

**AFRICAN HUMAN RIGHTS AND ACCESS TO JUSTICE PROGRAMME**  
**Application No. 223: Foundation for Human Rights Initiative, FHRI vs. The Attorney**  
**General of Uganda**

(Constitutional Petition No. 20 of 2006)<sup>1</sup>

Expert Instructed	Wachira Maina, Constitutional Lawyer
National Lawyer	Dorothy Nandugga Kabugo.

## **A. OVERVIEW**

- (1) **Summary of the Issues:** This case concerns, narrowly, the right to bail of 99 persons who have been held for four years in pre-trial remand in Uganda. However, in a broader sense, the case also implicates many of the other rights under the rubric of the ‘right to a fair trial.’ There are three legal questions that the case raises for answer in this opinion, to wit: a) Are the statutory provisions that authorise this pre-trial detention—the *Trial on Indictments Act*, the *Magistrates Courts Act* and the *Police Act* consistent with the bail provisions of the Ugandan Constitution? b) Is the pre-trial detention of accused persons under Uganda law consistent with State’s obligations under International Human Rights Instruments that it has ratified? If not, what specific rights have been violated? Finally, c) What remedies are available to the 99 accused persons both under the Constitution of Uganda and under International Human Rights Covenants?
- (2) **The Approach:** The rest of this opinion is in three parts: a) a brief review of Ugandan law relating to bail; b) a detailed review of the relevant international jurisprudence relating to fair trial (of which bail is a part) and c) a summary of the orders and declaratory reliefs that should be sought in court relating to the 99 accused. As will be clear shortly, I have undertaken a detailed and broad review of the international jurisprudence on the matter, rather than focus narrowly on the right to bail. Strictly speaking, the right to bail rests, narrowly, on the presumption of innocence and on the right to a speedy trial. However, I consider that narrow view inappropriate in this case. There are two reasons for this view. First, the string of ‘right to bail’ cases that have come from Uganda over the last five years have invariably raised other fair trial issues: i) accused persons have not usually been promptly informed of reasons for their arrests; ii) many have not been allowed prompt and confidential access to their lawyers; iii) sometimes accused persons are released on bail but still held in custody or promptly re-arrested and charged with more serious offences<sup>2</sup> and iv) many suspects have usually not

<sup>1</sup> Though this opinion has drawn from a wide variety of sources, it has relied heavily on three core sources: a) Ian Brownlie and Guy S. Goodwin-Gill, (eds.) *Basic Documents on Human Rights*, Fourth edition, OUP, 2002; *Human Rights in the Administration of Justice: A Manual on Human Rights For Judges, Prosecutors and Lawyers*, United Nations, New York and Geneva, 2003 and c) *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies*, HRI/GEN/1/Rev.8, 8<sup>th</sup> May 2006

<sup>2</sup> For instance, on November 25 Principal Judge James Ogoola ordered the release on bail of Dr. Kizza Besigye of the Forum for Democratic Change. On Monday, November 28, prison authorities and security personnel guarding Besigye at the High Court refused to release him even though he had signed the bond papers and fulfilled all the bail requirements. The authorities insisted that Besigye had to go back to Luzira Prison to be remanded in respect of the charges of terrorism and illegal possession of firearms [*both cognizable offences under 15(2) of the Trial on Indictment Act*] that he was facing before the General Court Martial. Monitor - December 5, 2005

been tried within a reasonable time. Secondly, without the benefit of affidavits from the 99 accused persons in this case, it is impossible to undertake an individualized analysis of each accused person's case.

## **B: ANALYSIS OF THE LEGAL ISSUES**

### **Part 1: Summary of Ugandan Law on Bail and the Constitutional Issues that Arise**

The foundation of Uganda's law on bail is article 23 of the 1995 Constitution. Sub-section 6 provides that "where a person is arrested in respect of a criminal offence" that person has the right to apply to be released on bail. This right has three elements. First, the court has discretion, in all cases, to grant "bail on *such conditions as the [it] considers reasonable.*" The Constitution sets no conditions or standards for the exercise of this discretion. Second, in cases where the suspect faces an offence that is triable by either the High Court or the Magistrate's Court, the Constitution mandates release on bail if he or she "*has been remanded in custody in respect of the offence before trial for one hundred and twenty days.*" Finally, if the offence charged is one that can be tried only by the High Court then he or she must be released if "*has been remanded in custody for three hundred and sixty days before the case is committed to the High Court.*"

There are two important elements in Article 23: One, the plenary nature of the power of Court to grant bail in all cases upon conditions it considers reasonable. Two, the 120 and 360 days limit on the time over which a person can be legally held in pre-trial custody. If a suspect has been held beyond the days set in Article 23(6) (b) and (c) he or she must be released on bail. The Court has no discretion *whether to grant or deny bail*; it has discretion only as relates *to the conditions that it can impose on that release.*

In terms of Ugandan law, the right of the 99 accused persons to be released on bail turns on the meaning of Article 23 of the Constitution in light of the provisions of the *Trial on Indictment Act*, the *Magistrates Courts Act* and the *Police Act*. As a preliminary matter, it is important to keep two points in mind: a) these statutes predate the 1995 Constitution and b) none of them has constitutional status. We shall come back to these two points presently. In meantime, we must scrutinise the bail provisions in these laws before testing their constitutionality.

We must begin with the *Trial on Indictment Act*. The *Act* imposes two qualifications on the right to bail which are not specified in the Constitution. First, it lists cases in which the Court may refuse bail. Secondly, it shifts the onus of proving entitlement to bail to the accused. This means persons charged with one or more of the offences listed in section 15(2) of the *Act* cannot be released on bail unless they prove that (a) there are exceptional circumstances justifying their release and that (b) they will not abscond if released. The offences under this section are a) offences triable by the High Court;<sup>3</sup> b) offences relating to acts of terrorism and cattle rustling;<sup>4</sup> c) firearms offences that carry a sentence of 10 or more

---

<sup>3</sup> *Trial on Indictment Act*, section 15(2)(a).

<sup>4</sup> *id.* section 15(2)(b).

years<sup>5</sup>; d) economic crimes like corruption<sup>6</sup>, bribery of public servant<sup>7</sup>, embezzlement<sup>8</sup>, causing financial loss<sup>9</sup>, and abuse of office<sup>10</sup>; e) rape and defilement<sup>11</sup>; and f) any offence for which a magistrate's court has no jurisdiction to grant bail<sup>12</sup>.

The *Magistrates Courts Act* reinforces the *Trial on Indictment Act*. Section 75(1) gives a Magistrate's court the power to release an accused person on bail but sub-section (2) lists offences where a magistrate cannot do so. This list is a carbon copy of section 15(2) of the *Trial on Indictment Act*. Like the Constitution, section 76 of the *Magistrates Courts Act* restricts the period of pre-trial remand. However, unlike the Constitution, a magistrate's court has discretion to release a person on bail only if that person has spent a longer period in custody than the 120 and 360 days limits laid down in the Constitution. That means the following: First, if a person charged with a capital offence has been held for 480 days<sup>13</sup> before the trial starts, he or she must be released on bail. Second, if the person is charged with other offences, including offences under 75(2) of the *Act*, then he or she must be released if he or she has been held for more than 240 days<sup>14</sup>. But although the act seems to say that after 240 or 480 days, as the case may be, an accused person must be released on bail, in fact it is not so. An accused person may not be released if he or she has been committed for trial in the High Court before 240 and 480 days limit has expired. Further, a person may still be held in custody beyond the time limits if the magistrate is "satisfied that it is expedient for the protection of the public that [the accused] should not be released from custody."<sup>15</sup> The conclusion arising from the analysis to this point is as follows: Under the Constitution of Uganda, the Court has no discretion whether to release a suspect once the time-limits of pre-trial remand have lapsed but it has discretion to impose conditions that it thinks reasonable. However, under section 76(d) of the *Magistrate's Courts Act*, the court has discretion both as whether to release the accused and also, implicitly, what conditions to impose.

The *Police Act* raises a slightly different issue from the two statutes just considered. The relevant provision here is the inelegantly drafted section 25(2). An arrested person must be charged in court within 48 hours under section 25(1) of the *Police Act* and Article 23(4) (b) of the Constitution. However, the somewhat unclear 25(2) relaxes this requirement where a suspect is arrested in one police area but the crime for which he or she is arrested was committed in another police area. Where this is so, the police are allowed to hold the suspect for up to seven days. But there is some vagueness in the wording of this provision: Does it mean that the police have seven days *to bring the suspect to court* or does it mean they have seven days *before* the 48 hour time limit for indicting a suspect begins to run? While it is important, as a drafting matter, to clarify this point, the clarification itself would not settle

---

<sup>5</sup> *id.* section 15(2)(c).

<sup>6</sup> *id.* section 15(2)(h).

<sup>7</sup> *id.* section 15(2)(i).

<sup>8</sup> *id.* section 15(2)(f).

<sup>9</sup> *id.* section 15(2)(g).

<sup>10</sup> *id.* section 15(2)(d).

<sup>11</sup> *id.* section 15(2)(e).

<sup>12</sup> *id.* section 15(2)(j).

<sup>13</sup> section 76(a) of the *Magistrates Courts Act*.

<sup>14</sup> *id.* section 76(a) of the *Magistrates Courts Act*.

<sup>15</sup> *id.* section 76(d),

the constitutional point whether the section is consistent with the 48 hour rule in Article 23(4) (b) of the Constitution.

This preliminary analysis points to the three constitutional points that arise in this case. These can be summarised as follows: a) the inconsistency between specific provisions of these ordinary acts of parliament with the constitution of Uganda; b) the constitutional ramification of imposing a duty on the accused person to prove entitlement to bail; and c) the interpretive obligation imposed on the court under Article 273 relating to laws that predate the Constitution. What does each of these constitutional points mean for this case?

**a. Inconsistency between the *Trial on Indictment Act*, the *Magistrates Courts Act*, the *Police Act* and the Uganda Constitution**

There is, on the face of it, plain inconsistency between the obligations imposed by the Constitution relating to bail and the restrictions required by the three statutes analysed in the foregoing paragraphs. For the 99 accused in this case, this argument has most traction for their claim to be released. There are a number of reasons for this.

First, the court has already noted these inconsistencies. Considering the case of *Tumushabe v Attorney General*<sup>16</sup> where the question of this inconsistency arose tangentially, the Constitutional Court had this to say:

“...[T]he law that governs bail in Uganda is contained in Article 23 (6) (a), (b) and (c) of the Constitution. All other laws on bail in this country that are inconsistent with or which contravene this article are null and void to the extent of the inconsistency. The Attorney General of Uganda needs to take a closer look at sections 75 and 76 of the Magistrates' Courts Act (Cap.16) and sections 15 and 16 of the Trial on Indictments Act (Cap. 23). There may be urgent need to bring them in conformity with Article 23 (6) of the Constitution.”

Though the judges, somewhat gratuitously, asked the Attorney General to take action to conform these sections to the Constitution, we can surmise that they asked him so only because the question of striking these sections down was not directly before them. Had it been, as it most certainly is now in the case of the 99 suspects, these provisions must be voided for inconsistency with the Constitution. The rationale for this strong conclusion is two-fold: the principle of *Marbury v. Madison*<sup>17</sup> and the supremacy clause of the Ugandan Constitution. As said by Chief Justice Marshall in *Marbury*:

“The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten the constitution is written. To what purpose are powers limited and, to what purpose are that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained. The distinction between a government with limited power and unlimited power is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation.”

It is this principle that the supremacy clause, article 2 of the 1995 Constitution articulates. Article 2 makes it explicit that the Constitution has “binding force on *all authorities*-[including

<sup>16</sup> Constitutional Petition No. 5 of 2004

<sup>17</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)

parliament]- *and persons* throughout Uganda” and that “if any other law or ... custom is inconsistent with any of [its] provisions, the Constitution shall prevail, and that other law or custom shall, to the extent of the inconsistency, be void.”

There are at least three specific types of inconsistencies that render the bail provisions of the *Trial on Indictment Act*, the *Police Act* and the *Magistrates Courts Act* unconstitutional.

*First*, article 23(6)(a) gives the court plenary power to give bail subject only to reasonable conditions; that article does not limit this discretion to the High Court. The words used here are “apply to the court.” The meaning of court under article 273 is “a court of judicature established by or under the authority of this Constitution.” (*emphasis added*). The Constitution does not specify any cases in which *some* courts cannot grant bail at their discretion. By specifying a list of cases in which Courts cannot grant bail, section 15(2) of the *Trial on Indictment Act* plainly contradicts and Constitution and therefore suffers the infirmity stipulated by *Marbury* and the supremacy clause.

*Secondly*, article 23(6) ordains the automatic release of a person who has spent 120 days in pre-trial custody for the offences described under (b) or 360 days for the offences described under sub-section (c). These provisions explicitly limit the period over which an accused can be held in pre-trial detention. Under the Constitution, *the court has no discretion whether to release the accused person*. It has discretion *only as to the conditions to impose* for that release. Both section 76 of the *Magistrates Courts Act* and section 16 of the *Trial on Indictment Act* contradict these provisions.

Section 76 stipulates time limits for the automatic release of people in pre-trial remand: 480 days for capital cases and 240 days for all other cases. Capital cases are usually committed to the High Court for trial: this means that in such cases the stipulation of article 23(6)(c) - *that an accused be released after 360 days* - is applicable. The plain fact, then, is that *the 480-days’ rule* of the *Magistrate Courts Act* is *inconsistent with the 360-days’ rule* of the Constitution. But section 76 is constitutionally infirm in another way too: sub-section (d) allows a magistrate to continue keeping a person in custody, even when the time limits have been passed, if he is satisfied that “*it is expedient for the protection of the public that he or she should not be released from custody*.” No court has that option under Article 23(6) of the Constitution. By making permissible that which is impermissible under the Constitution, section 76(d) of the *Magistrates Courts Act* also fails the constitutionality test. To the extent that section 16 of the *Trial on Indictment Act* imposes similar strictures on time limits<sup>18</sup> and release<sup>19</sup> on the High Court as the *Magistrates Courts Act* imposes on the Magistrates’ courts, it too, must fail.

*Thirdly*, article 23(4)(b) of the Constitution imposes an unqualified 48 hour limit for bringing suspects before a court of law. Section 25(2) *Police Act* allows the police to hold certain categories of suspect for up to seven days, perhaps more.

## **b. The Constitutional Ramification of Imposing a Duty on the Accused Person to Prove Entitlement to Bail**

<sup>18</sup> See *Trial on Indictment Act*, s. 16(a) and (b)

<sup>19</sup> *Id.* Section 16(d).

Section 15(1) of the *Trial on Indictment Act* imposes a duty on an accused person charged with offences specified under 15(2) to prove that he is entitled to bail. This has two constitutional problems. One, it is an unauthorised statutory interference with the Court's plenary discretion under Article 23(6)(a) to grant bail to any accused persons subject only to the conditions it thinks reasonable. Two, the duty to prove exceptional circumstances carries an additional two implicit risks: it has the potential to interfere with the fair trial of the accused and it reverses the burden of proof.

We begin with the first of these risks. An accused person cannot prove entitlement to bail without the court conducting an evidentiary hearing. The risk is that a full evidentiary hearing at the bail stage of the trial will also allow prosecutors to cross-examine the accused and, potentially, to collect material and evidence which they can use in the subsequent trial. This grave risk undermines the right against self-incrimination and generally imperils the right to a fair trial by eroding the principle of the equality of arms between prosecution and defence. In addition, a statutory requirement that an accused person prove entitlement to be released is a profound attack on the presumption of innocence recognised under article 28 of the Constitution.

Why should an accused person have the duty to prove that he or she is entitled to be set free pending trial when facing *charges of which he or she is constitutionally presumed to be innocent until proved guilty*? Notwithstanding article 28(4)<sup>20</sup> of the Constitution, this requirement is a *sub silentio* reversal of the burden of proof completely inconsistent with the principle of legality and the human rights principles underlying the right to bail.

The authority in point is *O (FC) v. Crown Court at Harrow*.<sup>21</sup> Lord Brown of Eaton-Under-Heywood summarised the legal arguments against such reversals of burden of proof and quoted with approval from the jurisprudence of the European Court of Human Rights in bail applications. Quoting paragraphs 84 and 85 of the Court's decision in *Ilijkov v Bulgaria*<sup>22</sup>, he had this to say:

“The Court reiterates that *continued detention can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty*. . . . Where the law provides for a presumption in respect of factors relevant to the grounds for continued detention . . . , the existence of the concrete facts outweighing the rule of respect for individual liberty must be nevertheless convincingly demonstrated.

<sup>20</sup> “Nothing done under the authority of any law shall be held to be inconsistent with (a) paragraph (a) of clause (3) of this article, to the extent that the law in question imposes upon any person charged with a criminal offence, the burden of proving particular facts.” The burden of proving particular facts allowed by this section is not a shift of the general burden of proof. For instance, if a public servant's lifestyle and assets are shown to be inconsistent with his income or inherited assets an anti-corruption law might require him to prove that the assets have not been illegally acquired. Section 15(1) of the *Trial on Indictment Act* shifts, beyond the constitutional prescription, the general burden of proof to the accused person since it requires him or her to demonstrate *presumptive innocence*.

<sup>21</sup> [2006] UKHL 42

<sup>22</sup> Application No. 33977/96 (Unreported, 26 July 2001).

Moreover, the court considers that it was incumbent on the authorities to establish those relevant facts. *Shifting the burden of proof to the detained person in such matters is tantamount to overturning the rule of article 5 of the Convention*, a provision which makes detention an exceptional departure from the right to liberty and one that is only permissible in exhaustively enumerated and strictly defined cases.” (emphasis added)

In other words, there must be a compelling public interest reason to outweigh the respect for individual liberty. It is not legitimate to try and get at the accused by shifting the burden of proof.

### c. **Article 273: How to Interpret Laws that Predate the Constitution**

The third element of the constitutional attack on the three acts of Parliament covered in this opinion stems from the fact that they all predate the 1995 Constitution. As a matter of general legal interpretation, a law enacted later in time is presumed to over-rule an earlier law on the same subject. This general principle has special force when applied to laws that predate the Constitution. First, unless the constitution specifically allows a law that predate to remain in force that law must be presumed to be, for supremacy reasons, repealed or amend to the extent that it contradicts the constitution. That is the theory. In practice, though, Constitutions will usually contain specific provisions that over-rule or require revision of all the laws that predate it.

Article 273(1) of the Uganda Constitution specifically provides that “the operation of the existing law after the coming into force of this Constitution shall not be affected by the coming into force of this Constitution but the existing law shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with this Constitution.”<sup>23</sup> This article reinforces the supremacy clause by imposing an interpretive duty on the court to modify and adapt existing laws to the realities of the Constitution.

In concluding this part, there is an important point to note. The constitutional court may agree with the applicants that the challenged laws are unconstitutional but still exercise its discretion against them and keep them in remand. The rest of this opinion sets out a case why the applicants should be released on bail. That case rests on two arguments, both linked: one, it is a blatant rebuff to constitutional rights to permit the continued gaoling of the accused on the basis of laws that are so plainly in conflict with the constitution and two, the human rights violations in this case so extensive and egregious that continued incarceration would amount to a judicial warrant to executive lawlessness. That the challenged laws are unconstitutional has been amply demonstrated. It remains to show just how extensive and egregious the violations are.

## **Part 2: Uganda’s Obligations under International Human Rights Laws**

---

<sup>23</sup> For the purpose of the Constitution, Article 273(2) defines existing law as “the written and unwritten law of Uganda or any part of it as existed immediately before the coming into force of this Constitution, including any *Act of Parliament or Statute* or statutory instrument enacted or made before that date which is to come into force on or after that date.”

Given the transparent inconsistencies between the Uganda Constitution and the provisions of the *Trial on Indictment Act*, the *Magistrates Courts Act*, the *Police Act*, the constitutional question is easily settled. This part highlights international human rights jurisprudence that could be deployed to reinforce the constitutional argument and to make a compelling case for release. There are two points here. First, it is important to emphasize to the Constitutional Court the ways in which the language of the Constitution mirrors the language of the human rights treaties that Uganda has ratified. Where that is so, courts will often draw upon the jurisprudence of international tribunals to give meaning to the provisions that are *in pare material*. Faced with a dearth of appropriate local case-law to draw upon in *Makwayane v. State*<sup>24</sup> the South African Constitutional Court adopted precisely that approach. It may said, *contra* this approach, that South African Constitution, unlike the Ugandan one, mandates courts look to international and comparative law to settle cases before them. But that argument missed the point of principle. The point of principle as stated in *Makwayane* is that where local jurisprudence and case-law is under-developed international treaties can:

“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 provisions of the bill of rights.”

This argument is sound in both law and reason and applies with some force to Uganda. The Ugandan Constitution is just over a decade old. 10 years is hardly enough time to develop a comprehensive jurisprudence to mark a decisive break with the past. International and comparative practices can support and re-inforce the positive elements of Uganda’s efforts to build a constitutional state.

With these considerations in mind, we now turn to the argument that the violations in this case are so extensive and egregious that the accused must be set free forthwith. It is not just the right to be freed on bail that has been violated. Three rights implicit in the right to a fair trial have been flagrantly abused. These are a) the right to be promptly given the reasons for arrest and the charges to be preferred; b) the right to be brought promptly before a judicial officer; and c) the right to be tried without undue delay or be freed on bail. In making the case for release, it will be necessary to determine what rights have been violated in reference to which accused persons. To decide this, a number of questions relating to the 99 accused persons, including: a) When were they arrested; b) When were they first told of the reasons for their arrest? c) Did they know or were they told which charges would be filed against them? And d) when they were first brought to court?

We consider each of these three rights in turn.

#### **i. The right to be Promptly given the reasons for arrest and the charges to be preferred**

There are three rights involved here, each of which can, on its own, found a separate cause of action in this case, vis: i) the right to be promptly informed of the reasons for the arrest

---

<sup>24</sup> CCT/4/1994

and detention; ii) the right to be told of the charges to be preferred in a language that one understands and iii) the right to freely and promptly communicate with one's lawyer.

**a. The right to be promptly given the reasons for arrest**

This is covered by article 23(3)<sup>25</sup> of the Ugandan Constitution, article 9(2) of the International Covenant on Civil and Political Rights (which corresponds to Article 5(2) of the European Convention on Human Rights). The African Charter on Human and Peoples Rights does not have a similar provision but the African Commission has said - in communication no. 224/98- *Media Rights Agenda v. Nigeria*<sup>26</sup> - that the right to a fair trial under article 7 includes a duty to inform arrested persons "in a language they understand, of the reasons for their arrest" and to promptly inform them "of any charges against them."

To determine the content of the right and the duty it imposes, we turn to jurisprudence of the European Court of Human Rights. In the case of *Fox, Campbell and Hartley*<sup>27</sup> the court said that any person arrested must be told:

"..[I]n simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able if he sees fit, to apply to a court to challenge its lawfulness in accordance with paragraph 4."

The Court emphasized that this information must be given promptly but noted that:

"..[I]t need not be related in its entirety by the arresting officer at the very moment of arrest. Whether the content and promptness of the information conveyed were sufficient is to be assessed in each case according to its special features."

But rider that 'promptness' is defined according to the special features of the case does not grant the police plenary discretion to do as they please with the accused. There is clearly some urgency, to be determined within reason, implicit in the idea of promptness. To illustrate: in one case, the Human Rights Committee found that article 9(2) had not been violated where an arrested person was held for 7 and another for 8 hours because the police had spent 3 of those eight hours looking for a translator to communicate with both accused.<sup>28</sup> But in *Campbell v. Jamaica*,<sup>29</sup> the Committee, echoing the European Court, stated that "one of the most important reasons for giving a suspect prompt information on a criminal charge is to enable that individual to request a prompt decision on the lawfulness of his or her detention by a competent judicial authority." In this case, article 9(2) had been violated since the complainant had been arrested but not informed of the reasons for that arrest for 7 days.

In conclusion, it is important to emphasize that reasons given to a suspect under article 9(2) need to be lawful reasons. For example, it will not do, as the Human Rights Committee

<sup>25</sup> A person arrested, restricted or detained *shall be informed immediately, in a language that the person understands, of the reasons for the arrest, restriction or detention and of his or her right to a lawyer of his or her choice.*

<sup>26</sup> Communication no. 224/98: <http://www1.umn.edu/humanrts/africa/comcases/224-98.html>.

<sup>27</sup> *Eur. Court HR, Fox, Case of Campbell and Hartley*, Series A, No. 182, p.19.

<sup>28</sup> Cf to Principle 14 of the *Body of Principles for the Protection of all Persons under any form of Detention or Imprisonment* stating that "a person who does not adequately understand or speak the language used by the authorities responsible for his arrest, detention or imprisonment is entitled to receive promptly, in a language which he understands" information relating to the charges against him or her.

<sup>29</sup> Communication no. 248/1987, *G. Campbell v. Jamaica*.

emphasized in *P.J. Mika Miha v. Equatorial Guinea*, simply to tell a detained person that he is being held under orders of the President of the country.<sup>30</sup>

**b. The right to be told of charges in a language that one understands**

This is the second of the informational rights relating to arrest and indictment and is covered under article 14(3) of the Covenant on Civil and Political Rights. It is also reproduced in identical language in article 28(3)(b)<sup>31</sup> of the Uganda Constitution. Although the right seems to be linked with the general duty to tell an accused person of the reasons for arrest under article 9(2), in fact it goes much further.

The right to be told of the charges that one will face includes specifying “both the law and the alleged facts [on which the charge] is based.” According to the Human Rights Committee the duty under Article 14(3) is “more precise than that for arrested persons.” In *P. Kelly v. Jamaica*<sup>32</sup>, the Committee stated that the “requirement of prompt information... only applies once the individual has been formally charged with a criminal offence.” Consequently, this right is different from that in Article 9(2) which applies only to those “remanded in custody pending the result of police investigations.”

**c. The Right to Communicate Freely and Promptly with One’s Lawyers**

This right is usually bundled together with the right to be given reasons for arrest and to be told of the charges, but, in fact, the right to communicate *freely* and *promptly* with one’s lawyer is a stand alone right. *Free communication* means that an accused person can consult without hindrance or under surveillance and *prompt access* means that he or she is allowed access to a lawyer reasonably quickly after arrest. In the language of Rule 93 of the United Nations Standard Minimum Rules for Treatment of Prisoners, 1955:

“[A]n untried prisoner shall be allowed to apply for free legal aid where such is available, and to receive visits from his legal adviser with a view to his defence and to prepare and hand to him confidential instructions. For these purposes, he shall, if he so desires, be supplied with writing material. Interviews between the prisoner and his legal adviser may be within sight but not within the hearing of a police or institution official.”

Rule 93 is reinforced by the Rule 18 of the 1998 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.<sup>33</sup> Though this right is not

<sup>30</sup> Communication no. 414/1990, *P.J. Mika Miha v. Equatorial Guinea*

<sup>31</sup> Every person who is charged with a criminal offence shall be informed immediately, in a language that the person understands of the nature of the offence.

<sup>32</sup> Communication No. 253/1987 adopted on 8<sup>th</sup> April 1991, UN doc GAOR, A/52/40(vol. II), p. 232.

<sup>33</sup> Principle 18 provides that:-

1. A detained or imprisoned person shall be entitled to communicate and consult with his legal counsel.
2. A detained or imprisoned person shall be allowed adequate time and facilities for consultation with his legal counsel.
3. The right of a detained or imprisoned person to be visited by and to consult with, and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order.
4. Interviews between a detained or imprisoned person and his legal counsel may be within sight but now within the hearing, of a law enforcement official.

specifically provided for in the African Charter, the African Commission's Resolution on the Right to Recourse and Fair Trial said in the determination of charges against them, accused persons shall be free to "communicate in confidence with counsel of their choice."<sup>34</sup> As with the African Charter, the European Convention "does not expressly guarantee the right of a person charged with a criminal offence to communicate with defence counsel without hindrance." However, the European Court of Human Rights has held, in *the Case of S. v. Switzerland*<sup>35</sup> that the right of an accused person "to communicate with his advocate out of the hearing of a third person is part of the basic requirements of a fair trial in a democratic society." Holding that this right flows from Article 6(3)(c) of the European Convention, the Court concluded that if a lawyer were unable "to confer with his client and receive confidential instructions from him without surveillance, his assistance would lose much of its usefulness, whereas the convention is intended to guarantee rights that are practical and effective."

A threshold question relevant to the case of the 99 accused is how soon after arrest an accused person must be allowed access to a lawyer to stave off a violation of article 6? The Inter-American Court of Human Rights considered this question in the case of *Suarez Rosero v. Ecuador*, the Court found that there had been a violation of article 8(2)(c), (d) and (e) of the Inter-American Convention on Human Rights where the applicant had been held incommunicado for 36 days before being allowed access to his lawyer. Even when he was finally allowed access to a lawyer he was "unable to communicate with him freely and privately."

The United Nations Principles and the decision of the Inter-American Court in *Suarez Rosero v. Ecuador* can be used, in this case, to buttress the provisions of articles 23 (5)(b)<sup>36</sup> and 28(3)(c)<sup>37</sup> of the Ugandan Constitution. Article 23 (5) (b)<sup>38</sup> requires that an arrested person be given "reasonable" access to his or her "next-of-kin, lawyer and personal doctor" whereas article 28(3) (c) ordains that a person charged with a criminal offence "be given adequate time and facilities for the preparation of his or her defence." The issue here must turn on the meaning of "reasonable access" to one's lawyer under article 23(5) and "adequate opportunity" to prepare one's defence under article 28(3). The submission surely must be as follows: Given how closely the Ugandan Constitution tracks the language of international human rights instruments, the founders' intention should surely be interpreted as a desire to give Ugandans the full enjoyment of rights as they are understood in those instruments.

## ii. The right to be promptly brought before a judicial officer

- 
5. Communication between a detained or imprisoned person and his legal counsel mentioned in the present principle shall be inadmissible as evidence against the detained or imprisoned person unless they are connected with a continuing or contemplated crime.

<sup>34</sup> This right was held to have been violated in the *Media Rights Agenda case* where the accused had not been allowed access to a lawyer or represented by a lawyer of his choice at all.

<sup>35</sup> *Eur. Court HR, Case of S. v Switzerland Judgment of 28<sup>th</sup> November 1991, Series A, No. 220.*

<sup>36</sup> *Where a person is restricted or detained the next-of-kin, lawyer and personal doctor of that person shall be allowed reasonable access to that person.* (emphasis added).

<sup>37</sup> Every person who is charged with a criminal offence shall be given adequate time and facilities for the preparation of his or her defence.

<sup>38</sup> *Where a person is restricted or detained the next-of-kin, lawyer and personal doctor of that person shall be allowed reasonable access to that person.* (emphasis added).

We now turn to the right to be promptly brought before a court after arrest. The applicable law is found in article 9(3) International Covenant on Civil and Political Rights which requires that “anyone arrested or detained on a criminal charge” to be “brought promptly before a judge or other officer authorized by law to exercise judicial power.” This provision is materially similar to article 5(3) of the European Convention on Human Rights and article 7(5) of the American Convention on Human Rights. Article 7(1)(a) of the African Charter, though not expressly providing for this right nonetheless gives every individual the right to “appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force.” However, the African Commission has said that the right to be “tried within a reasonable time by an impartial tribunal” guaranteed by article 7(1) (d) is reinforced by its Resolution on Fair Trial which requires that persons arrested or detained to “be brought promptly before a judge or other officer authorized by law to exercise judicial power” and that once brought before such tribunal they shall be entitled to “trial within reasonable time or to be released.”<sup>39</sup> Read this way, article 7 of the African Charter imposes duties that are no less onerous than those required by other international instruments.

The Ugandan Constitution gives voice to these provisions in article 23(4)(b)<sup>40</sup> which provides that “a person arrested or detained upon reasonable suspicion of his or her having committed... a criminal offence” must be brought to court “as soon as possible but in any case not later than forty-eight hours” since the arrest.

What are the applicable international standards imposed by article 9(3) of the International Covenant on Civil and Political rights? In *V. Kulomin v. Hungary* the Human Rights Committee said that the purpose of the first part of article 9(2) is to “bring the detention of a person charged with a criminal offence under judicial control.”<sup>41</sup> A preliminary question is what exactly the term “promptly” requires. The Human Rights Committee says that what constitutes a satisfaction of promptly should be decided “on a case by case basis.” However, in *L. Stephens v. Jamaica* the Committee noted that the time between arrest and indictment in court “should not exceed a few days.”<sup>42</sup> Indeed the Committee has generally found that any delay of between 4 to 10 days violates the duty of promptitude required by article 9(3). This must surely mean that any delay longer than 10 days, say two and a half months, as in *A. Berry v. Jamaica*<sup>43</sup> must necessarily be an egregious violation of article 9(3).

This conclusion is fortified by the jurisprudence of article 5(3) of the European Court of Human Rights. Article 5(3) is in *pare materia* to article 9(3) of Civil and Political Rights

<sup>39</sup> ACHPR, *Huri Laws (on behalf of Civil Liberties Organisation) v. Nigeria*, Communication no. 225/98 at [:/www1.umn.edu/humanrts/africa/comcases/225-98.html](http://www1.umn.edu/humanrts/africa/comcases/225-98.html)

<sup>40</sup>The section provides, in full, that, “A person arrested or detained upon reasonable suspicion of his or her having committed or being about to commit a criminal offence under the laws of Uganda, shall, if not earlier released, be brought to court as soon as possible but in any case not later than forty-eight hours from the time of his or her arrest.”

<sup>41</sup> Communication No. 521/1992, see UN doc. GAOR, A/51/40 vol. II) p. 20.

<sup>42</sup> Communication No. 373/1989, see UN doc. GAOR, A/51/40 vol. II) p. 9. See also General comment No. 8. Paragraph 2 of that Comments says of the Obligation in article 9, “Paragraph 3 of article 9 requires that in criminal cases any person arrested or detained has to be brought “promptly” before a judge or other officer authorized by law to exercise judicial power. More precise time limits are fixed by law in most States parties and, in the view of the Committee, *delays must not exceed a few days.*”

<sup>43</sup> Communication No. 330/1988, see UN doc. GAOR, A/49/40 (vol. II) p. 26-27.

Covenant. The European Court has said<sup>44</sup> that the purpose of promptness under this article is to protect the “individual against arbitrary interferences by the state with his right to liberty.” And though the Court has accepted that “the promptness is to be assessed in each case according to its special features” it has nonetheless emphasized that “the significance to be attached to those features never can be taken to the point of impairing the very essence of the right guaranteed by article 5.”

The Court considers article 5 obligations so stringent that even where “terrorism in Northern Ireland” was involved, it rejected the government’s argument that the circumstances there justified dispensing with prompt judicial control. It said that the scope for “flexibility in interpreting and applying the notion of ‘promptness’ is very limited.” Rejecting the claim that this case had special features that would justify a lengthy period of detention without the detained person appearing before a judge the Court said that such a reading would be an “unacceptably wide interpretation of the plain meaning of the word ‘promptly.’” In its words:

“An interpretation to this effect would import to Article 5(3) a serious weakening of a procedural guarantee to the detriment of the individual and would entail consequences impairing the very essence of the right protected by this provision.... The undoubted fact that arrest and detention of the applicants were inspired by the legitimate aim of protecting the community as a whole from terrorism is not, on its own, sufficient to ensure compliance with the specific requirements of Article 5(3).”

The conclusion, then, is not in doubt: both the Ugandan Constitution and the applicable international instruments oblige authorities to bring accused persons before court within two or no more than a few days. All of the 99 accused who were held longer than this before being brought to court must seek declaratory relief that their rights - under article 23 of the Constitution, article 7 of the African Charter and article 9 of the Covenant on Civil and Political Rights - have been violated.

### iii. The right to be tried without undue delay or to release pending trial

The inquiry must now turn to the gravamen of this application: the fact that the 99 accused persons have neither been tried “without delay” nor “released pending trial.” This right is the second element protected by article 9(3) of the International Covenant on Civil and Political Rights<sup>45</sup>, article 7(5) of the American Convention on Human Rights and Article 5(3) of the European Convention on Human rights, article 7 of the African Charter and articles 23(4)(b)<sup>46</sup> and 23(6)(a)<sup>47</sup> of the Uganda Constitution. All these articles oblige authorities to

<sup>44</sup> See the case of *Brogan and Others v. The United Kingdom*, *Judgement of November 29, 1988* in Eur. Court HR Series A, No. 145.

<sup>45</sup> It is also the subject of paragraph 3 of [General Comment no. 8](#) which says that, “Another matter is the total length of detention pending trial. In certain categories of criminal cases in some countries this matter has caused some concern within the Committee, and members have questioned whether their practices have been in conformity with the entitlement “to trial within a reasonable time or to release” under paragraph 3. *Pre-trial detention should be an exception and as short as possible.*”

<sup>46</sup> *id.* note 40.

<sup>47</sup> Article 23 (6) states that, “Where a person is arrested in respect of a criminal offence-

(a) the person is entitled to apply to the court to be released on bail and the court may grant that person bail on such conditions as the court considers reasonable.”

try the accused person within a reasonable time or to release him or her pending trial. We must consider what “trial without delay” or “within a reasonable time means.”

**a. Meaning of trial without undue delay**

Articles 14(3)(c) of the ICCPR, 7(1)(d) of the African Charter, 8(1) of the American Convention as well as Article 6(1) of the European Convention all require a trial to take place “without undue delay” or to be held “within a reasonable time.” Scouring through the jurisprudence of international tribunals, the difference between the two formulations is one of *language* not of *intent*. Particularly important for this case, is General Comment no. 13 of the Human Rights Committee. According to the Comment:

“This guarantee 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.”<sup>48</sup>

In the case before us, it is not an answer to argue that the trial has commenced and that therefore there is no delay. There is a violation of article 9 if a) the trial has not commenced promptly and b) it has commenced but not ended without delay and c) it has ended but judgement has not been rendered within a reasonable time.<sup>49</sup>

Trawling through the case-law, two additional points emerge. One, the right to be tried without delay is not violated if the delay has been caused by the defendants, for instance, by frequent changes of lawyers. Second, the right is violated whether the defendant is eventually convicted or that the weight of the evidence is against him. This latter point was made by the Human Rights Committee in the *Case of Pratt and Morgan*. In this case, the accused persons were convicted but were unable to appeal to the Privy Council because the Court of Appeal took nearly four years to render judgement. The state party sought to evade responsibility with the argument that the delay was “attributable to an oversight and that the [accused] should have asserted their right to receive earlier the written judgment.” The Committee disagreed finding that in this case the responsibility for the delay lay with the judicial authorities. This responsibility was “neither dependent on a request for production by the counsel in a trial nor is fulfilment of this responsibility excused by the absence of a request from the accused.” Concluding that this delay had violated article 14(3)(c) and (5) the committee said that “it matters not that in the event the Privy Council affirmed the conviction of the authors.” In all cases, “accused persons are entitled to trial and appeal without undue delay, whatever the outcome of those judicial proceedings turns out to be.”

Moreover, where the initial delay clearly violates provisions of international conventions, the state cannot escape responsibility by showing that further delays were caused by the defendant. In other words, if there has been a delay of two and a half years in coming to trial, the state cannot escape responsibility by showing that the half year delay additional to

---

<sup>48</sup> United Nations Compilation of General Comments, *General Comment No. 13: Article 14 (Administration of Justice)* p. 174 para.10.

<sup>49</sup> See the case of *Case of Pratt and Morgan below*.

the two years was caused by the accused person. This was the implicit conclusion of the Human Rights Committee in the communication of *C. Smart v. Trinidad and Tobago*<sup>50</sup>. Here there had been a delay of more than two years between arrest and trial. Concluding that this delay violated both article 14(3)(c) and 9(3) the Committee said that it was not necessary, in the circumstances, to decide whether “further delays in the conduct of the trial were attributable to the state party or not.”

The authorities do not offer a cut and dried formula for determining what constitutes a reasonable delay. In a line of cases, the European Court of Human Rights has held that whether a delay is reasonable or not will be assessed “in light of the particular circumstances of the case” and that relevant factors include “the *complexity of the case, the applicant’s conduct* and that of *the competent authorities*.”<sup>51</sup> This comment only brings us to the threshold: when would the complexity of a case, the conduct of the accused person or the behaviour of competent authorities excuse delay in coming to trial?

**i. When delay is caused by the complexity of a case.**

We begin with the complexity of a case. We are unable to find an international case directly in point. But the reasoning of the New Zealand Court of Appeal in the 2003 decision in *R. v. Harmer*<sup>52</sup> is illuminating and illustrative.

In *Harmer*, the wife of the accused was killed in a vehicle fire on his farm. Initially the police considered the death an accident and allowed the field to be ploughed and the vehicle to be sold and subsequently destroyed. Later, in December 2000, after reviewing expert evidence of the photos of the crime scene, the police charged Harmer with murder. The accused applied for stay or discharge of the proceedings on the grounds of prejudice occasioned by destruction of the crime scene, loss of witness notes and delay. His application was dismissed in July 2001. A trial date set for August 2001 was postponed to allow the accused to consider discovery of new materials. The trial then begun in February 2002 but was abandoned after three weeks after a prosecution witness said he had changed his mind upon inspecting the exhibits in person. The accused made another application for stay or discharge but this, too, was dismissed in May 2002. A new trial was held in July 2002 under a new judge and jury. On 30<sup>th</sup> August, Harmer was found guilty and sentenced to life imprisonment. He then appealed to the Court of Appeal on grounds of prejudice arising from destruction of the crime scene and for violation of his right under section 25(b) of the New Zealand bill of rights<sup>53</sup> to be tried without undue delay.

In rejecting the appeal on the question of delay, the Court said that there was no missing witness and none had his or her memory dimmed to the extent that it materially affected their testimony. With reference to the complexity of the case, the Court said that the delay of

<sup>50</sup> Communication No. 672/1995 *C. Smart v. Trinidad and Tobago*, (views adopted on 29<sup>th</sup> July, 1998) see UN doc. GAOR, A/53/40 (vol. II) p. 149.

<sup>51</sup> See, for example, *Eur. Court HR, Case of Kemmache v. France, Judgement of 27<sup>th</sup> November 1991, Series A, No. 218, p.20*. Also *Eur. Court HR, Martins Moreira Case v. Portugal Judgement of 26<sup>th</sup> October, 1988, Series A, No. 143, p.17*.

<sup>52</sup> See *R v. Harmer*, the New Zealand Court of Appeal, CA 324/02; CA 352/02; also *Commonwealth Human Rights Law Digest*, 4 CHRLD 315-451, Issue 3, Spring/Summer 2004 at 384-386.

<sup>53</sup> Section 25(b) of the New Zealand Bill of Rights states that : “Every person charged with an offence has, in relation to the determination of the charge, the following minimum rights: the right to be tried without undue delay.”

19 months between charging and trial did not unduly prejudice Harmer given the complexity of the case. There were eight weeks set aside for trial, 90 witnesses had to be called and there was a great deal of technical evidence to consider.

In the case of the 99, the decision of the Court of Appeal can be deployed to resist claims that the delays in concluding the trial have arisen from the complexity of the case. In Harmer, there were many technical difficulties, the crime scene had been destroyed and certain evidence had been discarded. Yet with all this complexity the delay was just 19 months, less than 2 years compared to the more than 36 months involved here.

**ii. Delays caused by the defendant**

How about the conduct of the accused? States have often blamed the accused person in cases of delay. But which type of conduct by the applicant is relevant here? The cases have not fully elaborated the types of conduct which is relevant here. However, the accused can not be blamed for delay merely because he or she has sought to exercise a constitutional or conventional right. This is the conclusion to be made from the decision of the European Court in the case of *Yagci and Sargin v. Turkey*.<sup>54</sup> In this case, Court was explicit that article 6 “does not require a person charged with a criminal offence to co-operate actively with the judicial authorities.” More important, an accused person must not be blamed for “taking full advantage of the resources afforded by national law in their defence.” This is to be distinguished from those cases in which the accused person and counsel have evinced a dogged “determination to be obstructive.”

**iii. Behaviour of the Competent Authorities**

A common argument made by states’ is that delays were caused by the difficulty of gathering evidence. Any number of reasons are offered to support such a claim, a common one being lack of financial resources or personnel in the investigating agencies. When such claims have been made under the ICCPR, the Human Rights Committee has given them short shrift. In *N. Filastre v. Bolivia*<sup>55</sup>, the Committee stated that lack of “budgetary appropriations for the administration of criminal justice.. does not justify unreasonable delays in the adjudication of criminal cases.” In this case, a delay of 3 years could not be justified by considerations of evidence gathering no matter what the explanations were for the difficulties encountered in the exercise. A delay of 31 months in *P. Chiiko Bwalya v. Zambia* was also held unreasonable and a violation of article 9(3) of the International Covenant on Civil and Political Rights. Here the accused person had been held merely because he belonged to a political party considered illegal under the Constitution of Zambia which allowed for one political party only.

*A fortiori*, a delay of 3 years, such as is the case here, is unreasonable and a violation of article 9 of the ICCPR.

**b. Right to Release Pending Trial**

So far we have considered situations where *the trial has not taken place within a reasonable time* not as here, where *the trial has not even begun*. In this regard, it is important to note that the

<sup>54</sup> Eur. Court HR, *Case of Yagci and Sargin v. Turkey* Judgement of 8<sup>th</sup> June 1995, Series A, No. 319-A, para 66.

<sup>55</sup> Communication No. 336/1988 *N. Filastre v. Bolivia*, (views adopted on 5<sup>th</sup> November 1991) see UN doc. GAOR, A/47/40 (vol. II) p. 306.

Human Rights Committee has held that the right to be tried without undue delay has been violated where the trial had not been held within 31 months. In this case *not only have the accused not been tried for three years, they have also been in pre-trial detention all that time*. What human rights principles apply in such a case? The relevant provisions are article 9(3) of the International Covenant on Civil and Political Rights; Article 7(5) of the American Convention on Human Rights; article 5(3) of the European Convention on Human Rights and Article 7 of the African Charter read together with the African Commission's *Resolution on Fair Trial*. Interpreting article 9(3) of the ICCPR, the Human Rights Committee has held that "pre-trial detention should be the exception and...bail should be granted, except in situations where the likelihood exists that the accused would *abscond or destroy evidence, influence witnesses* or flee the *jurisdiction of the state party*."<sup>56</sup>

The conclusion of the Human Rights Committee is on all fours with the provisions of the Uganda Constitution. The framers of that Constitution intended to minimise pre-trial detention. In section 23(6)<sup>57</sup> the framers granted two rights to secure that goal, to wit: a) a general right to bail without any conditions except those imposed by the court and b) an automatic right to be released on bail after the lapse of a specified period in custody.

Thus the letter of the law: how about its application? The European Court on Human Rights has fleshed out the principles underlying consideration of bail applications in the *Case of Assenov and Others v. Bulgaria*.<sup>58</sup> The Court noted that an accused person's detention "must be assessed in each case according to its special features" and that "the factors to be considered are extremely diverse." Notwithstanding, this qualification it made the following reflections on the question whether an accused person is to be released on bail or not:

"It falls in the first place to the national judicial authorities to ensure that that the pre-trial detention of an accused person does not exceed a reasonable time. To this end, they must examine *all the circumstances arguing for and against the existence of a genuine requirement of public interest justifying, with regard to the principle of the presumption of innocence, a departure from the rule of respect for individual liberty and set these out in their decisions on the applications for release*. It is essentially on the basis of the reasons given in these decisions and of the true facts mentioned by the detainee in his application for release and his appeals that the Court is called upon to decide whether or not there has been a violation of article 5(3).

---

<sup>56</sup> Communication No. 526/1993, *M. and B. Hill v. Spain*, (views adopted on 2<sup>nd</sup> April 1997) see UN doc. GAOR, A/52/40 (vol. II) p. 17.

<sup>57</sup> Article 23 (6) provides that, "Where a person is arrested in respect of a criminal offence-

- (a) the person is entitled to apply to the court to be released on bail and the court may grant that person bail on such conditions as the court considers reasonable.
- (b) in the case of an offence which is triable by the High Court as well as by a subordinate court, the person shall be released on bail on such conditions as the court considers reasonable, if that person has been remanded in custody in respect of the offence before trial for *one hundred and twenty days*;
- (c) in the case of an offence triable only by the High Court the person shall be released on bail on such conditions as the Court considers reasonable, if the person has been remanded in custody for *three hundred and sixty days* before the case is committed to the High Court." (*Emphasis added*).

<sup>58</sup> *Eur. Court HR, Case of Assenov and Others v. Bulgaria, Judgement of 28<sup>th</sup> October, 1998, Report 1998-VIII, p.3300.*

The persistence of reasonable suspicion that the person arrested has committed an offence is a condition *sine qua non* for the validity of the continued detention, but, after a certain lapse of time, it no longer suffices: the Court must then establish whether the other grounds cited by the judicial authorities continued to justify the deprivation of liberty. Where such grounds are ‘relevant’ and ‘sufficient,’ the Court must also ascertain whether the competent national authorities displayed ‘special diligence’ in the conduct of the proceedings.”

The facts of the *Assenov Case* have special relevance to the case under consideration in Uganda. In this case, the applicant was charged with more than 16 counts of burglary. The authorities expressed fear that he would commit more burglaries if released on bail. But it had taken two years for the case to come to trial. On these facts, the European Court concluded that he had been denied a trial within a reasonable time. In particular, it noted that during one of those two years, “virtually no action in connection with the investigation: no new evidence was collected and Mr. Assenov was questioned only once.”

There is Commonwealth jurisprudence to reinforce the conclusions of the European Court on this point. In the case 99 that is now before the court, the relevant factors for the Ugandan Constitutional Court to consider include: a) what action, if any, has been taken by the government in terms of gathering new evidence in the three years that the accused have been in custody?; b) What reasons have been offered for delay in coming to trial?; and c) What public interest argument, if any, has been made to justify continued incarceration?

The answers that the state gives to these questions will then have to be tested against the principles governing release on bail. These principles include: a) the danger of absconding; b) suspected involvement in serious offences; c) the risk of relapse into crime; and d) pressure on witnesses and risk of collusion. However, even though these are important considerations, it is important to underline that these factors *are not talismanic*: the mere invocation of any one of them does not justify continued incarceration. Evidence must be offered to support each claim. With that caution we turn to a brief consideration of each of these factors.

**i. The risk of absconding: principles applicable**

If a state alleges that an accused person will abscond if released, the European Court of Human Rights has held that the provenance of such a claim “cannot be gauged solely on the basis of the severity of the sentence” that the accused will face if convicted. Such claims “must be assessed with reference to a number of other relevant actors which may either confirm the existence of a danger of absconding or make it appear so slight that it cannot justify detention pending trial.” Moreover, even where the danger of absconding exists, the accused does not lose the right to be released. Rather it is the authorities who have a duty to “counter it [that risk] by, for instance, requiring the lodging of a security and placing the [accused] under court supervision.”<sup>59</sup> In the words of the Court in the *Wemboff Case v. the Federal Republic of Germany*,<sup>60</sup> “when the only remaining [reason] for continued detention is the fear that the accused will abscond and thereby subsequently avoid appearing for trial, his

<sup>59</sup> See *supra*. *Case of Yagci and Sargin v. Turkey*

<sup>60</sup> *Eur. Court HR, Wemboff Case v. the Federal Republic of Germany, Judgement of 27<sup>th</sup> June 1968, Series A. No. 7 p. 25.*

release pending trial must be ordered if it is possible to obtain from him guarantees that will ensure such appearance.”

Even where the accused is a foreigner, the same principles apply. As the Human Rights Committee noted in *M. and B. Hill v. Spain*, “the mere fact that the accused is a foreigner does not of itself imply that he may be held in detention pending trial.” The Committee was emphatic that, “the mere conjecture of a state party that a foreigner might leave its jurisdiction if released on bail does not justify an exception to the rule laid down in Article 9(3).”

**ii. The seriousness of the offence charged**

The argument has frequently been made- and is relevant to the case of the 99- that accused person’s should not be released on bail because the offence with which he or she is charged is very grave. The implicit conclusion to be drawn is that such an accused person poses a special risk to society. As to this claim, the European Court has said that though it is a relevant factor in applications under article 5(3), it “cannot alone justify a long period of pre-trial detention.” Thus in *Van Der Tang v. Spain*<sup>61</sup> where the accused person had been indicted for drug trafficking offences, the Court considered the offences “of a serious nature” and described “the evidence incriminating the accused” as “cogent” but concluded that this was not sufficient to justify detention. Although, in the end the Court did not find a violation of article 5(3), *the linchpin of its finding was not merely the fact that the offence was serious but this finding plus the fact that the case had become complex after being joined with another criminal investigation.* This finding was buttressed by the fact that the Court was satisfied that “the risk of the applicant’s absconding persisted throughout the whole of his detention on remand, the protracted length of which... was *not attributable to any lack of special diligence on the part of the Spanish authorities.*” [emphasis added].

**iii. The risk that the accused person will commit other offences if released**

Recidivism, the risk that an accused will commit similar offences once released on bail, cannot be wished away. This was in issue in the European Court’s decision in *Assenov*. But the authority directly in point is the *Case of Toth v. Austria*<sup>62</sup>. Here the European Court considered that *the risk of the applicant absconding* combined with *the risk that he would repeat the offences charged* justified his continued detention on remand. Even then, though, the court concluded that some cogent materials must be laid before the court to show that the fears expressed by the authorities are reasonable.

**iv. The risk that accused person will interfere with witness if released**

Though this danger is always a risk, there are a number of factors to consider before accepting the state’s argument that it is so. First, there is less danger of this happening if most of the witnesses are police officers or other law enforcement agents as opposed to ordinary citizens or relatives of the accused person. Second, the danger of interference with witnesses is usually greatest at the beginning when evidence gathering is still on-going. As the European Court has noted in the case of *Tommasi v. France*<sup>63</sup>, this danger will usually diminish or disappear in the course of the trial or incarceration.

<sup>61</sup> Eur. Court HR, *Case Van Der Tang v. Spain*, Judgement of 13<sup>th</sup> July, 1995, Series A. No. 321 p. 21.

<sup>62</sup> Eur. Court HR, *Case of Toth v. Austria*, Judgement of 12<sup>th</sup> December, 1991, Series A. No. 224 p. 19.

<sup>63</sup> Eur. Court HR, *Case of Tommasi v. France* Judgement of 27<sup>th</sup> August, 1992, Series A, No. 241-A, p. 36 para 91.

We have now considered the possible law and applicable principles in the case of the 99 accused. It now remains to consider what remedies are available in addition to the claim to be released on bail.

### **C. THE REMEDIES TO BE SOUGHT**

The remedies to be sought in this case are implicit in the legal analysis to this point. These remedies can conveniently be divided into two: Domestic Remedies and, upon exhaustion or frustration of domestic remedies, International Remedies.

#### **a) Domestic Remedies**

The domestic remedies available in this case can be divided into three: i) Orders relating to the constitutionality of impugned sections of the *Trial on Indictment Act*, the *Magistrates Courts Act* and the *Police Act*; ii) Declaratory reliefs that a series of fair trial rights, covered in part B of this opinion have been violated; iii) A finding that on account of orders in (i) and (ii), the accused persons are entitled to be freed on bail and to be compensated by the state.

##### **1. Orders and Findings of Unconstitutionality**

The existence of conflict between the bail provisions of the constitution of Uganda and the challenged sections of the *Trial on Indictment Act*, the *Magistrates Courts Act* and the *Police Act* has been acknowledged by the Constitutional Court in the *Tumushabe case* (considered above). All that remains are specific findings of unconstitutionality as relates to the sections of these laws that are now under challenge. Consistent with the *obiter dictum* in *Tumushabe* and with the analysis in this opinion, the Constitutional Court should now be asked to make the following findings:

- a. That by specifying a list of cases in which the Court has no discretion to grant bail, section 15(2) of the *Trial on Indictment Act* is plainly inconsistent with article 23(6)(a) of the Constitution which gives the court plenary power to give bail subject only to reasonable conditions read together with 273 which defines a court as “a court of judicature *established by or under the authority* of this Constitution.”
- b. That both section 76 of the *Magistrates Courts Act* and section 16 of the *Trial on Indictment Act* are inconsistent with article 23(6) which ordains the automatic release of a person who has spent 120 days in pre-trial custody for the offences described under (b) or 360 days for the offences described under sub-section (c). These constitutional provisions explicitly limit the period over which an accused can be held in pre-trial detention. Under the Constitution, *the court has no discretion whether to release the accused person*. It has discretion *only as to the conditions to impose* for that release.
- c. That section 76 *Magistrates Courts Act* and section 16 of the *Trial on Indictment Act* are unconstitutional to the extent they set different time limits from the Constitution- viz 480 and 240 days- for the automatic release of people in pre-trial remand. These time-limits are inconsistent with the 360 and 120 days time-limits set under article 23.

- d. Section 16 *Trial on Indictment Act* and section 76(d) of the *Magistrates Court Act* are inconsistent with the constitution to the extent that they allow the court to keep an accused person in custody even when the time limits permitted under the Constitution have been passed where the court is satisfied that “*it is expedient for the protection of the public that he or she should not be released from custody.*” These provisions unconstitutionally make permissible that which is impermissible under article 23(6) of the Constitution.
- e. That section 25(2) of the *Police Act* is inconsistent with article 23(4)(b) of the Constitution to the extent that that section allows the police to hold certain categories of suspects for up to seven days whereas the Constitution allows only 48 hours.
- f. That section 15(1) of the *Trial on Indictment Act* is unconstitutional to the extent that it imposes a duty on an accused person charged with offences specified in 15(2) to prove that he is entitled to bail. That this is unconstitutional in two ways: first, it is an unauthorised statutory interference with the Court’s plenary discretion under Article 23(6)(a) to grant bail to any accused persons subject only to the conditions its thinks reasonable and secondly, the duty to prove exceptional circumstances carries has the potential to interfere with the fair trial of the accused and may be an implicit reversal of the burden of proof.

(Here the Constitutional Court must be urged to read article 28(4) narrowly and consistently with the principle of legality, other provisions of the Constitution and international human rights covenants. That is, to make a finding that *the burden of proving particular facts allowed by this section* is not a shift of the general burden of proof to the accused. This section means, to give an example, that in the trial of a public servant for corruption, the burden of proof lies with the prosecution, as it must. However, if the prosecution establishes, conclusively, that a public servant’s lifestyle and assets are inconsistent with his income or inherited assets, then the burden of showing that such assets have not been illegally acquired may be shifted to the accused. This, however, is not what section 15(1) of the *Trial on Indictment Act*. This section shifts the general burden of proof beyond the constitutional prescription, to the accused person: it requires him or her to demonstrate *presumptive innocence.*)

- g. In the unlikely event that the Constitutional Court declines to make findings of unconstitutionality as urged, the court be asked to make an interpretive finding that the impugned sections of the *Trial on Indictment Act*, the *Magistrates Courts Act* and the *Police Act* must be read extremely narrowly under 273(1) of the Uganda Constitution, which specifically requires that “the operation of the existing law after the coming into force of this Constitution” be “construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with this Constitution.”

## 2. Declaratory reliefs

As already noted in detail above, many of the fair trial rights of the accused persons may have been violated. These violations must be vindicated through declaratory relief that can then be used for making claims for compensation. All or some of the applicants, should as applicable to them, seek the following declarations:

- a. A declaration that the failure of the authorities to promptly give them reasons for their arrest was a violation of their right under by article 23(3) of the Ugandan Constitution, article 9(2) of the International Covenant on Civil and Political Rights and article 7 of the African Charter on Human and Peoples Rights as interpreted in *Media Rights Agenda v. Nigeria*.
- b. A declaration that the failure of the authorities to promptly tell them of the charges to be preferred was a violation of their rights covered under article 28(3)(b) of the Uganda Constitution and article 14(3) of the Covenant on Civil and Political Rights. It is also reproduced in identical language in article.
- c. A declaration that the failure of the authorities to permit the applicants free and prompt access to their lawyers was a violation of articles 23 (5)(b)<sup>64</sup> and 28(3)(c) of the Ugandan Constitution, article 14(3)(d) of ICCPR and article 7(1)(c) of the African Charter.
- d. A declaration that the delay by the authorities to bring the accused persons promptly before a court after arrest was a violation of their rights under article 23(4)(b) of the Uganda Constitution, article 9(3) of International Covenant on Civil and Political Rights and article 7(1)(a) of the African Charter read together with the African Commission's Resolution on Fair Trial.
- e. A declaration that the 36-month delay in conducting the trial of the applicants is an egregious violation of their rights under articles 23(4)(b) and 23(6)(a) of the Uganda Constitution; article 9(3) of the International Covenant on Civil and Political Rights and article 7 of the African Charter.

### 3. Consequential findings and orders:

In consequence of the findings in sub-part (1) and (2) of this part, the court should be urged to come to the following findings:

- a. A declaration that in light of the incontrovertible unconstitutionality of the impugned laws, the detention of the applicants was void and unlawful *ab initio*.
- b. An order that on the finding of unconstitutionality as urged in this part, the applicant's bail application must now be determined under the court's plenary discretion in article 23(6)(a) and that, taking all the circumstances into account, there is a compelling case for their release. That case rests on: i) the extent, scope and egregiousness of the violations of the applicant's human rights; ii) the paucity, 3 years on, of any credible argument by the state, for their continued

---

<sup>64</sup> *Where a person is restricted or detained the next-of-kin, lawyer and personal doctor of that person shall be allowed reasonable access to that person. (emphasis added).*

incarceration and iii) the blatant unconstitutionality of the laws under which they have, so far, been denied bail.

- c. An order, based on the findings of unlawful detention in (a), that the applicants are entitled to compensation based on article 23 (7) of the Uganda Constitution and article 9(5) of the ICCPR for unlawful deprivation of liberty.

**b) International Remedies.**

Upon exhaustion of local remedies, if the applicants have not had the relief advised, their lawyers should make a communication to the African Commission on Human and People's Right under article 44 of the Charter.

**End of Opinion.....**