

UNIVERSITY OF THE WESTERN CAPE

FACULTY OF LAW

The legal status of evidence obtained through human rights violations in Uganda.



Mini- thesis submitted in partial fulfilment of the requirements for the award of the LLM degree in International Human Rights

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KEY WORDS

Administration of justice

Admissibility

Canada

Evidence

Fair trial

Human rights violations

Kenya

South Africa

Uganda

Zimbabwe



LIST OF ACRONYMS AND ABBREVIATIONS

| | |
|-----------------------|--|
| ACHPR | African Charter on Human and Peoples' Rights. |
| CAT | Committee Against Torture. |
| CIDT | Cruel, Inhuman and Degrading Treatment or Punishment. |
| ECHR | European Convention on Human Rights. |
| ECtHR | European Court on Human Rights. |
| HRC | Human Rights Committee. |
| ICCPR | International Convention on Civil and Political Rights. |
| IDPs | Internally Displaced Persons. |
| NPM | National Preventive Mechanisms. |
| SCC | Supreme Court of Canada. |
| SPT | Subcommittee on the Prevention of Torture. |
| The Guidelines | Robben Island Guidelines. |
| The Principles | The Principles and Guidelines on Legal Assistance in Africa. |
| UDHR | Universal Declaration of Human Rights. |
| UN | United Nations. |
| UNCAT | United Nations Convention Against Torture. |

DECLARATION

I, **Nanima Robert Doya**, declare that **The Status of Evidence Obtained Through Human Rights Violations in Uganda** is my own work and that it has not been submitted before for any degree or examination in any other university, and that all sources I have used or quoted have been indicated and acknowledged as complete references.

Signed: _____ Nanima Robert Doya

March 2016

Signed: _____ Prof. Jamil Ddamulira Mujuzi



March 2016

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DEDICATION

To my wife Barbara and our children, Crystal, Christian and Conrad.



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CHAPTER ONE

1. INTRODUCTION

The Constitution of the Republic of Uganda, 1995 (Constitution of 1995) is silent on the issue of dealing with evidence obtained through human rights violations. The Prevention and Prohibition of Torture Act¹ provides that

‘any information, confession or admission obtained from a person by means of torture is inadmissible in evidence against that person in any proceedings’.²

Section 14 limits its operation to evidence obtained through torture. This means that evidence obtained through human rights violations, other than torture is not covered by the Prevention and Prohibition of Torture Act. The position is different in South Africa,³ Kenya⁴ and Zimbabwe,⁵ which have constitutional provisions on how to deal with evidence obtained through human rights violations.

In Uganda today, evidence obtained through human rights violations is only treated with caution, especially if it involves involuntary confessions.⁶ Jurisprudence emanating from the courts is inconsistent on how to deal with such evidence. Since different jurisdictions have different ways of dealing with evidence obtained through human rights violations, a comparative study will assist the evaluation of the situation in Uganda.

¹ Act 3 of 2012.

² Section 14.

³ Section 35 (5) of the Constitution of the Republic of South Africa 1996. See also Schwikkard PJ & Van der Merwe SE *Principles of Evidence* 3ed (2009) 1281, De Waal J, Currie I & Erasmus G *The Bill of Rights Handbook* 4 ed (2001) 658.

⁴ Article 50 (4) of the Constitution of the Republic of Kenya, 2010.

⁵ Section 70(3) of the Constitution of the Republic of Zimbabwe, 2013.

⁶ Sections 25-27 of the Evidence Act Cap 6.

Courts are guided by three principles before admitting evidence obtained through human rights violations. First, courts use the reliability principle, because improperly obtained evidence may be as reliable as lawfully obtained evidence and may have a bearing on the innocence or guilt of an accused.⁷ Secondly, courts at times use the deterrent principle, for the purpose of punishing a person who obtained the evidence improperly.⁸ Thirdly, courts also follow the protective principle, whereby an accused does not suffer a disadvantage because of evidence obtained through human rights violations by investigators.⁹

The researcher is not aware of any literature on evidence obtained through human rights violations in Uganda. Mujuzi¹⁰ gives an interesting analysis of *HKSAR v Muhammad Riaz Khan (Khan)*¹¹ on the admissibility of evidence obtained through human rights violations in Hong Kong. The analysis uses a comparative study of the constitutions of Kenya,¹² South Africa,¹³ Zimbabwe,¹⁴ and of the Canadian Charter of Rights and Freedoms.¹⁵ He states that the ruling in *Khan's* case is similar to the provisions in the Constitutions of South Africa and Kenya.¹⁶ He hastens to add that the test was unanimously laid down by the Court in the *Khan* case. He does not consider Uganda's position to Hong Kong nor

⁷ Zeffert DT & Paizes AP *The South Africa Law of Evidence* 2ed (2008) 712. See also John DT & Sarah JS *The Internationalisation of Criminal Evidence Beyond the Common law and Civil Law Traditions* (2012) 154.

⁸ Zeffert DT & Paizes AP (2008) 712. See also John DT & Sarah JS (2012) 154.

⁹ Zeffert DT & Paizes AP (2008) 712. See also John DT & Sarah JS (2012) 155.

¹⁰ Mujuzi JD 'The admissibility of evidence obtained as a result of violating the accused's rights: Analysing the test set by the Hong Kong Court of Final Appeal in *HKSAR v Muhammad Riaz Khan*' (2012) 16 *International Journal of Evidence and Proof* 425 426.

¹¹ Mujuzi JD (2012) 427.

¹² Article 50 (4) of the Constitution of the Republic of Kenya 2010.

¹³ Section 35(5) of the Constitution of the Republic of South Africa, 1996.

¹⁴ Section 70(3) of the Constitution of the Republic of Zimbabwe, 2013.

¹⁵ Article 24(2) of the Canadian Charter of Rights and Freedoms.

¹⁶ Mujuzi JD (2012) 430.

discuss how courts in Uganda have grappled with this lacuna in the law. His analysis, however, shows that despite lack of a constitutional provision, courts may develop jurisprudence which serves the same purpose as a constitutional provision.

Mujuzi¹⁷ analyses the issues to grapple with in implementing the Ugandan Prevention and Prohibition of Torture Act, and observes that under section 14, evidence obtained through torture is inadmissible. He argues that evidence obtained through inadmissible confessions may be inadmissible, and that the police have been keen to exploit this loophole. His study is limited to evidence obtained through torture in Uganda and does not cover evidence that could be obtained through other human rights violations.

The common law exclusionary approach is narrow and generally limited to excluding confessions improperly obtained.¹⁸ Authors argue that it does not adequately deal with other types of evidence, such as, evidence obtained after illegal detention, evidence from illegal searches, autoptic evidence, evidence from interception, evidence as a result of handling other witnesses, and entrapments.¹⁹ Uganda uses the common law principles handed down in *Kurumah s/o Kairu v R*.²⁰ The two principles state evidence improperly obtained is admissible and the court is not concerned with how it was obtained. The court

¹⁷ Mujuzi JD 'Issues to grapple with in implementing the Ugandan Prevention and Prohibition of Torture Act' (2012) 1 *International Human Rights Law Review* 382 388.

¹⁸ Andrew LT & Susan N 'Improperly Obtained evidence in the Commonwealth; lessons for England and Wales' (2007) 11 *International Journal of Evidence and Proof* 75 75. Steven MP 'Unreal distinctions: The exclusion of improperly obtained evidence under section 24(2) of the Charter' (1994) 32 *Alberta Law Review* 782 797, Heydon JD 'illegally obtained evidence' (1973) 1 *Criminal Law Review* 603 603.

¹⁹ Andrew LT & Susan N (2007) 75. Steven (1994) 797, Heydon (1973) 603.

²⁰ *Kurumah s/o Kairu v R* (1955) AC 197, 203; Andrew LT & Susan N (2001) 78.

has discretion to not to allow the admission of improperly obtained evidence if, its admission will operate unfairly against the accused.²¹

1.1 THE POSITION IN UGANDA

1.1.2 THE CONSTITUTION OF 1995

The Constitution of Uganda 1995 (Constitution) provides that an accused has a right to a fair hearing.²² This right entails legal concepts like a presumption of innocence until proven guilty,²³ and to be charged in accordance with the law.²⁴ In addition, neither the accused nor a spouse can be compelled to give evidence against one's self.²⁵ The Constitution, however, lacks a directive on how to deal with evidence obtained through human rights violations.

Article 50 of the Constitution provides for enforcement of rights and freedoms. It states;

'(1) Any person who claims that a fundamental or other right or freedom guaranteed under this Constitution has been infringed or threatened, is entitled to apply to a competent Court for redress which may include compensation.

(2) Any person or organisation may bring an action against the violation of another person's or group's human rights.'

This Article provides for redress, for infringement of human rights by a court of competent jurisdiction upon application by an affected party. The Article is unclear on whether the exclusion of evidence obtained through human rights violations is a form of redress.

It, however, provides for compensation as a mode of relief.

²¹ *Kuruma* page 203.

²² Article 28 of the Constitution of 1995.

²³ Article 28(3)a.

²⁴ Article 28(7).

²⁵ Article 28(11).

1.1.3 OTHER LEGISLATION

The Prevention and Prohibition of Torture Act provides that:

‘any information, confession or admission obtained from a person by means of torture is inadmissible in evidence against that person in any proceedings.’²⁶

This section limits its operation to evidence obtained through torture. This means that evidence obtained through human rights violations other than torture is not covered by the Prevention and Prohibition of Torture Act.

The Evidence Act²⁷ places emphasis on admissibility of confessions, which is one form of evidence that is susceptible to human rights violations.²⁸ The Act regulates the relevance and admissibility of evidence in courts²⁹ and provides guidelines on recording of confessions.³⁰ It provides that a confession which would otherwise be inadmissible, may still be admitted in evidence, if in the view of court, the impression making it inadmissible is removed.³¹ The court, therefore, exercises a discretion either to admit or not to admit the evidence.³² Section 25 of the Evidence Act provides that a confession which would be irrelevant because it was obtained through violence, force, threat, inducement or promise may be relevant. This is possible if the prosecution proves to the court that there was no violence, force, threat, inducement or promise used in obtaining the confession. Despite the grant of discretion to the court to rely on a confession, the Act does not lay down a rule on the admissibility of a confession obtained through human rights violations.

²⁶ Section 14.

²⁷ Evidence Act Cap 6.

²⁸ Sections 23 - 27.

²⁹ Sections 24- 26.

³⁰ Section 23.

³¹ Section 25.

³² Section 25.

The Criminal Procedure Code Act³³ makes provision for the procedure to be followed in criminal cases,³⁴ and the modes of arrest and search of an accused.³⁵ The Act is also silent on how to deal with evidence obtained through human rights violations, such as, illegal arrests and searches. The Magistrates Courts Act³⁶ and the Trial on Indictments Act³⁷ are equally silent on how to handle evidence obtained through human rights violations.

The Regulation of Interception of Communications Act,³⁸ allows authorised persons from security organisations to obtain a warrant from a designated judge to intercept communications.³⁹ In instances where the holder of the warrant exceeds the bounds of the warrant, the Act still sanctions the admission of such evidence obtained, with due regard to the circumstances in which the evidence was obtained. Some of the circumstances include the potential effect of its admission or exclusion on issues of national security; and the unfairness to the accused that may be occasioned by its admission or exclusion.⁴⁰ The literal interpretation of the Act is that where there is a violation of rights of an individual, the evidence may still be admitted on grounds on national security.

³³ The Criminal Procedure Code Act Cap 116.

³⁴ Long title of the Criminal Procedure Code Act, Cap116.

³⁵ Sections 2- 27.

³⁶ Magistrates Courts Act Cap 16.

³⁷ Trial on Indictments Act Cap 23.

³⁸ Regulation of Interception of Communications Act 18 of 2010.

³⁹ Section 4.

⁴⁰ Sections 7(a)-(c).

1.2 CASE LAW

The courts have in the exercise of their discretion, at times admitted evidence obtained through human rights violations and at times not. Courts have not been consistent in their decisions, though recent decisions point to the need to disallow evidence that is obtained in violation of the human rights of an accused. The courts have held that where a few irregularities in recording a confession do not occasion a miscarriage of justice, the confession is admitted.⁴¹ In other cases, the courts have held that a confession made after an accused has been in custody for more than 48 hours is inadmissible.⁴² A consistent violation of the rights of the accused persons in obtaining evidence has been held to constitute an unfair trial and as a result such evidence may not be admitted.⁴³

1.3 PROBLEM STATEMENT

The Constitution of the Republic of Uganda, 1995 is silent on how evidence obtained through human rights violations should be treated. Lack of a constitutional provision compels judicial officers to act on their own discretion either to admit or not to admit the evidence. The discretion is based on the common law position where courts may disregard evidence if its admission shall be unfair to the accused's trial.⁴⁴ The courts' application of discretion without a constitutional provision on how to deal with evidence obtained through human rights violations has led to inconsistencies on how to deal with

⁴¹ *Namulodi Hassan v Uganda* unreported supreme court case no16/1997 (13 July 1998), *Ssewankambo Francis, Kiwanuka Paul, Mutaya Muzairu v Uganda* unreported supreme court case no 33 / 2001 (20 February 2003), *Walugembe Henry, Ssali Paul Sande and Kamanzi Joseph v Uganda* unreported supreme court case no 39/2003 (1 November 2005).

⁴² *Uganda v Kalawudio Wamala* unreported high court case no 442/1996 (6 November 1996).

⁴³ *Kizza Besigye & Others v The Attorney General* unreported constitutional court case no 7/2007 (12 October 2010) pg 39; para 5 of the judgment. *Uganda v Robert Sekabira and 10 others* unreported high court case no 85/2010 (14 May 2014). *Uganda v Ekungu Simon* unreported high court case no19/ 2011 (20 July 2011), pg. 9 of the judgment.

⁴⁴ *Kuruma v R* (1955) AC 157.

this kind of evidence. The decisions show inconsistency in dealing with evidence obtained through human rights violations. While decisions have had the evidence admitted, other have not.

The Constitutions of South Africa,⁴⁵ Kenya⁴⁶ and Zimbabwe⁴⁷ provide for a way of dealing with such evidence. Hong Kong has case law which is consistent in dealing with evidence obtained through human rights violations.⁴⁸ These four countries are all common law countries, like Uganda, and offer a basis for a comparative study.

1.4 OBJECTIVES AND SIGNIFICANCE OF THE RESEARCH

The Constitution is silent on how to admit evidence obtained through human rights violations in Uganda, yet there is lack of consistency in dealing with such evidence. Although the Prevention and Prohibition of Torture Act provides that any information, confession or admission obtained from a person by means of torture is inadmissible in evidence against that person, the Act is limited to evidence obtained through torture.

The decided cases indicate that jurisprudence has leaned more towards admission of confessions, yet there are other types of evidence which could be obtained through human rights violations. This includes evidence obtained through illegal searches, autoptic evidence and entrapments. If the problem is not resolved, the inconsistency in dealing with evidence obtained through human rights violations shall continue escalating. In

⁴⁵ Section 35 (5) of the Constitution of South Africa, 1996; Schwikkard PJ & Van der Merwe SE (2009) 1281, De Waal J, Currie I & Erasmus G (2001) 658.

⁴⁶ Article 50 (4) of the Constitution of the Republic of Kenya.

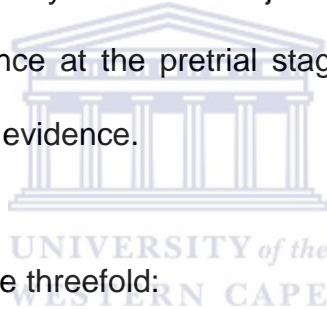
⁴⁷ Section 70(3) of the Constitution of the Republic of Zimbabwe, 2013.

⁴⁸ The *Khan* case.

addition, the judgments lead to a strain on the administration of justice in so far as it is brought into disrepute.

This research explores the concept of evidence obtained through human rights violations in courts of law. This evidence is a challenge every judicial officer has to deal with as it entails the need to punish the accused, while at the same time striking a balance to ensure that the evidence presented to the court for that purpose has been obtained in accordance with the required standards of investigation.

This study helps in the improvement of the practice of evaluating evidence in courts, by providing recommendations to policy makers and judicial officers in the criminal justice system on how to handle evidence at the pretrial stages in order to greatly attempt to contain the consequences of this evidence.



The objectives of this research are threefold:

1. To establish how countries like South Africa, Canada, Kenya, Zimbabwe and Hong Kong deal with evidence obtained as a result of human rights violations. This is because all these countries, apart from Hong Kong, have constitutional provisions on how to handle evidence obtained through human rights violations. Hong Kong has case law relating to evidence obtained through human rights violations.
2. To establish the position of international law on evidence obtained through human rights violations.
3. To establish how Ugandan courts have handled evidence obtained through human rights violations.

1.5 LIMITATION OF THE RESEARCH

The major challenge shall be obtaining cases from Uganda, because most of the cases are not reported. As the research is based at the University of the Western Cape, most of the materials for the study shall be obtained online.

1.6 RESEARCH METHODOLOGY

The methodology is desktop research based on the review and analysis of literature and case law that are relevant to the subject of the study. The sources of the mini- thesis shall include statutory laws; legal literature involving textbooks and journals; and case law.

1.7 THE PROPOSED STRUCTURE

Chapter One includes the research proposal.

Chapter Two includes the discussion of the position in international law in respect to evidence obtained through human rights violations; and whether it is binding on Uganda. The international instruments referred to will include the Universal Declaration of Human Rights,⁴⁹ the International Covenant on Civil and Political Rights,⁵⁰ the United Nations Convention Against Torture,⁵¹ the European Convention on Human Rights,⁵² and the African Charter on Human and Peoples' Rights.⁵³

Chapter Three examines the position of evidence obtained through human rights violations in South Africa, Canada, Kenya, Zimbabwe and Hong Kong in comparison with Uganda. It also involves an examination of the statutory laws and decided cases in the selected countries. This chapter highlights the position in the selected countries because

⁴⁹ Universal Declaration of Human Rights, UNGA Res 217 A(III) (UDHR).

⁵⁰ International Covenant on Civil and Political Rights, 999 UNTS 171.

⁵¹ United Nations Convention Against Torture, 1465 UNTS 85.

⁵² European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222.

⁵³ African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

the Constitutions of South Africa, Zimbabwe, Kenya and Canada have provisions on how to deal with evidence obtained through human rights violations. Hong Kong has developed case law which lays down rules on the admissibility of evidence obtained through human rights violations.⁵⁴ In addition, these countries are all common law countries.

Chapter Four discusses how courts have treated evidence obtained through human rights violations in Uganda in the light of the current statutory provisions.

Chapter Five gives an analysis of the content of improperly obtained evidence in Uganda in the light of the law and how courts have decided cases in dealing with improperly obtained evidence.

Chapter Six shall offer a conclusion of the findings and recommendations.



⁵⁴ The *Khan* case.

CHAPTER TWO

STATUS OF EVIDENCE OBTAINED THROUGH HUMAN RIGHTS VIOLATIONS IN INTERNATIONAL LAW

2. INTRODUCTION

This Chapter evaluates the position of international law on evidence obtained through human rights violations. The chapter discusses the Universal Declaration of Human Rights (UDHR),¹ two regional instruments, and two United Nations instruments. The two regional instruments are the African Charter on Human and Peoples' Rights (African Charter)² and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).³ The two international instruments are; the United Nations Convention against Torture, Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT)⁴ and the International Covenant on Civil and Political Rights (ICCPR).⁵

The evaluation of the instruments is placed on their monitoring bodies, and their jurisprudence and how they deal with evidence obtained through human rights violations. Arguments are advanced for the African Charter, ECHR, UNCAT and the ICCPR which act as an aid in the evaluation of the instruments. Thereafter, a conclusion is provided under each instrument and a general conclusion at the end of the evaluation. Uganda has ratified the African Charter,⁶ the UNCAT⁷ and the ICCPR.⁸ A discussion of the UDHR is done first, because of its significance as a basis for the regional and international

¹ UN Doc A/810 at 71 (1948).

² 1520 UNTS 217.

³ 213 UNTS 222.

⁴ 1465 UNTS 85.

⁵ 999 UNTS 171.

⁶ Ratified 27 March 1986.

⁷ Acceded 3 November 1986.

⁸ Acceded 21 June 1995.

instruments. Thereafter, a discussion of the regional instruments and the international instruments shall be made.

2.1 THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 1948

The Universal Declaration of Human Rights 1948 (UDHR)⁹ does not have a provision relating to admissibility of evidence obtained through human rights violations. It however, provides for rights which, if violated may have a basis for challenging the admission of evidence obtained in violation of these rights. Although it is not a treaty, some of its provisions have attained the status of customary international law.¹⁰ Some the rights that may be enforced, include, the right against torture, cruel, inhuman or degrading treatment,¹¹ right to an effective remedy,¹² right to liberty and security of a person,¹³ and the right to privacy.¹⁴ Enforcement of these rights, like the right to privacy requires respect for the purity of the home; with permissible limitations to the right and recognition that any interference with the right must be reasonable and limited to the scope necessary to satisfy a legal purpose.¹⁵ In addition, respect of the right means a rejection of arbitrary and unlawful interference with privacy, respect for human dignity and leads to legally

⁹ U.N. Doc. A/810 (1948).

¹⁰ Humphrey JP 'The Universal Declaration of Human Rights: Its History, Impact and Judicial Character' in Ramcharan BG (ed), *Human Rights. Thirty Years after the Universal Declaration* (1979) 21 – 37.

¹¹ Article 5.

¹² Article 8.

¹³ Article 9.

¹⁴ Article 12.

¹⁵ George EE, 'International Human Rights Law Challenges to the New International Criminal Court: The Search and Seizure Right to Privacy' (2001) 26 *Yale Journal of International Law* 385 383.

enforceable safeguards regulating the use of Police powers.¹⁶ The UDHR provides a basis for the African Charter, the ECHR, the UNCAT and the ICCPR.¹⁷

2.2 THE AFRICAN CHARTER ON HUMAN AND PEOPLES RIGHTS.

2.2.1 INTRODUCTION

The African Charter was adopted to promote and protect human and peoples' rights, to eradicate all forms of colonialism and to promote international cooperation.¹⁸

Under this section, provisions of the Charter, the concluding observations and decisions of the African Commission are considered. First, although the African Charter lacks a provision on how to deal with evidence obtained through human rights violations; the African Commission has developed principles and guidelines on how to handle the same. Secondly, the principles and guidelines are not adequately reflected in the decisions of the African Commission.



2.2.2 PROVISIONS OF THE AFRICAN CHARTER

The African Charter provides for rights, which if violated in obtaining evidence, may create a ground for challenging admissibility of that evidence. These rights include, the right against torture, cruel, inhuman or degrading treatment,¹⁹ security of a person,²⁰ the right to a fair trial and the right of appeal to competent national organs.²¹ Other rights include the right to a presumption of innocence until proven guilty²² and the right to defence.²³

¹⁶ George EE (2001) 323.

¹⁷ Preambles to the ICCPR, UNCAT, ECHR and ACHPR.

¹⁸ Preamble to the ACHPR.

¹⁹ Article 5.

²⁰ Article 6.

²¹ Article 7.

²² Article 7 (1) b.

²³ Article 7 (1) c.

2.2.2 THE AFRICAN COMMISSION AND ITS JURISPRUDENCE

The African Commission has mechanisms which may be instructive on how to deal with evidence obtained through human rights violations. These mechanisms include the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (the Principles)²⁴ and the Guidelines and Measures for the Prevention and Prohibition of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (the Robben Island Guidelines).²⁵ Before discussing these mechanisms, the wording of the African Charter needs to be scrutinised.

The African Charter establishes the African Commission on Human and Peoples Rights (the African Commission)²⁶ with a mandate to promote and protect human rights.²⁷ In exercise of its mandate, the Commission may formulate and lay down, principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African governments may base their legislation.²⁸ The African Commission passed a resolution establishing a working group with the mandate to prepare a draft of general principles and guidelines on the right to a fair trial and legal assistance.²⁹ The Working Group presented its findings to the Commission and these were adopted as the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (The Principles).³⁰

²⁴ DOC/OS(XXX)247.

²⁵ Adopted by the African Commission on Human and Peoples Rights at its 32nd Ordinary Session, on 17 to 23 October 2002.

²⁶ Article 30.

²⁷ Article 30.

²⁸ Article 45 (1) b. See Nsongurua JU, 'The African Commission and Fair Trial Norms' (2006) 6 *AHRLJ* 229 305.

²⁹ ACHPR Resolution on the Right to Fair Trial and Legal Aid in Africa (1996) ACPHR/Res.41(XXVI)99.

³⁰ DOC/OS(XXX)247.

At its 11th Ordinary Session in Tunis, and aware of the inadequacies of Article 7,³¹ the African Commission passed a resolution on the Right to Recourse and a Fair Trial.³² It stated that an accused person had rights to an effective remedy for his or her rights which were violated,³³ to be informed promptly of the charges against him or her³⁴ and be brought to court promptly.³⁵ In addition the accused had a right to prepare his defence in consultation with counsel,³⁶ examine witnesses³⁷ and exercise the right to an interpreter if one was needed.³⁸ Although the resolution provided for fairness of a trial, it did not provide guidance on how to deal with evidence obtained through human rights violations. This created a vacuum in the jurisprudence of the African Commission and would defeat the attempts by the African commission to clarify the status of evidence obtained through human rights violations.

In September 1999, the African Commission organised a seminar where the Dakar Declaration on the Right to a fair trial in Africa was issued.³⁹ The Declaration acknowledged that the right to a fair trial is a fundamental right and its realisation is dependent on existence of certain situations.⁴⁰ The Declaration laid down 11 practices that are instrumental to the enjoyment of the right to a fair trial. Among these practices included the practice of impunity and the failure by the state, to deal with human rights

³¹ Ouguergouz F (2006) *The African Charter on Human and Peoples' Rights. A comprehensive Agenda for Human Dignity and Sustainable Development in Africa* 141.

³² Document ACHR/Res.4(XI)92: Resolution on the Right to Recourse and Fair Trial(1992).

³³ At para 1.

³⁴ At para 2(b).

³⁵ At para 2(c).

³⁶ At para 2(e)i.

³⁷ At para 2(e)iii.

³⁸ At para 2(e)iv.

³⁹ Document ACHR/Res.4(XI)92.

⁴⁰ Introduction to the Dakar Declaration.

violations, resulting into a systematic denial of justice.⁴¹ The Declaration neither offered guidance required to ensure that evidence obtained through human rights violations is not admitted, nor elaborated on what effective redress entailed. On the basis of the Declaration, the African Commission passed a resolution⁴² to establish a working group to prepare a draft of general principles and Guidelines on the right to a fair trial and legal assistance.⁴³

2.2.2.1 *The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*

The Principles⁴⁴ urge State Parties to the African Charter to incorporate them into their domestic law and respect them. The Principles introduce four key concepts to aid the African Commission in dealing with evidence obtained through human rights violations.⁴⁵

The first concept is the right to an effective remedy. The Principles provide that everyone has a right to an effective remedy⁴⁶ which includes the right to access to justice⁴⁷ and reparation for harm suffered.⁴⁸ It is immaterial whether the harm is suffered by a victim or an accused person. An individual can invoke a provision of the African Charter, if he can show that he or she has suffered harm. The state has an obligation to ensure that a

⁴¹ At para 7.

⁴² Resolution on the right to a fair trial and legal assistance in Africa, Res AHG/222(XXXVI).

⁴³ At para 3.

⁴⁴ DOC/OS(XXX)247.

⁴⁵ Preamble to The Principles.

⁴⁶ Principle C(a).

⁴⁷ Principle C(a)1.

⁴⁸ Principle C(a)2.

person whose rights have been violated by state agents or persons acting in official capacity has an effective remedy by a competent judicial body.⁴⁹

The second concept elaborates on the role of prosecutors.⁵⁰ It requires prosecutors not to present evidence to Court to be admitted, if they know or have reason to believe that it has been obtained through a violation of a suspect's rights.⁵¹ The prosecutor is, however supposed to use that evidence against perpetrators of the human rights violations.⁵² This is an indication that the prosecutor should exercise his discretion to establish whether the evidence was obtained through a disregard of rights. Once he arrives at a decision that the evidence was obtained through a violation of human rights, he must perform a dual function. First, he must refuse to use that evidence against the suspect and secondly, he must use the evidence against the person who violated the rights of an individual in obtaining the information. In addition, scholars have argued that the prosecutor should only perform this dual function on only evidence obtained through torture.⁵³ This dual role is extended to evidence obtained through taking undue advantage of a detained or imprisoned person is also precluded from being tendered in court, since it amounts to evidence obtained through recourse to unlawful means.⁵⁴ This entails ensuring that this evidence is not tendered for admission.

⁴⁹ Principle C(c)1.

⁵⁰ Principle F.

⁵¹ Principle F (n).

⁵² Principle F (n).

⁵³ Mujuzi JD 'The African Commission on Human and Peoples' Rights and the Admissibility of evidence obtained as a result of torture, cruel, inhuman and degrading treatment: *Egyptian initiative for Personal Rights and Interights v Arab Republic of Egypt* 2013 (17) *International Journal of Evidence and Proof* 284 287.

⁵⁴ Principles M(7)(d) and F(l).

The third concept prohibits collection of evidence through a violation of a detained suspect's rights,⁵⁵ and requires that states put in place mechanisms for receipt and investigation of complaints.⁵⁶ In addition, it is a requirement that officers who subject suspects to torture, cruel, inhumane or degrading treatment are brought to justice.⁵⁷ Victims of cruel, inhuman or degrading treatment have a right to claim compensation.⁵⁸ This principle introduces four distinct features that surround evidence obtain through human rights violations. First; it upholds the dignity of a human being even when his freedom to liberty is curtailed. As a consequence, the presumption of innocence is upheld at a critical point of gathering evidence during investigations. Secondly, protection of the principle extends from victims of cruel, inhuman and degrading treatment to any person in detention, who is unduly taken advantage of.⁵⁹ Thirdly, states are mandated to provide mechanisms for the receipt and investigation of complaints that involve procuring of evidence through human rights violations. The fourth distinct feature is the requirement by states to provide legislative avenues for compensation.

The fourth concept in the Principles is the rule on how to deal with evidence obtained through force or coercion. It provides that

'Any confession or other evidence obtained by any form of coercion or force may not be admitted as evidence or considered as probative of any fact at trial or in sentencing. Any confession obtained during *incommunicado* detention shall be considered to have been obtained by coercion.'⁶⁰

⁵⁵ Principle M(7)(d)- (f).

⁵⁶ Principle M(7)(h).

⁵⁷ Principle M(7)(i).

⁵⁸ Principle M(7)(j).

⁵⁹ Principle M(7)(d).

⁶⁰ Principle N(6)(d)1.

This provision gives the stand of the African Commission on evidence obtained through human rights violations. Although from the wording of the provision, its application is limited to evidence obtained through coercion or force, Principle M(7) provides two instances where the application of the fourth concept above, may be extended. The first instance is the prohibition of taking undue advantage of a detained or imprisoned person from compelling him or her to confess, for the purpose of incriminating himself or herself or incriminating others.⁶¹ The second instance, where application of the fourth concept is extended is where a detained person is subjected to threats or methods of interrogation which impair his or her capacity of judgment.⁶² The interpretation of the four concepts should be interrelated and interdependent.

2.2.2.2 *Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines)*

Another important document is the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines or the Guidelines).⁶³ These are premised on the need to take positive steps to further the implementation of existing prohibitions on torture, cruel, inhuman and degrading treatment and punishment.⁶⁴

Paragraph 29 of the Guidelines provides safeguards against torture in pre-trial detention. It urges states to ensure that any statement obtained through the use of torture, cruel, inhuman or degrading treatment or punishment (CIDT) shall not be admissible as

⁶¹ Principle M(7)(d).

⁶² Principle M(7)(e).

⁶³ Res ACHPR Res 61 (XXXII) 02 adopted by the African Commission at its 32nd Ordinary Session, on 17 to 23 October 2002.

⁶⁴ Preamble to the Guidelines.

evidence in any proceeding except against the persons accused of torture. This means that statements obtained through use of torture or CIDT should not be admitted in evidence.

Just like the Principles, the Guidelines provide guidance on how to deal with evidence obtained through torture and CIDT.⁶⁵ The Guidelines however, do not provide guidance on evidence obtained through other human rights violations. Scholars suggest that the Guidelines have not provided added value for the civil society which usually seeks to control the use of torture by the state.⁶⁶ This is because the Guidelines reflect contents of other international instruments and as such lack the detail to make them a useful interpretative text to article 5 of the African Charter.⁶⁷ This reflection denies the Guidelines the necessary detail to make useful interpretative text to article 5 of the African Charter. However, without prejudice to the foregoing, guideline 29 states that evidence obtained through torture, cruel, inhumane or degrading treatment shall not be admitted except as against the perpetrators of the torture to bring them to justice. This provision is straight forward and the only requirement is proof of existence of torture, cruel, inhuman or degrading treatment.

2.2.2.3 *Decisions of the African Commission*

There are a number of decisions handed down by the African Commission which have a bearing on evidence obtained through human rights violations. This research shall focus on two decisions and provide an analysis of approach used by the African Commission.

⁶⁵ Debra L & Rachel M 'Ten years of the Robben Island Guidelines and Prevention of Torture in Africa: For what purpose?' (2012) 12 *AHRLJ* 311 generally.

⁶⁶ Debra L & Rachel (2012) generally.

⁶⁷ Oral Statement made by the APT at the 29th Ordinary Session of the African Commission; Report of East African Workshop 19-20 in Debra L & Rachel M (2012) 342.

The two decisions are the most notable on the admissibility of evidence obtained through human rights violations since the adoption of the Principles and the Guidelines.

In *Egyptian Initiative and another v Arab Republic of Egypt (Egyptian Initiative)*,⁶⁸ the complainants alleged that agents of the State Security Intelligence subjected the victims to various forms of torture and ill-treatment during their detention, in order to confess before the state security prosecutor, for their involvement in the Taba bombings. In addition, the two complainants were held in *incommunicado* detention for period of about nine months.⁶⁹ They claimed a violation of their rights under articles 4, 5, 7(1) (a), (c) and 26 of the African Charter.⁷⁰ The African Commission found a violation of Articles 5 in respect to torture,⁷¹ Articles 7 and 26 in respect to the right to a fair trial.⁷² The African Commission decided that evidence obtained as a result of coercion or force may be inadmissible.⁷³ This was an indication that if the degree of coercion amounted to torture, cruel inhuman or degrading treatment; the trial Court was mandated to hold it is inadmissible without recourse to exercise of its discretion. The African Commission did not, however, draw a line to show what degree of coercion may be fatal to exercise of discretion to admit or not to admit evidence.

Without prejudice to the foregoing, two issues were not dealt with by the African Commission. First, it did not address the issue of evidence obtained through use of undue advantage over the person in detention.⁷⁴ Secondly, it did not address the issue that the

⁶⁸ Communication no 334 of 2008.

⁶⁹ At paras 7, 104, 106 and 114 of *Egyptian Initiative*.

⁷⁰ At para 36.

⁷¹ At paras 170 to 171 and 190.

⁷² At para 219.

⁷³ At para 212.

⁷⁴ Principle M(7) d of the Principles.

despite the State Prosecutor's knowledge that the Police used torture to obtain confessions from the complainants,⁷⁵ had the confessions admitted this evidence, and did not bring the perpetrators of the torture to justice. The Principles require a State Prosecutor not to rely on evidence believed to have been obtained through recourse to unlawful methods.⁷⁶ The prosecutor is expected to cause the perpetrators to be brought to justice.⁷⁷ This failure by the African Commission, denied it a chance to enhance its jurisprudence on the duties of the State Prosecutors, where they knew that the evidence was obtained through torture or other illegal means and having it admitted.

In *Abdel Hadi and others v Republic of Sudan*,⁷⁸ the victims, Sudan nationals were internally displaced persons (IDPs), as a result of the armed conflict in Darfur. On the 18th of May 2005, a team of police officers and soldiers entered the camp and tried to forcibly relocate several thousands of resident families. As a result of the scuffle, fifteen police officers and five IDPs were killed. The individuals were arrested and detained for nine months without appearance in Court or access to an advocate. During the detention, they were tortured by the government officers for the purpose of obtaining confessions. Upon their release, they lodged a complaint with the police to bring the perpetrators of the torture to justice. The Sudanese government ignored it and the individuals lodged a communication with the African Commission, claiming that their rights under Articles 1, 5, 6 and 7 of the Charter had been violated. The African Commission only made reference to the Principles and Guidance to a fair trial in respect denial of the right to habeas corpus.⁷⁹

⁷⁵ At para 7 of *Egyptian Initiative*.

⁷⁶ Principle F(l) of the principles.

⁷⁷ Principle F (l).

⁷⁸ Communication no 368 of 2009.

⁷⁹ At para 87.

The African Commission reiterated its principle that where the State does not take measures to investigate allegations brought before it in spite of being notified, it forfeits its prerogative to deal with it domestically.⁸⁰ It found there was a violation of Article 5 (torture),⁸¹ Article 6 (unlawful detention),⁸² and Article 7 (right to a fair trial and lack of access to counsel for nine months).⁸³ In addition, the African Commission made reference to the Principles but limited itself to the suspect's right to a lawyer.

Without prejudice to the foregoing, the African Commission neither pronounced itself on the status of evidence that was obtained through torture, cruel, inhuman and degrading treatment nor on the status of evidence obtained after *incommunicado* detention. Although it is part of recognised international norms that evidence obtained as a result of torture is inadmissible,⁸⁴ it is pertinent to enhance this principle in decisions, whenever there is an opportunity. This communication also related to evidence obtained through violation of the right to counsel and the African Commission ought to have commented on evidence obtained in disregard of the right to counsel. In doing so, it would offer guidance to State Parties with similar challenges by way of a preventive mandate.

The African Commission failed to reiterate the mandate placed on the prosecutor where he or she knew or ought to have known that the evidence he or she intended to rely on had been obtained as a result of torture. Although the African Commission decided that there was a violation of Articles 1, 5, 6 and 7, it did not offer guidance to the state party in respect to its obligations and duties under the Principles and the Guidelines. Failure to do so cost the African Commission another opportunity at developing its jurisprudence.

⁸⁰ At para 46. See *Article 19 v Eritrea*, Communication 275 of 2003 paras 77-78.

⁸¹ At para 73.

⁸² At para 84.

⁸³ At para 90.

⁸⁴ Tobias T 'The Admissibility of Evidence Obtained by Torture under International Law' *The European Journal of International Law* 2006 (17.2) 349 351.

2.2.2.4 Concluding observations

The Concluding observations of the African Commission play a vital role in ensuring that evidence obtained through human rights violations is not admitted. Some of the recommendations made include, advising State Parties to provide an independent police oversight body,⁸⁵ and criminalization of torture.⁸⁶ Other State Parties have been advised to conform to the definition of torture as provided for in the UNCAT.⁸⁷ The African Commission has, therefore, in its concluding observations to states, made attempts to show the areas of concern and recommendations in dealing with evidence obtained through human rights violations. Though the recommendations are not explicit, they by implication play a vital role in ensuring that evidence obtained through human rights violations, especially torture and CIDT is not admitted.

2.2.3 CONCLUSION OF THE AFRICAN COMMISSION

Although the African Charter lacks a provision on how to deal with evidence obtained through human rights violations, the African Commission, in exercise of its mandate has passed very vibrant principles aimed at improving the enjoyment of human rights in Africa. It has reiterated the need to adhere to these principles in concluding observations. The African Commission does not have any General Comments. Unfortunately the decisions

⁸⁵ ACPHR concluding observations on consolidated 2nd to 10th Report of Tanzania, para 24 dated 3 -21 November 2008, available at http://www.achpr.org/files/sessions/43rd/conc-obs/2to10-1992-2008/achpr43_conc_staterep2to10_tanzania_2008_eng.pdf, (accessed 20 July 2015).

⁸⁶ ACPHR concluding observations on 3 Periodic Report of Uganda, para 27, Part V, paras (e) and (f), dated 22 May 2009 available at http://www.achpr.org/files/sessions/45th/conc-obs/uganda:-3rd-periodic-report.-2006-2008/achpr45_conc_staterep3_uganda_2009_eng.pdf, (accessed 20 July 2015).

⁸⁷ 1465 UNTS 85. See ACPHR concluding observations on initial periodic report of Botswana, 2010 dated 12 – 20 May 2010, available at http://www.achpr.org/files/sessions/47th/conc-obs/1st-1966-2007/achpr47_conc_staterep1_botswana_2010_eng.pdf (accessed 20 July 2015). See Section 7 of the Constitution of the Republic of Botswana 1997 available at http://www.chr.up.ac.za/undp/domestic/docs/c_Botswana.pdf (accessed 20 July 2015).

passed by the African Commission, about evidence obtained through human rights violations, offer little input to the development of the jurisprudence.

While it is true that one of the greatest challenges to the African Commission is the implementation of its decisions⁸⁸ and concluding observations, the contents of the decisions need to be poised and enriching on the facts in issue. This creates a sense of urgency on the defaulting state to implement the decision in whole or in part. Therefore, the greatest challenge is not just to advance human rights jurisprudence as reflected in the ACHPR,⁸⁹ but to advance human rights jurisprudence through nuance argued decisions.

2.3 THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

2.3.1 INTRODUCTION

The European Convention on Human Rights (ECHR); is a regional treaty which protects human rights and fundamental freedoms in Europe.⁹⁰ The ECHR was created in the aftermath of the Second World War and drew aspiration from the UDHR and the basis of the creation was to set a Guideline for enforcement of human rights in Europe. It was also created to place a mandate on State Parties to ensure that domestic law upheld human

⁸⁸ Michelo H, *African Courts and the African Commission on Human and Peoples' Rights* 233 271 available at www.kas.de/upload/auslandhomepages/namibia/human_rights_in_africa/8_hansungule.pdf (accessed 15 January 2015).

⁸⁹ Pityana NB Preface in Murray R *The African Commission on Human and Peoples' Rights and international law* (2000) vi. See Nsongurua JU 'The African Commission and Fair Trial Norms' (2006) 6 *AHRLJ* 229 229.

⁹⁰ 213 U.N.T.S. 222.

rights in its enforcement.⁹¹ An analysis of the jurisprudence emanating from the ECHR in relation to admissibility of evidence obtained through human rights violations is done.

2.3.2 PROVISION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

The ECHR provides for particular rights, whose violation could lead to challenging admissibility of evidence obtained through them. Some of these rights include right against torture,⁹² liberty and security of a person,⁹³ right to a fair trial,⁹⁴ right to respect for private and family life⁹⁵ and the right to an effective remedy.⁹⁶

The ECHR establishes the European Court of Human Rights (ECtHR)⁹⁷ with the mandate to pass decisions on individual or State applications alleging violations of the civil and political rights set out in the ECtHR.⁹⁸

The ECHR lacks a provision in regard to evidence obtained through human rights violations; but provides that 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.⁹⁹ Other rights include the right to be informed promptly, in a language which one understands, in detail, of the nature and cause of the accusation against him;¹⁰⁰ and to have adequate

⁹¹ Rainey B, Wicks E, & Ovey C *Jacobs, White & Ovey: The European Convention on Human Rights* 5ed (2010) 1–3.

⁹² Article 3 of the ECHR.

⁹³ Article 5.

⁹⁴ Article 6.

⁹⁵ Article 8.

⁹⁶ Article 13.

⁹⁷ Article 19.

⁹⁸ Articles 33, 34. Rainey B, Wicks E, & Ovey C (2010) 1–3.

⁹⁹ Article 6(1) of the ECHR.

¹⁰⁰ Article 6(3)(a).

time and the facilities for the preparation of his defence.¹⁰¹ The accused person also has the right to defend himself in person or through legal assistance of his own choosing or, to be given counsel freely when the interests of justice so require.¹⁰² He also has the right 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.¹⁰³ The ECtHR has developed jurisprudence whereby evidence which renders a trial unfair shall not be admitted. The ECtHR does not limit its wording to torture, but rather includes all evidence that may render proceedings unfair. The ECHR expressly prohibits torture or inhuman or degrading treatment, or punishment, and there is no derogation from this right.¹⁰⁴ In exercise of its mandate; the Court makes reference to the UNCAT¹⁰⁵ for purposes of defining torture.¹⁰⁶

2.3.3 DECISIONS OF THE EUROPEAN COURT OF HUMAN RIGHTS

Three decisions of the ECtHR are examined to establish how it has dealt with evidence obtained through human rights violations. Three cases decided in 1996, 2006 and 2010, dealing with violations of both absolute and non-absolute rights shall be analyzed in chronological order to show the various developments in the jurisprudence of the ECtHR.

In *Saunders v the United Kingdom*,^(Saunders),¹⁰⁷ the applicant, a director and chief executive of Guinness PLC (Guinness) was prosecuted for causing a substantial increase

¹⁰¹ Article 6(3)(b).

¹⁰² Article 6(3)(c).

¹⁰³ Article 6(3)(d).

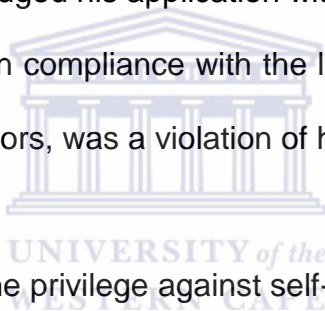
¹⁰⁴ Article 6.

¹⁰⁵ 1465 UNTS 85.

¹⁰⁶ *Jalloh v Germany*, ECHR Grand Chamber Application 54810/2000 paras 48 and 105. (11 July 2006)

¹⁰⁷ Chamber Application no 19187/1991.

in the quoted Guinness share price through an unlawful share-support operation. In the course of investigations, the accused was compelled by inspectors appointed by the Secretary of State for Trade and Industry to disclose incriminating evidence to them.¹⁰⁸ At the trial, the Applicant denied any knowledge of giving of indemnities or the paying of success fees and that he had not been consulted on such matters.¹⁰⁹ The prosecution sought to tender the interviews carried out by the investigators which revealed that he acknowledged knowledge of the payment of a success fee of 5 million pounds.¹¹⁰ On the basis of this evidence, the accused was convicted and sentenced to 5 years' imprisonment.¹¹¹ On appeal against the conviction based on admission of self-incriminating evidence,¹¹² the Court of Appeal held the transcripts were admissible evidence.¹¹³ The accused then lodged his application with the Commission and stated that use of statements made by him in compliance with the legal requirement to adhere to the compulsory powers of the inspectors, was a violation of his right to a fair trial.



The Commission held that first, the privilege against self-incrimination formed an important element in safeguarding individuals from oppression and coercion. Secondly, the privilege was linked to the principle of the presumption of innocence and should apply equally to all types of accused persons.¹¹⁴ The use of this evidence substantially impaired Mr Saunders' ability to defend himself against the criminal charges he faced, thereby depriving him of a fair trial.¹¹⁵ The Commission clarified that the rationale for the right against self-

¹⁰⁸ At para 25.

¹⁰⁹ At paras 30- 31.

¹¹⁰ At paras 31- 32.

¹¹¹ At paras 33-34.

¹¹² At para 38.

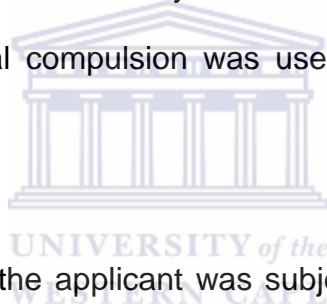
¹¹³ At para 38.

¹¹⁴ At para 65.

¹¹⁵ At para 65.

incrimination was to ensure that the prosecution prove their case against an accused person without recourse to evidence obtained through methods of coercion or oppression in defiance of the will of the accused.¹¹⁶

The Commission noted that the right against self-incrimination is a recognised international standard for a fair trial and if a legal compulsion to give evidence yields self-incriminating evidence at the trial, it renders the trial unfair and should not be admitted. It held that although the right against self-incrimination was primarily concerned with respecting an accused person's right to remain silent,¹¹⁷ the instant case involved legal compulsion of the accused, independent of his will to answer questions put to him by the inspector or risk contempt of Court and a 2- year term of imprisonment. Therefore where evidence arising out of the legal compulsion was used at a trial to incriminate him; it rendered the trial unfair.¹¹⁸



In *Jalloh v Germany (Jalloh)*,¹¹⁹ the applicant was subjected to forcible administration of emetics in order to obtain evidence of a drugs offence from his stomach. He applied to Court to find that the actions of the German Police constituted inhuman and degrading treatment prohibited by Article 3 of the Convention.¹²⁰ He further claimed that the use of this illegally obtained evidence at his trial breached his right to a fair trial guaranteed by Article 6 of the Convention.¹²¹ The Grand Chamber held that the forcible administration of emetics was not evidence of torture, but inhuman and degrading treatment.¹²²

¹¹⁶ At para 68.

¹¹⁷ At para 69.

¹¹⁸ At paras 75 to 76.

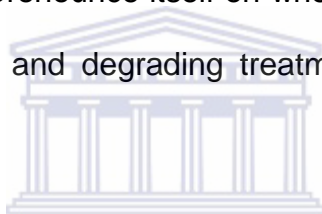
¹¹⁹ ECHR Grand Chamber Application 54810/2000.

¹²⁰ At para 3.

¹²¹ At para 3.

¹²² At paras 78, 82 and 106.

In establishing whether the right to a fair trial under Article 6 of the Convention was infringed, by use of the medical evidence against the applicant, the ECtHR held that it is settled law of the Court that while Article 6 guarantees the right to a fair hearing, it did not lay down any rules on the admissibility of evidence as such. This was primarily a matter for regulation under national law.¹²³ The Court reiterated that it was not its role to determine whether evidence obtained unlawfully in terms of domestic law, was admissible but rather, whether the proceedings as a whole, including the way in which the evidence was obtained, were fair.¹²⁴ This was because the domestic legislation of the Federal Republic of Germany provided for a mode of administering the emetics, to recover the evidence.¹²⁵ The ECtHR did not pronounce itself on whether the use of evidence obtained by an act qualified as inhuman and degrading treatment automatically renders a trial unfair.¹²⁶



The Court clarified the normal instances of self-incrimination. It distinguished between use of real evidence and derivative evidence obtained from an accused person in violation of Article 3. It noted that the privilege against self-incrimination is commonly understood in the Contracting States to be primarily concerned with respecting the will of the defendant to remain silent in the face of questioning and not to be compelled to provide a statement. Therefore in a case where the self-incrimination required the state to procure real evidence from the accused person and admit it in evidence, the mode of acquiring this evidence to be relied on at the trial was vital.¹²⁷ The Court advanced four reasons to justify

¹²³ At para 94. See *Schenk v Switzerland* para 45-46, (12 July 1988), Series A no. 140 and *Teixeira de Castro v. Portugal*, para 34, (9 June 1998), Reports 1998-IV.

¹²⁴ At para 95 of *Jalloh's Case*.

¹²⁵ At paras 33, 103- 104.

¹²⁶ At para 112.

¹²⁷ At para 110.

its decision that the forceful application of emetics to retrieve evidence from the accused person rendered the trial unfair. First, the administration of emetics was used to retrieve real evidence in defiance of the applicant's will.¹²⁸ Secondly, the Court contrasted the facts in *Saunders Case* and held that the degree of force used differed significantly from the degree of compulsion normally required to obtain the types of material like blood or hair samples.¹²⁹ Thirdly, the materials in question like blood, hair or stool samples were a product of normal bodily functions and not regurgitation of evidence, with risk to the applicant's health.¹³⁰ Fourthly, the evidence in the present case was obtained by means of a procedure which violated Article 3. This decision marked a development in the jurisprudence of the ECtHR in dealing with evidence whose admission would render the trial unfair and not simply because it violated Article 3 of the ECHR.

The ECtHR also laid down rules to be followed in establishing if the degree of compulsion used violated a right to a fair trial. First, the nature and degree of compulsion used to obtain the evidence. Secondly, the weight of the public interest in the investigation and punishment of the offence in issue and thirdly, the existence of any relevant safeguards in the procedure; and the use to which any material so obtained is put.¹³¹ These rules once assessed, would enable the ECtHR to determine violation of the right to a fair trial.

In conclusion, *Jalloh's case* was distinguished from *Saunders' case* in light of the mode of getting evidence. While in both cases, there was a legal compulsion to obtain evidence backed by domestic law, in *Jalloh's case*, the compulsion involved use of force to a severity rendering the conduct of the Police inhuman. Secondly, *Saunders' Case* suggested that only audible words extracted from the mouth of the suspect are

¹²⁸ At para 113.

¹²⁹ At para 114.

¹³⁰ At para 114.

¹³¹ At paras 117 to 120.

inadmissible provided their existence was independent of the will of the accused. By this yardstick, inhuman compulsion of a suspect to obtain evidence from his stomach would be admissible as long as its existence was independent of the will of the accused. This would lead to a creation of a dangerous precedent and as a result, the ECtHR stressed that in *Jalloh's Case*, there was use of inhuman treatment and the ECtHR desire to render the evidence admissible would mean that the Court did not have a strong stance against CIDT.¹³²

In *Gafgen v Germany (Gafgen)*,¹³³ the victim abducted one Jakob von Metzler on. During the interrogation, the victim changed his story several times, including claiming to having been involved in the kidnapping but only as courier. Due to a fear of death to Jakob, a senior police officer ordered a subordinate officer to threaten Gafgen with torture, and if necessary to inflict it, unless he revealed Jakob's whereabouts. After ten minutes and capitulation to the threat, Gafgen revealed where Jakob's body could be found. As a consequence, police collected evidence in form of tyre tracks matching the tyres to Gafgen's car and foot prints matching his shoes. On the way to the Police station, Gafgen confessed to having killed Jakob and then took the Police to a series of locations where some of Jakob's clothing and other incriminating items were retrieved.¹³⁴ Gafgen repeated these confessions in open Court during his trial and he was convicted of abduction and murder of Jakob and sentenced to life imprisonment.¹³⁵ Gafgen applied to the ECtHR seeking orders that the treatment he had been subjected to, during Police interrogation concerning the whereabouts of Jakob constituted torture prohibited by Article 3 of the

¹³² Concurring judgment of Judge Zupancic; page 44.

¹³³ European Court of Human Rights (ECtHR) Grand Chamber Application no. 22978/05 (1 June 2010).

¹³⁴ At paras 10-23.

¹³⁵ At paras 34 and 63.

Convention. In addition, that his right to a fair trial under Article 6 of the Convention, comprising a right to defend himself effectively and not to incriminate himself, had been violated in that evidence which had been obtained in violation of Article 3 had been admitted at his criminal trial.¹³⁶

In respect to torture, the ECtHR was tasked to qualify the threats and whether they amounted to torture for the purposes of establishing whether they could be excluded from admissibility.¹³⁷ The ECtHR reiterated that Article 3 of the Convention is absolute and makes no provision for exceptions and no derogation from it even in the event of a public emergency threatening the life of a nation.¹³⁸ The ECtHR also stated that the nature of the offence allegedly committed by the applicant is irrelevant for the purposes of Article 3.¹³⁹

In respect to the threats occasioned on Gafgen, and in contrasting *Jalloh's Case*, the ECtHR held that for ill-treatment to reach the threshold of Article 3, it must attain some level of severity and that the assessment depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim.¹⁴⁰ Secondly, for treatment to be inhuman, there should have been premeditation and that it caused either actual bodily injury or intense physical and mental suffering.¹⁴¹ For treatment to be degrading, it had to arouse in

¹³⁶ At para 2.

¹³⁷ At para 87.

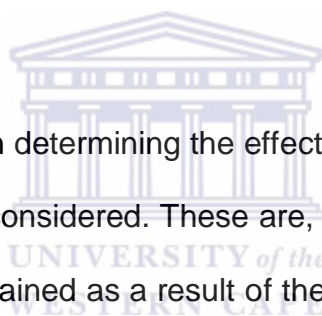
¹³⁸ At para 87. See *Selmouni v France* Grand Chamber Application no 25803/1994, para 95. See also *Labita v Italy* Grand Chamber Application no 26772/1995, para 119.

¹³⁹ *V. v the United Kingdom* Grand Chamber Application no 24888/1994, para 69. *Ramirez Sanchez v France* Grand Chamber Application no 59450/00, para 116. *Saadi v Italy* Grand Chamber Application no 37201/06, para 127.

¹⁴⁰ *Gafgen* para 88.

¹⁴¹ At para 89.

its victim feelings of fear, anguish and inferiority capable of driving the victim to act against his will or conscience.¹⁴² In addition, for the ill-treatment to be classified as torture, it had to meet the definition in Article 1 of the UNCAT.¹⁴³ The ECtHR noted that a threat to torture would merely be inhuman treatment and would require proof beyond reasonable doubt¹⁴⁴ and the threat or conduct of the state should be sufficiently real and immediate, to constitute at least inhuman treatment.¹⁴⁵ The Court found that the Police threatened to exert intolerable pain and use of a truth serum if Gafgen did not disclose the whereabouts of Jakob.¹⁴⁶ The duration of the use of the real and immediate threats of deliberate and imminent ill-treatment on the applicant, caused him considerable fear, anguish and mental suffering.¹⁴⁷ The ECtHR held this amounted to inhuman treatment and a violation of Article 3 of the ECHR.¹⁴⁸



The ECtHR, however, held that in determining the effect of the evidence on the fairness of the trial, three factors had to be considered. These are, the nature of the violation and the extent to which evidence was obtained as a result of the violation, the causal link between the interrogation and the real evidence secured. The other factor was, the admission of this evidence at the trial.¹⁴⁹ The ECtHR noted that there is no consensus among Contracting States on the exact scope of the application of the exclusionary rule.¹⁵⁰ This may be taken to be a move by the ECtHR to maintain its legitimacy by avoiding causing

¹⁴² At para 89.

¹⁴³ At para 90.

¹⁴⁴ At paras 91 to 92.

¹⁴⁵ At para 91.

¹⁴⁶ At paras 94-95.

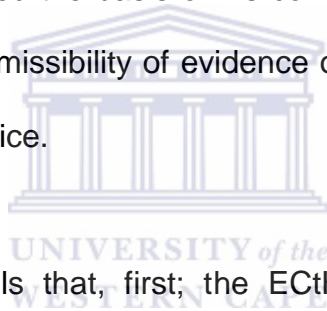
¹⁴⁷ At paras 100-104.

¹⁴⁸ At para 108.

¹⁴⁹ At paras 170-172.

¹⁵⁰ At para 174.

offence to national legislatures.¹⁵¹ It would however have a negative effect in the development of its jurisprudence. It also noted the need to take into consideration the competing rights of the accused and the victim and the interests of the state party.¹⁵² In examination of the factors above, the Court established that the confession obtained as a result of the threats against Gafgen, was not adduced in evidence notwithstanding the fact that the real evidence adduced at the trial was obtained as a result of the first confession to the Police.¹⁵³ The ECtHR held further that Gafgen made a second confession in the course of the trial which was corroborated by the findings of fact concerning the execution of the crime. This included the fact that Police had been trailing him from the time he took the ransom from the family of Jakob.¹⁵⁴ Therefore, the second confession, corroborated by the untainted real evidence formed the basis of his conviction and consequently there no unfairness occasioned by the admissibility of evidence obtained as a result of the threats occasioned on Gafgen by the Police.



An analysis of this case reveals that, first; the ECtHR still maintains that evidence obtained through cruel, inhuman or degrading treatment may be admitted in Court if it thinks, its admission does not render the trial unfair. This is an indication that if an absolute right is subjected to relativity in admission of evidence obtained through its violation; other non-absolute rights may not be effective to countermand admission of illegally obtained evidence. So, if the ECtHR finds that the evidence does not render the trial unfair, it is admitted. Secondly, in instances of a conflict of rights like an absolute right against torture of a suspect on one hand and non-absolute right to life of a victim on

¹⁵¹ Maffei S & Sonenshein D, 'The Cloak of the Law and Fruits Falling from the Poisonous Tree: A European Perspective on the Exclusionary Rule in the Gafgen Case' (2012–13) 19 *Columbia Journal of European Law* 22 48.

¹⁵² *Gafgen*, para 175.

¹⁵³ At para 179.

¹⁵⁴ At para 180.

another; the absolute right takes precedence. This can be viewed as the ECtHR's instance on the absolute nature of the right against torture.¹⁵⁵ Thirdly, the ECtHR reiterated its reluctance to establish rules of admission of evidence, whether it was real evidence or derivative evidence on grounds of established international standards.¹⁵⁶ The ECtHR left this role to the national legislatures to determine admissibility of evidence.¹⁵⁷

Secondly, this decision widens the debate on whether evidence obtained in violation of an absolute right in Article 3 is automatically rejected by the ECtHR. This is because the moral basis for absoluteness is usually an assumption; until a legal prohibition is qualified to be able to generate the absolute right against torture, cruel, inhuman and degrading treatment.¹⁵⁸ As a result the ECtHR requires convincing reasons to support an implied absolute right for purposes of rendering evidence obtained in violation of article 3 inadmissible. It seems, that the absolute nature of the right against torture, cruel, inhuman and degrading treatment is against the state and not against private individuals leading to a conclusion that the right may be absolute in principle but relative in application. Nowak & McArthur offer a distinction between torture, cruel, inhuman or degrading treatment (CIDT) and state that the distinction between torture and CIDT relates to personal liberty and outside a place of detention; CIDT is subjected to proportionality rendering it relative as

¹⁵⁵ Steven G 'Is the prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really 'Absolute' in International human Rights Law?' 2015 (15) *Human Rights Law Review* 101 103. See Maffei S & Sonenshein (2012–13) 21. Mavronicola N, 'What is an 'absolute right'? Deciphering Absoluteness in the Context of Article 3 of the European Convention on Human Rights' (2012) 12 *Human Rights Law Review* 723 736–7; Wierenga W & Wirtz S, 'Case of *Gafgen versus Germany*. How Absolute is the Absolute Prohibition of Torture? The Outcome of an Ethical Dilemma' (2009) 16 *Maastricht Journal of European and Comparative Law* 365 365.

¹⁵⁶ *Gafgen* paras 167-168.

¹⁵⁷ At paras 167 -168.

¹⁵⁸ Steven G (2015) 110.

opposed to absolute in application.¹⁵⁹ The Committee Against Torture (CAT) notes that the severity of the violations does not really matter since what leads to CIDT also leads to torture and as such, no exceptional circumstances may be invoked as a justification for torture.¹⁶⁰

2.3.4. CONCLUSION ON THE EUROPEAN COURT OF HUMAN RIGHTS

The ECtHR has gradually developed its jurisprudence on how to deal with evidence obtained through human rights violations. First, evidence is only rendered inadmissible if it renders the proceedings of an accused person unfair not because it is a violation of an absolute right. This is an indication that the yardstick is higher than mere reliance on non-admission of evidence because the right that has been violated is an absolute right. Secondly, the Court has recognised the right against self-incrimination as an international standard for a fair trial and elevated it from the respect of an accused person's right to remain silent to judicial scrutiny of evidence obtained as a result of a legal compulsion on the accused, independent of his will. Thirdly, where the legal compulsion is coupled with use of force, independent of the will of the accused person, the ECtHR shall render evidence obtained through compulsion inadmissible. This is because; to render the evidence admissible would mean Court lacks a strong stance to cruel practices used to obtain evidence.¹⁶¹

In addition, evidence obtained through a violation of an absolute right like CIDT, may still be admitted if its admission does not render the trial unfair. This is because the moral basis for absoluteness is usually an assumption; until a legal prohibition is qualified to be

¹⁵⁹ Manfred N & Elizabeth M 'The distinction between torture, cruel, inhuman or degrading treatment' 2006 (16) *Torture Journal* 147 151.

¹⁶⁰ U.N. Doc. CAT/C/GC/2/CRP.1/Rev.4 (2007) at para 4.

¹⁶¹ Concurring judgment of Zupancic J; pg 44.

able to generate the absolute right against torture, cruel, inhuman and degrading treatment.¹⁶² Where there is a conflict of rights, the absolute right takes precedence. The ECtHR is still reluctant to establish rules of admission of evidence, and has always reiterated that this role should be for the national legislatures to determine admissibility of evidence.¹⁶³

2.4 UNITED NATIONS CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

2.4.1 INTRODUCTION

The United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (UNCAT)¹⁶⁴ entered into force on the 26th of June 1987 in accordance with Article 27(1). The basis of the UNCAT was to promote universal respect of human rights and fundamental freedoms; which formed part of the obligations of the State Parties to the United Nations Charter and regard to the UDHR, and the ICCPR.

Two arguments are explored in relation to the CAT. First, the jurisprudence of the CAT in respect to admissibility of evidence obtained through human rights violations is limited to torture. Secondly, there is lack of clarity, whether the content of admissibility extends from torture to cruel, inhuman or degrading treatment.

2.4.2 PROVISIONS OF THE UNCAT

The United Nations Convention against Torture¹⁶⁵ (UNCAT) creates a general obligation under international law not to subject anyone to torture, cruel, inhuman or degrading

¹⁶² Steven G (2015) 110.

¹⁶³ *Gafgen* Case, paras 167 -168.

¹⁶⁴ 1465 UNTS 85.

¹⁶⁵ 1465 UNTS 85.

treatment or punishment.¹⁶⁶ This obligation has extended even to states that are not parties to the UNCAT.¹⁶⁷ The UNCAT emerged as a result of the resurgence of torture and increased prominence that a prohibition against torture was inevitable in the 1970s.¹⁶⁸ This led to the adoption of the 1975 Declaration against Torture¹⁶⁹ and the subsequent adoption of the UNCAT.¹⁷⁰

Before the adoption of the UNCAT, the UN General Assembly adopted a declaration condemning torture and cruel, inhuman and degrading treatment.¹⁷¹ The resolution, unlike the final UNCAT, provided explicitly that evidence obtained through torture, cruel, inhuman and degrading treatment may not be invoked. It, however, laid the discretion to use the evidence on the judicial officer or prosecutor since the wording used was 'may' instead of 'shall'. In addition, it provided for statements obtained through torture or other cruel, inhuman or degrading treatment or punishment. This was a departure from the final text of the UNCAT, which only referred to statements obtained through torture.

The UNCAT does not have a provision dealing with evidence obtained through human rights generally. It, however, has a provision dealing with statements obtained through torture. It provides that

'Each state party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings

¹⁶⁶ Articles 3 to 15.

¹⁶⁷ Rodley N & Pollard M *The Treatment of Prisoners under International Law*, 3ed (2009) 80. See also Rachel M, Elina S & Malcolm E *The Optional Protocol to the UN Convention Against Torture*, (2011) 1.

¹⁶⁸ Rachel M, Elina S, & Malcolm E (2011) 2.

¹⁶⁹ Declaration against Torture Resolution 3452 (XXX), adopted on 9th December 1975.

¹⁷⁰ General Assembly A Resolution A/RES/39/46, adopted on the 10th December 1984.

¹⁷¹ Declaration against Torture Resolution 3452 (XXX), adopted on 9th December 1975.

except against a person accused of torture as evidence that the statement was made.¹⁷²

This is an indication that the the statement is not limited to confessions only or need not be in writing. It may be a confession, a statement written or oral, provided it has been obtained through torture.

2.4.3. THE COMMITTEE AGAINST TORTURE AND ITS JURISPRUDENCE

The Committee against Torture (CAT) is established by the UNCAT¹⁷³ with a mandate is to carry out the functions of receiving state party reports, individual and interstate complaints and making recommendations, and organising state visits to evaluate the state parties' adherence to the UNCAT. The CAT also makes comments on reports it receives from State Parties to examine information relating to well-founded indications of torture in the territory of a state party. Its work plays an important role in defining torture and ensuring that states comply with the UNCAT.¹⁷⁴

2.4.3.1 General Comments

In its General Comment 2,¹⁷⁵ the CAT reminds State Parties that no exceptional circumstances whatsoever may be invoked as a justification for torture.¹⁷⁶ In addition, the comment prohibits confession extorted by torture being admitted in evidence except against the torturer.¹⁷⁷ The CAT further considers that the contents of Articles 3 to 15 are

¹⁷² The UNCAT, article 15.

¹⁷³ Article 17.

¹⁷⁴ Tobias K 'The UN Committee Against Torture: Human Rights monitoring and the legal recognition of cruelty' *Human Rights Law Quarterly* 2009 (31) 777 778.

¹⁷⁵ U.N. Doc. CAT/C/GC/2/CRP.1/Rev.4 (2007).

¹⁷⁶ At para 4.

¹⁷⁷ At para 4(3).

not limited to torture but include ill-treatment.¹⁷⁸ In addition, the General Comment ought to shed light on evidence obtained through torture of third parties, and its effect on evidence. Unlike the HRC, which has adopted the practice of publishing their interpretation of the content of human rights provisions in the form of comments on thematic issues, the CAT does not have many General Comments which limits its jurisprudence.¹⁷⁹

2.4.3.2 *Concluding Observations*

The UNCAT also uses concluding observations to take note of the States' adherence to the UNCAT and make recommendations for improvement. These recommendations are made on the basis of the reports submitted by State Parties to the UNCAT. It must be noted that the CAT has in a number of concluding observations, recommended that State Parties adhere to the strict enforcement of Article 15 of the UNCAT. The CAT requires that State Parties streamline their legislation and bring it into conformity with the UNCAT.¹⁸⁰ The prosecution of perpetrators of torture should not be subjected to discretion.¹⁸¹ State Parties are also urged not to place defences to torture in their domestic laws as this would lead to admission of evidence obtained through torture.¹⁸² In addition, in situations where evidence is obtained through torture, the CAT requires that even in instances where the

¹⁷⁸ At para 6.

¹⁷⁹ Tobias K (2009) 791.

¹⁸⁰ Concluding Observations on the second periodic report of Colombia of 1995; CAT/C/7/Add.1, paras 10 and 30, para 30 dated 23 November 1995. See Concluding Observations on the third periodic report of Australia of 2008, CAT/C/AUS/CO/1, para 30, dated 15 May 2008.

¹⁸¹ See Concluding Observations on the second periodic report of France of 1998, CAT/C/AUS/CO/1, para 11, dated 6 May 1998.

¹⁸² Concluding Observations on the sixth periodic report of Hong Kong of 2010, CAT/C/HKG/CO/4 paras 5,6; dated 4 November 2010. see also Sections 2,3 of the Crimes (Torture) Ordinance Cap 427.

accused person is tried in a another state, if the evidence was obtained through torture, it is not relied on during the trial.¹⁸³

In conclusion, the CAT has also insisted on the need for states to embrace the definition of torture as provided for in the UNCAT and to remove any defences which would otherwise require evidence obtained through torture to be upheld. However, without prejudice to the foregoing, the CAT's work is limited to evidence obtained through torture, cruel inhuman and degrading treatment. Although the absolutist principle has raised debate on whether there is an absolute prohibition against CIDT, the CAT's position is that what leads to CIDT also leads to torture and that is why Article 16 of the UNCAT is in place.¹⁸⁴

2.4.3.3 *Decisions*

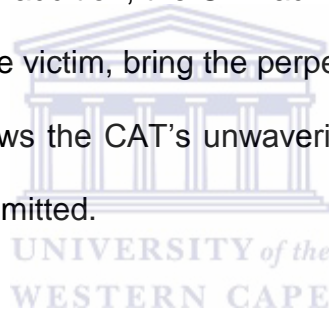
Three decisions of the CAT are considered. The first decision provides the cardinal stand of the CAT on evidence obtained through torture. The second decision evaluates the variance of the jurisdiction of the CAT on evidence that does not amount to torture, but

¹⁸³ Concluding Observations on the sixth periodic report of Canada of 2012, CAT/C/CAN/CO/6, para 17 dated 21 and 22 May 2012.

¹⁸⁴ See Manfred N & Elizabeth M 'The distinction between torture, cruel, inhuman or degrading treatment' 2006 (16) *Torture* 147 151, Steven G 'Is the prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really 'Absolute' in International human Rights Law?' 2015 (15) *Human Rights Law Review* 101 103. See Maffei S & Sonenshein D, 'The Cloak of the Law and Fruits Falling from the Poisonous Tree: A European Perspective on the Exclusionary Rule in the Gafgen Case' (2012–13) 19 *Columbia Journal of European Law* 21 21. Mavronicola N, 'What is an 'absolute right'? Deciphering Absoluteness in the Context of Article 3 of the European Convention on Human Rights' (2012) 12 *Human Rights Law Review* 723 736–7; Wierenga W & Wirtz S, 'Case of *Gafgen versus Germany*: How Absolute is the Absolute Prohibition of Torture? The Outcome of an Ethical Dilemma' (2009) 16 *Maastricht Journal of European and Comparative Law* 365 365.

cruel, inhuman and degrading treatment. The third decision evaluates how the CAT has handled communications that are based on anticipated torture.

In *Nouar Abdelmalek v. Algeria*,¹⁸⁵ the complainant was formerly in the Algerian army and in the context of widespread violence in Algeria during the 1990s, he refused, on a number of occasions, to participate in missions that troubled his conscience.¹⁸⁶ Upon his subsequent release from the army, he attempted to flee Algeria on falsified documents. He was arrested and tortured for the purpose of obtaining information or confessions, and punishing, intimidating or coercing him for his supposed political affiliations.¹⁸⁷ The CAT decided that the statement obtained through torture served as a basis for his conviction was a violation of Article 15.¹⁸⁸ In addition, the CAT advised the State Party to conduct an investigation into the torture of the victim, bring the perpetrators to justice and report to the CAT within 90 days.¹⁸⁹ This shows the CAT's unwavering role in ensuring that evidence obtained through torture is not admitted.



In *R.A.Y. v. Morocco*,¹⁹⁰ the complainant, a dual French and Algerian citizen, ordinarily residing in France, was arrested in Morocco on 26 February 2012, under an International Criminal Police Organization (INTERPOL) international arrest warrant. He claimed to be a victim of a violation of Article 15 of the Convention by Morocco, which had authorized his extradition to Algeria on the basis of incriminating information that had allegedly been obtained under torture. The complainant also claimed that if he were to be extradited to

¹⁸⁵ Communication no. 402/2009

¹⁸⁶ At para 2.1.

¹⁸⁷ At paras 2.5, 3.1.

¹⁸⁸ At para 11.9.

¹⁸⁹ At para 13.

¹⁹⁰ Communication no 525/2012.

Algeria, he would be at risk of being tortured, in violation of Article 3 of the Convention.¹⁹¹ The State party contested the admissibility of the communication and that the complainant had not provided any evidence to show that he would be tortured once extradited.¹⁹² The Committee stated that the communication was admissible. It however noted that the complainant merely stated before the Court of Cassation that he feared being subjected to torture in Algeria, without substantiating the allegation.¹⁹³ The CAT stated that the allegation of a violation was vague in so far as he had not substantiated that he faced a personal and actual risk of being tortured if extradited to Algeria and that, accordingly, his extradition would not constitute a violation of Article 3 of the Covenant.¹⁹⁴ This decision clearly shows that much as the CAT would hold that the consequences of an extradition may have a holding on a violation of Article 15, the complainant must go beyond speculation to an arguable case.¹⁹⁵

In *Sergei Kirsanov v Russian Federation*,¹⁹⁶ the complainant claimed that his excessively long detention in inhumane conditions at the temporary confinement ward during the pre-trial investigation of the criminal charges against him amounted to torture, which was perpetrated by the State to elicit a confession, in violation of Article 15 of the Convention.¹⁹⁷ The Committee considered that the conditions of detention in the temporary confinement ward amounted to cruel, inhuman or degrading treatment within the meaning of Article 16 of the Convention, and not torture.¹⁹⁸ The CAT observed that

¹⁹¹ At para 3.1.

¹⁹² At para 4.6.

¹⁹³ At para 7.4.

¹⁹⁴ At paras 7.4 , 7.5.

¹⁹⁵ See *C.A.R.M. et al. v. Canada*, Communication no 298/2006, para. 8.10, decision adopted on 18 May 2007; *M.Z. v. Sweden*, Communication no. 256/2004, para. 9.3, decision adopted on 12 May 2006; No. 214/2002.

¹⁹⁶ Communication no 478/2011.

¹⁹⁷ At para 1, 2.1.

¹⁹⁸ At para 11.2.

Articles 14 and 15 of the Convention referred only to torture in the sense of Article 1 of the Convention and did not cover other forms of ill-treatment.¹⁹⁹ This principle goes against jurisprudence developed by the CAT in its General Comment²⁰⁰ where it stated that violation of Article 15 was not limited to torture but extended to cruel, inhuman and degrading treatment as well.²⁰¹ It must be noted that this decision was passed in 2011, four years after the enactment of the General Comment.

2.4.4 THE OPTIONAL PROTOCOL TO THE UN CONVENTION AGAINST TORTURE

The Optional Protocol to the Convention against Torture (OPCAT) is an international agreement aimed at preventing torture and cruel, inhuman or degrading treatment or punishment.²⁰² Unlike other principal UN human rights treaties, it does not set out additional substantive human rights commitments; but focuses on establishing mechanisms to further the realization of pre-existing commitments of partner states.²⁰³ The OPCAT has created mechanisms with the mandate to visit places of detention, by its external independent observers.²⁰⁴ The rationale of this approach is to reduce the magnitude of the Committee dealing with questions of proof of torture for the purpose of deciding on the admissibility of evidence obtained through torture. The OPCAT establishes the Subcommittee on the Prevention of Torture (SPT)²⁰⁵ to conduct the country visits²⁰⁶ and the National Preventive Mechanisms (NPMs)²⁰⁷ to examine the

¹⁹⁹ At para 11.4.

²⁰⁰ U.N. Doc. CAT/C/GC/2/CRP.1/Rev.4 (2007).

²⁰¹ At para 6.

²⁰² 2375 UNTS 237.

²⁰³ Preamble and Article 1 to the OPCAT.

²⁰⁴ Preamble, para 8 and Article 1.

²⁰⁵ Article 2.

²⁰⁶ Article 15.

²⁰⁷ Article 3.

treatment of persons deprived of their liberty and to make recommendation to relevant authorities.²⁰⁸ This in effect; means that the OPCAT grants a pre-emptive remedy to countries to minimize instances of obtaining evidence through torture through the preventive mechanisms in place.

However a couple of challenges do exist which derail it from having the desired results. First and foremost, only 79 states are party to the Optional Protocol.²⁰⁹ In reference to the countries under research, it is only South Africa that is a signatory and has not yet ratified the Optional protocol.²¹⁰ This is an indication that the pre-emptive measures therefore do not benefit the countries under study. Secondly reports of the OPCAT do not indicate whether there is a reduction of cases that involve cases dealing with evidence obtained through the violation of the right against torture. This is majorly because of the confidentiality used by the SPT and the state parties. This confidentiality affects the ability to gauge the effectiveness of the OPCAT.²¹¹ Thirdly since the SPT makes known the expected visits;²¹² this enables member states to avoid instances where they would consider to be in breach of their commitments to the UNCAT. Fourthly, the reports are of a confidential nature. This eludes a state party of public accountability for lack of

²⁰⁸ Article 19.

²⁰⁹ State parties to the OPCAT available at <http://www.ohchr.org/Documents/HRBodies/OPCAT/StatRatOPCAT.pdf> (accessed 14 July 2015).

²¹⁰ State parties that have ratified the OPCAT available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9-b&chapter=4&lang=en (accessed 14 July 2015).

²¹¹ The 1st, 2nd, 3rd, 4th, 5th, 6th, 7th and 8th Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=12&DocTypeID=27 (accessed 14 July 2015).

²¹² Article 15 of the OPCAT.

commitment to admission of evidence obtained through violation of the right against torture.

2.4.5 CONCLUSION ON THE COMMITTEE AGAINST TORTURE

In conclusion, the CAT will always ensure that evidence obtained through torture is not admitted. The rule lacks clarity in instances of evidence obtained through CIDT, although there is practice to the contrary. Although the General Comment states that the rule extends to cruel, inhuman and degrading treatment, decision seems to be at variance. Secondly the CAT has to ensure the victim has suffered torture in accordance with the definition in the UNCAT before considering whether such evidence is admissible. Thirdly, mere speculation by a victim that he will be subjected to torture upon extradition with substantiation of his claims is not enough to invoke the operation of Article 15 of the UNCAT.



2.5 INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS.

2.5.1 INTRODUCTION

The ICCPR²¹³ was adopted to give effect to the ideals of the UDHR in recognition of the fact that human beings have civil and political rights which may be enjoyed in adequately created conditions.²¹⁴ The ICCPR therefore creates an obligation on State Parties to promote the universal respect for and observance of human rights.²¹⁵

Two arguments are evaluated; first that the HRC readily decides that facts violate a particular Article without deciding issues of admissibility of evidence. Secondly that the HRC only provides as exception if it is shown that there is an arbitrary denial of justice by

²¹³ International Covenant on Civil and Political Rights 999 UNTS 171 (ICCPR).

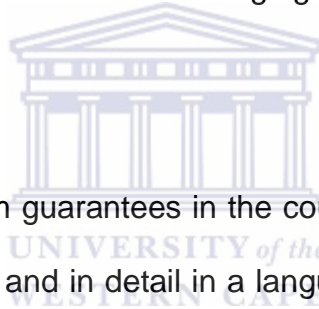
²¹⁴ Preamble to the ICCPR, para 3.

²¹⁵ At para 4.

the domestic courts. This section of the research analyses jurisprudence of the ICCPR which includes General Comments, decisions and concluding observations.

2.5.2 PROVISIONS OF THE ICCPR

The ICCPR does not have a provision on how to deal with evidence obtained through human rights violations. Just like the instruments discussed before, It has a number of provisions and mechanisms which are instructive on how to deal with evidence obtained through human rights violations. The ICCPR provides for the right against torture, cruel, inhuman and degrading punishment or treatment,²¹⁶ right to liberty and security of person,²¹⁷ the right to dignity of persons deprived of their liberty²¹⁸ and the right to privacy.²¹⁹ These rights provide a basis for challenging evidence obtained through human rights violations.



The ICCPR provides for minimum guarantees in the course of proceedings which include the right to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him,²²⁰ to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing,²²¹ and to be tried without undue delay.²²² Other guarantees include the right to defence,²²³ the

²¹⁶Article 7.

²¹⁷Article 9.

²¹⁸Article 10.

²¹⁹Article 17.

²²⁰Article 14(3)a.

²²¹Article 14(3)b.

²²²Article 14(3)c.

²²³Article 14(3)d.

right to examine witnesses,²²⁴ the right to services of an interpreter²²⁵ and the right not to be compelled to testify against oneself or to confess to his or her guilt.²²⁶

2.5.3 THE HUMAN RIGHTS COMMITTEE AND ITS JURISPRUDENCE

The Human Rights Committee (HRC) monitors the implementation of the ICCPR.²²⁷ It however has jurisprudence which enables it to be dynamic compared to the African Commission and the European Court of Human Rights. The jurisprudence includes decisions of the HRC, General Comments and Concluding Observations.

2.5.3.1 General Comments

The requirement to control compulsion of a person from incriminating himself, provides a safeguard to the right to human dignity and the right against torture. As such, the HRC in its General Comments states that, evidence obtained by way of compulsion of any form is inadmissible.²²⁸ The HRC has also provided that evidence obtained through torture or other treatment contrary to Article 7 is inadmissible in Court; and has advised State Parties to train and instruct law enforcement officers not to apply such treatment.²²⁹ In addition, the HRC mandates State Parties to ensure an effective protection against ill-treatment through effective investigation by competent authorities.²³⁰ The State Parties are supposed to ensure that perpetrators of this evidence are brought to justice.²³¹ In

²²⁴ Article 14(3)e.

²²⁵ Article 14(3)f.

²²⁶ Article 14(3)g.

²²⁷ Article 28.

²²⁸ General Comment 13 U.N. Doc. HRI/GEN/1/Rev.1 (1984) para 16.

²²⁹ General Comment 20, U.N. Doc. HRI/GEN/1/Rev.1 (1994) para 1. See Conte A, Davidson S & Burchill R *Defining Civil and Political Rights* (2004) 94.

²³⁰ At para 1.

²³¹ General Comment 32, U.N. Doc. CCPR/C/GC/32 (2007) Part I, para 6.

addition, the HRC interprets the accused person's right to adequate facilities to include access to documents the prosecution may intend to rely on to incriminate the accused. So if the evidence was obtained in violation of one's rights, he or she has a right to access it to prepare for his or her defence.²³²

Without prejudice to the foregoing, the HRC places the mandate on determination of admissibility of evidence on State Parties through their national courts and use of domestic legislation.²³³ This means that in instances where the evidence was obtained in violation of one's constitutional rights, the HRC prefers that the domestic Courts evaluate the evidence. The HRC shares the same principle with the CAT in respect to evidence obtained through torture, cruel, inhuman or degrading treatment or punishment. The HRC mandates member state to ensure that statements or confessions obtained through torture are excluded from the evidence,²³⁴ unless, as stated earlier, that this evidence is used for bringing perpetrators of torture to justice.²³⁵ In contrast with the African Commission, the HRC does not place a dual duty on prosecutors to exercise their discretion in tendering evidence which is established to have been obtained through unlawful methods.²³⁶

In addition, the HRC requires that the right to privacy²³⁷ is upheld when the state through its agencies is gathering information. It places emphasis on the need to conduct searches

²³² Part IV, para 3.

²³³ General Comment 32, para 39.

²³⁴ Article 7 of the ICCPR.

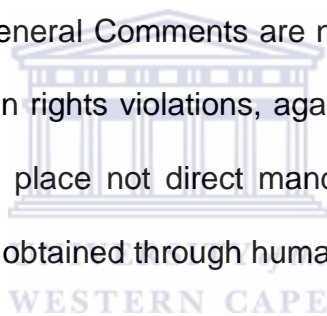
²³⁵ General Comment 32, para 41.

²³⁶ See Principles on the Right to a fair Trial and legal assistance in Africa, DOC/OS(XXX)247; Principle F; see also Guidelines on the Role of Prosecutors (Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990).

²³⁷ Article 17 of the ICCPR.

without harassment.²³⁸ If the collection of evidence requires surveillance, proper measures are taken to ensure it is done after a designated authority by law, has given an order.²³⁹

In conclusion, the General Comments, as part of the jurisprudence of the HRC, have performed a great role in enhancing the principle that evidence obtained through human rights violations is not admitted. The only exception to this rule is if the evidence is being used against a perpetrator of torture, for purposes of bringing him to justice. The General Comments have, in particular, addressed the right to a fair trial, the right to privacy and the right to freedom from torture, cruel, inhuman or degrading punishment or treatment. In addition, the HRC, has as a matter of principle, mandated the State Parties to lay down rules to establish admissibility of evidence and its assessment by Courts. Without prejudice to the foregoing, the General Comments are not instructive on how to deal with evidence obtained through human rights violations, against the perpetrators if it does not involve torture.²⁴⁰ Secondly they place not direct mandate on the State Prosecutors to deal with evidence that has been obtained through human rights violations.



2.5.3.2 *Decisions of the Human Rights Committee*

This Section shall examine four decisions of the HRC between 1997 and 2014. The views of the first two decisions were adopted by the General Assembly in 2007.²⁴¹ The views of the subsequent two decisions were adopted by the General Assembly in 2012.²⁴² These decisions shall be used to establish the status of the HRC in dealing with admissibility of evidence obtained through human rights violations. an argument is advanced that,

²³⁸ General Comment 16 of 1988,U.N. Doc. HRI/GEN/1/Rev.1 at 21 (1994) paras 8-9.

²³⁹ At para 8. See Conte A, Davidson S & Burchill R (2004)147.

²⁴⁰ See notes 290- 294 above.

²⁴¹ Report of the HRC for the 75th to the 84th sessions to the General Assembly (VolumeVIII), CCPR/C/OP/8.

²⁴² Report of the HRC for the 103rd and 104th sessions to the General Assembly (Volume II) at its 67th Session; Official Record A/67/40 (Vol. II).

although the HRC has been quite elaborate in General Comments, it has not followed suit when dealing with decisions arising out of individual communications. The reasoning of the HRC is examined in respect to decisions obtained through human rights violations. Thereafter, a concluding argument shall be given.

In *Azer Garyverdyogly Aliev v Ukraine*,²⁴³ the author alleged that he had been tortured by the state authorities for the purpose of extracting confessions from him. He stated further, that as a result, the courts convicted him on the basis of the said evidence. He filed an individual communication stating that his rights under Articles 7 and 14 were violated. It must be noted that there was proof of torture since the author and his wife were not given anything to eat for four days in the detention.²⁴⁴ Secondly they were interrogated for four days.²⁴⁵ Thirdly, the Police made the author put on gas masks and prevent him from breathing.²⁴⁶ In addition, his wife was beaten until she became unconscious and subsequently had a miscarriage.²⁴⁷ This was proof that the evidence relied on at the hearing was tainted with these gross human rights violations and should have been disregarded. The HRC observed that there was a violation of Articles 7 and 14 of the ICCPR.²⁴⁸ It however, reiterated its stand that it is for Courts to evaluate facts and evidence and not the HRC unless there is a manifestly arbitrary denial of justice.²⁴⁹ The HRC found in general terms that there had been a violation of Articles 7 and 14 of the ICCPR. It opted not to deal with the issue of torture because it had not been raised by the author in the Court of first instance. The decision of the HRC did not adequately deal with

²⁴³ Communication no 781/1997.

²⁴⁴ At para 2.4.

²⁴⁵ At para 2.4.

²⁴⁶ At para 2.4.

²⁴⁷ At para 2.4.

²⁴⁸ At para 6.6.

²⁴⁹ At para 6.6. See General Comment 32, para 39.

evidence obtained through human rights violations. First, although the HRC recognises that inherent dignity is the foundation of freedom, justice and peace in the world,²⁵⁰ it did not show that it considers this principle in the decision. Secondly, the HRC's omission of failing to establish why the allegations of torture were not handled in the Court of first instance created a failure to exercise their mandate above the exemplary minimum. As a result the decision showed a lack of use of the opportunity to develop the jurisprudence of the HRC. The HRC failed to offer clarity on what constitutes a manifest arbitrary denial of justice.

In *Teofila Casafranca de Gomez (on behalf of Richardo Ernesto Gomez Casafranca v Peru)*,²⁵¹ the author stated that the victim was arrested without a valid warrant and was detained for 22 days instead of the mandatory maximum period of 15 days. He also stated that the Courts did not take into consideration the events that occurred in the pre-trial stages. The HRC noted that there was torture and threats of cruel and inhumane treatment.²⁵² The HRC held that there was a violation of Articles 7, 9(1),(3) and 14. It is not enough to simply declare which Articles have been violated. The HRC ought to have established all the evidence that was obtained through human rights violations and make a value decision. It opted for the softer landing, where it could simply state which Articles had been violated without addressing the manifest, arbitrary denial of justice. The HRC failed to clarify what constitutes a manifest and arbitrary denial of justice for purposes of establishing when it may intervene. In addition; it noted that there was torture but it did not comment on the evidence obtained through torture. This is an indication that the HRC was willing to find a violation of a constitutional right and declare which Articles are violated.

²⁵⁰ At para 1 to the preamble to the ICCPR.

²⁵¹ Communication no 981/2001.

²⁵² At para 2.2.

The HRC should have commented on the international human rights standards of acceptable periods of detention of person arrested.

In *Torobekov v Kyrgyzstan*,²⁵³ the author claimed his arrest, search without a warrant, pre-trial detention and interrogation in absence of a lawyer by Kyrgyzstan authorities was a violation of his rights under Article 9, (1) and (3); Article 14, (1),(2), (3(b), (c), (d), (e); and Article 17 (1), of the ICCPR.²⁵⁴ The HRC observed that the complaints refer primarily to the appraisal of evidence adduced at the trial and that is for Courts of State Parties to evaluate facts and evidence in a particular case.²⁵⁵ The HRC reiterated its stand in the previous decisions. It noted that the only exception to render the complaint admissible was proof by the author that the evaluation by the domestic courts was done arbitrarily and amounted to a denial of justice,²⁵⁶ and that the conduct of the criminal proceedings in his case suffered from such defects. The HRC noted that although the denial of counsel during interrogation was a violation of the author's right to a fair trial,²⁵⁷ the author had to show how this affected the outcome of the criminal charges against him.²⁵⁸ The HRC did not give instances under which the exception would be evident. It did not draw a line between the fulfilled requirements for admissibility in instances concerning evaluation of evidence of by domestic Courts.

²⁵³ Communication no. 1547/2007.

²⁵⁴ At paras 3.1 -3.2 .

²⁵⁵ At para 5.4. See *Errol Simms v Jamaica* communications no 541/1993, para. 6.2; *Riedl-Riedenstein. v Germany* Communication no 1188/2003, para. 7.3; *Bondarenko v Belarus* Communication no. 886/1999, para. 9.3; *Arenz et al. v Germany* Communication no. 1138/2002.

²⁵⁶ At para 5.4.

²⁵⁷ At para 5.5.

²⁵⁸ At para 5.5.

In *El Hagog Jumaa v. Libya*,²⁵⁹ the author claimed a violation of his rights under Articles 6,7,9,10 and 14 of the ICCPR. He was arrested and charged with premeditated murder and causing an epidemic by injecting 345 children with the HIV virus at the a public hospital in Libya.²⁶⁰ In the course of the interrogations, he was compelled to confess to his guilt after torture.²⁶¹ The author claimed that the death sentence was imposed after an arbitrary and unfair trial by the State²⁶² and that he was tortured during the pre-trial detention.²⁶³ In respect to violations of Article 14, the author stated that he was not informed of the charges against him for the first four months of his detention; nor was he assigned a lawyer until a full year after his arrest.²⁶⁴ He further stated that he was forced to testify against himself through torture; he was not assisted by a lawyer when he made his confession before the Prosecutor; the Court, without providing sufficient reasons, dismissed the expert report despite every indication that their report exonerated the author and his co-defendants.²⁶⁵ He contended that these elements including the unreasonable delays to conduct of the trial was a violation of Article 14 of the Covenant.²⁶⁶ The HRC stated that an accumulation of violations of the right to fair trial took place, including the violation of the right not to testify against oneself, the violation of the principle of equality of arms through unequal access to pieces of evidence and counter-expertise.²⁶⁷ In addition, the author's right to prepare one's own defence through the lack of access to a lawyer

²⁵⁹ Communication no. 1755/2008.

²⁶⁰ At para 2.2.

²⁶¹ At para 2.3.

²⁶² At para 3.2.

²⁶³ At para 3.3.

²⁶⁴ At para 3.6.

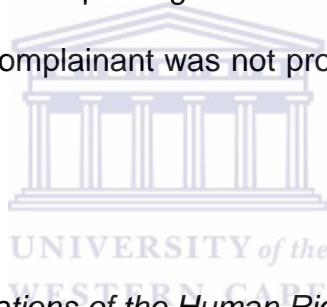
²⁶⁵ At para 3.6.

²⁶⁶ At para 3.6

²⁶⁷ At para 8.10.

prior to the beginning of the trial and the inability to speak to him freely collectively amounted to a violation of Article 14.²⁶⁸

In contrast with the previous case, the author was able to prove that the evaluation by the domestic Courts was done arbitrarily and amounted to a denial of justice and as a result, the proceedings were greatly affected by such defects. The author also showed that denial of counsel during pre-trial detention affected the outcome of the criminal charges against him. The HRC by implication allowed the facts of the communication to act as an exception to the HRC's stand on evaluation of evidence as a preserve of the domestic Courts. Since the facts included a violation of the non-derogable right against torture and the right to life, it played a great role in proving to the HRC that there was a violation of the right to a fair trial. Although the complainant was not prosecuted, his rights were none the less violated by the State Party.



2.5.3.3 *Concluding Observations of the Human Rights Committee*

The HRC requires that the actions of torture and arbitrarily deprivation of liberty of persons in unacknowledged places of detention is stopped.²⁶⁹ It recommends that the accused is promptly brought before a judge in conformity with Article 9 (3) of the ICCPR and that suspects do not access to a lawyer during the initial stages of detention.²⁷⁰ Furthermore, the HRC requires that allegations of torture and similar ill-treatment are promptly and thoroughly investigated by an independent body so that perpetrators are brought to

²⁶⁸ At para 8.10.

²⁶⁹ Concluding Observations on the third periodic report of Uganda of 2004; para 17, CCPR/CO/80/UGA, dated June 30, 2004.

²⁷⁰ Concluding Observations on the second periodic report of Kenya of 2005; para 17, CCPR/CO/83/KEN, dated 28 March 2005.

justice, and that complaint forms are available from a public body other than the Police.²⁷¹

The HRC also complements the work of other monitoring bodies by requiring State Parties to implement the recommendations. The HRC recommended that Hong Kong implements the recommendations of the CAT, requiring it to bring its laws to conform with the UNCAT.²⁷²

2.5.4 CONCLUSION ON THE HUMAN RIGHTS COMMITTEE

In conclusion, the HRC has developed meticulous General Comments and decided a number of complaints. In the General Comments, it has stated that evidence obtained in violation of an accused persons rights should not be admitted. At the same time, the HRC maintains that issues of evaluation of evidence are a role of the domestic Courts, unless there exists an arbitrary denial of justice and the proceedings are affected as a result. It must be noted further that instances where the HRC has gone ahead to address matters of evaluation of evidence, the author has to surpass a high standard. In addition, if the violation includes the violation of the right against torture, the HRC will advise that the evidence is not admitted. This principle on evaluation of evidence should be evaluated to, through learning a few lessons from the ECtHR which has the mandate to render evidence inadmissible if its admissibility shall render the trial proceedings unfair. It would have a dual tool; to determine complaints on the strength of the violation and the effect of the evidence on the trial of an author.

²⁷¹ At para 18.

²⁷² Concluding Observations on the third periodic report of Hong Kong of 2013; para 8, CCPR/C/CHN- HKG/CO/3, dated 12th and 13th March 2013.

2.6 CONCLUSION

The African Commission, in exercise of its mandate has passed very vibrant principles and Guidelines aimed at improving the enjoyment of human rights in Africa. It has also attempted to enhance its jurisprudence in concluding observations. Unfortunately the decisions passed by the African Commission, about evidence obtained through human rights violations, offer little input to the development of the jurisprudence. The principles remain profound legislation of the African Union but with little development of the jurisprudence in African Commission decisions.

The ECtHR follows a number of principles on how to deal with evidence obtained through human rights violations. First, evidence is only rendered inadmissible if it renders the proceedings of an accused person unfair regardless of the nature of the right violated. This is because the moral basis for absoluteness is usually an assumption; until a legal prohibition is qualified to be able to generate the absolute right. Secondly, the Court has recognised the right against self-incrimination as an international standard for a fair trial. Thirdly, the ECtHR is reluctant to decide on evaluation of admissible evidence and reiterates that this role should be for the national legislatures to determine admissibility of evidence.

The CAT has a provision on non-admissibility of evidence obtained through torture. This is only a small part of evidence that may be obtained through human rights violations. There is a variance as to whether this evidence only relates to torture or cruel, inhuman and degrading treatment. In addition, before a decision is made on the non-admissibility of evidence obtained through torture, the facts should clearly fall within the definition of torture as provided for in the UNCAT.

The HRC's jurisprudence shows that it depends of the effect of admission of evidence in relation to justice. If the justice is seen to be arbitrarily denied, then the HRC shall evaluate the admissibility of evidence. If the victim cannot pass this test, then admissibility is taken to be within the bounds of domestic Courts. Arbitrary denial of justice seems to only be evident if a number of Articles are violated, including the rights against torture.



CHAPTER THREE

STATUS OF EVIDENCE OBTAINED THROUGH HUMAN RIGHTS VIOLATIONS IN SOUTH AFRICA, CANADA, ZIMBABWE, KENYA AND HONG KONG.

3. BACKGROUND

Chapter two dealt with the status of evidence obtained through human rights violations in the context of international law. Chapter three deals with the status of this kind of evidence in South Africa, Canada, Kenya, Zimbabwe and Hong Kong. In evaluation of these countries, focus is placed on their constitutions and their position on evidence obtained through human rights violations.

The discussion deals with the relevant case law, to show how the courts have interpreted the constitutional provisions. Hong Kong lacks a constitutional provision, and therefore focus is on cases handed down by courts on how to deal with impugned evidence.

3.1 THE POSITION IN SOUTH AFRICA

3.1.1 THE CONSTITUTION 1996

The Constitution 1996 provides that

‘Evidence obtained in a manner that violates any right in the bill of rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice’.¹

From the wording, there is a need to evaluate the manner in which evidence is obtained, nature of the rights and the two legs of the section. The two legs of this section are; fairness of the trial and administration of justice. This section presumes that the evidence

¹ Section 35(5) of the Constitution 1996.

is admissible, unless it renders a trial unfair or is detrimental to the administration of justice.²

The evidence should be obtained in a manner that violates any right in the bill of rights. The major situations include cases of pointing-out, where the accused is not informed of his or her rights before the pointing-outs,³ illegal searches,⁴ illegal surveillance,⁵ autoptic evidence,⁶ and evidence obtained through improper treatment of witnesses.⁷ Therefore, in instances of violation of statutory rights, the common law exclusionary rule or application of judicial may be used.⁸ The distinction between the common law exclusionary rule and the rule under section section 35(5) is that unlike the latter, the former applies to all cases, and not only criminal cases.⁹ Some of the rights canvassed in the bill of rights include, the right to freedom and security of the person,¹⁰ privacy,¹¹ expression¹² and movement,¹³ and the right to a fair trial.¹⁴ The right to a fair trial is guaranteed by the provision of pre-hearing safeguards by the Constitution. These safeguards include an accused's right to be informed promptly of the charge against him,¹⁵ the right to remain silent¹⁶ and the consequences of not remaining silent.¹⁷

² *S v Tandwa* [2007] SCA 34 (RSA) para 116. See *Mthembu v S* [2008]3 All SA 159 (W) para 25.

³ Zeffert DT & Paizes AP *The South Africa Law of Evidence* 2ed (2008) 724 .

⁴ Zeffert DT & Paizes AP *The South Africa Law of Evidence* 2ed (2008) 725.

⁵ Zeffert DT & Paizes AP *The South Africa Law of Evidence* 2ed (2008) 728.

⁶ Zeffert DT & Paizes AP *The South Africa Law of Evidence* 2ed (2008) 731.

⁷ Zeffert DT & Paizes AP *The South Africa Law of Evidence* 2ed (2008) 736.

⁸ *Mthembu v S* [2008]3 All SA 159 (W) para 32;

⁹ *Mthembu v S* [2008]3 All SA 159 (W) para 32; see note 22 of the judgment.

¹⁰ Section 12, Constitution 1996.

¹¹ Section 14.

¹² Section 16.

¹³ Section 21.

¹⁴ Section 35.

¹⁵ Section 35(3)a.

Other guarantees are, the right not to be compelled to make a confession or admission that could be used in evidence against an accused,¹⁸ the right to be brought to court within 48 hours¹⁹ and the right to be presumed innocent till proven guilty.²⁰ Where the safeguards are disregarded by the investigating authority while collecting evidence, a violation of the constitutional rights occurs. This consequently creates an enabling environment for the accused person to invoke the section.

Unfairness of the trial is one of the grounds for exclusion of evidence under the section. In *S v Tandwa and others (Tandwa)*,²¹ the factors listed included the severity of the human rights violation, the degree of prejudice to the accused, the need to balance public policy on fighting crime, the interests of society and the need to balance the due process of the law against crime control. In *Tandwa's case*, the court regarded the violations as severe because they were flagrant.²² This is an indication that where the conduct of the police is deliberate and flagrant, the court will be inclined not to admit the evidence because it would render the trial unfair to the accused person. These grounds apply to both unfairness of the trial and placing the administration of justice into disrepute.

This is because, although the Court in *Tandwa* held that the grounds listed are relevant in establishing the unfairness on the trial of the accused,²³ they added that what is unfair to the accused shall always be detrimental to the administration of justice.²⁴

¹⁶ Section 35(3)h.

¹⁷ Section 35(1)a.

¹⁸ Section 35(b)a

¹⁹ Section 35(1)c.

²⁰ Section 35(3)h.

²¹ 2008 (1) SACR 613 (SCA) para 120.

²² *Tandwa*, para 128. Zeffert DT &Paizes AP *The South Africa Law of Evidence* 2ed (2008) 741.

²³ *Tandwa*, para 117.

²⁴ At para 118.

Where the admission of the evidence places administration of justice into disrepute, then it shall not be admitted. In examining this ground, the court looks at factors like presence of good faith on the part of law enforcement officers. In *Soci*, the court was reluctant to uphold systematic detentions by police in disregard of constitutional rights without any justifications whatsoever.²⁵ Other factors which the courts consider include, the nature and seriousness of the violation,²⁶ urgency and public safety,²⁷ availability of other alternative means of obtaining evidence in question²⁸ and the deterrence or disciplinary factor to discourage police from using illegal methods.²⁹ If the violation involves torture, the evidence is not admitted.³⁰

3.1.2 INTERPRETATION BY COURTS

The courts have dealt with the issue of the magnitude of a causal link; the connection between the violation of the right and the collection of evidence. It varies in degree in relation to the violation. While the presence of a causal link is required for the application of section 35(5), its degree of severity is not a condition precedent to determination of admissibility of evidence. The court examines each case on its merits. In *Tandwa*, the Court held that there is a high degree of prejudice when there is a close causal connection between the rights violation and the subsequent self-incriminating acts of the accused.³¹ In

²⁵ *S v Soci* 1998 2 SACR 275 (E), 297a.

²⁶ *S v Mark* 2001 (1) SACR 572 (C), *S v Naidoo and another*, 1998 (1) SACR 479, Zeffert DT & Paizes AP *The South Africa Law of Evidence* 2ed (2008) 748, Schwikkard PJ & Van der Merwe SE *Principles of Evidence* 3ed (2009) 250.

²⁷ Schwikkard PJ & Van der Merwe SE *Principles of Evidence* 3ed (2009) 256. Zeffert & Paizes 749.

²⁸ Zeffert DT & Paizes AP *The South Africa Law of Evidence* 2ed (2008) 751, Schwikkard 257, *S v Hena* 2006 (2) SACR 33 (SE).

²⁹ *S v Mphala and another* 1998 (1) SACR 388 (W).

³⁰ *Mthembu*.2008 2 SACR407 (SCA) para 32.

³¹ *Tandwa*, para 117.

S v Mark,³² the court held that a weak causal link between the violation and the evidence would not render the evidence obtained through human rights violations inadmissible. In *S v Soci*,³³ the court held that the evidence of pointing out without being informed of his right to counsel be excluded. The situation is only different if the case involves torture. In *S v Mthembu*,³⁴ the court held that where torture had irredeemably stained the evidence of a third party, the subsequent voluntary testimony in court could not deter the fact that the evidence had been obtained through torture. In addition, evidence can still be excluded, even when a third party's rights have been violated in the process of obtaining evidence against an accused.³⁵ The principles above show that if the rigid rule on the use of the severity of a causal link is used, judicial integrity and the purpose of the constitutional directive would be compromised.

The section is silent on whether an accused person has standing to bring an application under section 35(5), where the rights of a third party have been violated. The courts have held that an accused person can apply section 35(5), even where it's the rights of a third party that have been violated in obtaining evidence that incriminates the accused.³⁶ This reinforces the policy behind the enactment of the section, by ensuring that it is not only in instances where the accused's rights are violated that section 35(5) may be applied. A strict interpretation for that requirement would be inconsistent with the purpose of preventing exclusion of evidence obtained through human rights violations.³⁷

³² *S v Mark* 2001 (1) SACR 572 (C).

³³ *S v Soci* 1998 2 SACR 275 (E).

³⁴ *S v Mthembu* 2008 2 SACR 407 (SCA).

³⁵ *S v Mthembu* 2008 2 SACR 407 (SCA); See *Gafgen vs Germany* European Court of Human Rights (ECtHR) Application no. 22978/05 para 74.

³⁶ *S v Mthembu* 2008 2 SACR 407 (SCA) para 27.

³⁷ Schwikkard PJ & Van der Merwe SE *Principles of Evidence* 3ed (2009) 219; para 1282.

In instances where evidence is obtained by third parties or vigilantes in violation of an accused's rights, the evidence is subjected to section 35(5) before Court exercises its discretion to admit it. In *S v Songezo Mini and 4 others (Mini)*,³⁸ the Court subjected the evidence obtained by security officers to section 35(5) before admitting it. In instances, where there was a violation of the rights of the accused before evidence was obtained, the evidence was not admitted. In instances where the violation of the rights of the accused persons was after the evidence had been obtained, the evidence was admitted.³⁹ In *S v Hena*,⁴⁰ the court held that section 35(5) covers situations where the police abdicate their statutory duty to investigate crimes by sub-contracting it to anti-crime committees who gather evidence by seriously and deliberately violating the constitutional rights of an accused person. In *S v Zuko*,⁴¹ court provided four factors which may form the basis for not admitting such evidence. These are, lack of good faith on the part of vigilantes, non-justification of their conduct on public safety or emergency, the seriousness of the violation of the appellants' rights to privacy, freedom and security of person and dignity and fourthly, the availability of lawful means to acquire the evidence. This approach enhances the right to a fair trial right from the pre-trial stages.

The concept of who bears the burden of proof to establish that there has been a violation of rights in obtaining evidence is not clear in South Africa. While two decisions have varying views on the matter; a textual reading of the section requires the state to bear the burden. In *Director of Public Prosecutions, Transvaal v Viljeon (Viljeon)*⁴² the Court held that the accused has to show a violation of his or her rights, before court makes a decision

³⁸ *S v Songezo Mini and 4 others* unreported Case no 141178 of 2015 (30 April 2015), paras 20, 21, 22.

³⁹ At paras 11, 12, 13, 16, 18, 20 and 23.

⁴⁰ 2006 2 SACR 33 (SE 40i-41b).

⁴¹ Unreported ECD Case no CA & R159 of 2001.

⁴² [2005] 2 All SA 355 (SCA).

on whether to admit the evidence.⁴³ In other words, the accused should prove a violation of a right, as a threshold requirement to application of section 35(5). In *S v Mgcina (Mgcina)*⁴⁴ the court placed the burden on the prosecution to disprove that the evidence had been obtained in an unconstitutional manner.⁴⁵ The case of *Viljeon* was decided erroneously and cannot pass the constitutional test, while *Mgcina* offers a purposively approach to application of section 35(5).

Evidence acquired as a result of entrapments⁴⁶ is also relevant to this study because it involves violations of an accused's rights. Some of these rights include the right to equality before the law,⁴⁷ privacy,⁴⁸ and association⁴⁹ in the course of obtaining evidence. In *Carel Christian Van De Berg and another v S (Carel)*,⁵⁰ the Court held that evidence obtained through entrapment which renders a trial unfair, or is detrimental to the administration of justice should not be admitted.

The Procedure used for the application of the exclusionary rule is a trial-within-a-trial to test the admissibility of evidence. The application is made before the evidence is admitted.⁵¹ This is done when the accused objects to the admission of a piece of

⁴³ At paras 32, 33-4, 43.

⁴⁴ 2007 (1) SACR 82.

⁴⁵ Page 95*h-i*. See *S v Brown* 1996 (2) SACR 49 (NC) at 73, See D Ally 'Constitutional exclusion under s 35(5) of the Constitution: should an accused bear a 'threshold burden' of proving that his or her constitutional right has been infringed?' 2010 (1) SACJ 22 22-38 generally.

⁴⁶ Section 252A Criminal Procedure Act 51 of 1977.

⁴⁷ Section 9 of the Constitution 1996.

⁴⁸ Section 14 of the Constitution 1996, *Nicholas Petrus Kotze v State*, [2010] 1 All SA 220 (SCA) paras 17-18.

⁴⁹ Section 18 of the Constitution 1996.

⁵⁰ Case No. A 116/2004 para 33.

⁵¹ *S v Makhanya* 2002 (3) SA 201 (N) at 201.

evidence. The reason for this procedure is to ensure that the accused can testify on the issue concerning admissibility of the impugned evidence without exposing himself to cross examination as to his guilt. In *S v Ntzweli*,⁵² it was held that the lower court's refusal to hold a trial-within-a-trial to determine admissibility of evidence obtained as a result of an illegal search amounted to a failure of justice.⁵³

3.1.3 CONCLUSION ON SOUTH AFRICA

The Constitution 1996 provides a directive to exclude all evidence obtained in a manner that violates a right in the bill of rights, if its admission would render the trial unfair or would otherwise be detrimental to the administration of justice. Before a court exercises this directive, it exercises its discretion to establish if the impugned evidence would be unfair to the trial or would be detrimental to the administration of justice. Although it is a threshold requirement that there is a causal link, its degree is not a condition precedent to determination of admissibility of evidence and the courts examine each case on its merits.

In instances where a third party's right are violated in obtaining evidence, and the evidence is used against an accused party, the accused has a standing before court to challenge that evidence. Where evidence is obtained by third parties other than the police, it is subjected to the test in section 35(5), before a court makes a decision on its admissibility. The Procedure used for the application of the exclusionary rule is a trial-within-a-trial to test the admissibility of evidence and the application is made before the evidence is admitted.

⁵² [2001] 2 All SA 184.187f-189g. See also *DPP Transvaal v Vijeon*, 2005 (1) SACR 505 (SCA) para 32.

⁵³ 187f-189g.

3.2 POSITION IN CANADA

3.2.1 THE CANADIAN CHARTER

Canada has the Canadian Charter of Rights and Freedoms (the Charter)⁵⁴ which contains a provision which deals with evidence obtained through human rights violations. Section 24(2) of the Canadian Charter provides that

‘Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute’.

From the wording, there is a need to examine the manner in which evidence was obtained, that infringes on the rights in the charter. In addition to the above, evidence obtained in violation of section 24(2) of the Charter remains presumptively admissible until the preliquisites are fulfilled.⁵⁵ The requirement to look at all the circumstances of the case, means that the scope of evaluation of the evidence is wider than the fairness of the trial as envisaged in the South African situation.

⁵⁴ Part I of *The Constitution Act, 1982*, Schedule B to *The Canada Act 1982 (U.K.)*, 1982, c. I1, s. 24(2).

⁵⁵ *R v Manninen* [1987]1 SCR 1233 at 1241.

3.2.2 INTERPRETATION BY COURTS

If the evidence brings administration of justice into disrepute, it shall not be admitted. In *R v Grant*,⁵⁶ the Court held that bringing administration of justice into disrepute must be understood to mean the long-term sense of maintaining the integrity of, and public confidence in the justice system, using an objective inquiry.⁵⁷ For instance, where a co-accused co-operated with the police to testify, the section cannot be applied. Furthermore, in *R v Goldhart*,⁵⁸ through an unconstitutional search, real evidence was obtained in violation of the accused's right to privacy under the charter. The Supreme Court of Canada (SCC), held that first, the testimony of the co accused had not been obtained in a manner that violated any right in the Charter; secondly there was insufficient link or casual connection between the infringement of his rights and the evidence obtained. The co-accused's decision to co-operate with the police, plead guilty and testify against Goldhart was a decision taken at his own volition. As a result the court declined to apply section 24(2) to the facts. Other factors that the courts use to examine the evidence shall place the administration of justice into disrepute include the requirement of good faith on the part of the police⁵⁹ and the seriousness of the violation.⁶⁰

⁵⁶ *R. v. Grant*, [2009] 2 S.C.R. 353.

⁵⁷ *R. v. Grant*, [2009] 2 S.C.R. 353 para 66-70. Hauschildt J 'Blind Faith: The Supreme Court of Canada, s. 24(2) and the Presumption of Good Faith Police Conduct' (2010) 56 *Criminal Law Quarterly* 469 469.

⁵⁸ [1995] 31 CRR 2d 330 (SCC).

⁵⁹ *R v Therens*, paras 30, 73, Hauschildt J 'Blind Faith: The Supreme Court of Canada, s. 24(2) and the Presumption of Good Faith Police Conduct' (2010) 56 *Criminal Law Quarterly* 469 526 474, *R v Chiomack* [1980] 1 SCR 471, 49 CCC (2D) 257; *R v Collins* [1987] 1 S.C.R. 265. See also S Coughlan; 'Good faith and the exclusion of evidence under the charter' (1992) 11 *Criminal Reports* (4th) 304 304.

⁶⁰ Hauschildt J 'Blind Faith: The Supreme Court of Canada, s. 24(2) and the Presumption of Good Faith Police Conduct' (2010) 56 *Criminal Law Quarterly* 469 475, *R v Collins* [1987] 1 S.C.R. 265, para 35.

It must be noted that since the decision in *Grant*, the SCC directed that the factors to be considered while establishing exclusion of evidence under section 24(2) are as follows. First, the seriousness of the infringement of the Charter right by the state, secondly the impact of the breach on the Charter-protected interests of the accused and thirdly, society's interest in the adjudication of the case on its merits.⁶¹ By creating the three principles, the SCC placed emphasis on the seriousness of the violation rather than the seriousness of the offence. The SCC noted that the reliability and importance of evidence is not the determining factor of the exclusion of evidence, but rather, the magnitude of the infringement.⁶² Before *Grant* was decided, the Supreme Court had read into the section, the requirement for unfairness of the trial on the basis of the infringed rights.⁶³

Canadian courts, do not require the presence of a causal link to justify the application of section 24(2) of the Charter.⁶⁴ The reason advanced is that the causal connection is too narrow and difficult to apply and therefore, its existence is not determinative. This was a departure from the earlier position of the courts that required the presence of a causal link.⁶⁵ This position was subsequently confirmed in *R v Brydges*,⁶⁶ where the Court held

⁶¹ *R. v. Grant*, [2009] 2 S.C.R. 353 paras 71-72, 76-77, 79, 86 and 127. See also Dawe J & McArthur H 'Charter Detention and the Exclusion of Evidence after *Grant*, *Harrison* and *Suberu*' (2010) 56 *Criminal Law Quarterly* 381 411.

⁶² Stuart D 'Welcome flexibility and better criteria from the Supreme Court of Canada for exclusion of evidence obtained in violation of the Canadian Charter of rights and freedoms' (2010)16 *South Western Journal of International Law* 313 324.

⁶³ Santoro DC 'The Unprincipled Use of Originalism and Section 24(2) of the Charter' (2007) 45 *Alberta Law Review* 1 1.

⁶⁴ *R v Strachan* [1988] 2 S.C.R. 980,1005-6.

⁶⁵ *R v Therens* [1985] 1 S.C.R. 613, 649, *R v Upton* [1988] 1 S.C.R. 1083.

⁶⁶ *R v Brydges* [1990] 1 S.C.R. 190.

that section 24(2) would be used as long as a charter violation occurred in the course of obtaining the evidence.⁶⁷

Just like South African courts, the Canadian courts do not encourage use of vigilante evidence. The courts do subject the evidence to the application of section 24(2) of the Charter before it is admitted.⁶⁸

An applicant, who seeks to exclude evidence, bears the burden of persuading court on a balance of probabilities that his or her rights have been infringed.⁶⁹ He must also show that there is an adequate relationship between the charter violation and evidence he wants to exclude. Before *Strachan* was decided, the applicant only bore the burden of persuading court that there was a violation in the course of obtaining evidence. In *Bartle*,⁷⁰ courts required the need to use a generous approach and take into consideration the evidence as part of an entire chain of events involving the charter breach.⁷¹ Courts later recognised that although the burden of proof was on the accused to prove his assertion, the state was better placed to disprove the breach because of its superior knowledge of the circumstances surrounding the way the evidence was obtained.⁷²

The Charter does not provide for the procedure to be followed in applying for exclusion of evidence under section 24(2) of the Charter. Case law has, however, provided for a systematic mode of invoking the section. From the wording of the section, the remedy

⁶⁷ Page 210.

⁶⁸ *R v Bulhay* [2003] 1 SCR 206. See also *R v Harrer* [1995] 3 SCR 562, *R v White* [1999] 2 SCR 417

⁶⁹ *R v Collins* [1987] 1 S.C.R. 265, 277 *R v Cobham* 33 CR (4th) 75 at 81.

⁷⁰ *R v Bartle* 33 C.R (4th) 1, 31; *Collins*, 16.

⁷¹ See *R v Schmautz* (1990) 1 SCR398, *R v Harper* [1994] 3 SCR 343.

⁷² *R v Bulingham* [1995] 2 SCR 206, 234-5.

under section 24(2) only arises when one is proceeding under section 24(1). While section 24(1) empowers one to apply to a court of competent jurisdiction for redress, it directs the exclusion of evidence if it finds that the evidence was obtained in a manner that infringes or denies charter rights.⁷³

3.2.3. CONCLUSION ON CANADA

The Canadian application of the exclusionary rule in the charter has undergone three stages. The first stage was use of the literal interpretation of the section. This was followed by a reading into the section of the fairness of the trial concept.⁷⁴ The third stage started after the SCC revised the interpretation of the section in *Grant*.⁷⁵

The courts hold that the causal link is not determinative of the application and it's only where a victim's rights have been infringed that section 24(2) may be applied.



3.3 POSITION IN KENYA

3.3.1 THE CONSTITUTION OF THE REPUBLIC OF KENYA 2010

Kenya, like South Africa, Canada and Zimbabwe,⁷⁶ has a provision in its constitution (Constitution 2010) relating to evidence obtained through human rights violations. Kenya has ratified to the ICCPR,⁷⁷ UNCAT⁷⁸ and ACHPR,⁷⁹ an indication that it recognises the authority of the decisions of the monitoring bodies.

⁷³ *R. v. Hynes*, [2001] 3 S.C.R. 623, at para. 15.

⁷⁴ *R. v. Grant*, [2009] 2 S.C.R. 353 paras 71-72, 76-77, 79, 86 and 127.

⁷⁵ *R. v. Grant*, [2009] 2 S.C.R. 353 paras 71-72, 76-77, 79, 86 and 127.

⁷⁶ As shall be discussed shortly.

⁷⁷ Ratified 1 May 1972. Available at <http://www.claiminghumanrights.org/kenya.html> (accessed 21 September 2015).

⁷⁸ Ratified 21 February 1997. Available at <http://www.claiminghumanrights.org/kenya.html> (accessed 21 September 2015).

The Constitution 2010 provides that

‘Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.’⁸⁰

The text of the Article is quite similar to section 35(5) of the South African Constitution 1996. The first point of inquiry is to establish what kind of evidence is referred to. The law regulating admissibility and relevance of evidence in Kenya is the Evidence Act,⁸¹ which prohibits the admission in evidence of any statement obtained through threat where the accused make such a statement or confession ‘to avoid any evil of a temporal nature.’⁸² It must be noted that Article 50(4) does not envisage a complete bar to admission of the evidence and it is left to the discretion of the courts to suppress it if its admission would render the trial unfair or detrimental to the administration of justice.⁸³

It is important to examine the context of Article 50(4) of the Constitution 2010. This portion of the Article is under the right to a fair trial of an accused person. The Article provides for the components of an accused person’s right to a fair trial which include the right against self-incrimination,⁸⁴ the right to be presumed innocent,⁸⁵ and the right to counsel.⁸⁶ This is an indication that Article 50(4) is an extension of the accused person’s right to a fair trial

⁷⁹ Ratified 21 January 1992, available at <http://www.achpr.org/instruments/achpr/ratification/>. (accessed 21 September 2015).

⁸⁰ Article 50 (4) of the Constitution 2010.

⁸¹ Cap 80 Laws of Kenya.

⁸² Section 26; See Mujuzi JD ‘The Constitution in practice: An Appraisal of the Kenyan Case law on the right to a fair trial’ 2008 (2) *Malawi Law Journal* 135 150.

⁸³ Kiage P *Essentials of Criminal Procedure in Kenya* (2010) 26.

⁸⁴ The Constitution 2010, Article 50 (2)l.

⁸⁵ Article 50(2)a.

⁸⁶ Article 50(2) g-h.

and provides a safeguard to an accused person's right to a fair trial. This is because the tenets of the right to a fair trial include the right against self-incrimination, right to legal representation and the right to freedom from torture in so far as the torture is inflicted for purposes of compelling one to confess to commission of an offence.⁸⁷

The person seeking to rely on the Article must prove to court that the evidence has been obtained in a manner that violates a right or fundamental freedom in the Constitution.⁸⁸ If the manner in which the evidence has been got does not violate any right in the constitution, then an accused person cannot benefit from the redress in Article 50(4).

The evidence shall be excluded upon the prospect of given events. The wording of the Article connotes that it is mandatory to exclude it. Unlike South Africa which says it must be excluded, the Kenyan Constitution states that it shall be excluded. Case law seems to suggest that must and shall carry the same meaning. It is suffice to note that there is a mandate no to admit the evidence.

The Article is silent on who has locus to apply to court to invoke the operation of Article 50(4) of the Constitution. Since the context of the Article deals with the rights to a fair trial, it is prudent to hold the view that it is an accused person who has the locus to seek the operation of the Article.

Fourthly, the evidence shall be excluded upon application of a dual test; if it renders the trial unfair or is detrimental to the administration of justice. Just like South Africa, the duo test is applied before the mandatory directive is applied. A discussion on how the courts have dealt with this kind of evidence shall be dealt with in due course.

⁸⁷ Mujuzi JD 'The Constitution in practice: An Appraisal of the Kenyan Case law on the right to a fair trial' 2008 (2) *Malawi Law Journal* 135 136, 150,153.

⁸⁸ Part II, Chapter 4 of the Constitution 2010.

3.3.2 INTERPRETATION BY COURTS

Three cases are discussed in relation to evidence obtained through human rights violations. These cases illustrate that Kenyan courts are dynamic in dealing with cases involving evidence obtained through human rights violations, development of principles of use of, and the bounds of Article 50(4) of the Constitution 2010.

In *Anthony Muriti v The OC Meru and two others (Muriti)*,⁸⁹ the court recognised and used the common law exclusionary rule. The court was aware of the existence of Article 50(4) of the Constitution 2010 and the applicant's failure to bring his application under the Article. The applicant was detained beyond the prescribed limit and denied access to counsel as required by the Constitution 2010. In addition, blood and saliva samples were obtained from him without his consent.⁹⁰ The Court held that the samples were obtained through illegal means in complete disregard of his fundamental rights and freedoms. It stated that where evidence is tainted with illegality, it cannot be used in any proceedings against the applicant.⁹¹ The applicant did not apply for the use of Article 50(4) of the Constitution 2010, but instead sought redress under Articles 22, 23(3) and 258 of the Constitution 2010. These Articles provide for enforcement of the bill of rights,⁹² authority to uphold and enforce the bill of rights by the courts by providing relief⁹³ and the enforcement of the provisions of the constitution 2010.⁹⁴ The Court still excluded the evidence on the basis of the common law exclusionary rule which grants courts powers to exercise discretion in admitting evidence which renders the trial of the accused unfair. The

⁸⁹ [2012] eKLR 1.

⁹⁰ Pages 1- 2.

⁹¹ Pages 1- 2.

⁹² Article 22 of the constitution 2010.

⁹³ Article 23(3) of the Constitution 2010.

⁹⁴ Article 258 of the Constitution 2010.

Court in interpreting Articles 22, 23(3) and 258 validated the common law exclusionary rule of evidence.

In addition, this case has a number of notable features which would enable the interpretation of Article 50(4) of the Constitution. The procedure for the application was by way of petition to the High Court, arising out of the criminal case pending the disposal of the main criminal case.⁹⁵ The court was empowered to grant an injunction, restrained the state from relying on evidence obtained through human rights violations.⁹⁶ The joint interpretation of Articles 22(1) and 258 of the Constitution 2010 indicate that the accused person and any other person who claims the violation of a right in the bill of rights has standing to seek redress from Court on his own behalf or on behalf of others.

In *Stephen Ouma Ambogo v The Hon Attorney General*,⁹⁷ the court stated that it required the applicant to give sufficient clarity of the rights violated. The Petitioner was arrested in an operation conducted by the Kenya Anti-Corruption Commission officers. At the time of filing his petition, the Constitution 2010 was not in force. He sought to amend his petition and seek redress under Article 50 of the Constitution 2010. The Court declined to grant relief to the petitioner because he did not clarify the rights that were violated.⁹⁸ The court reasoned that the applicant's pleadings did not stipulate which rights were violated and as a result, court could not make decisions in a vacuum. The Court reiterated that for one to get relief under Article 50(4), one had to sufficiently show the violation of his rights.

⁹⁵ Page 1.

⁹⁶ Page 8.

⁹⁷ [2014] eKLR 1.

⁹⁸ Page 6.

In *John Kipeu Kiprotich v R*,⁹⁹ the Court stated that section 50(4) should not be used in abuse of the court process. The applicant, after failing in all his appeals brought an application to Court, claiming that his rights were violated because the identification parade was not conducted in accordance with the law. In dismissing his application, the court hinted on the desired procedure. The court stated that the accused had exhausted all his remedies by way of appeal; and therefore, to entertain the petition would be to entertain a disguised but non-existent appeal couched in constitutional language.¹⁰⁰ This means that the application under section 50(4) does not oust the procedural aspects of criminal law. The application should be brought in the course of filing other applications and not to use it as a last resort.

3.3.3 CONCLUSION ON KENYA

Despite the existence of the constitutional provision on how to deal with evidence obtained through human rights violations, Kenya needs to incorporate the provisions of the UNCAT into its domestic laws, to bring it into conformity, with the UNCAT.¹⁰¹ This is because of three major reasons. First, since the promulgation of the Constitution 2010, international law has a more prominent role in Kenya's judicial system because of the inclusion of a provision directly incorporating ratified treaty law into the Kenyan legal system as a legitimate source of law.¹⁰² Secondly, to accord the due seriousness to torture by providing for penalties and appropriate sanctions and thirdly, to protect the tenets of the right to a fair trial which include the right against self-incrimination, the right to

⁹⁹ [2015] eKLR 1.

¹⁰⁰ Page 3.

¹⁰¹ Concluding observations on Kenya's Report by the Committee Against Torture; CAT/C/KEN/CO/1 para 8, dated 5 May 2013.

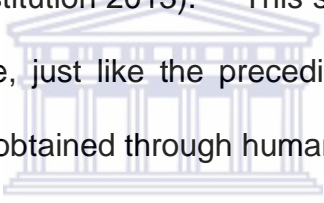
¹⁰² Article 2(6) of the Constitution 2010. See Orago NW 'The 2010 Kenyan Constitution and the hierarchical place of international law in the Kenyan domestic legal system: A comparative perspective' (2013) 13 *AHRLJ*415 415.

counsel during detention, among other rights. These rights are essential to the proper procurement of evidence and the viability of a fair trial. Evidence obtained through human rights violations, especially torture, is a common occurrence in Kenya, coupled with denial of counsel to accused persons during detention.¹⁰³ The courts are consistently, developing the principles to reinforce the provision in Article 50(4) on obtaining evidence obtained through human rights violations.

3.4 POSITION IN ZIMBABWE

3.4.1 THE CONSTITUTION 2013

Zimbabwe has had two major constitutions; the Lancaster Constitution of 1980,¹⁰⁴ and the recent Constitution of 2013 (Constitution 2013).¹⁰⁵ This section of research limits its scope to the Constitution 2013. Zimbabwe, just like the preceding States, has a provision in its constitution to cater for evidence obtained through human rights violations. It provides that


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‘In any criminal trial, evidence that has been obtained in a manner that violates any provision of this Chapter must be excluded if the admission of the evidence would render the trial unfair or would otherwise be detrimental to the administration of justice or the public interest.’¹⁰⁶

It must be shown that the evidence was obtained in a manner that violates any of the provisions of chapter 4 of the Constitution 2013. Once the applicant has proven this, the court has to establish the existence of one of the three grounds in the section, in exercise

¹⁰³ Concluding observations on Kenya’s Report by the Human Rights Committee; CCPR/CO/83/KEN para 17, dated 29 April 2005.

¹⁰⁴ Constitution of the Republic of Zimbabwe 1980.

¹⁰⁵ Constitution of the Republic of Zimbabwe 2013.

¹⁰⁶ Section 70(3) of the Constitution 2013.

of its discretion. It has to establish the effect of the evidence on the fairness of the trial, or on the administration of justice or on public interest. The constitutions of South Africa and Kenya provide for a dual test; thus effect of the evidence on the fairness on a trial and administration of justice, while the Canadian charter provides for one test, effect of the trial on the administration of justice. It is upon proof of the existence of any of the three grounds that a court may exercise the constitutional directive to exclude the evidence.

Section 70(3) of the Constitution 2013, applies if the right infringed is in the declaration of rights, otherwise an applicant's resort is the common law discretionary exclusionary rule that existed before the enactment of the constitution. While the courts have developed various principles to aid the interpretation of the section (as shall be discussed in due course), the wording creates a threshold requirement for the need of a violation of a right in the declaration of rights.¹⁰⁷

In Zimbabwe, there is a statutory rule relating to admissibility of irrelevant evidence. It provides that no evidence as to any fact, matter or thing shall be admissible which is irrelevant or immaterial and cannot conduce to prove or disprove any point or fact at issue in the case which is being tried.¹⁰⁸ This provision does not help in dealing with evidence obtained through human rights violations unless the evidence is irrelevant. It must be noted that irrelevancy of evidence is not based on an objective criteria but rather a subjective criteria.

Searches and seizures with and without warrants are governed by the Part VI of the Act.¹⁰⁹ The purpose of this is to ensure that searches and seizures are in accordance with

¹⁰⁷ Chapter 4 of the Constitution 2013.

¹⁰⁸ Section 252 of the Criminal Procedure and Evidence Amendment Act 2006.

¹⁰⁹ Sections 47-64.

the law. The Act also deals with arrests with and without warrants.¹¹⁰ The purpose of these sections is to attempt to supplement the process of acquiring evidence from the time the liberty of an individual is curtailed to the time he is produced in court.

Zimbabwe does not have any law criminalising torture, cruel, inhuman or degrading treatment (CIDT). This is exacerbated by the fact that Zimbabwe is not a State Party to the UNCAT. Although it is bound by the international norm on the prohibition against torture, there are not clear statistics to show how Zimbabwe has upheld this norm. Although the Constitution 2013 prohibits torture,¹¹¹ lack of a penal law affects the operation of the Constitutional provision. The penal law does not criminalise torture and CIDT. It simply provides for crimes against bodily assaults and injuries. It does not in any way supplement the operation of exclusion of evidence obtained through human rights violations.¹¹²

Security organisations have the ability to obtain a warrant from a designated minister to intercept communications.¹¹³ There are four persons who are authorised to intercept upon grant of warrant include; the Chief of Defence Intelligence or his or her nominee; the Director-General of the President's department responsible for national security or his or her nominee; the Commissioner of the Zimbabwe Republic Police or his or her nominee; and the Commissioner-General of the Zimbabwe Revenue Authority or his or her nominee.¹¹⁴ This process creates grounds for obtaining evidence through human rights violations as noted below.

¹¹⁰ Sections 24 – 46 of Criminal Procedure and Evidence Amendment Act 2006.

¹¹¹ Section 53 of the Constitution 2013.

¹¹² The Criminal Law Codification and Reform Act Cap 9:23.

¹¹³ The Interception of Communications Act, Cap 11:20, Act 06 Of 2007.

¹¹⁴ Section 5.

The process of application is devoid of any kind of judicial control. The application for the interception is made to the Minister instead of a judicial officer.¹¹⁵ The act refers to a minister as the minister of transport and communications or any other minister as the president may appoint.¹¹⁶ This may be abused by the head of the executive arm of government. Secondly the four designate persons who may apply all belong to the executive arm of government. In addition, they apply to another member of the executive, appointed by the head of the executive.

There is a violation of the constitutional right to privacy through use of non-judicial procedures to grant institutions permission to intercept communication. As a result of this, all the evidence obtained in violation of the right could be admitted. In instances where the holder of the warrant exceeds the bounds of the warrant, the Act still sanctions the admission of such evidence obtained, with due regard to the circumstances in which the evidence was obtained. Some of the circumstances include the potential effect of its admission or exclusion on issues of national security; and the unfairness to the accused that may be occasioned by its admission or exclusion.¹¹⁷ The literal interpretation of the Act is that where there is a violation of rights of an individual, the evidence may still be admitted on grounds on national security. Section 8 provides that evidence obtained by unlawful means is not admissible in criminal proceedings. It provides thus:

‘Evidence which has been obtained by means of any interception effected in contravention of this Act shall not be admissible in any criminal proceedings except with the leave of the court, and in granting or refusing such leave the court shall have regard, among other things, to the circumstances in which it was obtained, the

¹¹⁵ Section 5(2).

¹¹⁶ Section 2.

¹¹⁷ Sections 7(a)-(c).

potential effect of its admission or exclusion on issues of national security and the unfairness to the accused that may be occasioned by its admission or exclusion.’

While this provision may be seen as a ray of hope to a potentially dangerous situation, it must be noted that the section is based on a procedure that does not reflect the role of the judicial in granting warrants which would otherwise have the effect of violating constitutional rights to privacy of an individual. Therefore section 8 is merely an attempt to sugar coat a terminally archaic law.

Secondly the provision still grants the Courts powers, to make good and use evidence obtained in contravention of the Act, especially if the evidence hinges on matters of national security or the eminent unfairness of a trial to an accused person. In respect to national security, it is not defined in the Act. In respect to unfairness, the law and the procedure being used to intercept evidence is always unfair to the accused person because it provides incriminating evidence, obtained improperly by the executive institutions. This Act does not compliment the provision of excluding evidence under the constitution.

3.4.2 INTERPRETATION BY COURTS

In *S v Mudyandzo, Moyo and Hove*,¹¹⁸ the first accused was tortured by state operatives to make a confession. She brought the application seeking an order that the Court does not to admit the evidence of one of the witnesses, because it violated section 70 (3) of the Constitution 2013. The Court stated that for the section to apply, it must be proved that first, the evidence must have been obtained in a manner that violates the provisions of the Constitution and secondly, the use or admission of such evidence must

¹¹⁸ Unreported case 92/ 2015 (1 July 2015).

be prohibited if its admission would render the trial unfair or would otherwise be detrimental to the administration of justice or the public interest.¹¹⁹ The Court noted further that the evidence must be relevant to the case before admissibility is determined; if the evidence obtained is not relevant; it cannot cause unfairness of a trial.¹²⁰ This indicates that the court has to exercise its discretion to establish whether the evidence was obtained in violation of the constitutional provisions and secondly, apply the constitutional directive if this impugned evidence renders the trial unfair, or is not detrimental to the administration of justice or public interest.

In *Jestina Mukoko V Attorney General*,¹²¹ the Applicant sought an order of a permanent stay of criminal proceeding because of she was tortured by the State prior to the criminal charges brought up against her.¹²² She was held in *incommunicado* detention for 20 days.¹²³ This application was brought to court before the repeal of the Constitution 1980. The court pronounced itself on a number of issues concerning admissibility of evidence through torture, which is very instrumental to the development of Zimbabwe's jurisprudence. The court reiterated its role in the development of jurisprudence on torture, despite lack of a law criminalising the same in Zimbabwe. It used the definition of torture in the UNCAT and elaborated on instances under which it arises,¹²⁴ the absolute nature of the right¹²⁵ and a ground for exclusion of evidence so obtained.¹²⁶ In citing the UNCAT,

¹¹⁹ Page 8.

¹²⁰ Page 9.

¹²¹ Unreported case 36/ 2009 (20 March 2012).

¹²² Page 1.

¹²³ Page 4.

¹²⁴ Pages 12- 14, See Amris K, Pedersen ST & Rasmussen OV 'Long Term Consequences of Falanga Torture' (2009) 19 *Torture* 33 33; See *S v Masitere* 1990(2) ZLR 289(S) at 290F, *S v Nkomo* 1989 (3) ZLR 117(S) at 131F.

¹²⁵ Page 11.

¹²⁶ Page 11.

the Court stated it was relevant not only on the basis of upholding obligations on the part of a State Party, but on the principle of interpretation involved.¹²⁷

The Court states that use of the fruits of ill-treatment such as torture had an effect on the validity of these decisions, especially if there was a violation of the right to personal liberty.¹²⁸ The court used the poisonous fruit doctrine and stated that the exclusionary rule would extend not only to confessions and other statements obtained under torture, but also to all other pieces of evidence subsequently obtained through legal means, but which originated from an act of torture.¹²⁹

In addition, the court stated that the prosecutors had a big role to play in dealing with evidence obtained through torture.¹³⁰ The Court based its decision on the UNCAT,¹³¹ the Principles and Guidelines on the Rights to a Fair Trial and Legal Assistance in Africa¹³² and Guidelines on the Role of Prosecutors.¹³³ The Court recognised the obligation on prosecutors to exercise diligence in not having the admission of evidence that they know has been obtained through torture. Although the decision was greatly based on torture, it was very instrumental developing evidence obtained through human rights violations. The

¹²⁷ Page 31.

¹²⁸ Page 16.

¹²⁹ See HRC, general comment No. 32, para. 6; see also ACHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, section N, para. 6 (d) (i), See also Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan EM, UN Document A/HRC/25/60 para 29.

¹³⁰ Page 31 of the Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.

¹³¹ Article 15 of the UNCAT.

¹³² Principle 15 of the Principles.

¹³³ Article 16 of the Guidelines.

Court also stated that evidence obtained through CIDT was not admissible in evidence and it should be given the same treatment given to evidence obtained through torture.¹³⁴

In *Patrick Madhume v S (Madhume)*,¹³⁵ the accused person who confessed to murder of three persons, applied to court not to admit the evidence. He claimed he had not made the confessions voluntarily. In dismissing his application, the Court stated that he had not discharged the onus, on a balance of probabilities, that he did not give his statements freely and voluntarily without having been unduly influenced thereto.¹³⁶ The court relied on the consistency provided in the statements and the corroboration from other evidence. The application was not brought under section 70(3) of the Constitution 2013 but under the normal procedure for establishing the voluntariness of confessions under the Criminal Procedure and Evidence Act. An accused is required to discharge the burden of proof to show involuntariness in making a confession. This requirement from the accused, in a criminal case is wrong, and it is doubted that it would pass the constitutional test in so far as it violates the right against self-incrimination and the right to remain silent.¹³⁷ In other jurisdictions, like South Africa, in *S v Zuma (Zuma)*,¹³⁸ the facts are that, a provision in the Criminal Procedure Act presumed that a confession by an accused before a magistrate, was made freely and voluntarily.¹³⁹ The accused challenged this provision on grounds that the application of the section violated his right against self-incrimination and the right to

¹³⁴ *Mukoko*, pages 32-33; Mujuzi JD 'Evidence obtained through violating the right to freedom from torture and other cruel, inhuman or degrading treatment in South Africa' 2015 (15) *AHRLJ* 90 108.

¹³⁵ Unreported case 3/ 2015 (26 June 2014).

¹³⁶ Page 2.

¹³⁷ Section 70(1)I of the Constitution 2012.

¹³⁸ *S v Zuma* 1995 (2) SA 642.

¹³⁹ Section 217 (1)b1(ii) of the Criminal Procedure Act 51 of 1977.

remain silent. The Court declared the provision inconsistent with the Constitution, and was declared invalid.¹⁴⁰ In the same vein, *Madhume* would not pass the constitutionality test.

3.4.3 CONCLUSION ON ZIMBABWE

The Constitution 2012 requires that evidence obtained through human violations shall not be admissible if it is shown that its admission renders the trial unfair, or be detrimental to administration of justice or it should be excluded in public interest. The courts have been instructive enough to hold that evidence obtained through CIDT is not admissible and it should be given the same treatment given to evidence obtained through torture.¹⁴¹

3.5 POSITION IN HONG KONG

3.5.1 CONSTITUTION OF HONG KONG

Hong Kong does not have a constitutional provision for dealing with evidence obtained through human rights violations.¹⁴² The Constitution (or Basic law) of Hong Kong provides for the right to freedom from torture,¹⁴³ the right not to be subjected to arbitrary or unlawful arrest, detention or imprisonment and the right not to be subjected to arbitrary or unlawful search.¹⁴⁴

The Basic law provides for rights instead, which once violated, may require that an accused person seeks redress from courts on the violation. Some of the rights include the

¹⁴⁰ *Zuma*, para 39.

¹⁴¹ Pages 32-33; Mujuzi JD 'Evidence obtained through violating the right to freedom form torture and other cruel, inhuman or degrading treatment in South Africa' 2015 (15) *AHRLJ* 90108.

¹⁴² Articles 24-42 of the Basic Law or Constitution 1990.

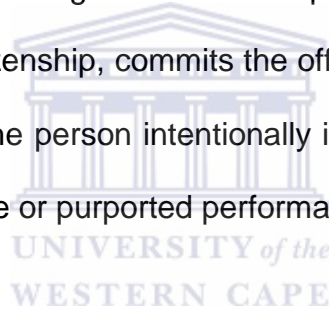
¹⁴³ Article 28(2).

¹⁴⁴ Article 29.

right to freedom of speech,¹⁴⁵ freedom from arbitrary or unlawful arrest, detention and imprisonment.¹⁴⁶ These rights give a basis on which one may seek to obtain redress. The Bill of Rights Ordinance,¹⁴⁷ which incorporates the provisions of the ICCPR provides for the right against torture,¹⁴⁸ liberty and security of a person,¹⁴⁹ rights of persons deprived of liberty¹⁵⁰ and the right to privacy of a person, family, home, correspondence, honour and reputation. In addition, Hong Kong has provisions in the codified laws which deal with the question of evidence obtained through human rights violations.¹⁵¹

Although the Crime (Torture) Ordinance¹⁵² criminalises torture,¹⁵³ it qualifies it, contrary to the wording of the UNCAT, where it involves public officials.¹⁵⁴ It provides that

‘A public official or person acting in an official capacity, whatever the official's or the person's nationality or citizenship, commits the offence of torture if in Hong Kong or elsewhere the official or the person intentionally inflicts severe pain or suffering on another in the performance or purported performance of his or her official duties.’¹⁵⁵



The UNCAT defines torture as follows;

‘For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a

¹⁴⁵ Article 27 of the Basic law,

¹⁴⁶ Article 29.

¹⁴⁷ Enacted 1997.

¹⁴⁸ Article 3.

¹⁴⁹ Article 4.

¹⁵⁰ Article 6.

¹⁵¹ As will be discussed shortly.

¹⁵² Cap 427, laws of Hong Kong.

¹⁵³ Section 2(2).

¹⁵⁴ Section 3(1).

¹⁵⁵ Section 3(1).

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.¹⁵⁶

It is clear that both provisions accommodate the elements of occasioning severe pain, intentionally, by a public official. The Crime (Torture) Ordinance does not, however, provide for the element of purpose. While this is welcome development that seems to widen the scope of torture as a concept, it may lead to torture of an accused for purposes of obtaining evidence.



In addition, the law creates a defence of lawful authority, justification and any excuse for use of torture.¹⁵⁷ This justification creates a barrier in the effort to deal with evidence obtained through torture as a human rights violation. Hong Kong has been requested by the CAT and the HRC to remove the justification from its statute books and use the international perspective on torture.¹⁵⁸ This is because the definition accorded to torture limits the term public official in the Crime (Torture) Ordinance to professionals normally involved in the custody or treatment of persons deprived of liberty.¹⁵⁹ The second problem

¹⁵⁶ Article 1(1) of the UNCAT.

¹⁵⁷ Section 3(4).

¹⁵⁸ Concluding observation by the Human Rights Committee on Hong Kong at 107th Ordinary Session CCPR/C/CHN- HKG/CO/3 dated 29 April 2013. See also Concluding Observations by the Committee against Torture at 41st Ordinary Session CAT/C/HKG/CO/4 dated 4 November 2010.

¹⁵⁹ At para 5. Section 2 of the Crimes (Torture) Ordinance Cap 427.

is that, the definition of public official is too restrictive and may create practical loopholes preventing effective prosecution of torture.¹⁶⁰

While the CAT calls upon each State Party to ensure that all parts of its Government adhere to the definition set forth in the Convention for the purpose of defining the obligations of the State, it notes that serious discrepancies between the Convention's definition and that incorporated into domestic law may create actual or potential loopholes for impunity.¹⁶¹ The defence should be removed from the statute books to ensure that use of lawful authority is not used to violate rights of an accused in the process of obtaining evidence.

3.5.2 INTERPRETATION BY COURTS

In *HKSAR v. Li Man Tak and Others (Tak)*,¹⁶² the court held that the secret interception of communications had been inconsistent with the requirements of Article 30 of the Basic Law and thereby unlawful. The court warned that, in future criminal trials, investigating agencies may be held to have acted in bad faith if they continued the practice of the secret monitoring of communications without a legislative basis upon which to do so. That warning, of course, came in the wake of a finding that the existing legislation did not meet the requirements of the Basic Law or the Bill of Rights. The court in its ruling identified the need to realign the law on the admissibility of evidence in so far as surveillance was concerned. This marked a great step towards the development of case law to guide admissibility of evidence obtained through human rights violations.

¹⁶⁰ At para 5.

¹⁶¹ UN Committee Against Torture (CAT), General Comment No. 2: Implementation of Article 2 by States Parties, 24 January 2008, CAT/C/GC/2, para 9.

¹⁶² [2005] HKEC 1308.

In *HKSAR v. Chan Kau Tai (Chan)*,¹⁶³ the court stated that first; account must be taken of any breach of rights contained in the Basic Law or the ICCPR. Second, the breach will not, however, automatically result in the exclusion of the evidence obtained in consequence of the breach and thirdly, that in exercise of its discretion; the court shall balance the nature of the right involved and the extent of the breach before making a decision on the admissibility of the evidence.

In *HKSAR v. Wong Kwok Hung (Wong)*,¹⁶⁴ the court laid two grounds for admissibility of the evidence. First, that the right to privacy was not breached in bad faith; Secondly, it was clear in the circumstances of the case, that the breach of that right could not outweigh the public interest in detecting crimes involving the importation or exportation and sale of very large quantities of dangerous drugs. As a result the evidence was admitted.

In *HKSAR v. Shum Chiu and Others (Chiu)*,¹⁶⁵ having found that the secret recording of an accused talking with his solicitors constituted an abuse of process so profound as to challenge the integrity of the justice system, the court went on to express the view that legislation regulating the secret monitoring of private communications should be introduced without delay so that the 'guarding of the guards' was not left only to the courts. This showed that the court did not support the use of illegally obtained evidence. It still fell short of efficacy in so far as the court did not lay down the rules for admissibility of such evidence.

¹⁶³ [2006] 1 HKLRD 400 at pp 443A – 448F.

¹⁶⁴ [2007] 2 HKLRD 621

¹⁶⁵ [2011] 2 HKLRD 746 (CA).

In *HKSAR v Muhammad Riaz Khan (Khan)*,¹⁶⁶ the Court of Final Appeal in Hong Kong considered the factors that allow a court to admit evidence which has been obtained in breach of constitutional rights. Such evidence can be received if, upon careful examination of the circumstances, its reception (a) is conducive to a fair trial, (b) is reconcilable with the respect due to the right or rights concerned, and (c) appears unlikely to encourage any future breaches of those rights.¹⁶⁷

The five cases above show a consistent trend in the development of principles that guide courts in dealing with impugned evidence, despite lack of a constitutional provision. The courts have called for a need to re-align the existing legislation with the rights in the basic law, where the legislation perpetuates a violation of human rights.¹⁶⁸ Much as the courts recognise the presumption that all evidence is admissible, they have a duty to decide on admission of impugned evidence. This duty requires balancing the nature of the right against the extent of its violation before deciding on its admissibility.¹⁶⁹ The failure by the Court to lay down the rules on admissibility in *Chiu*, despite lack of support for the state's violation of an accused's rights; *Khan* provided the perfect opportunity to lay down the rules on admissibility of evidence.

3.5.3 CONCLUSION ON HONG KONG

Just like the South Africa, Canada, Kenya and Zimbabwe, admission of evidence in Hong Kong on the basis of the first ground in *Khan*, addresses entails establishing if the

¹⁶⁶ [2012] HKFCA 38; FACCI 13/2010.

¹⁶⁷ Mujuzi JD 'The admissibility of evidence obtained as a result of violating the accused persons' rights: analyzing the test set by the Hong Kong Court of Final Appeal in *HKSAR v Muhammad Riaz Khan*, (2012)16 *International Journal of Evidence & Proof* 425 425.

¹⁶⁸ See *Tak* generally.

¹⁶⁹ See *Chan* and *Wong* generally.

admission will have an effect on the fairness of the trial.¹⁷⁰ The two grounds cover, whether it will be detrimental to the administration of justice. The third ground, It also takes into consideration the interests of society, like Canada (after the decision in Grant) and Zimbabwe. So despite lack of a constitutional provision, the case law has developed substantially to deal with evidence obtained through human rights violations.

3.6 CONCLUSION

In conclusion, the Constitution of South Africa provides a directive to exclude all evidence obtained in a manner that violates a right in the bill of rights, if its admission would render the trial unfair or would otherwise be detrimental to the administration of justice. Courts exercise discretion to establish if the impugned evidence would be unfair to the trial or places the administration of justice into disrepute. Like Canada, South Africa requires the existence of a causal link. The degree of causation is however, not a determinant for the exclusion of evidence. However, while, violation of a third party's rights in South Africa and Kenya; may be a ground for an accused person to challenge the impugned evidence, Canada requires the accused proves his rights were violated in obtaining evidence. The researcher is not aware of Hong Kong using the Canadian approach. It is clear that the Constitution 2012 of Zimbabwe states that the exclusion applies only to criminal trials; the wording does not create a different modes of application in South Africa, Canada and Kenya. This is because their respective constitutions require the provisions apply only where a right in the bill of rights is violated. Hong Kong has consistent case law which enhances the need for fairness of the trial, administration of justice and public interest before the decision to admit evidence obtained through human rights violations is made.

¹⁷⁰ Mujuzi JD 'The admissibility of evidence obtained as a result of violating the accused persons' rights: analyzing the test set by the Hong Kong Court of Final Appeal in *HSAR Muhammad Riaz Khan*, (2012)16 *International Journal of Evidence & Proof* 425 429.

This chapter is significant to the study because it analyses the status of evidence in the four countries and distinguishes the interpretation involved in the application of the various constitutional provisions. This adds voice to the development of knowledge in the comparative study of the four countries.



CHAPTER FOUR

STATUS OF EVIDENCE OBTAINED THROUGH HUMAN RIGHTS VIOLATIONS IN UGANDA

4. INTRODUCTION

Chapter three dealt with the status of evidence obtained through human rights violations in South Africa, Canada, Zimbabwe, Kenya and Hong Kong. This chapter deals with the status of evidence obtained through human rights violations in Uganda. An examination of the drafting history of all the constitutions enacted in Uganda since independence, is made.¹ Particular regard is given to the drafting history by the Constituent Assembly and the finding of the Uganda Constitutional Commission to establish if the silence of the Constitution is by default or design of the drafters.

Thereafter, an examination of pieces of legislation that deal with criminal justice, to establish whether, unlike the Constitution, they provide rules on dealing with evidence through human rights violations. A chronological analysis of case law gives the trend courts have followed in dealing with this evidence. The case law is examined to show how they have been decided and whether they offer consistency in developing rules to be followed. A conclusion is then provided on the status of evidence obtained through human rights violations in Uganda.

As noted in chapter one, the Constitution is silent on evidence obtained through human rights violations. It acknowledges that fundamental rights and freedoms of the individual are inherent and not granted by the State, and that the bill of rights shall be respected, upheld and promoted by all persons, organs and agencies of government.²

¹ Constitutions of the Republic of Uganda 1962, 1967 and 1995.

² Constitution of 1995, article 20.

In addition, any person who claims that a fundamental or other right or freedom has been infringed or threatened, may apply to a competent court for redress.³ While these provisions guarantee rights and offer enforcement, they do not provide a directive on how to deal with evidence obtained through human rights violations.

The constitution provides for rights which, when violated in the course of gathering evidence, require a directive on how to deal with evidence obtained through human rights violations. These rights include, the right to a fair hearing,⁴ presumption of innocence until proven guilty,⁵ and to be charged in accordance with the law.⁶ Other rights are the right to privacy,⁷ personal liberty⁸ and the right against self-incrimination.⁹

4.1 DRAFTING HISTORY OF CONSTITUTIONS OF UGANDA

Uganda has had a turbulent constitutional history, with four constitutions since independence.¹⁰ A look at the drafting history of the four constitutions gives an insight into the silence of the Constitution on how to deal with evidence obtained through human rights violations.

The Constitution 1962, referred to as the Independence Constitution, was drafted in London by the British, as the colonial masters.¹¹ An examination of the broader context

³ Article 50.

⁴ Article 28.

⁵ Article 28(3)a Constitution of 1995.

⁶ Article 28(7) Constitution of 1995.

⁷ Article 27.

⁸ Article 23.

⁹ Article 28(11) Constitution of 1995.

¹⁰ Constitutions 1962, 1966, 1967 and 1995. See Wapakhabulo J 'Managing the constitution-making process in Uganda' in Hyden G & Venter D *Constitution-making and democratization in Africa* (2001)114 114- 31 generally.

within which it was drafted reveals that it was more of a political constitution geared at creating a balance of interests between political factions Uganda.¹² It did not have a provision relating to status of evidence obtained through human rights violations.

The suspension of the Constitution 1962 was as a result of the constitutional crisis of 1966, which led to the Pigeon- Hole Constitution of 1966 and the subsequent constitution of 1967 (Constitution 1967).¹³ The Constitution 1967, just like the earlier two versions did not have a provision relating to evidence obtained through human rights violations. This is partly because the broader context for drafting it was purely for political ends to be met, which is beyond the scope of this research paper.¹⁴

The Constitution was largely based on the recommendations of the Report of the Uganda Constitutional Commission (Odoki Commission).¹⁵ This Report did not specifically deal with evidence obtained through human rights violations. It provided for the most violated rights in Uganda's history,¹⁶ and recommended respect of the right to personal liberty,¹⁷ right to a fair hearing,¹⁸ and conduct of a fair trial¹⁹ among other rights.

¹¹ Wapakhabulo J 'Managing the constitution-making process in Uganda' in Hyden G & Venter D *Constitution-making and democratization in Africa* (2001)114 114.

¹² Tripp AM, 'The politics of Constitutional making in Uganda in Laurel EM & Loius A, *Framing the state in times of transition, Case Studies in Constitution Making* (2010) 158 159.

¹³ Tripp AM, 'The politics of Constitutional making in Uganda in Laurel et al in *Framing the state in times of transition, Case Studies in Constitution Making* (2010) 158 160.

¹⁴ See Furley O & Katalikawe J 'Constitutional Reform in Uganda: The New Approach' 1997 (96) *African Affairs* 243 261, Barya JJ *The Making of Uganda's 1995 Constitution: Achieving Consensus by Law* (2000) 42- 46, Mutibwa P *Uganda since Independence: A Story of Unfulfilled Hopes* (1992) 58, Mukholi D *A Complete Guide to Uganda's Fourth Constitution: History, Politics, and the Law* (1995) generally.

¹⁵ The Report of the Uganda Constitutional Commission dated 31 December 1992. The Odoki Commission was appointed in accordance with the Constitutional Commission Statute 5 of 1988.

¹⁶ The Report of the Odoki Commission; pages 146 – 147, paras 7.52- 7.60.

The Report provided for enforcement of rights in the draft constitution,²⁰ and recommended for the establishment of the Uganda Human Rights Commission to exercise quasi-judicial powers in the enforcement and investigation of human rights issues.²¹ The functions handed down to the Uganda Human Rights Commission, however, did not include a directive on how to deal with evidence obtained through human rights violations. In addition, the Uganda Human Rights Commission was not accorded the status of a court of record.²²

When the draft Constitution was presented to the Constituent Assembly for debate, the delegates acknowledged two issues that are instructive on the final outcome of the Constitution. First, that the aim of the bill of rights was to enhance the protection, promotion and enjoyment of human rights²³ and secondly, Uganda being a signatory to many international instruments, its commitment would be judged by the manner in which the Constitution provided safeguards to avoid a violation of human rights in the country.²⁴ The Constituent Assembly, however, through the entire debates on the bill of rights, did

¹⁷ Page 180, para 7.153. See article 35 of draft Constitution of 1995; at page 764.

¹⁸ Pages 181- 183, paras 7.152- 7.169. See article 37 of draft Constitution of 1995; at page 765.

¹⁹ Pages 183, paras 7.168- 7.169. See article 40 of draft Constitution of 1995; at page 765.

²⁰ Appendix 1 to the Report of the Odoki Commission.

²¹ Pages 186- 188, paras 7.178- 7.181. See articles 42-43 of draft Constitution of 1995; at page 767.

²² Constitution of 1995, article 129.

²³ Submission of Hon. Cecil Ogwal, page 1809 of the official report of the proceedings of Constituent Assembly (CA proceedings) dated 31 August 1994.

²⁴ Submission of Hon. Cecil Ogwal, page 1809 of CA proceedings dated 31 August 1994.

not debate on the issue of a directive on evidence obtained through human violations. The debates, to a great extent, focused on the recommendations of the Odoki Commission.²⁵

4.2 LEGISLATION

Current pieces of legislation do not adequately provide for a mode of dealing with evidence obtained through human rights violations. The Prevention and Prohibition of Torture Act²⁶ has a provision, which is limited to evidence obtained through torture and CIDT. It provides that:

‘any information, confession or admission obtained from a person by means of torture is inadmissible in evidence against that person in any proceedings.’²⁷

This section limits its operation to evidence obtained through torture and CIDT. This means that evidence obtained through human rights violations other than torture is not covered by the Prevention and Prohibition of Torture Act.²⁸

The Evidence Act²⁹ places emphasis on admissibility of confessions which is one form of evidence that is susceptible to human rights violations.³⁰ Other forms of evidence arising from illegal searches, autoptic evidence, vigilantee evidence are not covered by the legislation.³¹ The Act regulates the relevance and admissibility of evidence in courts³² and

²⁵ Report of the proceedings of Constituent Assembly (CA proceedings) generally dated 31 August 1994.

²⁶ Act 3 of 2012.

²⁷ Section 14.

²⁸ See Mujuzi JD ‘Issues to grapple with in implementing the Uganda Prevention and Prohibition of Torture Act’ (2012) 1 *International Human Rights Law Review* 382 382-94 generally.

²⁹ Evidence Act Cap 6, Laws of Uganda.

³⁰ Sections 23 to 27.

³¹ See Zeffert DT & Paizes AP *The South Africa Law of Evidence* 2ed (2008) and Schwikkard PJ & Van der Merwe SE *Principles of Evidence* 3ed (2009) generally.

³² Sections 24- 26.

provides guidelines on recording of confessions.³³ It provides that a confession which would otherwise be inadmissible, may still be admitted in evidence, if in the view of Court, the impression making it inadmissible is removed.³⁴ The court, therefore, exercises discretion either to admit or not to admit the evidence.³⁵ Section 24 of the Evidence Act provides that a confession which would be irrelevant because it was obtained through violence, force, threat, inducement or promise may be relevant. This is possible if the prosecution proves to the court that there was no violence, force, threat, inducement or promise used in obtaining the confession. The Evidence Act³⁶ contains provisions that deal with confessions to a great extent, than other forms of evidence obtained through human rights violations. Lack of a rule dealing with evidence obtained through human rights violations, other than confessions affects narrows the scope of application of the Evidence Act in dealing with evidence obtained through human rights violations.

The Criminal Procedure Code Act³⁷ makes provision for the procedure to be followed in criminal cases,³⁸ and the modes of arrest and search of an accused person.³⁹ The Act is also silent on how to deal with evidence obtained through human rights violations, such as, illegal arrests and searches. The Magistrates Courts Act⁴⁰ and the Trial on Indictments Act⁴¹ are equally silent on how to handle evidence obtained through human rights violations. This silence does not, however, remedy the situation.

³³ Section 23.

³⁴ Section 25.

³⁵ Section 25.

³⁶ The Evidence Act Cap 100.

³⁷ The Criminal Procedure Code Act Cap 116, Laws of Uganda.

³⁸ Long title of the Criminal Procedure Code Act Cap116, Laws of Uganda.

³⁹ Sections 2- 27.

⁴⁰ Magistrates Courts Act Cap 16, Laws of Uganda.

⁴¹ Trial on Indictments Act Cap 23, Laws of Uganda.

The Regulation of Interception of Communications Act⁴² allows authorised persons from security organisations to obtain a warrant from a designated judge to intercept communications.⁴³ In instances where the holder of the warrant exceeds the bounds of the warrant, the Act still sanctions the admission of such evidence obtained, with due regard to the circumstances in which the evidence was obtained. Some of the circumstances include the potential effect of its admission or exclusion on issues of national security; and the unfairness to the accused that may be occasioned by its admission or exclusion.⁴⁴ This pities individuals at the mercy of state organs. The literal interpretation of the Act is that where there is a violation of rights of an individual, the evidence may still be admitted on grounds of national security.

4.3 CASE LAW

The decisions handed down by courts have been inconsistent in dealing with evidence obtained through human rights violations. In *Namulobi Hasadi v Uganda (Namulobi)*,⁴⁵ the Court upheld the use of a confession obtained from an accused person after spending a week in custody. A conviction was sustained because it did not occasion a miscarriage of justice.⁴⁶ This unsigned confession was recorded in a room full of people, in a language he did not understand.⁴⁷ There was a pointing-out by the accused person after 72 hours in custody in absence of counsel.⁴⁸ This was a violation of his right to a fair trial.⁴⁹

⁴² Regulation of Interception of Communications Act 18 of 2010 available at <http://www.ulii.org> (accessed 6 September 2014).

⁴³ Section 4.

⁴⁴ Sections 7(a)-(c).

⁴⁵ *Namulobi Hasadi v Uganda* unreported case no16/ 1997 (13 July 1998).

⁴⁶ Page 4.

⁴⁷ Page 4.

⁴⁸ Page 6, See Constitution of 1995, article 23(5).

⁴⁹ Constitution of 1995, article 23 generally.

The Court noted that there was overwhelming evidence to sustain the conviction of the accused.⁵⁰ This confession should not have been admitted in evidence in light of the glaringly irregularities in violations of the accused's rights. This admission had a dual negative effect. Firstly, it created inconsistency in the development of jurisprudence on evidence obtained through human rights violations. Secondly, it rendered the trial unfair and caused disrepute on the administration of justice in so far as the confession obtained in violation of the accused's right to personal liberty.

In *Uganda v Kalawudio Wamala (Kalawudio)*,⁵¹ the accused made a confession after being in police custody for ten days instead of 48 hours.⁵² The Court declined to admit the confession because it was repugnant to the values and standards set forth in the new Constitution.⁵³ The Court declined to admit the confession because of two reasons. First, the Court upheld the need to protect the accused, uphold public interest and to deter persons and organs of government from condoning the breach of human rights.⁵⁴ Secondly, admission of the confession would be against the tenets of the right to a fair trial.⁵⁵ This was indicative of the Court's will to develop case law on the exclusionary rule.

The Court acknowledged that despite lack of a similar provision like the one in the Canadian Charter,⁵⁶ Article 20(2) and 50 of the Constitution would have the same effect.⁵⁷

⁵⁰ *Walusimbi* page 2, para 2.

⁵¹ *Uganda v Kalawudio Wamala* unreported case no 442/ 1996 (6 November 1996).

⁵² At para 19; see Article 23(3)b of the Constitution of 1995.

⁵³ At para 26.

⁵⁴ At para 28.

⁵⁵ At paras 31-33.

⁵⁶ Canadian Charter, section 24(2).

The effect is not felt due to lack of a constitutional directive. This is an indication that the court would not admit evidence obtained through human rights violations, if it rendered the trial unfair.⁵⁸ The Court also stated that the burden of proof was on the prosecution, on a balance of probabilities to prove that the evidence was not obtained in violation of the rights of an accused.⁵⁹ In addition, presence of good faith did not amount to a special reason to warrant the admission of evidence obtained through human rights violations.⁶⁰ Unfortunately, this was a High Court decision which could not overturn the precedent set by the Supreme Court in *Namulobi*.

In *Ssewankambo Francis, Kiwanuka Paul, Mutaya Muzairu v Uganda (Ssewankambo)*,⁶¹ the appellants sought to have their convictions set aside because of repudiated confessions. The confessions relied on by the accused were not subjected to a trial-within-a-trial to ascertain whether they were made voluntarily. The Court in allowing the appeal stated first, that the voluntariness of making the confessions was not established by the trial Court.⁶² Secondly, the mode of acquiring the confession was improper and thirdly, there was evidence of assault of the accused before they signed the confessions.⁶³

The court therefore, reiterated the principle that in cases involving evidence obtained through human rights violations, the evidence had to be subjected to a test as to whether it was made voluntarily. The decision served a triple purpose; it enhanced the presumption

⁵⁷ At paras 25, 34; Reference made to *R v Stillman* [1997] 1 SCR 607, *Micheal Feeney v R* [1997] 2 SCR 13, *R v Duguay* [1989] 1 SCR 93.

⁵⁸ Section 24(2) of the Canadian Charter.

⁵⁹ At para 25.

⁶⁰ At para 35.

⁶¹ *Ssewankambo Francis, Kiwanuka Paul, Mutaya Muzairu v Uganda* unreported case no 33 / 2001 (20 February 2003).

⁶² Page 9.

⁶³ Page 9.

of innocence which requires a trial court to be cautious in admitting evidence that derails this principle and buttressed the need for the procedure of a trial-within-a-trial to ascertain the voluntariness of making the confession. It also upheld the right against self-incrimination of an accused from an adjudication perspective. This decision buttressed the duty on courts to ensure that they do not provide an enabling environment for self-incrimination of the accused.⁶⁴

In *Walugembe Henry, Ssali Paul Sande and Kamanzi Joseph v Uganda (Walugembe)*,⁶⁵ the accused were convicted of robbery. On second appeal, *Ssewankambo* was followed. The Court developed the jurisprudence further by enhancing the issue of the onus of proof in ascertaining the voluntariness of making a confession. It stated that the onus of proof was on the prosecution and not the accused.⁶⁶ To discharge this onus, therefore, the prosecution is expected to prove that there was no violence, force, threat, inducement or promise to cause the receipt of an untrue confession.⁶⁷ In addition, the recording of the confession must adhere to the procedure of recording the statement in a language the accused understands, and not in the presence of another officer.⁶⁸ The Court did not however pronounce itself on the standard of proof. It however, by implication validated the decision in *Kalawudio*.

⁶⁴ Page 9. See also *Kawoya Joseph v Uganda*, unreported case no 50/ 1999, *Edward Kawoya v Uganda*, unreported case no 4/1999, *Kwoba v Uganda*, unreported case no 2/2000 as collectively reported in *Ssewankambo* at page 9.

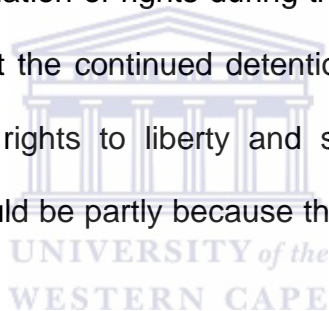
⁶⁵ *Walugembe Henry, Ssali Paul Sande and Kamanzi Joseph v Uganda* unreported case no 39/2003 (1 November 2005).

⁶⁶ Page 6.

⁶⁷ Page 6. See section 24 of the Evidence Act Cap 100 laws of Uganda.

⁶⁸ Pages 5, 10. See *Festo Androa Assenua and Others v Uganda* Unreported case no 1/ 1998, (2 October 1998).

In *Kizza Besigye v the Attorney General*,⁶⁹ the Court stated that it could not sanction the continued prosecution of the petitioners where during the proceedings, their human rights had been violated.⁷⁰ The court referred to persuasive decisions from other jurisdictions such as Kenya and the United Kingdom.⁷¹ While this principle would apply to evidence obtained through human rights violations, the background to the case leaves its application shrouded in mystery. First, the case hinged on the siege of the High Court Chambers by the military, while cases were being adjudicated. Secondly, the court did not comment on evidence obtained through human rights violations in the course of investigations. It dealt with the conduct of state agencies in the course of a trial. The right to a fair trial referred to was premised on the interruption of the court adjudicating a criminal case, and not on the violation of rights during the collection of evidence. While it was agreed to, by the Court that the continued detention of the accused persons would have been a violation of their rights to liberty and security of person, this was not addressed by the Court. This could be partly because the accused raised the grounds but failed to substantiate them.⁷²



In *Uganda v Robert Ssekabira and 10 others*,⁷³ the Court followed the principle handed down in *Besigye*,⁷⁴ and *Kalawudio*⁷⁵ and held that improper evidence or evidence obtained through human rights violations should not be admitted if it affects the accused's right to a

⁶⁹ *Kizza Besigye v the Attorney General* Unreported case no 07/2007 (12 October 2010)

⁷⁰ Page 38.

⁷¹ See *Albanus Mwasia Mutua v R* [2006] eKLR.3, *R v Amos Karuga Karatu* [2008] eKLR and *R v Horseferry Road Magistrates Ex parte Bennet* [1994] 1 A.C. 42. See also *Gerald Macharia Githuku v Republic* [2007] eKLR.

⁷² *Kizza Besigye v the Attorney General* Unreported case no 07/2007 (12 October 2010), para 1(d)(vii), page 4.

⁷³ *Uganda v Robert Sekabira and 10 others* unreported case no 85/2010 (14 May 2014).

⁷⁴ Page 4, 7.

⁷⁵ Page 8.

fair trial. The rights that were violated were the right to liberty and the impropriety involved use of police officers to conduct investigation without the consent of the DPP.⁷⁶

The Court noted the failure of the prosecution to guide it,⁷⁷ but did not use this opportunity to enhance the role of prosecutors in guiding court in instances where they had knowledge of evidence obtained in violation of the accused's rights.⁷⁸

4.3.1 ENTRAPMENTS

There is no law regulating entrapments in Uganda. This practice of police trappings is an unusual crime prevention strategy based predominantly upon deceptive law enforcement techniques.⁷⁹ Unlike other jurisdictions like South Africa, where entrapments are within specified guidelines,⁸⁰ it is not the case in Uganda. There are instances where the police go beyond providing an opportunity for commission of an offence. The Courts recognise traps as an aid to arrest of suspects,⁸¹ and the human rights violation that accompany the traps.⁸² Issues such as traps set out of malice do not have a yardstick. While court noted existence of a poor relationship between the person laying the trap and the victim in

⁷⁶ Page 14-18.

⁷⁷ Page 17-18.

⁷⁸ See The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, DOC/OS(XXX)247, principle F generally. See also Mujuzi JD 'The African Commission on Human and Peoples' Rights and the Admissibility of evidence obtained as a result of torture, cruel, inhuman and degrading treatment: *Egyptian initiative for Personal Rights and Interights v Arab Republic of Egypt* 2013 (17) *International Journal of Evidence and Proof* 284-89 generally.

⁷⁹ Narnia B. *Lead us not into temptation; the criminal liability of the trappe revisited*; (1999) 12 *SAJCJ* 317 317.

⁸⁰ Section 252A of the Criminal Procedure Act 51 of 1977.

⁸¹ *Uganda v Cheptuke David Kaye (Cheptuke)* Unreported case no 121/2010 (11 November 2010).

⁸² Unreported case no 19/2011 (5 January 2012), page 9.

Cheptuke,⁸³ but it did not delve into that issue. In *Uganda v Muwonge Emmanuel*,⁸⁴ however, the court described the malice as an acute itch to prosecute the accused, such that proper investigations were jettisoned to the winds.

In addition, the police abuses its own procedure to the detriment of the accused person. In *Uganda v Ekungu Simon (Ekungu)*,⁸⁵ the accused person's officemates were ordered by the arresting officers to sign search certificates as witnesses yet they were not in the room when the money was found.⁸⁶ The court stated that the mode of arrest and the requirements for search certificates needed to be re-examined.⁸⁷ The illegality in procuring the search certificate and the violation of the accused's right to dignity⁸⁸ were upheld by court in allowing the accused's appeal. Since courts are becoming cognisant of the use of entrapment and showing their distaste for them, it is only proper that they are regulated.

4.4 CONCLUSION

This research shows that the status of evidence obtained through human rights violations is significant in light of the legislative framework and the judicial development of jurisprudence on evidence obtained through human rights violations. The Constitution is silent on how courts should handle evidence obtained through human rights violations. The constitution does create a working framework for the enforcement of the right to a fair hearing for an accused person, but fails to secure strict observance of this right in so far as it is silent on how to deal with evidence obtained through human right violations. Lack of statutory provisions in legislation for criminal procedure, exacerbates the situation.

⁸³ *Cheptuke*, page 3.

⁸⁴ Unreported case no 738/2009 (3 September 2009).

⁸⁵ Unreported case no 19/2011 (5 January 2012).

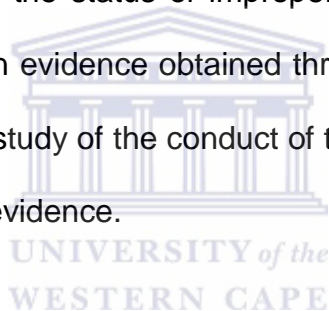
⁸⁶ Unreported case no 19/2011 (5 January 2012), page 9.

⁸⁷ *Ekungu* page 10.

⁸⁸ Article 34 of the Constitution of 1995.

It is only in cases where the courts have attempted to develop jurisprudence that earlier cases were referred to. In cases where the jurisprudence was not developed, there was no reference to the earlier cases on the matter of evidence obtained through human rights violations. In addition, the courts have laid emphasis on the procedural aspects governing obtaining of confessions instead of dealing with the violation of human rights leading to the recording of the confessions. The most notable rights violated were the presumption of innocence, right to counsel, right to personal liberty, CIDT and other pre-trial rights to a fair trial.

This creates the need to look at the status of improperly obtained evidence in Uganda. While there is a thin line between evidence obtained through human rights violations and improperly obtained evidence, a study of the conduct of the investigating organs shall help in ascertaining the status of this evidence.



CHAPTER FIVE

STATUS OF ILLEGALLY OR IMPROPERLY OBTAINED EVIDENCE IN UGANDA

5. INTRODUCTION

Chapter four dealt with the status of evidence obtained through human rights violations in Uganda. It was established that the Constitution is silent and the courts have been inconsistent in developing jurisprudence to deal with evidence obtained through human rights violations. Chapter five deals with how courts have grappled with improperly obtained evidence and cases of police conduct at pre-trial inquiries. Improperly obtained evidence includes; arrests, searches, conduct of identification parades, mode of obtaining autoptic evidence, improperly obtained confessions, and use of entrapments. This selection focusing on illegal searches, identification parades, confessions and entrapments, helps in achieving a fair analysis of improperly obtained evidence.

This chapter follows the rationale that the Constitution is silent on evidence obtained through human rights violations and improperly obtained evidence. On this basis, courts may admit improperly obtained evidence, if in their view, the improprieties do not occasion injustice to the accused, or if there is corroboration or independent evidence to prove facts in issue.

5.1 CONCEPTUALIZATION OF IMPROPERLY OBTAINED EVIDENCE

Improperly or illegally obtained evidence, unlike evidence obtained through human rights violations, refers to evidence obtained without following the right procedure. Improperly obtained evidence may exist where there has been no infringement of a constitutional right.¹ In Uganda, improperly obtained evidence is governed by the principle handed down

¹As shall be discussed shortly.

in *Kurumah s/o Kairu v R*² that evidence improperly obtained is admissible and the court is not concerned with how it was obtained. In addition, court has discretion to not to allow the admission of improperly obtained evidence if, its admission will operate unfairly against the accused.³ This part of the study examines how courts have dealt with evidence obtained through improper conduct.

5.2 CONFESSIONS

The rules for recording of confessions were stated in *Festo Androa Asenua v Uganda*,⁴ and they require that an accused is cautioned before the statement is made. In addition, if the recording is by a police officer, he should be at the level of Assistant Inspector of Police or higher. The confession should be recorded by the officer in a language that the accused understands. The room in which the confession is being made, should have only two people, unless an interpreter is required.⁵

There are no guidelines in case law on assessing the admission of improperly obtained confessions, because injustice to the accused is an objective test which depends on the merits of each case. To a great extent however, such confessions are admitted.

In *Namulobi Hasadi v Uganda (Namulobi)*,⁶ the Court upheld a conviction based on an unsigned confession, recorded in a room full of people, in a language the accused did not understand.⁷ The court held that it did not occasion a miscarriage of justice because the

² (1955) AC 197, 203; Andrew LT & Susan N 'Improperly obtained evidence in the commonwealth' (2001)11 *International Journal of Evidence & Proof* 75 78.

³ *Kuruma* page 203.

⁴ *Festo Androa Asenua v Uganda* Unreported case no 1/1998 (2 October 1998) pp.26-30.

⁵ Page 27.

⁶ *Namulobi Hasadi v Uganda* unreported case no16/ 1997 (13 July 1998).

⁷ Page 4.

accused did not complain about it.⁸ The accused did not complain because he did not know the guidelines, and as a result could not bring them to the attention of the court. Although the accused was represented, his ignorance of the guidelines should not have been used as a ground to hold that there was no injustice occasioned to him.

In *Ssewankambo Francis, Kiwanuka Paul, Mutaya Muzairu v Uganda (Ssewankambo)*,⁹ a police officer recorded two statements from the first and second appellant. Secondly, the lower courts did not subject the admissibility of the confessions to a trial within a trial.¹⁰ The Court in allowing the appeal stated first, that the voluntariness of making the confessions was not established by the trial Court.¹¹ Secondly, the mode of acquiring the confessions was improper and thirdly, there was evidence of assault of the accused before they signed the confessions.¹² This indicated a shift in the exercise of discretion by the courts in ascertaining whether evidence improperly obtained would be admitted.

The court therefore, reiterated the principle that in cases involving impugned evidence, the confession had to be subjected to a test as to whether it was made voluntarily. The decision served a triple purpose; it enhanced the presumption of innocence which requires a trial court to be cautious in admitting evidence that derails this principle and buttressed the need for the procedure of a trial-within-a-trial to ascertain the voluntariness of making the confession. It also upheld the right against self-incrimination of an accused from an

⁸ Page 4.

⁹ *Ssewankambo Francis, Kiwanuka Paul, Mutaya Muzairu v Uganda* unreported case no 33/ 2001 (20 February 2003).

¹⁰ Page 9-10 of the judgment.

¹¹ Page 9.

¹² Page 9.

adjudication perspective. This decision buttressed the duty on courts to ensure that they do not provide an enabling environment for self- incrimination of the accused.¹³

In *Mweru Ali, Abas Kalema, Sulaiman Senkumbi v Uganda*,¹⁴ the second appellant averred that the confession was irregularly obtained in so far as it was not recorded in a language he understood.¹⁵ The Court held that irregular recording of the confession in English, a language he did not understand did not occasion any injustice to the appellant, because the it was read back to the appellant before he signed it.¹⁶ This is an indication that courts are more than willing to admit an improperly obtained confession if the impropriety can be excused, and the excuse does not operate unfavourably against the accused person.

In addition to the above, if the impropriety is not a material departure from the rules of recording a statement, the court shall admit it. In *Nashaba Paddy v Uganda*,¹⁷ the appellant was not informed of the charge against him, neither was it recorded in a language he understood. In addition, the statement recorded by the Magistrate was recorded by the court clerk instead of the Magistrate.¹⁸ The court held that the irregularities by the magistrate were not prohibited by the law, and the procedure adopted was not a material departure from the guidelines for recording confessions.¹⁹ The court

¹³ Page 9 of the judgment. See also *Kawoya Joseph v Uganda*, unreported case no 50/ 1999, *Edward Kawoya v Uganda*, unreported case no 4/1999, *Kwoba v Uganda*, unreported case no 2/2000 as collectively reported in *Ssewankambo*.

¹⁴ *Mweru Ali, Abas Kalema, Sulaiman Senkumbi v Uganda* unreported case no 33/ 2002 (21 August 2003).

¹⁵ Page 10 of judgment.

¹⁶ Page 11.

¹⁷ *Nashaba Paddy v Uganda* unreported case no 39/2000 (9 August 2000).

¹⁸ Pages 4-5.

¹⁹ Page 6.

stated further, that although the only omission was that of the magistrate not certifying the charge and caution statement, it was cured by the confirmation of the appellant that the recording was accurate.²⁰ This reiterates the position that courts are inclined to admit improperly obtained statement if the impropriety does not occasion injustice to the accused. The yardstick for measuring the impropriety, whether on grounds of unfairness to the trial, disrepute to the administration of justice or public policy is not clear.

In *Walugembe Henry, Ssali Paul Sande and Kamanzi Joseph v Uganda (Walugembe)*,²¹ the confessions of the first two appellants had been recorded by the same police officer, and in English rather than a language the accused persons understood. The confession of the second appellant was recorded in the presence of another officer.²² The Court was of the view that the voluntariness of the confessions was not meticulously tested by the lower court and since the procedure was not adhered to, the confessions were rendered inadmissible.²³ While the Court did not however pronounce itself on the standard of proof in proving voluntariness of confessions, it however, by implication validated the decision in *Kalawudio*.

5.3 ENTRAPMENTS

While evidence from entrapments involves a violation of the right to privacy and dignity, the irregularities in the collection of evidence are overlooked by courts. Use of entrapments by police, is an unusual crime prevention strategy based predominantly upon

²⁰ Page 7.

²¹ *Walugembe Henry, Ssali Paul Sande and Kamanzi Joseph v Uganda* unreported case no 39/2003 (1 November 2005).

²² Page 5 of the judgment.

²³ Pages 6, 10 of the judgment. See section 24 of the Evidence Act Cap 100 laws of Uganda and *Festo Androa Assenua and Others v Uganda* Unreported case no 1/ 1998, (2 October 1998).

deceptive law enforcement techniques.²⁴ Unlike other jurisdictions like South Africa, where entrapments are within specified guidelines,²⁵ it is not the case in Uganda. Police often goes beyond providing an opportunity for commission of an offence. Instances of malice in the use of entrapments lack clear yardsticks. In *Cheptuke*,²⁶ where the appellant was challenging the conviction of corruptly soliciting a bribe, the Court noted existence of a poor relationship and the existence of malice between the person laying the trap and the appellant. It did not however, delve into that issue. In *Uganda v Muwonge Emmanuel*,²⁷ a case with a similar charge, the Court used the existence of malice on the part of the police, to discredit the evidence.

5.4 SEARCHES

There is a practice of admitting evidence on search certificates, procured by police in the course of collecting evidence. Although the Constitution provides for a right to privacy,²⁸ the right has limitations, which may justify an intrusion into an individual's privacy. The section provides that

'No person shall be subjected to —

- (a) unlawful search of the person, home or other property of that person; or
- (b) unlawful entry by others of the premises of that person'.²⁹

²⁴ Narnia B. *Lead us not into temptation; the criminal liability of the trappe revisited*; (1999) 12 SAJ CJ 317 317.

²⁵ Section 252A of the Criminal Procedure Act 51 of 1977.

²⁶ *Uganda v Cheptuke*, Unreported case no 121/2010 (11 November 2010) page 3.

²⁷ Unreported case no 738/2009 (3 September 2009).

²⁸ Article 27.

²⁹ Article 27.

So where a search is lawful, it justifies a violation of the right as a limitation. The Police Act³⁰ allows a police officer at or above the level of a Sergeant to conduct a search if he has reason to suspect that anything for the purposes of an investigation into any offence which he or she is authorised to investigate may be found in the place he wishes to search.³¹ It must be noted the officer should be in possession of a search warrant issued by a Magistrates' Court, notwithstanding whether an arrest has been made or not.³²

The impropriety arises where the police officer gives wrong information to the court for purposes of obtaining the search warrant,³³ or where the conduct of preparing the search warrant involves forcing persons who are not present at the search to append their names and signatures.³⁴ There is inconsistency in dealing with evidence as a result of these search warrants. The courts always admit search warrants if the procedural grounds are met.³⁵ In some cases, where witnesses are forced to sign search certificates, the courts have not admitted them, usually if the impropriety is coupled with a violation of human rights. In *Uganda v Ekungu Simon*,³⁶ the accused person's officemates were ordered by the arresting officers to sign search certificates as witnesses yet they were not in the room when the money was found.³⁷ The court stated that the mode of arrest and the requirements for search certificates needed to be re-examined.³⁸

³⁰ Cap laws of Uganda.

³¹ Section 27.

³² Section 69 Magistrate Courts Act, Cap 16 Laws of Uganda. See section 27 Police Act.

³³ See The Regulation of Interception of Communications Act 18 of 2010, Sections 7(a)-(c).

³⁴ *Ekungu* generally.

³⁵ See *Akbar Godi v Uganda* Unreported case no 62/2011 (26 July 2013), *Uganda v Kato Kajubi* Unreported case no 28/2012 (26 July 2012).

³⁶ *Ekungu* page 10

³⁷ Page 9

³⁸ Page 9

5.5 CONDUCT OF IDENTIFICATION PARADES

The courts are reluctant to expunge the evidence of identification parades if it is established that the accused did not complain or cross examine on the impropriety of the parade. In *Sentale v Uganda*,³⁹ the court held that the main guidelines required in conducting identification parades include, informing the accused of the right to counsel, the officer in charge of the case not conducting the parade, and no witnesses seeing the accused before the parade takes place. In addition, the accused person is supposed to be placed among, at least eight persons, as far as possible of similar age, height, general appearance and class of life as the accused, and the accused may take any position he wishes. It is mandatory to inform an accused of the right to counsel before conducting an identification parade is mandatory and failure to do so is fatal to the parade.⁴⁰ The situation should be distinguished from a scenario where an accused is informed of his right to counsel to be present at the identification parade and he says he has no advocate.⁴¹ He cannot turn around to say that the evidence obtained at the parade is improper, because he made the decision to take part in the parade after being informed of his right to counsel.

In *Kurong Stanley v Uganda*,⁴² the accused objected to the admissibility of the evidence of the identification parade on grounds that he was not informed of his right to have counsel present, and that the identifying witnesses were shown the accused before the exercise began.⁴³ Other grounds were that the accused was not placed on a parade with people of similar appearance, and that his presence among the nine people taking part in the

³⁹ [1968] E.A. 365.

⁴⁰ *Ssesanga Stephen vs Uganda* Unreported case no 85/2000 in *Kurong* page 5.

⁴¹ *Ambaa Jacob and Asiku Jamil v Uganda* unreported case no 10/2009 (16 May 2012) page

⁴² Unreported case no 314 OF 2003 (13 June 2003)

⁴³ Page 3.

identification parade, was suggested to the witnesses by the police.⁴⁴ In evaluating the evidence, the court found the grounds were not substantiated and that the minor irregularities in the exercise did not prejudice the fairness of the identification parade.⁴⁵ This case illustrates that exercise of discretion by courts embraces improperly obtained evidence if in their view, the irregularities are minor.

In *Ambaa Jacob and Asiku Jamil v Uganda*,⁴⁶ the accused objected to identification parade evidence on grounds that the accused being 19 years old was placed in a group of person with a big variance in age difference of 29, 36, 45, 32, 34, 55, 20, 24, 22, 23, 23, 28, and 40 respectively. In addition, the accused, a butcher, was placed among police officers who were from a different standing in life. He argued that this greatly prejudiced the fairness of the identification parade.⁴⁷ The Court stated that although the lower court did not comment on the organization of the parade, it evaluated the evidence properly.⁴⁸ Since the accused did not cross examine the police officer who organized the parade nor object to the presence of the persons who took part in the parade and the tendering of the police recordings of the parade; the Court found the conduct of the parade to be valid exercise and the identification of the first appellant at the parade was accurate.⁴⁹

⁴⁴ Page 3.

⁴⁵ Page 10.

⁴⁶ Unreported case no 10/2009 (16 May 2012) page 3.

⁴⁷ Pages 3-4. See *Njiru and others Vs Republic* [2002] 1 EA 218 (CAK).

⁴⁸ Page 4.

⁴⁹ Page 5.

5.6 INCULPATORY STATEMENTS

There are instances where the accused inculpatory statements, which point to his guilt. Inculpatory statements may be used to corroborate the guilt of the accused. The general rule was laid in *Musoke v R*,⁵⁰ where the Court held that it is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference. This is an indication that inculpatory statements should be subjected to other pieces of evidence before court relies on them to make a decision. So if the inculpatory statement is inconsistent with the innocence of the accused, and there is circumstantial evidence to point to the guilt of the accused, the statement will be admitted. They may be used to place an inference of guilt and court may admit that evidence.

5.6 CONCLUSION

It is significant to note that the courts use corroboration, other independent evidence and human rights violations, to decide whether to admit improperly obtained evidence. Where there is no human rights violation, the courts may admit the evidence. Where there is corroboration or independent evidence to support the existence of improperly obtained evidence, this evidence may be admitted. Where corroboration, independent evidence and human right violations are lacking or weak, the courts' admission of improperly obtained evidence revolves degree of impropriety. If the impropriety is high, the courts use the test of injustice occasioned to the accused. If it is affirmatively resolved that there is no injustice, the evidence is admitted.

The trend by courts shows an exercise of discretion, if the admission of the improperly obtained evidence would lead to an unfair trial on an accused. Other than confessions, the researcher is not aware of any case, where a court has in its discretion, subjected

⁵⁰ [1958] EA 715. See also *Teper v R* [1952] AC 480, *Mwathi v R* [2007] 2 EA 334, 227.

admissibility of evidence to a trial-within-a-trial. There is need therefore to provide recommendations which will aid the courts and relevant stakeholders, to deal with improperly or illegally obtained evidence.



CHAPTER SIX

CONCLUSION AND RECOMMENDATIONS

6.1 GENERAL CONCLUSION

The African Commission has enhanced its jurisprudence on evidence obtained through human rights violations by passing the Principles and guidelines on the right to a fair trial and legal assistance in Africa¹ and the Robben Island Guidelines.² These principles and guidelines have been used in some of its communications. The ECtHR has used its communications to develop principles to guide the admissibility of evidence obtained through human rights violations. Although it is reluctant to evaluate admissibility of evidence, it requires that evidence that is unfair to the trial of an accused person should not be admitted. Its jurisprudence has raised question on the non- admission of evidence in instances where absolute rights like the rights against torture, cruel, inhuman and degrading treatment are violated. It has greatly enhanced the right against self-incrimination as a yardstick for the fairness of a trial.

While the CAT has a provision on non-admissibility of evidence obtained through torture, its application relates to cases of torture, cruel, inhuman and degrading treatment. The HRC is reluctant to evaluate admissibility of evidence unless there is an arbitrary denial of justice to the complainant. The decisions of these international monitoring bodies lack an enforcement mechanism and their success depends on the co-operation of the state parties.

While South Africa, Kenya and Zimbabwe have provisions in their constitutions that allow for a mode of dealing with evidence obtained through human rights violations, Hong Kong has developed consistent case law to deal with this evidence. These principles operate

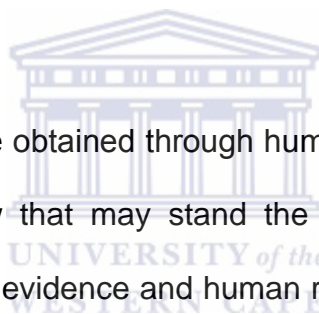
¹ DOC/OS(XXX)247.

² Adopted by the African Commission on Human and People's Rights at its 32nd Ordinary Session, on 17 to 23 October 2002.

alongside the common law exclusionary rules. Application of the developed principles play a triple role of using reliable evidence, while at the same time deterring the perpetrators of evidence obtained through human rights violations and protecting the accused from suffering a disadvantage from the admission of this evidence.

In Uganda, it has been established that the Constitution is silent on evidence obtained through human rights violations. An evaluation of various pieces of legislation reveals that they do not adequately deal with this evidence. The only legislation which deals with evidence obtained through human rights violations is the Prevention and Prohibition of Torture Act, which is limited to evidence obtained through torture, cruel, inhuman and degrading treatment.

The courts' approach to evidence obtained through human rights violations is inconsistent in providing guidelines to follow that may stand the test of time. The courts look at corroboration, other independent evidence and human rights violations, to decide whether to admit the evidence. The admission of improperly obtained evidence depends on the balancing of the degree of impropriety and potential injustice to be occasioned to the accused. The courts also rely on exercise of discretion which greatly leans to the reliability principle in admitting this evidence.



6.2 RECOMMENDATIONS

6.2.1 AMENDMENT TO THE CONSTITUTION

The Constitution should be amended to provide for a directive on how to deal with evidence obtained through human rights violations. The amendment should at least provide for a dual test of unfairness to the trial and administration of justice. The test of public opinion, may conflict with the administration of justice. The amendment may be placed as a clause under Article 50 of the Constitution, which provides for a right of redress. The principles of causal link, standing, evidence procured by third parties should be left to the courts to develop as the amendment is applied. The amendment should have clarity to compel the exclusion of all illegal or improper evidence in form of information, statement and confessions.

Chapter eight to the Constitution, provides for the Courts of Judicature. The courts of record in Uganda's legal system should be empowered to develop common law in instances where there is an apparent problem with the law, which cannot be solved. Apart from confessions, one of the problems exacerbating the admission of evidence obtained through human rights violations is lack of a law to subject this evidence to a trial-within-a-trial to establish whether it was obtained voluntarily. The courts' ability to develop common law, will enable them to subject all issues of admissibility of evidence, to a trial-within-a-trial.

6.2.2 ENACTMENT AND AMENDMENT OF LEGISLATION

Enactment of new legislation should reflect the international and regional practices. The principles emanating from the jurisprudence of the African Commission should be reflected in Uganda's legislation. There should be an enactment of a Directorate of Public Prosecutions Act, to provide for the duties of a prosecutor to the accused, the victim and the court in instances where evidence is obtained through human rights violations. These

duties should include, first, the duty not to use evidence obtained through coercion, torture, inhuman or degrading treatment. Secondly the duty to bring to the attention of Court evidence that has been obtained through human and degrading treatment. Thirdly, duty to prosecute the perpetrators of such evidence and have the same admitted against them in courts of laws.

While the principles and guidelines on the right to a fair trial are applicable in Uganda, as a State Party to the African Charter, they are not reflected in any criminal procedural laws. This diminishes chances of being used by conventional judicial officers who follow the law as it is written.

The Police should be compelled to stop using procedures that taint the voluntariness of accused and other individuals who offer evidence to it. For instance, forcing persons to sign search certificates, yet they are not present during the search should be discouraged. Many cases, arising from Magistrates Courts, which are unfortunately, not courts of record, receive a lot of cases of this nature. The procedure from arrest to production of a person in Court for plea should be streamlined to avoid human rights violations.

Amendments to the Criminal Procedure Code Act should provide for the bounds of using entrapments to acquire evidence. These bounds should include a clear definition by the Director of Public Prosecutions, of the persons, individuals or entities who may use traps. Secondly the conduct of the person using the trap to get evidence should not go beyond providing an opportunity to commit an offence. This shall help to place guidelines on what it means to go beyond an opportunity to commit an offence and enhance professionalism in investigations, while at the same time upholding human rights in the process. The Police Act, Criminal Procedure Act may also be amended to provide for duties on the investigators in the course of gathering evidence. This legislation will play a great role in

preventing human rights violations and procedural irregularities in the process of collecting evidence.

6.2.3 JUDICIAL ADOPTION TO HUMAN RIGHTS RELEVANCE

The Courts should be dynamic in the making of decisions which enhance the jurisprudence of evidence obtained through human rights violations. The decisions made should reflect the need to uphold human rights as the first priority. The procedural aspects of the chain of investigations should be used to enhance a fair trial. There is a heavy reliance on the reliability theory of evidence. A shift to use the deterrent and protective theories should also be used. This will deter the police from human rights violations and protect accused persons from suffering from unfair advantage due to the conduct of the police.

The burden of proof should be on the prosecution to prove that evidence was obtained without violation of any rights of the accused. This will serve to protect the integrity of the criminal justice system by ensuring the presumption of innocence, principle of legality, protection of the right against self- incrimination and the right to remain silent.

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