, and on pain of nullity, whether or not the detainee has signed;
- To bring the detainee before the Public Prosecutor within the stipulated period or, if transportation is difficult, refer the case to him; and
- Keep a register of detentions at the local headquarters of the criminal police and submit it to judicial authorities whenever required to do so.

Article 59 of the same *Code of Criminal Procedure* provides for sanctions in the event of abuses committed by an officer of the criminal police during detention of a suspect. The sanctions may be disciplinary (pronounced by a criminal court on application by the Public Prosecutor) or penal.

The provisions contained in articles 55 – 59 of Senegal’s criminal code were developed to forestall abuse of detainees by sharing responsibilities between the police and an independent prosecutor. It is not clear how long the prosecutor can approve a detention measure or whether a detainee also has the right to judicial appeal over the decisions of the prosecutor. In the elaboration of the HRC, the right to such an appeal from the administrative decision of a prosecutor is enforceable and must lie with a competent, independent judicial

body.<sup>44</sup> As an administrative check, the prosecutor is not independent of the detention since he is also an arm of the same executive organ responsible for the prosecution. First, prosecution relies on the investigative work of the police, which includes responses to questioning in detention. While the detainee is permitted a medical examination, the procedure says nothing of legal representation. The same prosecutor who authorizes extended detention is also responsible for disciplining officers who abuse the rights of a detainee. It is also noteworthy that detention may be extended for purely operational hitches such as absence of transport.<sup>45</sup> Clearly, rights are not so paramount in this procedure.

It is ironic therefore that Senegal's Constitution starts by recognising the history of human rights from as far back as 1789. The preamble of the Constitution adopted on the 7 January 2001 starts by affirming Senegal's adherence to a French Declaration of Human Rights of 1789 and refers to the Universal Declaration of Human Rights of 10 December 1948 as sources of inspiration undergirding its adoption.

In this Constitution, largely due to its styling in the effective parts, the right to fair trial and even the rights of persons under arrest are not provided for expressly, but are subsumed under a general article 8.<sup>46</sup> The styling is not meant to diminish these rights, particularly in light of the preamble to the Constitution. Furthermore, the right to remedy in cases of violations of human rights is a constitutional principle and the violation of rights is actually declared to be illegal as well as unconstitutional.<sup>47</sup>

Within the Senegalese judicature system, judicial power is exercised by the Constitutional Council, the Council of State, the Court of Cassation and other courts and tribunals. The Council of State is competent in matters of abuse of power by the executive authorities of the state. It is responsible for ensuring the legality of administrative acts. Meanwhile, the Court of Cassation is responsible for pronouncing upon the law and does this by means of the

<sup>44</sup> See General Comment No. 13

<sup>45</sup> Article 55 of Senegal's Code of Criminal Procedure

<sup>46</sup> Article 8 of the Constitution states: "The Republic of Senegal guarantees to all citizens their individual fundamental freedoms, economic and social rights as well as group rights. These freedoms and rights are: Civil and political liberties, freedom of opinion, freedom of expression, press freedom, freedom of association, freedom to hold meetings, freedom of movement, freedom to protest, cultural freedoms, religious freedoms, philosophical freedoms, union freedoms, freedom of enterprise, the right to education, the right to literacy, the right to property, the right to work, the right to health, the right to a healthy environment, and the right to a variety of information. These freedoms and rights shall be exercised under the conditions provided by law."

<sup>47</sup> Article 9 of the Constitution: "Any infringement of these freedoms and any international restriction of the exercise of a freedom shall be punishable by law. No-one may be convicted other than by virtue of a law which became effective before the act was committed. Defence is an absolute right at all stages and at all levels of the proceedings."

control it exercises over decisions of lower courts and tribunals. It may receive an application for review on questions of law from any person whose application has been dismissed in proceedings of final instance.

Senegal is monist and international law once ratified is applicable directly. Article 98 of her Constitution states:

*‘Treaties or agreements duly ratified shall, upon their publication, have an authority superior to that of the laws, subject, for each treaty and agreement, to its application by the other party. The state may not ratify an international instrument that conflicts with the national law as may be determined by the constitutional court, unless and until the constitution is revised.’*

Senegal ratified the ACHPR on 13 August 1982. In addition Senegal ratified the ICCPR on 13 February 1978 and it entered into force on 13 May 1978. Senegal also ratified the ICCPR First Optional Protocol on the same date as the main Covenant. It recognises the right of individual petition to the HRC and also to the Committee against Torture under the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>48</sup>

Accordingly, within the Senegalese system, a person held in police custody or in prison for a prolonged duration awaiting trial has a constitutional recourse to *habeas corpus*, to temporary relief from the domestic courts, as well as before the ACmHPR or the HRC in terms of their admissibility conditions. In theory, such a person also has recourse to administrative remedies, particular appeal to the prosecutor under article 55 of the *Criminal Procedure Code*. Even if this Code does not recognise a right of appeal from the prosecutor’s decision, such a right exists and is enforceable under international law.

Despite the assurances in Senegal’s constitution, prolonged detention is the result of the prosecutor’s discretion aided by judicial acquiescence at the lower court level. It is not clear why judicial review over the decisions of the prosecutor and the lower courts regarding prolonged detention awaiting or pending trial is not pursued in these cases. Ironically, prolonged detention has been the subject of a complaint against Senegal to the HRC. In the case of *Famara Kone versus Senegal* the HRC recommended that the author be compensated following a long period of detention. The recommendations were implemented through presidential fiat, leaving the structural problems posed by the Code intact.

It bears noting that in the current case, the Code does not stipulate the maximum length of time for detention awaiting trial. It does not provide for continuing judicial review over continuing detention, nor does it have any

<sup>48</sup> Article 17 of CAT establishes the Committee and article 22 establishes the individual complaints mechanism subject to formal recognition and therefore renunciation, by a state party.

procedure by which a detainee can request his or her case to be committed to trial without any further delay, and to be determined speedily. It does not provide a procedure to dismiss the charges if prosecution is not commenced within a reasonable period. It does not distinguish between prolonged detention based on the nature of the charge and the maximum custodial sentences permitted by law in each case. Due to the absence of detailed provision, the law is too broad, vague, and arbitrary and results in abuse.

Similar weaknesses are manifest by the Nigerian law relating to the holding charge. In that country however, the detainees brought a challenge against the validity of the holding charge, seeking individual relief from continued detention and, more importantly, a declaration that the holding charge is unconstitutional. The court granted the prayers but as of now the law is yet to be changed to comply with the court's decisions, and moreover, it may be need changes in every state in the federal republic.

The main ground for invalidation was that a holding charge, which allows continued detention without trial, violates s 32(1) of the Nigerian Constitution, which prohibits deprivation of liberty save in accordance with law and requires a person to be brought before a court of law within a reasonable time. Moreover, a holding charge violates the presumption of innocence protected by s 33(5) of the Constitution. The court also found that the procedure by which a holding charge order was granted by a judicial officer who lacked jurisdiction to try the charges was unlawful. Section 236 of the Criminal Procedure Law, which allowed a Magistrate to remand a person who had not been charged, contravened the right to a fair trial and s 32(1). The court made a monetary award, following the declaration of invalidity, and ordered a public apology from the police commissioner to each of the detainees. The matter has therefore been tested in Nigeria jurisprudence, with results affirming the stance taken in similar cases in international human rights law.

As in Senegal, the basis of pre trial detention in Nigeria was a statute permitting prolonged detention under the discretion of the police and prosecution, with the acquiescence of lower courts. The holding charge presents a dilemma to the right to protection from arbitrary arrest and the right to a fair trial. There is a requirement that a person who is arrested must be brought before a judicial officer without delay, and that such a person will be brought to trial without delay, including the proviso that the trial itself will not be unduly prolonged. Unlawful arrest and prolonged detention pending trial have an implication on the overall right to fair trial.

The right to speedy trial is not exactly the same as trial within a reasonable period, although both are activated once the criminal charges are made and extend to all persons facing the charges. The guarantee regarding trial within a reasonable period is subsequent and is generally applicable only after a person

has been accused of a crime. The state obligation becomes engaged when an accused is charged.

In order to legally arrest and detain, the state must assert reasonable belief that the person arrested has committed a crime. Arrest itself has a negative impact not only on the right to liberty of the arrested person, but also on his or her reputation and social standing. Detention following arrest disrupts family life and employment. Lengthy detention awaiting trial, and prolonged trial impair the ability of an accused person to mount an effective defence against the charge. For instance, witnesses who may support the defence case may die or leave the jurisdictions and their memories may be diminished.

In General Comment No. 13, the HRC has stated that the right to be tried without undue delay is a guarantee that “*relates not only to the time by which a trial should commence, but also the time by which it should end and judgement 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.” The main purpose is to ensure that people awaiting trial on criminal charges do not suffer prolonged uncertainty and that evidence is not lost or undermined

Both the HRC and the ACmHPR have assessed the reasonableness of time before trial. Factors considered germane to the issue have included: the seriousness of the offence alleged to have been committed; the nature and severity of the possible penalties; and the danger that the accused will abscond if released. The conduct of authorities may also be scrutinised, such as whether the national authorities have displayed “special diligence” in the conduct of the proceedings, considering the complexity and special characteristics of the investigation, and whether continued delays are due to the conduct of the accused (such as refusing to cooperate with the authorities) or the prosecution.

The ACmHPR 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.<sup>49</sup> In another communication, it concluded 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 ACHPR.<sup>50</sup>

<sup>49</sup> Annette Pagnoulle (on behalf of Abdoulaye Mezou) v. Cameroon, (39/90), 10th Annual Report of the African Commission, 1996 -1997, ACHPR/RPT/10th. See also Alhassan Abubakar v. Ghana, (103/93), 10th Annual Report of the African Commission, 1996 -1997, ACHPR/RPT/10th.

<sup>50</sup> Krishna Achutan (on behalf of Aleke Banda), Amnesty International on behalf of Orton and Vera Chirwa, Amnesty International on behalf of Orton and Vera Chirwa versus Malawi. (64/92, 68/92, 78/92 respectively), 8th Annual Report of the African Commission, 1994-1995, ACHPR/RPT/8th/Rev.I

There is a presumption that people charged with a criminal offence will not be detained before their trials. International standards explicitly recognize that there are, however, circumstances in which the authorities may impose conditions on a person's liberty or detain an individual pending trial, under article 9(3) of the ICCPR. Where the risk of flight is substantiated, although this is relevant in determining whether pre-trial detention is justified, it does not determine the issue of whether the length of pre-trial detention is reasonable. The conduct of the authorities must also be examined. The European Court has stated that the danger of an accused absconding cannot be gauged solely on the basis of the severity of the possible sentence.<sup>51</sup> The HRC has also stated that "(p)re-trial detention should be an exception and as short as possible".<sup>52</sup>

In order to safeguard the right to liberty and freedom from arbitrary arrest or detention, and in order to prevent violations of fundamental human rights, all forms of detention or imprisonment must be ordered by or subject to the effective control of a judicial or other authority.<sup>53</sup> The purposes of the review before a judge or judicial authority include:

- to assess whether sufficient legal reason exists for the arrest;
- to assess 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. If held in detention without being brought to trial, one has the right to review detention, and the accompanying right to constant review of detention by an independent court.

This right of review safeguards the right to liberty and provides protection against arbitrary detention and other human rights violations. This right is guaranteed to all people deprived of their liberty, not just those detained in connection with a criminal offence.<sup>54</sup>

The ACmHPR has held that the failure to allow a prominent political figure detained for 12 years without charge or trial to challenge the violation of his right to liberty before a court violated Article 7(1)(a) of the African Charter.<sup>55</sup>

Moreover, the review body must be a court, not an administrative officer such as a prosecutor. The HRC held that review by a superior military officer of a

<sup>51</sup> Yaci and Sargin v. Turkey, (6/1994/453/533-534), 8 June 1995

<sup>52</sup> Human Rights Committee General Comment 8, para.3

<sup>53</sup> For instance Article 9(3) of the ICCPR, Article 59(2) of the ICC Statute

<sup>54</sup> Article 9(4) of the ICCPR

<sup>55</sup> Krischna Achutan ibid fn 50



disciplinary measure involving detention did not meet the requirements of Article 9(4) of the ICCPR.<sup>56</sup> It also ruled that the possibility of review by the Ministry of the Interior of the detention of an asylum-seeker did not meet the requirements of Article 9(4).<sup>57</sup> For its part, the ACmHPR decided that denying detainees considered illegal aliens the opportunity to appeal to national courts violated Article 7(1)(a) of the ACHPR as it deprived them of the right to have their case heard.<sup>58</sup> The review of the lawfulness of the detention must ensure that the detention was carried out according to the procedures established by national law, and that the grounds for detention were authorized by national law. The detention must comply with both the substantive and the procedural rules of national legislation. Courts must also ensure that the law is not arbitrary according to international standards.

Moreover, anyone held in detention has the right to have the lawfulness of that detention reviewed by a court or other authority at reasonable intervals. The right to challenge the lawfulness of detention is a guarantee essential for the protection of other rights. Although the right to challenge the lawfulness of detention before a court is currently subject to derogation under the ICCPR, it is not under the ACHPR, which make no provisions at all regarding derogation.

Finally, there is a possibility that delay in trial may be caused by the defendant. Delay is only an issue if it is not caused by the actions of the defendant's for instance, because of absence from proceedings during sickness or incessant motions and appeals.

Once there is a finding of violation, then an accused person is entitled to dismissal of charges and cessation of trial. He or she is also entitled to be released from detention. International law authorizes dismissal of an indictment, information, or complaint "(I)f there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial . . . ."

The defendant is also entitled to reparation.<sup>59</sup> Forms of reparation include but are not limited to: restitution; compensation; rehabilitation; satisfaction; and guarantees of non-repetition. This right to reparation is also enforceable.

### **Right to Legal assistance: Case of legal aid for Caprivi detainees in Namibia**

The Caprivi treason cases have been notorious inside and outside Namibia since the uprising itself in 1999. The case dealing with the right to legal aid is

<sup>56</sup> *Vuolanne v. Finland*, (265/1987), 7 April 1989, Report of the HRC, (A/44/40), 1989

<sup>57</sup> *Torres v. Finland*, (291/1988), 2 April 1990, Report of the HRC Vol II, (A/45/40), 1990, para.7

<sup>58</sup> *Rencontre Africaine pour la Defense de Droits de l'Homme v. Zambia*, (71/92), 10th Annual Report of the African Commission, 1996 -1997, ACHPR/RPT/10th

<sup>59</sup> Article 9(5) of the ICCPR and Article 7 of the ACHPR

however different and distinct from the treason trial itself which commenced in 2002. Before the treason trial commenced, the government refused to provide legal assistance to nearly 122 detainees and accused persons, to which they were entitled under the Namibian Constitution. Legal Assistance Centre (LAC) was aided by AHRAJ to press for the right of the Caprivi accused persons to legal aid, in a case decided later by the Supreme Court.

This analysis is concerned only with the legal aid aspects of the Caprivi trial saga, which is ongoing. Caprivi uprising: Briefly, the facts<sup>60</sup> are that on 2 August 1999, members of a secessionist group, the Caprivi Liberation Army (CLA), launched an armed attack on the police headquarters, the local offices of the Namibian Broadcasting Corporation, an army base and an immigration post in the regional capital of Katima Mulilo in the Caprivi region of north eastern Namibia. According to official sources, 11 people were killed, at least six of whom were members of the security forces. President Samuel Nujoma declared a State of Emergency on the evening of the same day. A curfew was imposed in Katima Mulilo and Namibia's borders with Angola, Zambia and Botswana were closed. Under a state of emergency, the Constitution permits detention without trial, although the names of detainees must be published in the Government's gazette within 14 days, and their cases must be reviewed within 1 month by an advisory board appointed by the President. Most of the detained were held incommunicado for 2 weeks, which the Constitution allows during states of emergency, before the Government provided public notice of the detentions. All of the detainees were later arraigned on treason charges but were denied bail, and 126 remained in detention until the end of 1999.

After the attacks were repulsed, over 300 people were detained on suspicion of participating in the attack, or sympathizing with the secessionists or assisting them to plan or launch the attacks. According to Amnesty International<sup>61</sup> and Legal Assistance Centre<sup>62</sup>, most of the detainees were tortured at the time of their arrest and during interrogation. The Prime Minister at the time, stated that "because of provocation by the separatists, some unfortunate excesses had resulted in the effort [of] our security forces to zealously protect their motherland."<sup>63</sup> In October two defendants, filed new bail applications based on poor health. The government approved the applications, but in December ruled against granting bail. During the year, three defendants in the case died in custody, reportedly of natural causes. By end of 2002 eight defendants had died in detention.

<sup>60</sup> The information regarding the uprising and the chronology of events is based on information submitted by the Legal Assistance Centre to AHRAJ and independent secondary sources primarily Amnesty International report of 2002 highlighting the Caprivi trial and several independent media reports.

<sup>61</sup> Amnesty International, 'Namibia justice delayed in justice denied; The Caprivi treason trial' 4 August 2003 AI Index 42/001/2003

<sup>62</sup> See [www.lac.org](http://www.lac.org)

<sup>63</sup> "Prime Minister avoids condemning Caprivi abuses", Pan-African News Agency (PANA), 9 August 1999

## Denial of legal assistance:

Of those arrested in following the uprising, approximately 122 were still in custody in 2004 awaiting the resumption of their trial on charges of high treason, murder and other offences in connection with the uprising. By 2006, a majority have been in custody for close to 6 years and face long prison sentences if convicted, but not the death penalty, which is abolished. Although most could not afford legal representation, legal aid was initially refused by the state on the grounds of insufficiency of funds to provide legal assistance to the defendants.

In November 2001, with the assistance of the Legal Assistance Centre, the defendants challenged the constitutionality of the state's refusal to provide legal aid. On 14 December 2001, three High Court judges ruled unanimously that the Director of Legal Aid should provide legal aid to the defendants to enforce their constitutional right to a fair trial. The Namibian government subsequently lodged an appeal with the Supreme Court against the High Court ruling, arguing that it did not have the resources to provide legal aid to the defendants and denying that the constitutional rights to a fair trial and to legal representation include a guarantee that legal aid be provided by the state. On 7 June 2002, the government lost its appeal. The Supreme Court ordered the government to provide legal aid to the defendants.<sup>64</sup> Since June 2002 the trial has been adjourned several times, partly to enable the appointment and preparation of the state-funded defence lawyers.<sup>65</sup>

In June 2002, the Ministry of Justice appointed lawyers from the Legal Aid Directorate to represent the defendants. This legal aid is restricted to the defence of the treason and related charges. The legal aid director has insisted legal aid will not be available to the detainees for other purposes for instance to challenge the jurisdiction of the trial court.

## Right to legal assistance before and pending criminal trial

An important safeguard against ill treatment and forced, involuntary confessions is the provision of effective legal assistance to anyone being detained by the police. Individuals who are detained in police or prison custody before or pending trial and without any access to legal assistance are vulnerable to torture and other mistreatment. In addition, during any interrogation in detention, many suspects who do not have legal representation present are not aware of their rights, or even if aware, may be unable to exercise those rights. Individuals

<sup>64</sup> Government of the Republic of Namibia and Others v. Mwilima and others 2002 NR 235 (SC)

<sup>65</sup> Narrative report of the LAC, 2004. Copies and citation of the main legal suit and the appeal were not available. However, see also The *Namibian* newspaper website, [www.namibian.com.na](http://www.namibian.com.na) Namibian Press Agency, [www.grnnet.gov.na](http://www.grnnet.gov.na), and IRIN Africa [www.irinnews.org](http://www.irinnews.org) on the coverage of the legal aid case. Amnesty International Report 2002 also highlights the legal aid case.

who cannot afford legal representation in such circumstances, when there is no provision for legal aid, tend to be even more vulnerable. The denial of legal assistance to individuals in detention not only aggravates their exposure to abuse in the hands of 'overzealous' officials, but also affects their right to a fair trial in subsequent proceedings. In general, the denial of legal assistance before and during interrogation, as well as for the duration of trial, is inconsistent with international standards, including Articles 7 and 14 of the ICCPR, which establish the right of detained people to have access to a lawyer during pre-trial detention as well as at trial.

International legal standards require that everyone arrested or detained and everyone facing a criminal charge has the right to prompt assistance of counsel.<sup>66</sup> The HRC has stated that all persons arrested must have immediate access to counsel and has recognized that prompt and regular access to a lawyer is an important safeguard against torture, ill treatment, coerced confessions and other violations<sup>67</sup>.

Article 7 of the ACHPR does not include the right to a lawyer or to legal aid, but the ACmHPR has stated in its resolution on fair trial that a defendant's right to access to a lawyer may be restricted or suspended only in exceptional circumstances, such as a state of emergency, when it is considered indispensable by a judicial or other authority in order to maintain security and good order.

In this case, the following elements of the right to legal assistance were at issue: First, that Legal aid should always be provided in complex cases and where penalty is extreme, otherwise substantial injustice may result. Second, that legal aid should include access to counsel during questioning in detention or police custody. Third, that the legal aid lawyer must be competent.

Namibia ratified the ICCPR on 28 November 1994 and it entered into force 28 February 1995. Concurrently, Namibia ratified both its First and Second Optional Protocols.

### **Legal aid in Namibia:**

As with the other cases, the Namibia's Constitution adopted on 9 February 1990 has an entrenched Bill of Rights and creates a body of law and form of constitutional practice that is said to be human rights oriented, concerned less with legality and legislative intent and more with the moral and compelling aspect of the Bill of Rights. The framing is deliberate and is meant to mark off the legal system of Namibia when it was a mandate governed by apartheid, racist South Africa from the independent, self determining Namibia of the 1990s.

<sup>66</sup> The UN Basic Principles on the Role of Lawyers (Principle 7); Body of Principles (Principles 15 & 18).

<sup>67</sup> HRC General Comment 20 paragraph 11

Article 12 of the Namibian Constitution provides for the right to fair trial and is framed almost in the same wording and styling as Article 14 of the ICCPR. Moreover, the constitution explicitly prohibits interference with judicial officers. Article 78 (3) of the Constitution provides:

*“No member of the Cabinet or the Legislature or any other person shall interfere with Judges or judicial officers in the exercise of their judicial functions, and all organs of the State shall accord such assistance as the Courts may require to protect their independence, dignity and effectiveness, subject to the terms of this Constitution or any other law.”*

This protection is reinforced by detailed legislation. Courts and tribunals enforce enabling statutes and regulations together with rules of common law so as to give practical meaning to the rights guaranteed under article 12. The statutes are the *High Court Act*, 1990, the *Supreme Court Act*, 1990, and the *Magistrates’ Court Act*, 1944,

Any person who alleges that his or her human rights have been violated or are likely to be violated may seek redress in the High Court. If he or she is dissatisfied with the decision or judgement of the High Court, he or she may appeal to the Supreme Court. As though to reemphasise that the main object of the Bill of Rights is to ensure that the rights and freedoms guaranteed by the Constitution are not trampled upon with impunity, the constitution allows persons alleging human rights violations to seek redress in the courts of law or in the quasi judicial office of the Ombudsman. The Ombudsman is empowered to investigate allegations of human rights violations *mero motu* or after receiving a complaint from an individual

The inclusion in article 24 (3) of the Constitution of a list of rights and freedoms which cannot be suspended or derogated from in any circumstances or for any reason, not even during the state of emergency, for instance, detention without trial and without access to a legal practitioner, is also significant

Finally, in Namibia, international treaties and agreements to which Namibia is a party, are self executing under the Constitution and provide a legal basis for enforcing additional rights. Article 144 of the Namibian Constitution provides that:

*“Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding on Namibia under this Constitution shall form part of the law of Namibia.” As framed, article 144 opens up to international human rights standards, although parliament may negatively affect the full implementation of the these standards at the domestic level since ordinary courts are not permitted to derogate from valid legislation affecting them.*

The *Legal Aid Act*<sup>68</sup> establishes Namibia's present state funded legal aid scheme. Legal aid is available on the basis of individual means test to both criminal and civil cases, and to complaints to the ombudsman. Under the Act, the Director of Legal Aid is to be guided by the interest of justice, the means of the applicant, and the relevant provisions of the Namibian Constitution when determining the provision of legal aid in any given case.

The Director, in exercise of his statutory powers, refused to provide legal aid to the applicants citing the excessive costs of doing so, implying that the legal aid scheme was not designed for huge cases, insinuating the right to legal aid was also not meant to be recognised in extreme situations. This decision bears on whether the detainees were unfairly denied legal aid to which they were entitled and had legitimate expectation of, considering the three part statutory test, to wit, (i) the means of the applicant, (ii) the interest of justice and (iii) the relevant provisions of the Namibian Constitution.

First, their indigence was not denied nor was it at issue. If indigence of the accused was not denied, then the one part of the statutory test is met. Consequently, the Director was entitled to refuse legal aid only for any or both of the other two remaining tests.

A second test deals with the 'interests of justice.' This term is not defined in the law, but it has become a term of art suggesting that in the determination of criminal charges, as well as rights and obligations in a suit at law, the end result is that achievement of justice. There is a compelling public or state interest that the litigation system serves the ends of justice. Since Namibian law is silent on what is meant in this context by the phrase 'interest of justice' article 144 assists us to consider the meaning given to that term in similar contexts under international law. Article 14 (3) (d) of ICCPR provides that an accused defendant is 'entitled to have legal assistance assigned to him in any case where the interests of justice so require, and without payment by him in any case if he does not have sufficient means to pay for it.'" In elaborating the meaning of the interests of justice, the HRC looks at the integrity of the trial, severity of the charge and complexity of the case.<sup>69</sup> The HRC has concluded "it is axiomatic that legal assistance be available at all stages of the proceedings in capital cases."<sup>70</sup>

It could be reasoned that in this, the biggest criminal case in Namibia's history, where there are many accused persons facing charges of the most serious

<sup>68</sup> Act No. 29 of 1990 Republic of Namibia

<sup>69</sup> O.F versus Norway Communication 158 of 1993 (26 October 1984) See also Reid versus Jamaica, 250 of 1997 (20 July 1990)

<sup>70</sup> Clarence Marshall versus Jamaica Communication 730/1996 (3 November 1998) where the Committee found a violation of article 14 (2) (d) when the court commenced and proceeded through a whole day of preliminary hearing without informing the author of his right to legal representation. Report of the HRC Vol.II, GAOR, 54th Session, Suppl. No.40 pp228 – 237

crime, treason, where the penalty is lengthy incarceration and where they have already been detained longer than required under the Constitution before being brought to trial, all the elements of the interest of justice are triggered. A third test deals with giving effect to constitutional provisions. In this case, the provisions are examined in two contexts. First, the Constitution imposes an obligation to provide legal aid. A clear and express constitutional obligation exists to ensure that Namibians have legal aid, and it is backed up by an implied right to legal aid under international law applicable pursuant to article 144. That it is a right and not a licence suggests that when in doubt, the director ought to err on the side of the accused and provide legal aid. Secondly, other constitutional guarantees are at risk as a result of the director's refusal to give legal aid. To start with, the detainees were held for longer than the rules allow, and had no access to legal advice and representation during interrogation. Many of them were tortured. Moreover, a majority are charged only on the basis of association with known CLA members, raising real doubt as to their actual complicity in the charges. All of the 122 defendants were charged under the "common purpose" or "joint criminal enterprise" doctrine with 275 counts of criminal conduct including high treason, murder, sedition, public violence, theft, possession of weapons and malicious damage to property.

The common purpose doctrine is useful in indicting international war criminals without the need to establish individual culpability say of the commanders or inciters or authors of the crime. In Namibia, as with the rest of Commonwealth Africa, it has its origins in English law but was used introduced via penal codes to quell colonial era uprisings through political trials. The doctrine of "common purpose" essentially relieves the prosecution of having to prove beyond a reasonable doubt that each participant committed conduct, which contributed causally to the ultimate unlawful consequence. The conduct of a participant who actually causes the consequence or offence is imputed or attributed to the other "participants". In doing so, the "common purpose" doctrine shifts the burden of proof from the prosecution to the defendants and undermines their right to be presumed innocent. However, in accordance with the standard principle of the presumption of innocence, the rules of evidence and conduct of a trial must ensure that the prosecution bears the burden of proof throughout a trial.

Finally, denial of legal assistance resulting in unrepresented trial would most likely affect the detainees right to equality of arms between the state prosecution and the defence. The government would be represented by the Attorney General or an experienced representative, who in all probability given the nature of the charges, would bring to bear the might of the state on the case.

On the basis of the foregoing, consideration of the constitution and its provisions made a compelling case for grant of legal aid, and also satisfied the third test. The director's refusal to grant legal aid to the detainees is administrative and operational, not legal. Nowhere does the Constitution tie the provision of legal aid to the availability of funds. Under the legal aid statute, the high cost or



administrative difficulty arising from providing legal aid is not a ground for its denial or withdrawal. The HRC has ruled out cost as a defence for failure to grant legal assistance where the interests of justice demand, although it has stated that the state is at liberty to assign its own counsel, rather than meets the cost of the defendant's counsel of choice.<sup>71</sup> But the counsel assigned by the state must be competent and well remunerated nonetheless.<sup>72</sup>

From all the foregoing, the Director's failure to grant legal assistance has no basis either under Namibian law or in international law, and is therefore a violation of both.

As for remedies, it must be noted that this denial is likely to imperil the defendants' rights to a fair trial. Under the rules of common law, now recognised in comparative international human rights law, a judge had power to order the appointment of a lawyer in certain circumstances in the interest of justice in order to ensure a fair trial.<sup>73</sup> An amendment to the Legal Aid Act of Namibia in 2000, at the time when the refusal to grant legal aid started, removed the independent power of the court to order provision of legal aid.<sup>74</sup> Consequently, only the legal aid director can order legal aid. It is not clear whether his decision refusing legal aid could be appealed, and whether judicial review remedies were available, which should be the case, if the decision was in bad faith (*mala fides*), beyond the scope of the law (*ultra vires*) or fatal on other grounds.

Namibia has ratified the first Optional Protocol to ICCPR allowing the HRC to be seized of individual complaints. Two communications filed against Namibia found the country in violation of the ICCPR. In *Diergaardt et al. v. Namibia*,<sup>75</sup> decided on 25 July 2000, the authors claimed restitution of community property and official recognition of their language in legal proceedings. The HRC recommended with 6 dissenting views, that the 'State party is under the obligation to provide the authors and the other members of their community an effective remedy by allowing its officials to respond in other languages than the official one in a non-discriminatory manner.' In the second communication, *Müller and Engelhard v. Namibia*<sup>76</sup> decided 26 March 2002 regarding a husband who wanted to assume his wife's surname but was encumbered by Namibia's *Aliens Act* the state party was asked to remove the discrimination. Compliance with the views of the HRC followed political protocols resulting in changes affecting the authors personally, but not in any structural change in the law or practice.

<sup>71</sup> George Osbourne versus Jamaica Communication no. 759/1997 (15 March 2000) Report of the HRC, Vol. II, GAOR, 55th Session Suppl. No. 40

<sup>72</sup> Ibid.

<sup>73</sup> See Canadian case *R versus Rowbotham* (1988) 41 C.C.C. where Ontario Court of Appeal ordered a drug trafficking defendant be provided a state funded legal aid lawyer. The case developed the initial means test, requiring the defendant to show that on a balance of probabilities, the defendant was unable to hire a lawyer, and second that the proceedings were both serious and complex.

<sup>74</sup> Legal Aid Amendment Act No. 17 of 2000

<sup>75</sup> Case No. 760/1997

<sup>76</sup> Case No. 919/2000

## Conclusion:

As the result of the delay in providing the detainees with legal aid, the right to fair trial of the detainees may have been compromised in several ways, including:

- a) charges based on flawed police investigations
- b) charges based on statements obtained following interrogations in police detention without benefit of legal representation and in an atmosphere where evidence of torture exists
- c) charges based on perceived association to or sympathy with an organisation proscribed by the state where no evidence of individual complicity exists
- d) lengthy delay in bringing detainees to trial as a result of the wrangles over provision of legal assistance
- e) failure to provide assistance in time to prepare effective defence
- f) defence lawyers initially assigned were inexperienced although the charges facing the detainees are extensive and complex, there are qualitative factors to legal aid.

While the right to legal assistance of the detainees has been respected following the decision of the Supreme Court, the initial wrangles regarding its actual provision have compromised the ability of the defence to put up an effective defence. The common cause charge increases the likelihood that the results will occasion substantial injustice to the accused persons. Given the gravity of the Caprivi situation, the nature of the charges, the number of accused persons, the operational and other complexities of sustaining the criminal trial process and Namibia's constitutional and international law obligations, Namibia had a great opportunity to showcase the process of law and its human rights culture in the country and in Africa.

The conclusion of the LAC website seems apposite: "Namibian laws have not been sufficiently revised to incorporate the commendable ideals of the Namibian Constitution or of the regional and international covenants ratified by Government and, as a result, the ideals fostered by the Constitution have not been translated into practical application by government officials and ministries. The majority of the Namibian population do not have access to the law in order to challenge unconstitutional practices and unequal treatment nor do they have sufficient knowledge or understanding of human rights."

Right to access to justice and right to fair trial inter-related: case of trial of civilian by military tribunal in Uganda

In AHRAJ cases 35 and 37, Human Rights Network (HURINET) Uganda requested a legal opinion on the trial of civilians before military tribunals.

The facts in these cases dealt with arrest, detention and torture of civilians in 2001 by security and military personnel of Uganda's Peoples Defence forces, UPDF and their subsequent trial in military courts of terrorism related charges under Uganda's *Anti Terrorism Act* of 2002.

All the individuals on behalf of whom HURINET Uganda applied for assistance were civilians and all were in detention under military authority in non-designated prisons. HURINET Uganda undertook to secure their legal representation at trial. The legal opinion was canvassed on the questions (a) whether a military tribunal set up under *Uganda People's Defence Forces Act*, was competent to try civilians and if not (b) what was the legal status of the proceedings and any subsequent conviction. At the end of 2003, the prosecution indicated it would not press the charges, leaving the former detainees at liberty to pursue any remedy for their detention and torture by military and security agents. The questions regarding torture and compensation therefore are dealt in a different section of the casebook. The analysis immediately following relates to the charges and prosecution before military tribunal and whether these were a nullity and what remedies, if any, the former detainees could pursue.

These questions are canvassed on the basis of the right to access to justice and the rights to fair trial before an independent and impartial tribunal. Based on HURINET's reports on the cases submitted to AHRAJ, the following were noted:

- a. The UPDF law permits the detention and trial of civilians under military tribunal in special circumstances, such as for crimes related to weapons or committed in association with military officers. Military tribunals may also try former military officers who have become civilians.
- b. The Anti terrorism law does not sanction the trial of civilians by military tribunal.
- c. The UPDF do not have an express role under the Anti terrorism law.
- d. The 1995 Constitution of Uganda guarantees the right to fair trial and the right to access to courts including by means of a constitutional complaint to vindicate the rights guaranteed. The Constitutional court has attempted to bring military tribunals under the jurisdiction of the right Court through a 2003 decision. The government does not allow appeals from military tribunal to lie with the High Court.
- e) Civilian oversight over the UPDF is minimal. Under the Constitution, special parliamentary seats are reserved for the UPDF.

A starting assumption is made that civilians ought to be tried for all crimes in ordinary courts, in open and public proceedings, save where there is compelling justification recognised by international law. The necessary guarantees for the right to fair trial have been elaborated at length in article 10 of the UDHR, article 14 of the ICCPR and article 7 of the ACHPR. They include the right to a lawyer, to prepare an effective defence, to confront evidence, to presumption of innocence, to adversarial process, to equality of arms and to an impartial tribunal. International law does not rule out the criminal trial of civilians before military or special tribunals, even though it discourages it. However, the rights to access to justice and to fair trial continue to apply and remain relevant in all cases where civilians will be tried before military tribunal.<sup>77</sup>

The right to access to justice is broader than the right to fair trial. While the latter is at the heart of the necessity of a criminal justice process, the right to access to justice underpins the legal protection of all human rights but it is also has directive value for the proper administration of justice. The right to access to justice upholds a series of individual rights such as equality before the courts and tribunals and the right to a fair and public hearing by a competent, independent and impartial tribunal established by law.

It must be said that the right of access to courts must be non discriminatory, and that men and women must have equal access thereto and that this equality might require the granting of legal aid for the purposes of securing the effectiveness of this right. (cf. case-law under art. 14(1) of the International Covenant and art. 6(1) of the European Convention as explained in Chapter 6).

Article 10 of the UDHR states that “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” Articles 7(1) and 26 of the ACHPR make similar provisions.

Article 14 read with article 26 of the ICCPR, mean that the right to access to justice applies not only to procedures for the determination of criminal charges against individuals but also to procedures to determine their rights and obligations in a suit at law. Its essential elements are equality before the courts, equal access to courts, fair and public hearings, access to effective remedy for any violation and the competence, impartiality and independence of courts, established by law and guaranteed in practice

The right to access to justice is at the heart of the principle of judicial independence under the familiar exhortation that justice must be not only done, but be seen to be done. Public administration of justice has developed solely to guarantee that its independence and impartiality can be thereby

<sup>77</sup> See Human Rights Committee General Comment No.13 para 4.

strengthened. In this regard, forums meant to adjudicate between competing rights and interests, and which are at the same time closed, secret or exclusive, that operate on hidden rules and procedures, by surprise and ambush, that are mere extensions of active partisan political ideology or theology, or that are subordinate to the interests of one party, whether or not hostile to the other, are not tribunals within the requirement of international standards.

The partiality of the judge must be objective and established by judicial appointment, promotion, discipline and removal criteria written in the law.

The concerns about the impartiality of military tribunals in Uganda arise in the context of these principles.

First, in the legislation establishing military tribunals, these tribunals are to operate on matters under the *UPDF Act*. The jurisdiction of military tribunals over civilians arise in connection to military officers and the involvement together with citizens in crime, or to crimes involving weapons within the context of the armed forces. In Uganda, civilians have a right to bear arms responsibly, under licence granted outside the scope of the *UPDF Act*. Still, the law governing the use of weapons in crimes by civilians, and by weapons meaning is the Uganda *Penal Code*. It would be illogical and contrary to the right to a fair trial to bring the operation of the *UPDF Act* against civilians for crimes involving any class of weapons. The jurisdiction of tribunals established under the martial law to try civilians of charges related to weapons.

In law, the jurisdiction of the military tribunal over civilians under the *UPDF Act* was *ultra vires*. Moreover, the fact that the civilians were charged *ab initio* with offences under the *Anti terrorism Act*- in which the UPDF has no overt role- admits as much.

Secondly, the *UPDF Act* affects members of the UPDF. The law is framed with the intention of regulating the military, its organisation, regulations and norms of behaviour. It does not exist to regulate general crime in the country. In the extreme cases of security operations in Kampala in 2001 when the UPDF was deployed to assist ordinary police fight crime, the nature of the operation was not changed by that fact from a policing one against civilian crime, to a martial one, otherwise the Ugandan law would have required first, the official declaration of a state of emergency allowing the imposition of martial law. No such declaration is on the record. Under Ugandan law, the UPDF assumed no extra powers over civilians even though it assisted with a policing function. Such powers could not, under the 1995 Constitution or the *UPDF Act*, have been assumed retrospectively by detaining civilians arrested in a crime swoop in the city under military authority and indicting them before military tribunals.

Third, the UPDF law provides no access to justice and nowhere explains how this constitutional and international law right is to be respected and ensured with respect to any civilian tried by military tribunal.

Thus from this analysis, the legal basis of the military jurisdiction is a major part of the problem. The military tribunals themselves are another.

First, the tribunals are in every sense military. Charges are brought by a military authority, prosecuted by a military authority, judged by military officers, and sentencing is done by military officers. The presiding officer who acts as a judge is a military officer as is the prosecution. A military presiding officer is not impartial from the state and its executive branch. In the scheme of things, he or she is a subordinate under a rigid chain of command that has for its head, the Commander in Chief who is also the chief executive.

Second, proceedings are inquisitorial, and civilian lawyer defending an accused person must first be authorised by the military. The *Evidence Act* does not apply in the proceedings and the defendant right to confront adverse evidence is subject to constraints set by the presiding officer. Evidence obtained through torture is admissible. Proceedings are not open to the public and, in fact, are held on confined military grounds.

Third, in practice, the decisions of military tribunals in Uganda have not been appealable to the High Court.

Based on these facts, the conclusion is that the rights to fair trial and to an impartial and independent tribunal are curtailed when civilians are indicted before these tribunals. It bears noting that the Ugandan government begun trying civilians in military tribunal after coming under extreme pressure from national and international human rights bodies for its general conduct of the 2001 security operations. The HRC has recognised that the procedures in special courts often offer fewer guarantees of fair trial than the ordinary courts. It has also stated “quite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice.”<sup>78</sup>

Reviewing the law granting jurisdiction to military tribunals and the manner of exercising this special jurisdiction suggests that more vigilance was required on the part of the government to ensure the rights of civilians to the right to fair trial and to impartial tribunal would be upheld. If the government could not guarantee that vigilance, the trial of civilians before these tribunals would be a violation of its international obligations. Moreover, if the government deliberately sought to exploit the lower standards of protection in military courts,

<sup>78</sup> Human Rights Committee General Comment No. 13 para 14 *ibid*.

while denying citizens their constitutional rights and access to the ordinary judicial system that could vindicate these rights, then the violations would be serious and gross.

The right to fair trial was endangered in these specific cases in the following ways:

- the arrests were unlawful
- the detention in unofficial 'safe houses' was illegal
- the detainees were held in a context where torture was rife,
- the detention period exceeded the 48 hour rule
- denial of access to a lawyer during detention and interrogation and to family was unlawful
- there was delay in bringing any of the detainees to trial
- detainees were never afforded an opportunity to prepare their defence against the charges; they were not informed of the charges until they were arraigned before the military tribunals; they continued to be detained in safe houses even after being charged and thus were denied adequate access to lawyers; their right to bail was denied and lacking access to the courts, their right of habeas corpus was denied.

In *Avocats Sans Frontières (on behalf of Gaëtan Bwampamye) v. Burundi* the ACmHPR held that "the right to fair trial involves fulfilment of certain objective criteria, including the right to equal treatment, the right to defence by a lawyer, especially where this is called for by the interests of justice, as well as the obligation on the part of courts and tribunals to conform to international standards in order to guarantee a fair trial to all."<sup>79</sup> The ACmHPR added that "*the right to equal treatment by a jurisdiction*, especially in criminal matters, means, in the first place, that both the defence and the public prosecutor shall have equal opportunity to prepare and present their pleas and indictment during the trial."<sup>80</sup> Both parties must be able to "argue their cases ... on an equal footing." Secondly, "it entails the equal treatment of all accused persons by jurisdictions charged with trying them." In this case, when the Court of Appeal in Burundi refused to allow the accused person an adjournment of the proceedings in the absence of his lawyer, although it had earlier accepted an adjournment plea by the prosecutor, the ACmHPR found that it had "violated the right to equal treatment, one of the fundamental principles of a right to a fair trial."<sup>81</sup>

Regarding the rights to access to courts, in the Ugandan case, the right kicked in as soon as the detainees were unlawfully arrested and detained illegally in unofficial detention centres. Under the 1995 Constitution, they were entitled

<sup>79</sup> ACHPR, *Avocats Sans Frontières (on behalf of Gaëtan Bwampamye) v. Burundi*, Communication No. 231/99, decision adopted during the 28th Ordinary session, 23 October – 6 November 2000, paras. 26-27 of the text of the decision downloaded from <http://www1.umn.edu/humanrts/africa/comcases/231-99.html>

<sup>80</sup> Ibid para 27

<sup>81</sup> *Avocats Sans Frontières (on behalf of Gaëtan Bwampamye) v. Burundi* ibid para 29



to be informed of the reason for their arrest and the charges had to be brought against them within the 48 hours. Instead, the military did not charge them and denied them the right to file *habeas corpus* in the High Court for an order to set them free. Later, the authorities arraigned the accused before a military tribunal to answer charges of terrorism, where they were, again, denied the right to file habeas corpus proceedings in the High Court. The decision of the tribunal denying them the right to file proceedings in the High Court was delivered orally, according to the HURINET case report, and was itself announced to be unappealable. All later proceedings were conducted without allowing the detainees access to the High Court.

The right of access to court provides the only means by which judicial remedies can be obtained. Article 2 and 14 of the ICCPR impose conditions on state parties, first, to establish competent courts, and secondly to recognise the right of access to the courts. On the face of it, the military tribunal in Uganda does not meet the conditions required by article 14. First, though it is established by law, the tribunal exercises a jurisdiction not contemplated by that law. A tribunal is only legitimate as a matter of law if its competence is restricted to matters set down by law. Second, the tribunal does not use established legal procedures. The law of evidence does not bind it. Instead, it is guided by military norms, and staffed by military personnel who need not be trained in law. Thirdly, the tribunal ousts the jurisdiction of the courts and compromises their competence.

By using tribunals to circumvent the judiciary, Uganda fails to satisfy article 14 of the ICCPR. In the jurisprudence of the European court regarding right to access to court in article 6 of the ECHR, the court has refused to recognise a tribunal as judicial body if it has no power to control the decisions that it has a remit over. Hence, in cases where administrative authorities have remit over administrative offences that amount to a “criminal charge” under article 6(1) of the ECHR – such as speeding on motorways – if the decisions taken by such administrative authorities do not satisfy the requirements of article 6(1), they “must be subject to subsequent control by a ‘judicial body that has full jurisdiction’”<sup>82</sup> This means that the judicial body must have “the power to quash in all respects, on **questions of law and fact**”, the decision of the lower body.<sup>83</sup> If in these circumstances, a Constitutional Court has power to examine only points of law on appeal, the requirements of article 6(1) are not met. Similarly, if the Administrative Court has no power to quash the decision “on questions of fact and law”, it cannot, in the view of the European Court, be considered as a “tribunal” for the purposes of article 6(1).<sup>84</sup>

<sup>82</sup> Eur. Court HR, Case of Palaoro v. Austria, judgment of 23 October 1995, Series A, No. 329-B, p. 40, para. 41.

<sup>83</sup> Ibid. at p.41

<sup>84</sup> Ibid. loc. cit.

The independence of the judiciary requires it to have exclusive jurisdiction over all issues of a judicial nature. This also means that a non-judicial authority may not change judicial court decisions to the detriment of one of the parties, except for issues relating to mitigation or commutation of sentences and pardons.

When military tribunals are used to oust or circumvent ordinary courts, a violation of Principle 5 of the Basic Principles of the Independence of the Judiciary result.<sup>85</sup>

In *Media Rights Agenda on behalf of (Niran Malaolu) versus Nigeria* the ACmHPR dealt with the trial of a journalist by military tribunal under the Treason and Other Offences (Special Tribunal) Decree No. 1 of 1986.<sup>86</sup> The complainant was detained for 49 days and denied access to his lawyer. He was not permitted representation by a lawyer of his choice, but was assigned a military lawyer by the tribunal. He was not allowed any appeal to the courts, whose jurisdiction was ousted by the decree. The ACmHPR concluded that Nigeria had violated the right to fair hearing under article 7 of the ACHPR. It concluded that the selection of serving military officers, with little or no knowledge of law, as members of the tribunal contravened Principle 10 of the United Nations Basic Principles on the Independence of Judges and that the arraignment, trial and conviction of a civilian, by a special military tribunal, presided over by serving military officers, who are still subject to military commands was prejudicial to the basic principles of fair hearing guaranteed by Article 7 of the African Charter. Finally, the ACmHPR held that setting up a military tribunal to try treason and other related offences impinged on the independence of the judiciary, since these offences are recognised in Nigeria as falling within the jurisdiction of regular courts.

The ACmHPR also found a violation of Article 7(1)(d) of the Charter where a special tribunal was set up in Nigeria by the *Robbery and Firearms (Special Provisions) Act* whose judges were mainly people without legal expertise who belonged to the executive branch of government, the same branch that passed the Robbery and Firearms Act.<sup>87</sup> In a similar case, the ACmHPR found that a trial by a special tribunal established by the *Civil Disturbances (Special Tribunal) Act* violated the Charter because the tribunal consisted of one judge and four

<sup>85</sup> The Principle states: "Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals."

<sup>86</sup> *Media Rights Agenda versus Nigeria*, 224/98 decided at 28th Ordinary session 2000. See also *Amnesty International versus Sudan*, Case 48/90

<sup>87</sup> *Constitutional Rights Project (in respect of Wahab Akamu, G.Adega and others) v. Nigeria*, Communication 60/91. Decision found in 'Compilation of Decisions of the African Commission for Human and Peoples' Rights', Institute for Human Rights and Development, Banjul (2001)

members of the armed forces. The ACmHPR noted that “the tribunal is composed of persons belonging largely to the executive branch of government, the same branch that passed the *Civil Disturbances Act*.” It concluded that “[r]egardless of the character of the individual members of such tribunals, its composition alone creates the appearance, if not actual lack of impartiality. It thus violates Article 7(1)(d).”<sup>88</sup>

In the Ugandan case, HURINET’s narrative suggests that the tribunal were also appointed to serve a political purpose. If so, it means that the tribunals in these cases were not free to decide matters before them impartially, on the basis of the facts and in accordance with the law, without interference, pressures or improper influence from the government or elsewhere. Also, the people appointed as arbiters were selected primarily on the basis of their subordination to the executive. Due to concerns of this nature, the ACmHPR has stated in a related context that it is immaterial whether the trial by military tribunal is authorised by law. “For a state to avail itself of this plea, it must show that such a law is consistent with its obligations under the Charter.”<sup>89</sup>

Uganda ratified ACHPR 10 May 1986. The detainees have therefore the right to move the ACmHPR for temporary measures to prevent further violations of their rights in terms of article 7 and 26 of the ACHPR.

### **Protection from torture and forced confessions; Access to justice in cases of torture in Uganda**

There two additional cases from Uganda on the use of torture, sponsored as AHRAJ Cases 35 and 37. In the first case, O. Embati was arrested by security officers in May 2001. He was detained incommunicado in a non designated detention centre under military authority referred to in Uganda as ‘safe house.’ Here he was tortured by state security agents. He was later released in August 2001 without any charge, ostensibly for medical purposes. Thereafter he was re-arrested and charged with terrorism in October 2001. However, the prosecution never started. As a result of the extensive injuries suffered during the torture, he was treated by the ACTV, a Ugandan NGO supported by AHRAJ and had to be castrated. With the support of Hurinet, he filed a complaint against the Attorney General with the Ugandan Human Rights Commission, a quasi judicial body. AHRAJ also supported an initiative to file proper judicial proceedings.

In the second case, the complainants were part of 432 people arrested in ‘operation Wembley,’ a July 2002 security swoop in Kampala city. They were also held incommunicado in safe houses where they were also tortured by

<sup>88</sup> The Constitutional Rights Project (in respect of Zamani Lakwot and six others) v. Nigeria, Communication 87/93, 8th Annual Activity Report of the African Commission on Human and Peoples’ Rights, 1994-1995, ACHPR/RPT/8th/Rev.1]

<sup>89</sup> Dawda Jawara versus Gambia supra

members of the Ugandan Peoples Defence Forces and unofficial paramilitary groups, before being charged with terrorism. According to the UHRC, the torture was extensive and nine individuals died as a result. Subsequently, the complainants were arraigned before martial courts and the proceedings were not concluded at the time of writing. A 1989 statute permits civilians acting with military personnel in the commission of crime to be tried by court martial.

These and other related cases during the same periods are widely reported by the Ugandan Human Rights Commission<sup>90</sup>, HURINET, ACTV, Human Rights Watch<sup>91</sup> and Ugandan independent press.

In these cases many of the interrogation techniques used by the security forces were described as torture by the Uganda Human Rights Commission and Human Rights Watch. The two cases supported under AHRAJ are seeking compensation for torture but additional complaints are also pending before the Ugandan Human Rights Commission which has a jurisdiction to award compensation. The following are among the violations that bedrock the complainant's case:

- a) they were arbitrarily arrested by security agents who lacked legal authority to arrest and detain civilians;
- b) they were held in arbitrary detention beyond the constitutional 48 hour police custody period at the expiry of which they should have been arraigned before a court of law or released, and denied their rights of habeas corpus;
- c) they were held in detention in unofficial detention centres;
- d) they were held incommunicado without access to legal assistance, medical aid or kin;
- e) they were extensively tortured by state security personnel;
- f) although charged, they were not prosecuted, and where prosecution was preferred, trial was held or to be held before military tribunal even though all the complainants were and are civilians; and,
- g) government officials have persistently denied the torture allegations but have also refused to authorize an independent investigation including by the human rights commission.

According to independent reports, which include medical examination certificates issued by ACTV and endorsed by the human rights bodies, these violations were carried out knowingly by military or security personnel in 2001 and 2002. Moreover, these are also illegal in Uganda, against the constitution and against Uganda's international obligations.

<sup>90</sup> UHRC, Annual Report, January 2001 to September 2002.

<sup>91</sup> Human Rights Watch, *Protectors or Pretenders?: Government Human Rights Commissions in Africa* Human Rights Watch: New York, 2001, chapter on Uganda, at <http://www.hrw.org/reports/2001/africa/uganda/uganda.html>.

Uganda's new Constitution of 1995 faced its first crisis in 2005 when no fewer than 85 miscellaneous amendments were proposed. Some affected the limitation of the president's term and were politically controversial while others affected the independence and effectiveness of the Uganda Human Rights Commission.

In its unaltered form, the 1995 Constitution is widely praised for its expanded and entrenched provisions in the Bill of Rights<sup>92</sup>, as well as for its autochthonous qualities.<sup>93</sup> Article 23 of the 1995 Constitution provides that "a person arrested, restricted or detained shall be kept in a place authorized by law" and arraigned under the 48 hour rule. Same article makes provision for information of kin and access to medical attention and to a lawyer. There is a right to compensation for unlawful arrest and detention.

Article 28 (1) of the 1995 Constitution provides that "In the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law.

Article 50 guarantees access to a constitutional court for enforcement of rights or to a human rights commission under article 48. This commission is empowered to review and to continue to review cases of persons in detention.

At statutory level, the Evidence Act and the Evidence (Statements to Police Officers) Rules protect against self-incrimination

Notwithstanding these provisions, the violations are rife. Specifically as regards torture, the Uganda Human Rights Commission, whose 2002 report was dismissed by the government, states that torture was the second highest violation of human rights, **"with deprivation of personal liberty - those arrested but not charged within 48 hours - topping the list."** (emphasis provided). The report states that torture appeared to be an indispensable part of the work of crack anti-crime units and some security agencies and that it was either part of training or a learned practice.<sup>94</sup> This analysis is concerned with the prohibition against torture, an absolute legal norm, and access to justice for torture victims as highlighted in the AHRAJ cases.

<sup>92</sup> Article 20 states rights are inalienable and fundamental.

<sup>93</sup> The Constitution is based on the concept of peoples' sovereignty and its text reflects popular opinion collated by an elected constitutional review commission and adopted by an elected constituent assembly in 1995.

<sup>94</sup> UHRC Annual Report, January 2001 to September 2002. See also Daily Monitor, 'Torture cases up, says UHRC', April 11, 2003

## Prohibition against Torture:

Because torture is an extreme abuse of human rights, its prohibition is universal and absolute. Indeed, there is an international legal ban on the infliction of torture. The prohibition against torture is today well established as a peremptory norm of customary international law, that is, as *jus cogens*. As a legal norm, its legal status is fundamental, non derogable and inderogable in any and all circumstances, whether in situations of war, armed conflict or states of emergency.<sup>95</sup> Crimes that are *jus cogens* are subject to universal jurisdiction, meaning that any state can exercise its jurisdiction, regardless of where the crime took place, the nationality of the perpetrator or the nationality of the victim.

Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, states that ‘torture’ means:

“(A)ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”

The definition is similar to that contained in the non-binding Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>96</sup>

Uganda ratified the ICCPR in 1995 whose article 7 prohibits torture. Uganda ratified the CAT in 1986 whose article 1 also prohibits torture. Uganda is also a State party to the ACHPR whose article 5 prohibits torture, inhuman or degrading treatment or punishment and all forms of degradation.

## Article 2 of CAT states that:

- “1. Each State Party shall take effective legislative, administrative, judicial or Other measures to prevent acts of Torture in any territory under its jurisdiction.

<sup>95</sup> Selmouni v. France (25803/94) [1999] ECHR 66 (28 July 1999), paras. 91

<sup>96</sup> Adopted by General Assembly resolution 3452 (XXX) of 9 December 1975, article 1

2. No exceptional circumstances whatsoever, whether a State of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.
3. An order from a superior officer or a public authority may not be invoked as a justification of torture.”

Article 2 first means that there can be no exceptional circumstances to permit torture. It is an area of strict liability once fault is properly established and apportioned. There is an obligation not to allow torturers to escape justice, not merely through some form of legal immunity, but also through failure to adequately investigate and prosecute. This article also means that once countries ratify, they have a duty to prohibit torture in their domestic law. In the case of Uganda, the prohibition starts with article 24 of the constitution.

In effect, article 2(3) of CAT exposes any state official who carries out torture to individual liability under the Nuremberg rule of personal culpability up and down the command chain. Under art 3(1) the obligation to legislate against torture should include in Uganda the criminalisation of torture and the enactment of penalties for perpetrators in their individual capacities without any shield of command. The obligation to prosecute perpetrators carries with it an obligation to investigate the torture complaint and it is reinforced by article 4 of CAT. Again, this was not done in Uganda. Without effective investigation, culpability of military officers is difficult to establish in the civil suits.

The distinct obligations to investigate and to prosecute must be seen in light of the rights of a complainant under article 13 to a ‘prompt and impartial’ investigation. Uganda made a declaration in 2001 under article 21 of the CAT that it would allow the Committee against Torture, which monitors compliance with the CAT, to consider complaints made against it by another state party to the treaty. However, Uganda has made no declaration under Article 22 of the CAT to allow the Committee Against Torture to consider complaints by individuals from Uganda. Nor has it ratified the new Optional Protocol to the CAT to allow monitoring and inspection visits to Uganda by the CAT’s Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Uganda’s 1995 Constitution prohibits torture in article 24: “No person shall be subjected to any form of torture, cruel, inhuman or degrading treatment or punishment.” However, this is purely a normative provision.

In Uganda’s dualist system, the Constitution is supreme and ratified treaties have domestic application only after enactment as local statute. Hence, neither the ICCPR, CAT nor the ACHPR are self-executing, nor do they constitute a direct source of rights or impose duties that Ugandan citizens can claim in local courts. However ratified treaties can be auxiliary materials for the



interpretation of the legislation permitting the constitutional court to invalidate offensive legislation in accordance with Uganda's binding international obligations.

As noted, since the prohibition on torture is *jus cogens*, any country can assume jurisdiction to try perpetrators of torture including Ugandan perpetrators, if the domestic, that is Ugandan, jurisdiction lacks the ability or wherewithal to try them.

### **Access to remedy:**

Implicit in the treatment of human rights as capable of legal enforcement, is the notion of adequate, timely, effective and non-discriminatory remedy for occurring violations. Article 8 of the UDHR declares that everyone has the right to an effective remedy for the violation of any of their rights. Article 2(3) of the ICCPR as well as articles 1, 7(1) and 26 of the ACHPR also recognise the right to remedy. It includes the right to access to national and international procedures, to a determination of appropriate remedy by competent authorities and to enforcement of the remedy.

The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law<sup>97</sup> adopted in April 2005 states:

“In accordance with domestic law and international law, and taking account of individual circumstances, victims of gross violations of international human rights law and serious violations of international humanitarian law should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation, as laid out in principles 19 to 23, which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non repetition.”<sup>98</sup>

The remedies for torture begin with recourse to court for compensation, declaration of right, assignment of culpability and monetary award that is exemplary. Recourse to legal proceedings requires that the right to be framed in a way that supports an express claim, rather than by implication from general prohibitions. It also requires that criminal investigations and prosecutions support civil claims for compensation. Under the CAT, victims of torture must have an enforceable right to compensation.

<sup>97</sup> UN Res. 2005/35 of 19 April 2005 downloaded from <http://www1.umn.edu/humnrts/instate/res2005-35.html>

<sup>98</sup> Principle no.18

Reparation for torture, which aims to compensate and remove the consequences of debasement, usually includes rehabilitation through counselling and social support. Since torture is widely accepted as brutalising, it leaves in addition to physical wounds that may need continuing medical treatment, considerable psychological trauma. Both ought to be catered for in the rehabilitation of the torture victim, and may be included in the court award against the state.

In Uganda, the main provider of rehabilitation to victims was a private NGO operating on donor funding. Incredibly, even the UHRC referred trauma cases to the ACTV, suggesting that there are no state facilities to assist torture victims.<sup>99</sup> Although the efforts of the ACTV are welcome, the provision of rehabilitation services by a private and voluntary NGO utilising its own resources is by no means a remedy as contemplated by international law. After all, the principal obligation holder is the state rather than private charity. The absence of recourse to rehabilitation must be seen as a systemic failure of state obligation and is part of the denial of access to a remedy.

The other major forms of reparation are restitution and compensation. Restitution shall be provided to re-establish the situation that existed prior to the violations of human rights.<sup>100</sup> Restitution requires, *inter alia*, restoration of liberty, family life, citizenship, return to one's place of residence, and restoration of employment or property.

According to the principles on remedies, compensation shall be provided for any economically assessable damage resulting from violations of human rights and humanitarian law, such as:

- (a) Physical or mental harm, including pain, suffering and emotional distress;
- (b) Lost opportunities including education and employment as well as any social benefits;
- (c) Material damages and loss of earnings, including loss of earning potential;
- (d) Harm to reputation or dignity (moral damage);
- (e) Costs required for legal or expert assistance as well as medical assistance.<sup>101</sup>

The Basic principles also require satisfaction for the violation. Before the HRC and the ACmHPR, satisfaction usually takes the form of a pledge of cessation, non-continuance and non-repetition. Principle 22 is more comprehensive regarding the essential elements of satisfaction. It should include:

<sup>99</sup> ACTV narrative report submitted to AHRAJ in 2003. The UHRC also confirmed in its annual report 2002 that it referred cases needing treatment to ACTV.

<sup>100</sup> Principle 19, *ibid*.

<sup>101</sup> Principle 20, *ibid*.

- “(a) Effective measures aimed at the cessation of continuing violations;
- (b) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim’s relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations;
- (c) The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities;
- (d) An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim;
- (e) Public apology, including acknowledgement of the facts and acceptance of responsibility;
- (f) Judicial and administrative sanctions against persons liable for the violations;
- (g) Commemorations and tributes to the victims;
- (h) Inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels.”

Finally, the basic principles make reference to basic measures to prevent recurrence.<sup>102</sup>

In the ACHPR regime, ‘remedy’ includes any legislative or administrative measure not necessarily judicial, and in fact judicial remedies are not prioritised at all. Under the ICCPR, the question of an effective remedy is interpreted closely with the question of access to justice for victims and the regime is very attentive to the nature of remedies available to the complainant, and in some cases, insist that these must be of a judicial nature. Whether or not judicial remedies are superior to those of an administrative nature is not the point here, since the intention in international law is not to delimit remedies but to ensure the victims access to justice and thus to all the remedies that are available within the domestic system.

In its initial report to CAT submitted 2004, seven year after accession, Uganda conceded that it had not criminalised torture in national law.<sup>103</sup> Nor did it have

<sup>102</sup> Principle 28 guidelines are:

- (i) Ensuring effective civilian control of military and security forces;
- (ii) Restricting the jurisdiction of military tribunals only to specifically military offences committed by members of the armed forces;
- (iii) Strengthening the independence of the judiciary;
- (iv) Protecting the legal profession and human rights defenders;
- (v) Improving, on a priority basis, human rights training to all sectors of society, in particular to military and security forces and to law enforcement officials.

<sup>103</sup> CAT/C/5/Add.32 30 June 2004. Report itself dated 19 May 2004.

any law defining what torture, cruel, inhuman or degrading treatment was. Here starts the defeat of legal recourse for victims. Essentially, without this criminalisation, perpetrators cannot be prosecuted under national law. Although the normative constitutional provision reflects the prohibition against torture under article 24, and its non derogable nature under article 44, by themselves, these provisions form only a part of the right to a remedy, containing one part allowing an individual to complain to the court seeking a remedy, but omitting a second and important element of criminalising the conduct and establishing a legal basis for the prosecution and punishment of offenders.

In the two AHRAJ cases, it was observed that proceedings against the state for compensation were filed before the Uganda Human Rights Commission tribunal. The right of complaint before the constitutional court, on the basis of the Bill of Rights is in article 50. The right is independent of the complaint procedure before the Human Rights Commission established by a different section. Parliament is required by article 50(4) to legislate modalities of enforcing the Bill of Rights and accessing the constitutional court on human rights questions. It is this legislation, giving effect to the right of complaint before the court, that determines access. According to the HURINET report, the complainants were poor and thus unable to sue before the constitutional court since legal aid is not available.<sup>104</sup> This issue is referred to later.

Proceedings in both cases were before the human rights Commission at the end of 2005. Since the Commission is accessed through its own administrative rules, it is a more widely used avenue of redressing rights, and has issued compensatory awards against the state on torture claims on more than one occasion. AHRAJ noted that there were other cases where the commission has ordered compensation, but the government has not yet paid.<sup>105</sup> AHRAJ also noted that in 2003, the cabinet in Uganda approved plans to abolish the human rights commission but backed down under pressure.<sup>106</sup>

The Uganda's Human Rights Commission is established by the 1995 Constitution (article 52) with a specialized human rights protection mandate. It is authorized inter alia to conduct investigations originated externally or suo moto, to review detention orders and to make release and compensatory orders (article 53(2)). The Commission has power to issue summonses for the appearance of any person or production of documents, and to question witnesses and suspects (article 53). Appeals on all questions from the Commission lie with the High Court (article 53(3)).

Where torture has resulted in the death of the victim, Ugandan statutory survivor rights permit his or her dependants to sue for damages and

<sup>104</sup> HURINET case narrative report, 2004.

<sup>105</sup> HURINET, *ibid.* fn 71

<sup>106</sup> See Daily Monitor, 'EU opposes plans to kill rights body', December 1, 2003.

compensation as a result of an act of torture committed.<sup>107</sup> This statutory provision gives effect to the obligation under article 14 of the CAT. The dependants' suit may also be lodged before the Commission for Human Rights.

In both cases, the proceedings before the Human Rights Commission were brought against the Attorney General of Uganda, sued in his official capacity on behalf of the state. Theoretically, a possibility exists to sue perpetrators of torture in their individual capacity since there is no defence based on directive orders. Certainly the possibility is lessened but not defeated by the absence of a domestic definition of torture and the personal criminality of perpetrators. Under international law, the principles were established by the Nuremberg trials in 1950 that first, "(a)ny person who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment" and second, "(t)he fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law."<sup>108</sup> In a suit at law within Uganda, the liability of the perpetrator to compensate the victim is therefore not defeated by the absence of criminal sanctions for the acts of torture. It would assist the suit at law if the liability of the perpetrator was first established by criminal process, with its higher proof threshold.

Such prosecution could be initiated through a private prosecution in terms of Uganda's Criminal Procedure Code. The country's *Penal Code* is the main law defining criminal acts and stipulating punishment. Uganda's legislation governing the police, the *Police Act*, prohibits torture in section 44 but leaves its definition and procedures of internal discipline to the Police Manual and Police Code of Conduct. In both cases, the legislation did not apply since the police neither arrested the victims nor detained or interrogated them in a police station.

It is also worth noting that a new law dealing with counter-terrorism forbids torture. The *Anti-terrorism Act 2002* provides for the prosecution of any authorized officer who engages in torture and provides for a maximum custodial sentence of five years if convicted.<sup>109</sup> However, in both cases the victims were arrested, detained and tortured outside the operation of this law, and in fact, before its enactment. Military law is silent on torture but prohibits mistreatment of junior officers and 'scandalous behaviour' in public or to civilians.<sup>110</sup> In effect,

<sup>107</sup> Law Reform Miscellaneous Provisions Act (CAP 79) of Uganda

<sup>108</sup> Principle 1 and 2 of the Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal Adopted by the International Law Commission of the United Nations in 1950.

<sup>109</sup> Section 21

<sup>110</sup> UPDF Act (CAP 307) provides:

(a) Section 26 that "a person subject to military law who unlawfully strikes, draws, lifts up a weapon against or in any way ill treats any person in the army who by reason of rank or appointment is subordinate to him commits an offence and is liable on conviction to imprisonment for a term not exceeding five years";

this law applies to relations between members of the armed forces largely internally and in limited contact with civilians. In addition, it is a martial law establishing an internal system and procedure for the discipline of military cadres. It is therefore unsurprising that it makes no reference to the instigation of a complaint by a civilian against a military officer.

Moreover, these laws punish errant behaviour on the part of police and military officers, including establishing administrative and military norms and guidelines for their punishment, the possibility of civilians invoking the disciplinary processes are curtailed by the limited civilian oversight over the Ugandan police and the Ugandan Peoples' Defence Forces in general under the constitutionally established system of governance in that country. In 2003, the constitutional court ruled that the country's military courts are subordinate to the High Court, but the government did not respond to the decision, although it did not appeal it either.

Legislative loopholes such as failure to criminalise torture or to provide for universal jurisdiction in Uganda are sufficient reason to believe that courts do not have the necessary means to punish violators, even though they can award compensation in suits at law. The amount of compensation is based on judicial reasoning and depends on the circumstances of each case and the degree or gravity of the violation. It is not clear whether the Uganda human rights Commission uses judicial tests when determining the amount of compensation, and whether the compensation is purely monetary or also moral and exemplary against the state. It is also unclear whether this body has the power to enforce its own decisions independently as envisaged of such a forum by article 7 of the ICCPR and article 4 of the CAT. For instance, can the commission cite a state officer who fails to pay compensation as ordered for contempt? What recourse exists for a victim who has an award from the commission but has not obtained any honour for it from the government? According to the HURINET who instigated both cases before the Uganda human rights commission tribunal, the tribunal relies on the good will of the state regarding respect for its decisions.<sup>111</sup> It was noted that in some cases, it has taken years to honour an award for monetary compensation, while in more extreme cases, the award has been ignored. This information must be seen in the context of deliberate attempts by the state to reduce and limit the mandate of the commission through constitutional amendment in 2003. Under international law, compensation remedy is not effective when there is no

(b) Section 27 (2) covers scandalous conduct by officers. It provides that "a person in the army who behaves in a cruel, disgraceful, indecent or unnatural manner commits an offence and is liable on conviction to imprisonment for a term not exceeding seven years";

(c) In Schedule 14, code of conduct for the army, provides that "a member of the army shall not abuse, insult, shout at, beat or in any way annoy any member of the public" (sect.

2 (a); section 46 of the Act and Schedule 14 prohibit torture of civilians by the army.

<sup>111</sup> Ibid fn 71 and 72

guarantee whether or when it will be honoured. Based on article 7(1) of the ACHPR, the ACmHPR has also stated that:

*“(31) The rationale of the local remedies rule both in the Charter and other international instruments is to ensure that before proceedings are brought before an international body, the State concerned must have had the opportunity to remedy the matters through its own local system. This prevents the Commission from acting as a court of first instance rather than a body of last resort. Three major criteria could be deduced from the practice of the Commission in determining this rule, namely: the remedy must be available, effective and sufficient. (32) A remedy is considered available if the petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success, and it is found sufficient if it is capable of redressing the complaint.”<sup>112</sup>*

The effectiveness of compensatory remedies offered by the Commission must be seen in this light.

Torture victims are also entitled to satisfaction as part of the legal remedy. Satisfaction in these cases could take the form of public apology or public commemoration as outlined in principle 22 above. But in Uganda, official and public denial of torture, coupled with contemptuous dismissal of all torture claims, and the failure to institute independent investigations, implies that the remedy of satisfaction is not one Ugandan victims can hope for.

Analysis of existing Ugandan laws leaves grave doubts as to what victims can actually hope for. Clear, express provisions based on article 24 of the Uganda constitution of 1995, that define torture and provide for its punishment are declaratory and not part of the main body of criminal law in the country. Indeed outside the anti-terror law, which provides a basis for disciplining ‘authorized persons’ who engage in torture, there is no reference to the criminality of torture in any law at all. Notwithstanding the report of the Ugandan Human Rights Commission on the high incidences of torture, there is no single prosecution for torture arising out of ‘operation Wembley’ or other anti crime operations of 1999 to 2002. In its 2004 report to CAT,<sup>113</sup> Uganda conceded that it had not criminalised torture and lamented that it had little control over administration officers engaging or tolerating torture in regions outside the capital city of Kampala. In one incidence of action, the state reported that an officer who had permitted torture had been demoted, and was directly compensating the victim as ordered by the Uganda Human Rights Commission. However, the report was silent on the prosecution of the authorizing officer and the perpetrating officers. Impunity is systemic in Uganda. Yet a

<sup>112</sup> Dawda Jawara versus The Gambia, ACmHPR Comm Nos. 147/95 and 149/96 decided in 2000.

<sup>113</sup> Ibid fn 70.



consequence of the obligation to enforce through domestic law is an obligation to investigate and punish any violation.<sup>114</sup> Not only is Uganda bound by article 4 of CAT to ensure that torture is prohibited and punished under law, it has, in addition, the obligation to ensure that perpetrators are brought before independent courts, including where necessary through extradition or universal jurisdiction.

At any rate, successful prosecution would depend on effective investigations of torture claims. Investigating all torture claims is part of the state obligation. Such investigations are required to be prompt and impartial.<sup>115</sup> Independent investigation of torture is part of the process of making reparation when facing the legal consequences of torture in the hands of state agents. Carrying out investigations begins the process of officially acknowledging the rights of individuals. Government's resistance to prompt and independent investigation weakens the victim's case for compensation since in any suit at law, the claimant and the state can not be at equal arms with regard to access to and control of evidence. Despite the gravity of the findings of the Uganda Human Rights Commission, the government resisted its obligation to authorise and independent investigation of the torture claims, including forbidding the Commission itself from investigating the claims pursuant to its own mandate.<sup>116</sup>

### **Individual petition for international remedy**

Because the international legal ban on torture is absolute and permits no exceptions whether in times of war or national emergency, international law also provides independent redress. However, Uganda's has not ratified the optional protocols to the ICCPR as well as the CAT which would anchor a right to individual petition before the HRC and the Committee against Torture respectively. Subject to the rule regarding exhaustion of domestic remedies and other admissibility conditions set out in article 56 of the ACHPR, an individual who has undergone torture in Uganda has an independent recourse to the ACmHPR. The Commission is therefore supplies the most likely complaints forum for individuals who have been tortured in Uganda.

Individuals can also benefit indirectly from a censure of Uganda at the international level. Theoretically, there is an interstate remedy against Uganda sanctioned first by article 21 of CAT and also article 47 of the ACHPR. Interstate mechanisms have seldom been used within the ACHPR procedures and there is no evidence of any state complaint against Uganda before the Committee against Torture.

<sup>114</sup> See General Comment no. 20 of the HRC on article 7 of the ICCPR para 8

<sup>115</sup> Article 7 ICCPR *ibid*, article 4 CAT *ibid*.

<sup>116</sup> UHRC 2002 *ibid*.

## CONCLUDING OBSERVATIONS

### A Guide for Assessing Respect for the Right to a Fair Trial

1. **Are there national judicial criteria on the right to fair trial?** Particular jurisdictions may base protection for the right to fair trial on specific standards and judicial criteria that guide courts in decision-making. It is usually best if these standards and criteria are a matter judicial policy rather than leave them to evolve through judicial interpretation of the precedents. In the countries considered, there were no legislated criteria for the right to fair trial, such as right to speedy trial and judicial criteria were not universal.
2. **Does the constitution adequately protect the right to fair trial and access to justice?** Are there supplemental provisions that open up the practice in the country to the application of international standards? All the countries in the case study have post 1990 constitutions with expanded Bills of Rights, and in addition specifically empowered constitutional judges to consider international law, and to apply it where appropriate. In Eritrea and Namibia, failure to respect the independence of the judiciary is criminalised. But as in all cases, the gap between practice and good constitutional texts is huge partly a failure of implementing legislation to give effect to constitutional commandments.
3. **If there is a right to individual petition, are there procedures or systems under the law to ensure that decisions of the international organs can lead to structural change in domestic practices?** Save for Senegal and Namibia, the right to individual petition is only common in the case of the ACHPR system. In the recent ratifications to CAT, the trend has been towards resistance of the right of individual petition. At any rate, in Namibia and where a right to petition the HRC exists or Senegal, where a similar right to petition the CAT exists, there is no legislation or binding rule for implementing the decisions of these treaty bodies. The state's decision to comply or ignore the decisions of international bodies is left to the political branches of government.
4. **Are express guarantees of rights re-enforced with strong and independent complaints procedures?** The guarantee of rights and the existence of a complaint procedure to an impartial tribunal are both implicated when questions of violation arises. Complaint procedures in the case of violation must be strong enough to assess the constitutionality of any limitation or infringement of rights. In the case of Nigeria, there is express guarantee of rights as well as a

complaints procedure under the constitution. In practice, Nigeria, however, government is able to circumvent constitutional rights by framing an arrest and detention as a holding charge pending trial. This device does not meet international standards. So even here constitutional guarantees are clawed back by prosecutorial practices. For Eritrea, the constitutional guarantees are weak and rendered wholly ineffectual through official arbitrariness. As the journalists case indicate, there is no effective complaints procedure to buttress enjoyment and protection of constitutionally guaranteed rights. It is this lack of an reliable enforcement mechanism that has necessitated recourse to the ACmHPR for a remedy.

5. **Would access to international remedies made matters any different in these cases?** In terms of the ratification of the ACHPR, it is difficult to conclude what effect it would have if these cases had been filed before the ACmHPR. The ACHPR has been described as the product of a genuinely African process incorporating or at least taking for its foundation, African notions of substantive justice and individual rights as well as duties that are rooted in common fraternal cultures.<sup>117</sup> Notwithstanding this, the observance by the states of the recommendations of the ACmHPR has been encouraging. The ACHPR has no independent enforcement mechanism and relies wholly on the political body of the AU, meaning that enforcement is voluntary. Although in theory, the AU has in its founding articles abandoned its non interference stance in favour of accountable sovereignty, gross violations of human rights still occur under its watch. Moreover, the existence of massive violations coupled by failure to submit state reports or even to send representatives to the sessions of the ACmHPR is evidence that ratification of instruments by African states has little effect on state practice in the domestic sphere. This may explain why few national lawyers dealing with human rights violations take up communications even when domestic revenues have been exhausted.

In terms of the UDHR and ICCPR, most African states have enacted these instruments into their bills of rights. The worrying thing therefore is that in a majority of cases of human rights violation, states are actually acting against norms that they have embedded in their constitutions, laws and policies. In the Eritrean, Swazi and Namibian cases high state officials have sought to justify rather than deny the violations. They explain the violations in terms of justifiable choices made against serious social or political upheaval. No such justifications

<sup>117</sup> Paragraph 5 of the Preamble of the ACHPR states “Taking into consideration the virtues of their historical tradition and the values of African civilization which should inspire and characterize their (African states) reflection on the concept of human and peoples’ rights”. Emphasis mine.

were made in the Ugandan, Gambian, Senegalese cases, where violations are the result of acts of the lower cadres of state officials.

**6. Is cost of a factor?**

Cost may be a factor in respecting rights and enforcing them. The question of cost related to observing the right to fair trial only emerges in the Namibian treason case. In that case, legal assistance is accepted as a constitutional right, and possibly cultured into legal practice given the fact that legal representation was, for a while, offered by private lawyers *pro bono*. Namibia recognised that the Caprivi detainees were individually entitled to legal aid but protested that the system put in place to give effect to the right to legal assistance would be stretched beyond endurance. Without endorsing the argument of the Namibian Government, it is feasible that when the cost becomes a huge factor, even a rights conscious state may be overwhelmed with the consequence that rights enforcement become frayed and ad hoc.

**7. Does ratification relate to qualitative improvements?**

In studies on the effect of ratification on state practice, it seems that the duration over which ratification has occurred has some effect.<sup>118</sup> In the cases considered, Eritrea ratified the ICCPR more recently than Namibia. Gambia and Nigeria are among the first to ratify the ACHPR. The Nigerian, Senegalese and Namibian cases suggest that ratification of the individual complaints procedures has enabled victims to secure the assistance of international fora to strengthen their claims to national remedies. Transnational advocacy has had an ameliorative effect in Uganda, but not Eritrea. The main problem seems to lie in the lack systems that tie access to these forums with structural changes at the domestic level. In addition, ratification and individual petition have permitted national courts in Nigeria and Gambia to consider the jurisprudence of the international fora more readily, and in their own way to contribute to that jurisprudence through interpretation.

<sup>118</sup> See Hathaway, O 2002, Do Human Rights Treaties make a difference? Yale Law Journal, 111, p1935 - 2042



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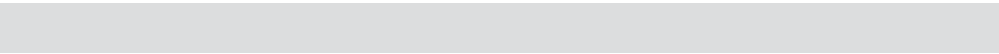
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## APPENDIX

List of Countries that Have Signed, Ratified/Adhered to the African Charter On Human And Peoples' Rights <sup>1</sup>

NO.	COUNTRY	DATE OF SIGNATURE	DATE OF / ACCESSION RATIFICATION	DATE DEPOSITED
1.	Algeria	10/04/86	01/03/87	20/03/87
2.	Angola		02/03/90	09/10/90
3.	Benin		20/01/86	25/02/86
4.	Botswana		17/07/86	22/07/86
5.	Burkina Faso	05/03/84	06/07/84	21/09/84
6.	Burundi	28/07/89	30/08/89	
7.	Cameroon	23/07/87	20/06/89	18/09/89
8.	Cape Verde	31/03/86	02/06/87	06/08/87
9.	Central African Republic		26/04/86	27/07/86
10.	Comoros		01/06/86	18/07/86
11.	Congo	27/11/81	09/12/82	28/07/87
12.	Congo (RD)	23/07/87	20/07/87	28/07/87
13.	Côte d'Ivoire		06/01/92	31/03/92
14.	Djibouti	20/12/91	1/11/91	31/03/92
15.	Egypt	16/11/81	20/03/84	03/04/84
16.	Equatorial Guinea	18/08/86	07/04/86	18/08/86
17.	Eritrea	14/01/99	15/03/99	
18.	Ethiopia	15/06/98	22/06/98	
19.	Gabon	26/02/82	20/02/86	26/06/86
20.	Gambia	11/02/83	08/06/83	13/06/83
21.	Ghana		24/01/89	01/03/89
22.	Guinea	09/12/81	16/02/82	13/05/82

<sup>1</sup> As of 7 January 2005

23.	Guinea Bissau	04/12/85	06/03/86	
24.	Kenya	23/01/92	10/02/92	
25.	Lesotho	07/03/84	10/02/92	27/02/92
26.	Liberia	31/01/83	04/08/82	29/12/82
27.	Libya	30/05/85	19/07/86	26/03/87
28.	Madagascar	09/03/92	19/03/92	
29.	Malawi	13/11/81	17/11/89	23/02/90
30.	Mali	13/11/81	21/12/81	22/01/82
31.	Mauritania	25/02/82	14/06/86	26/06/86
32.	Mauritius	27/02/92	19/06/92	01/07/92
33.	Mozambique	22/02/89	07/03/90	
34.	Namibia	30/07/92	16/09/92	
35.	Niger	09/07/86	15/07/86	21/07/86
36.	Nigeria	31/08/82	22/06/83	22/07/83
37.	Uganda	18/08/86	10/05/86	27/05/86
38.	Rwanda	11/11/81	15/07/83	22/07/83
39.	Sahrawi Arab Democratic Republic	10/04/86	02/05/86	23/05/86
40.	Sao Tome & Principe		23/05/86	28/07/86
41.	Senegal	23/09/81	13/08/82	25/10/82
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44.	Somalia	26/02/82	31/07/85	20/03/86
45.	South Africa	09/07/96	09/07/96	09/07/96
46.	Sudan		03/09/82	11/03/86
47.	Swaziland		15/09/95	09/10/95
48.	Tanzania	31/05/82	18/02/84	09/03/84
49.	Chad	29/05/86	09/10/86	11/11/86
50.	Togo	26/02/82	05/11/82	22/11/82
51.	Tunisia		16/03/83	22/04/83
52.	Zambia	17/01/83	10/01/84	02/02/84
53.	Zimbabwe	20/02/86	30/05/86	12/06/86

## Ratification of Fundamental ILO Conventions by African States \*



Convention ratified



Convention not yet ratified

	Freedom of association and collective bargaining	Elimination of forced and compulsory labour	Elimination of discrimination in respect of employment and occupation	Abolition of child labour
Country	Conv. 87	Conv. 29	Conv. 105	Conv. 138
Algeria	19:10:1962	19:10:1962	12:06:1969	30:04:1984
Angola	13:06:2001	04:06:1976	04:06:1976	13:06:2001
Benin	12:12:1960	12:12:1960	22:05:1961	11:06:2001
Botswana	22:12:1997	05:06:1997	05:06:1997	05:06:1997
Burkina Faso	21:11:1960	21:11:1960	25:08:1997	11:02:1999
Burundi	25:06:1993	11:03:1963	25:06:1993	19:07:2000
Cameroon	07:06:1960	07:06:1960	25:05:1970	13:08:2001
Cape Verde	01:02:1999	03:04:1979	16:10:1979	23:10:2001
Central African Republic	27:10:1960	27:10:1960	09:06:1964	28:06:2000
Chad	10:11:1960	10:11:1960	08:06:1961	21:03:2005
Comoros	23:10:1978	23:10:1978	23:10:1978	17:03:2004
Congo	10:11:1960	10:11:1960	26:11:1999	26:11:1999
Democratic Republic of the Congo	20:06:2001	20:09:1960	16:06:1969	20:06:2001

\* As at October 2005

Côte d'Ivoire	21:11:1960	05:05:1961	21:11:1960	05:05:1961	05:05:1961	05:05:1961	07:02:2003
Djibouti	03:08:1978	03:08:1978	03:08:1978	03:08:1978	03:08:1978	28:02:2005	28:02:2005
Egypt	06:11:1957	03:07:1954	29:11:1955	23:10:1958	26:07:1960	10:05:1960	06:05:2002
Equatorial Guinea	13:08:2001	13:08:2001	13:08:2001	13:08:2001	12:06:1985	13:08:2001	13:08:2001
Eritrea	22:02:2000	22:02:2000	22:02:2000	22:02:2000	22:02:2000	22:02:2000	
Ethiopia	04:06:1963	04:06:1963	02:09:2003	24:03:1999	24:03:1999	11:06:1966	02:09:2003
Gabon	14:10:1960	29:05:1961	14:10:1960	29:05:1961	13:06:1961	29:05:1961	28:03:2001
Gambia	04:09:2000	04:09:2000	04:09:2000	04:09:2000	04:09:2000	04:09:2000	03:07:2001
Ghana	02:06:1965	02:07:1959	20:05:1957	15:12:1958	14:03:1968	04:04:1961	13:06:2000
Guinea-Bissau		21:02:1977	21:02:1977	21:02:1977	21:02:1977	21:02:1977	
Guinea	21:01:1959	26:03:1959	21:01:1959	11:07:1961	11:08:1967	01:09:1960	06:06:2003
Kenya		13:01:1964	13:01:1964	13:01:1964	07:05:2001	07:05:2001	07:05:2001
Lesotho	31:10:1966	31:10:1966	31:10:1966	14:06:2001	27:01:1998	27:01:1998	14:06:2001
Liberia	25:05:1962	25:05:1962	01:05:1931	25:05:1962		22:07:1959	02:06:2003
Libyan Arab Jamahiriya	04:10:2000	20:06:1962	13:06:1961	13:06:1961	20:06:1962	13:06:1961	04:10:2000
Madagascar	01:11:1960	03:06:1998	01:11:1960		10:08:1962	11:08:1961	04:10:2001
Malawi	19:11:1999	22:03:1965	19:11:1999	19:11:1999	22:03:1965	22:03:1965	19:11:1999
Mali	22:09:1960	02:03:1964	22:09:1960	28:05:1962	12:07:1968	02:03:1964	14:07:2000
Mauritania	20:06:1961	03:12:2001	20:06:1961	03:04:1997	03:12:2001	08:11:1963	03:12:2001
Mauritius	01:04:2005	02:12:1969	02:12:1969	02:12:1969	18:12:2002	18:12:2002	08:06:2000
Morocco		20:05:1957	20:05:1957	01:12:1966	11:05:1979	27:03:1963	26:01:2001
Mozambique	23:12:1996	23:12:1996	16:06:2003	06:06:1977	06:06:1977	06:06:1977	16:06:2003
Namibia	03:01:1995	03:01:1995	15:11:2000	15:11:2000		13:11:2001	15:11:2000
Niger	27:02:1961	23:03:1962	27:02:1961	23:03:1962	09:08:1966	23:03:1962	23:10:2000
Nigeria	17:10:1960	17:10:1960	17:10:1960	17:10:1960	08:05:1974	02:10:2002	02:10:2002
Rwanda	08:11:1988	08:11:1988	23:05:2001	18:09:1962	02:12:1980	02:02:1981	23:05:2000
Sao Tome and Principe	17:06:1992	17:06:1992	04:05:2005	04:05:2005	01:06:1982	01:06:1982	04:05:2005
Senegal	04:11:1960	28:07:1961	04:11:1960	28:07:1961	22:10:1962	13:11:1967	01:06:2000



### 3.3 Summary of International Human Rights documents on Labour

#### *International Treaties of General Application:*

- 1) Universal Declaration of Human Rights
- 2) International Covenant on Civil and Political Rights
- 3) International Covenant on Economic Social and Cultural Rights
- 4) African Charter on Human and Peoples Rights
- 5) Covenant on the Rights of the Child
- 6) Convention for the Elimination of Discrimination Against Women
- 7) Convention on the Elimination of All forms of Racial Discrimination

#### *Fundamental ILO Conventions:*

- 1) Freedom of Association of the Right to Organize Convention No. 87 of 1948
- 2) The Right to Organize and Collective Bargaining Convention No. 98 of 1949
- 3) Forced Labour Convention of 1930 ( No. 29)
- 4) Abolition of Forced Labour Convention of 1957 ( No. 105)
- 5) The Minimum Age Convention of 1973 ( No. 138)
- 6) The Elimination of the Worst Forms of Child Labour Convention of 1999 ( No. 182)
- 7) The Equal Remuneration Convention of 1951 ( No. 100)
- 8) The Discrimination ( Employment and Occupation) Convnetion of 1958 ( No. 111)

#### **Findings on evictions by treaty bodies**

##### ❖ **CHR, Res. March 10 1993 (1993/77)**

In this resolution, the CHR affirms the practice of forced eviction constitutes a grave violation of human rights, and *“recommends that all Governments provide immediate restitution, compensation and/or appropriate and sufficient alternative accommodation or land, consistent with their wishes and needs.”*

##### ❖ **ICESCR, Zimbabwe, E/1998/22 (1997) 24**

###### **Paragraph 76**

Concern is expressed about the precarious situation of persons living in illegal structures or unauthorized housing. People should not be subjected to forced eviction unless this is done under conditions compatible with the Covenant.

###### **Paragraph 84**

Appropriate measures should be taken to guarantee the right to housing and, in particular, to ensure that no forced evictions are carried out without alternative housing being offered.

❖ ICESCR, Nigeria, E/1999/22 (1998) 27

Paragraph 117

The rising number of homeless women and young girls, who are forced to sleep in the streets where they are vulnerable to rape and other forms of violence, is of deep concern.

Paragraph 136

The Government should cease forthwith the massive and arbitrary evictions of people from their homes and take such measures as are necessary to alleviate the plight of those who are arbitrarily evicted or are too poor to afford decent accommodation. In view of the acute shortage of housing, the Government should allocate adequate resources and make sustained efforts to combat this serious situation.

❖ ICESCR, Cameroon, E/2000/22 (1999) 56

Paragraph 355

The State party is urged to implement laws and policies to combat the problem of forced evictions, in accordance with General Comments No. 4 (1991) and No. 7 (1997) concerning the right to adequate housing (art. 11, paragraph 1 of the Covenant).

❖ CERD, Sudan, A/56/18 (2001) 40

Deep concern is expressed about the forced relocation of civilians from the Nuer and Dinka ethnic groups in the upper Nile region and reports that the relocations involved significant military force resulting in civilian casualties. The State party is urged to uphold the fundamental economic and social rights of the Nuer and Dinka in the upper Nile region including the right to personal security, to housing, food and to just compensation for property confiscated for public use.

❖ Sub-Commission on the Protection and Promotion of Human Rights, Res. August 20 1998/9

This resolution, among other things, urges governments to protect those currently threatened with forced evictions, repel existing plans for forced evictions and include in negotiations and consultation the affected persons or groups.

❖ Sub-Commission on Prevention of Discrimination and Protection of Minorities, Res. 26 August 1991, 1991/12

This resolution provides guidance in determining the legal responsibilities of those who evict. It states that *“forced evictions can be carried out, sanctioned, demanded, proposed, initiated or tolerated by a number of actors, including, but not limited to, occupation authorities, national Governments, local governments, developers, planners, landlords, property speculators and bilateral and international financial institutions and aid agencies”*. The resolution goes on to emphasize *“ultimate responsibility for preventing evictions rests with Governments”* (preamble).

Below is the list of Countries that have signed, ratified or acceded to the Second Optional Protocol.<sup>1</sup>

Country	Signature	Ratification, Accession (a)
Andorra	5 Aug 2002	.
Australia	.	2 Oct 1990 a
Austria	8 Apr 1991	2 Mar 1993
Azerbaijan	.	22 Jan 1999 a
Belgium	12 Jul 1990	8 Dec 1998
Bosnia and Herzegovina	7 Sep 2000	16 Mar 2001
Bulgaria	11 Mar 1999	10 Aug 1999
Canada	.	25 Nov 2005 a
Cape Verde	.	19 May 2000 a
Chile	15 Nov 2001	.
Colombia	.	5 Aug 1997 a
Costa Rica	14 Feb 1990	5 Jun 1998
Croatia	.	12 Oct 1995 a
Cyprus	.	10 Sep 1999 a
Czech Republic	.	15 Jun 2004 a
Denmark	13 Feb 1990	24 Feb 1994
Djibouti	.	5 Nov 2002 a
Ecuador	.	23 Feb 1993 a
Estonia	.	30 Jan 2004 a
Finland	13 Feb 1990	4 Apr 1991
Georgia	.	22 Mar 1999 a
Germany	13 Feb 1990	18 Aug 1992
Greece	.	5 May 1997 a
Guinea Bissau	12 Sep 2000	.
Honduras	10 May 1990	.
Hungary	.	24 Feb 1994 a
Iceland	30 Jan 1991	2 Apr 1991
Ireland	.	18 Jun 1993 a
Italy	13 Feb 1990	14 Feb 1995
Liberia	.	16 Sep 2005 a
Liechtenstein	.	10 Dec 1998 a
Lithuania	8 Sep 2000	27 Mar 2002
Luxembourg	13 Feb 1990	12 Feb 1992
Malta	.	29 Dec 1994 a
Monaco	.	28 Mar 2000 a
Mozambique	.	21 Jul 1993 a

<sup>1</sup> Information is as of 8th May 2006. All Countries, which are signatories to the International Convention on Civil and Political Rights, are open to ratify the Second Optional Protocol.

Namibia	.	28 Nov 1994 a
Nepal	.	4 Mar 1998 a
Netherlands	9 Aug 1990	26 Mar 1991
New Zealand	22 Feb 1990	22 Feb 1990
Nicaragua	21 Feb 1990	.
Norway	13 Feb 1990	5 Sep 1991
Panama	.	21 Jan 1993 a
Paraguay	.	18 Aug 2003 a
Poland	21 Mar 2000	.
Portugal	13 Feb 1990	17 Oct 1990
Romania	15 Mar 1990	27 Feb 1991
San Marino	26 Sep 2003	17 Aug 2004
Sao Tome and Principe	6 Sep 2000	.
Serbia and Montenegro	.	6 Sep 2001 a
Seychelles	.	15 Dec 1994 a
Slovakia	22 Sep 1998	22 Jun 1999

## Authors' Biography

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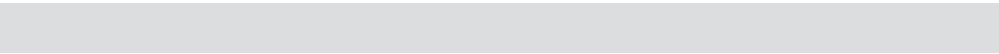
**Krissie Hayes**, Holds a Law Degree from Deakin University, Australia and a Masters Degree (LL.M) from University of Melbourne, Australia. Currently she works as a project manager for Henley Properties which is a Property Development Company. In 2003 Krissie volunteered to work at Salem Orphanage in Kisumu, Kenya. After her return to Australia she convinced her employer to commit to longterm support of the Children's Home in Kenya. She heads this project, which among other things intends to build of a new orphanage and clinic to supplement the current home.

**Wachira Maina**, Advocate of the High Court of Kenya holds Law Degree from the University of Nairobi, Kenya and a Masters Degree (LL.M) from Columbia University, New York, US. He has authored various books and articles and currently works as an independent consultant for various organizations. He has also previously worked with committees of the Kenyan National Assembly on issues of legal and constitutional reform, to the Department of Public Prosecutions in the Ministry of Justice and Constitutional Affairs and to the Department of Governance and Ethics on anti-Corruption Reform. He also advised on setting up of the inquiry into the illegal and irregular allocation of public land in Kenya

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