The jurisprudence of the rights to trial within a reasonable time in Namibia and Zambia
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Abstract

The demands of sovereignty place on states and governments, inter alia, the responsibility to protect and defend the integrity of the state, and maintain peace and security. Among the institutions and mechanisms employed by states is the criminal justice system that provides for the legal framework of the powers exercised by law enforcement agents and judicial officers. Penal laws and their enforcement, in particular, impinge on the rights of the individual, especially with regard to the rights of personal liberty, freedom of movement and privacy, etc. The concern about the potential abuse of the rights of the individual in the process of the enforcement of penal laws by the state security apparatus and law enforcement agents has resulted in legislative intervention at both international (in the form of international Covenants) and national levels aimed at protecting the rights of the individual. International Bills of Rights have impacted on municipal jurisdiction to the extent that most contemporary jurisdictions have incorporated the International Bill of Rights1 and international treaty norms in their constitutions and domestic legal systems. The jurisdictions referred to in this article have written constitutions with Bills of Rights that trace their origins to international Conventions. Both jurisdictions have acceded to relevant international Conventions dealing with the rights of the individual to fair trial.

Introduction

The issue of alleged violation of the rights of individuals who are detained for a long time before trial has become phenomenal and has raised global concern. One need only think here of the interns in the infamous Guantanamo Bay detention facility. In the Zambian case The People v John Chisimba,2 for example, the victim was arrested on a charge of alleged murder in 1994. In 1998, he was examined by a specialist psychiatrist and neurologist to determine whether he was fit to stand trial. It was concluded that he was, and

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1 The International Bill of Human Rights consists of the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and its two Optional Protocols.
2 2TO/09/95.
a report was sent to the court in May 2004. Despite the report being received, the victim had not yet stood trial by June 2006, when the applicant applied for constitutional bail – which was granted. During the bail hearing, it emerged that the prosecution had misplaced the victim’s file: hence, the delay in trial.

In Namibia, in what is commonly referred to as the Caprivi Treason Trial, the accused were arrested in August 1999 and charged with some 275 counts of, inter alia, high treason, murder, sedition, public violence and attempted murder, following an armed attack launched in the country’s Caprivi Region. Bail applications were denied by the courts because of the nature of the offences. Amnesty International, in a 2003 report, refers to alleged violations of the accuseds’ pre-trial rights, and concludes that these alleged violations may seriously undermine their right to a fair hearing in accordance with international standards articulated on the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples’ Rights (hereafter Charter).3 Concerns have also been raised about the duration of the trial. The Government of the Republic of Namibia, in its Report to the United Nations (UN) Secretary General, has responded to these allegations,4 explaining that one obvious reason for the prolonged duration of the trial is the complex nature of the case.

Review of the applicable international human rights treaties and Conventions5

The demands of sovereignty place on states and governments, inter alia, the responsibility to protect and defend the integrity of the state and to maintain peace and security. Among the institutions and mechanisms employed by states is the criminal justice system, which provides for the legal framework of the powers exercised by law enforcement agents and judicial officers. Penal laws and their enforcement, in particular, impinge on the rights of the individual – especially with regard to the rights of personal liberty, freedom of movement and privacy, etc. The concern about the potential abuse of the rights of the individual in the process of the enforcement of the penal laws by the state security apparatus and law enforcement agents has resulted in legislative intervention at both international (in the form of international Covenants) and national levels aimed at protecting the rights of the individual. Bills of Rights

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The jurisprudence of the rights to trial within a reasonable time

have impacted on municipal jurisdiction to the extent that most contemporary jurisdictions have incorporated the International Bill of Rights and treaty norms in their constitutions and domestic legal systems. For example, with regard to the right to fair trial, both the Charter and the ICCPR have provisions protecting the rights of the individual to fair trial, and these provisions have been internalised in most countries’ municipal laws. The provisions in the two instruments concerned are as follows:

- Article 7(d) of the Charter states that “every individual has the right to be tried within a reasonable time by an impartial court or tribunal”, and
- Article 9(3) of the ICCPR states that “anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release”.

As a general application of the basic principles of the Law of Treaties, in international law, the parties to international treaties are states and the UN. Therefore, such international standards and norms become binding on states parties either through the constitutional technique of legislative incorporation, or through automatic incorporation. Such constitutions guarantee the civil and political rights of every citizen as well as the democratic values of human dignity, equality and freedom and, in the Bill of Rights provisions, such rights as the right to a fair hearing – including the right to be heard, to appeal, to be presumed innocent, to be defended by counsel of one’s choice, and to have a trial within a reasonable time by an impartial court or tribunal – are both entrenched and justiciable.

International Covenants such as the ICCPR and its two Protocols provide not only for these rights, but also the mechanisms for redress and appropriate remedies that are available to a victim of a human rights violation. Because states parties to such Covenants are bound by these international instruments, any alleged violations of individual rights are governed by the provisions of not only the municipal laws of a particular jurisdiction, but also international law. The Human Rights Committee established under the ICCPR, for example, is mandated to monitor and supervise the implementation of the rights set out in that Covenant. At the continental level, treaty bodies such as the African Court on Human and Peoples’ Rights (hereafter Court) and the African Commission on Human and Peoples’ Rights (hereafter Commission) are mandated to protect and defend the rights of the individual against violations by state agencies.


However, it has to be added that, under international law, as a general rule there is no formal obligation on states to ratify a particular international Covenant or Protocol. Therefore, for example, the invocation of the jurisdiction of the Human Rights Committee mentioned above will require prior ratification of the Protocol establishing the Committee. The limitations of the binding effect of international Conventions and the lack of enforcement mechanisms by which to hold signatories accountable are recognised in the jurisprudence of international law. Furthermore, under international law, individuals seeking the jurisdiction of international tribunals have the locus standi only where the state has acceded to the jurisdiction of the international organisation concerned, and the individual has exhausted all available domestic remedies to enforce compliance with domestic and international law applicable under his/her home country’s constitution.

This seeming inefficacy of the enforcement mechanisms under international law does not mean that states can indulge in violations of rights with impunity, however. In modern international relations, and especially in human rights jurisprudence, there are mechanisms and instruments of compliance such as sanctions and isolation of the recalcitrant and delinquent state that can be exerted by the international community, and international human rights watchdogs such as Amnesty International that can enforce compliance. Steiner and Alston describe the concept as follows:

Human rights violations occur within a state, rather than on the high seas or in outer space outside the jurisdiction of any one state. Ultimately, effective protection must come from within the state. The international human rights system does not typically place delinquent states in political bankruptcy and through some form of receivership take over the administration of a country in order to assure the enjoyment of human rights – although the measures implemented by the international community in Bosnia-Herzegovina after the 1995 Dayton Peace Agreement and especially in Kosovo represent steps in that direction. Rather the international system seeks to persuade or pressure states to fulfil their obligations through one or another method – either observing national law (constitutional or statutory) that is consistent with the international norms, or making the international norms themselves part of the national legal and political order.

Under international law, the international standards and norms contained in international treaties and Conventions become binding on states upon their accession to the said instruments and acceptance of the jurisdiction of the international organisation concerned. However, if the provisions of a treaty or other international instrument are considered to be self-executing, the individual may – if s/he has the standing to do so – invoke the provisions of a treaty before national courts in automatic incorporation in the absence of implementing legislation. Individuals have locus standi before the international organisation’s

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institutions if all available domestic remedies have been exhausted. This international rule of exhaustion of local remedies before taking to international remedies is one of the basic rules in international law. The object of the rule is to offer the respondent state the first opportunity to correct the harm and redress it. Hence, a person whose rights have been violated should first make use of domestic remedies to right a wrong rather than immediately approach the relevant international committee, international court or other tribunal. However, if no domestic remedies are available or there is unreasonable delay on the part of the national courts in granting remedy, then a person is justified in having recourse to international remedies. The rule of local remedies should not constitute an unjust impediment to access to international remedies.

The International Covenant of Civil and Political Rights

As stated in the previous section, two of the international human rights treaties or Conventions and treaty bodies that, inter alia, protect and enforce the right of the individual to a trial within a reasonable time are the ICCPR, the Charter, the Human Rights Committee, the Commission and the Court.

As mentioned earlier, the ICCPR states in Article 9(3) that –

[a]nyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release.

This provision cannot be seen as standing on its own. Its efficacy and application will only be fully appreciated if it is discussed in a holistic context and in conjunction with the complementary provisions under Articles 1 and 2 of the Optional Protocol. These Articles read as follows:

**Article 1**
A State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant. No communication shall be received by the Committee if it concerns a State Party to the Covenant which is not a Party to the present Protocol.

**Article 2**
Subject to the provisions of article 1, individuals who claim that any of their rights enumerated in the Covenant have been violated and who have exhausted all available domestic remedies may submit a written communication to the Committee for consideration.

**Comments on Article 1**
Reference is made to the Human Rights Committee established under Article 28 of the ICCPR. The jurisdiction of the Committee, which is stated
under Article 40 of the Covenant, requires states parties to submit reports on measures taken to effect the undertakings of the Covenant and on the progress made in the enjoyment of rights declared by it. The reports are transmitted to the Committee for its perusal. The same Article instructs the Committee to transmit such general comments as it may consider appropriate to these states parties. The other aspect of the Committee’s jurisdiction, which is particularly relevant to this case, is the jurisdiction provided for by Article 2 of the Optional Protocol (see “Comments on Article 2” below).

The Human Rights Committee is a treaty body whose jurisdiction may be described as quasi-judicial. With respect to individuals’ human rights, the Committee has the jurisdiction to receive communications from individuals who claim to be victims of a violation by a state party to the Protocol of any of the rights set forth in the Covenant. After being notified of the communication, the state party is required to submit to the Committee any explanations or statements clarifying the matter. The Committee examines the communications, and then forwards its views to the individual and the state concerned. The Committee’s views may include payment of compensation or the release of a prisoner. Notably, however, there is no provision setting forth the precise legal effect of the Committee’s views, or what follow-up should take place if the Committee’s views are ignored.

Comments on Article 2

Article 2 requires that, in addition to the effective protection of Covenant rights, states parties are obliged to ensure that individuals also have accessible and effective remedies to vindicate those rights. Furthermore, states parties are enjoined to establish appropriate judicial and administrative mechanisms for addressing claims of rights violations under domestic law. The enjoyment of the rights recognised under the Covenant can be effectively assured by the judiciary in many different ways, including direct applicability of the Covenant, application of comparable constitutional or other provisions of law, or the interpretive effect of the Covenant in the application of national law. Administrative mechanisms, in particular, are required to give prompt effect to the general obligation to investigate allegations of violations thoroughly and effectively through independent and impartial bodies. A failure by a state party to investigate allegations of violations could, in and of itself, give rise to a separate breach of the Covenant. Cessation of an ongoing violation is an essential element of the right to an effective remedy.

Article 2 also requires that states parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals in this position, the obligation to provide an effective remedy – which is central to the efficacy of Article 2 – is not discharged. In addition to explicit reparation in specific instances of violations, the Covenant generally entails appropriate compensation. Reparation can involve restitution, rehabilitation, and measures
of satisfaction such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing the perpetrators of human rights violations to justice. Victims of violations of rights suffering from long periods of detention, such as the case of the accused in the John Chisimba case, are entitled to such reparation.

International human rights jurisprudence indicates that, in general, the purposes of the Covenant would be defeated without an obligation integral to Article 2 to take measures to prevent a recurrence of a violation of the Covenant. Accordingly, in cases under the Optional Protocol, the Commission has often included in its views the need for measures – beyond a victim-specific remedy – to be taken to avoid a recurrence of the type of violation in question. Such measures may require changes in the state party’s laws or practices, and are encouraged in jurisdictions that have the notoriety of violations of the right to fair trial and, in the context of this article, trial within a reasonable time.


The continental human rights regime under whose jurisdiction cases of alleged violations of the right to speedy or reasonable time may be redressed is the Charter and its Protocol. Under Article 7(d), the Charter states that every individual has the right to be tried within a reasonable time by an impartial court or tribunal. However, this provision does not operate in a vacuum: its application and enforceability are found in the jurisdiction of the Commission and the Protocol to the Charter on the Establishment of an African Court on Human and Peoples’ Rights.

Article 30 of the Charter establishes the Commission, the primary function of which is the promotion and protection of human and peoples’ rights in Africa. The modus operandi employed by the Commission includes submission of communications by both states parties and individuals – or what are referred to as non-state communications.

With regard to cases such as that of John Chisimba, the most appropriate procedure will be the individual communications procedure. However, this procedure has certain limitations which may impact on the satisfactory redress of such matters and which must, therefore, be highlighted. As stated by Steiner and Alston, the Charter does not expressly define an objective for the individual communications procedure. In the Free Legal Assistance Group

11 The People v John Chisimba, 2TO/09/95, Zambia.
the Commission established that the objective of the communications procedure was “to initiate a positive dialogue, resulting in an amicable resolution between the complainant and the state concerned, which remedies the prejudice complained of”. The attainment of this objective, the Commission continued, was dependent on “the good faith of the parties concerned, including willingness to participate in a dialogue”. Thus, the Commission recognises that the bottom line of the communications procedure is the redress of violations complained of. To enable the Commission to reach this objective, it is prepared to seek an amicable settlement between the parties, which are obliged to fulfil two-pronged, subjective and objective criteria. Subjectively, the parties need to be satisfied with the result – a difficult standard to meet, given that the interests and aims of the victims and perpetrators of violations are often at odds. Objectively, both parties are called upon to act in good faith so as to bring about a resolution which “remedies the prejudice complained of”.

Another limitation of the objectives established by the Commission for the communications procedure is that it is dependent on the volition and good faith of the state party – the respondent, in this case – and, thus, may not be entirely consistent with the obligation of the states parties under Article 1 of the Charter to recognise the rights, duties, and freedoms enshrined in it and to “undertake to adopt legislative and other measures to give effect to them”. Where efforts to reach an amicable resolution fail, the Commission is forced to reach a decision on the merits of the case in question. Article 56(5) also subjects the invocation of this procedure to the general law principle in international law on the exhaustion of domestic remedies. But, as pointed out by Steiner and Alston, in practice, the Commission has been willing to allow wide margins of exception to this requirement, especially in situations in which massive violations of human rights are alleged.

Pityana also points out that the Commission’s decisions lack enforceability as they are not judicial. Also, too many of the Commission’s decisions are routinely ignored by states. Thus, the Commission lacks not only the authority to enforce its own decisions, but also the resources to undertake follow-up activities and monitor compliance with its decisions. The matter could be placed before the Assembly of the AU, but the Assembly itself has not had any legislative framework to date by which it could demand compliance from member states.

The African Court on Human and Peoples’ Rights was established in 1998 by a Protocol which entered into force on 1 January 2004 upon its ratification by 15 member states. The Protocol under Article 2 asserts that the Court is obliged to complement the Commission’s mandate to protect human and peoples’ rights – its protective mandate. Given the limitations of the Commission as described earlier, this should be understood to mean that it will reinforce the Charter’s objectives and make them more effective by ensuring that member states comply with their obligations. Under Article 3, the Court has jurisdiction over all cases and disputes submitted to it concerning the interpretation and application of the Charter, the Protocol, and other relevant human rights instruments ratified by the states concerned. In terms of locus standi, the Court may entitle relevant non-governmental organisations (NGOs) with observer status before the Commission as well as individuals to institute cases directly before it in accordance with Article 34(6) of the Protocol, which demands that the states parties are obliged to have made a declaration at the time of the ratification of the Protocol or any time thereafter, accepting the competence of the Court to receive cases under Article 5(3) of the Protocol. Hence, in the absence of any such declaration, individuals have to submit their complaints to the Commission first. The Protocol is silent on the question of the exhaustion of local remedies, but it may be presumed that the general principles of international law will apply to subject individuals that seek the jurisdiction of the Court to the satisfaction of the exhaustion of local remedies principle.

The judgment of the Court is binding on states parties to the Protocol. These states parties undertake, in terms of Article 30, to comply with the judgment in any case where they are parties within the time stipulated by the Court, and to guarantee such judgment’s execution. In other words, the states take primary responsibility for the execution of the Court’s judgments. Should the affected parties fail to do so, other persuasive and coercive means are available to the African Union. The Court submits its reports to the regular session of the Assembly of the AU, and the provision goes on to state that the report is required, in particular, to specify the cases in which a state has not complied with the Court’s judgment. This provision, in effect, transfers the secondary responsibility for ensuring compliance with the rulings of the Court to the collective of the Heads of State and Government. This could serve as a kind of peer review mechanism. As a monitoring mechanism, the judgments of the Court are notified not only to the parties in dispute, but also to the Council of Ministers who monitors its execution on behalf of the Assembly.

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17 Article 30, Protocol to the Charter.
18 Article 31, Protocol to the Charter.
19 (ibid.).
21 Article 29.2, Protocol to the Charter.
Application of international human rights Conventions and standards

As stated earlier, both the ICCPR and the Charter have provisions protecting the right of the individual to trial within a reasonable time. Treaty bodies have been established and empowered with the jurisdiction to enforce compliance of the obligations under such treaties. In Zambia, international instruments are not self-executing: they require legislative implementation to be effective. The position in Namibia is rather more complex. Namibia has adopted both the monist and dualist approaches with respect to implementation of international treaties. The executive concludes or accedes to international treaties, which then require ratification by the National Assembly. Ratification does not imply automatic integration of treaty obligations as part of the law of Namibia. The nature of the treaty obligations will determine whether Parliament will regard a particular international instrument self-executing or not after ratification. Both Namibia and Zambia have ratified the ICCPR and are also parties to its First Optional Protocol, which provides for individual communications procedures. First and foremost, therefore, it must be emphasised that Zambia is bound by the treaty obligations under Article 2 of the ICCPR to make available to the victim the remedies stated earlier herein, if violation of the victim's right is successfully established. Secondly, in the event of the victim's dissatisfaction with the local legal system for the reasons stated earlier, the victim/applicant can avail him-/herself of the individual communications procedure under the jurisdiction of the Human Rights Committee. As stated earlier, the Committee has the jurisdiction to examine communications from individuals who claim to be victims of a violation of any of the rights proclaimed in the ICCPR, including the right to trial within a reasonable period.

At the regional level, both Namibia and Zambia are also parties to the Charter. The Zambian Constitution has incorporated international human rights standards, and these include the right to fair trial, which is justiciable. Therefore, both Namibia and Zambia are bound by the treaty obligations under the Charter, just as much as they are bound by the treaty obligations of the ICCPR. The victim/applicant is entitled to invoke the jurisdiction of the Commission and avail him-/herself of the individual communications procedure.

These international instruments that provide for these rights, however, do not define what constitutes “within a reasonable time” or a “speedy” trial; therefore, reference will have to be made to other sources for the determination of what constitutes a “speedy” trial, for example. These sources will include relevant legislation and case law, but it should be explained that, in this article, there is

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22 Namibia and Zambia acceded to the ICCPR on 10 April 1984.
Namibia became a state party to the ICCPR on 28 February 1995.
more reliance on case law than legislative sources, simply for lack of access to the latter, if they are available.

Establishment of a violation of rights under international Conventions and treaty bodies

To establish a successful case of infringement and violation of rights will necessitate the adducing of sufficient evidence to satisfy the requirements of both substantive and procedural law in order to establish that the delay complained of exceeds what is reasonable. Furthermore, evidence will have to be adduced to quantify the damage/loss occasioned as a result of the violations with regard to the claim for compensation.

Substantive Considerations

The determination of what constitutes “reasonable time” has been discussed in judicial decisions of certain jurisdictions, the most notable of which is perhaps the case of *R v Askov*,24 where the issue involved alleged violations of constitutional rights. This case reviews relevant authorities, especially cases of the Supreme Courts of the United States (US) and Canada, and lays down standards for the establishment of a “speedy” trial or trial within a “reasonable time”. These standards have been followed by superior and constitutional courts in a number of jurisdictions, including Zimbabwe25 and Namibia.26 The standards are extensively discussed in the cases mentioned later herein,27 but a summary of the factors can be mentioned here in order to put them in context. *R v Askov* lays down four factors to determine “reasonable time”, namely –

- the length of the delay
- the explanation for the delay (this includes evidence relating to the conduct of the Crown or the state, systemic or institutional delays, and the conduct of the accused)
- the waiver, and
- prejudice to the accused.

The Supreme Court of Canada held that the first factor was the triggering mechanism or threshold determination of the excessiveness of the delay and that, if that delay appeared prima facie excessive, the court was then obliged to consider the three remaining factors to determine whether the accused had been deprived of the Sixth Amendment. In the Zimbabwean case of *In Re Mlambo*,28 in determining whether the rights of the accused to trial within

24 (1990) 2 SCR 1199; (1991) 49 CRR 1 (Supreme Court of Canada).
a reasonable time had been violated, Gubbay CJ followed the factors laid down in the Askov case and stated that additional evidence would have to be established to determine violation of human rights. He stated the following:29

I have no hesitation in holding that the time frame is designed to relate far more to the period prior to the commencement of the hearing or trial than to whatever period may elapse after the accused has tendered a plea. This meaning is wholly consonant with the rationale of s18(2) – that the charge from which the reasonable time enquiry begins, must correspond with the start of the impairment of the individual’s interest in the liberty and security of his person. The concept of “security” is not restricted to physical integrity, but includes stigmatisation, loss of privacy, anxiety, [and] disruption of family, social life and work.

I may say that this view accords with the interpretation given to the materially similar wording of Article 6 para 1 of the European Convention by the European Courts of Human Rights.

In R v Askov,30 Lamer J, as he then was, expressed similar views and referred to these vexations, as described above by Gubbay CJ, as “all strictly individual rights”. In the case under consideration, the Presiding Judge ruled that there had been inordinate delay as the accused had been in detention for more than 12 years. Therefore, there is incontrovertible evidence to satisfy the triggering mechanism that the delay was prima facie unreasonable or, in the words of Powell J in Barker v Wingo,31 “presumptively prejudicial”. However, in order to conclude that the effect of the lengthy delay is such that it denies the applicant the right to a fair hearing, in this case there is the need to balance the other factors mentioned in the Askov judgment.

Further evidence will also have to be adduced to prove that the inordinate delay led to the impairment of the accused’s interests in the liberty and security of his person, and therefore constituted a violation of his rights. In light of the above, therefore, proof of violation will include evidence to establish, for example, stigmatisation, loss of privacy, anxiety, and disruption of family life, social life and work, occasioned as a result of the inordinate delay and long period of detention.

Procedural considerations

The burden of proof required will be the standard required in civil proceedings, which is on the balance of probabilities and with regard to the question of locus standi there must be evidence of the exhaustion of local remedies, which will include both judicial and extra judicial remedies, like in the case of Zambia, for example, placing the case before the Zambian Human Rights Commission

29 (ibid.).
30 (1990) 2 SCR 1199.
31 (1972) 407 US 514 at 530.
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(ZHRC). The other requirement is proof that the prevailing conditions are such that it can be legitimately claimed that the victim will not receive justice under the local legal system, including reasons stated earlier. These procedural considerations will apply to applications to both the Human Rights Committee and the Commission.

With respect to petitions before the African Court on Human and Peoples’ Rights, it is imperative that the petition be directed against a state party which has made a declaration under Article 43.6 of the Protocol which authorises direct access to the Commission for individuals and NGOs with observer status before it. To be admissible under Article 56.2 of the Charter, the petition is required to invoke the provisions of the Charter allegedly violated, in this case Article 7(d).

Remedies

The provisions of the ICCPR that deal specifically with remedies can be found under Article 2, the relevant provisions of which read as follows:

**Article 2**

3. Each State Party to the present Covenant undertakes:

   (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

   (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the state, and to develop the possibilities of judicial remedy; [and]

   (c) To ensure that the competent authorities shall enforce such remedies when granted.

Therefore, the specific remedies are initially to be sought from the remedies provided under the municipal laws of a particular jurisdiction. As indicated earlier herein, however, the remedies include compensation and reparation. These may be ordered by the Human Rights Committee, and the state concerned is obliged to comply with the order.

The jurisprudence of the right to a fair trial under municipal law

*The right to a hearing within a reasonable time*

Article 18(1) of the Zambian Constitution that deals with protection of law provides as follows:
If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

Article (12)(1)(b) of the Constitution of the Republic of Namibia has a similar provision and provides as follows:

A trial referred to in Sub-Article (a) hereof shall take place within a reasonable time, failing which the accused shall be released.

The term *reasonable time* is not defined in the two Constitutions, but it may be interpreted to mean that a party upon whom it is incumbent duly fulfils his/her obligation notwithstanding protracted delay, so long as such delay is attributable to cause beyond his/her control, and s/he has neither acted negligently nor unreasonably. The term *reasonable time*, however, has been considered in a number of cases from different jurisdictions.

Perhaps the most comprehensive consideration of what amounts to a *speedy trial* and/or a fair hearing *within a reasonable time* is to be found in the judgment of Cory JJ of the Supreme Court of Canada in the case of *R v Askov*. The case involved the interpretation of what constituted *unreasonable delay* in the context of Section 11(b) of the Canadian Charter of Rights and Freedoms, which provides that “any person charged with an offence has the right to be tried within a reasonable time”. The provisions of Section 11(b) of the Canadian Charter of Rights and Freedoms are couched in the same terms as the provisions of Articles 18(1) of the Zambian Constitution and 12(1)(b) of the Namibian Constitution stated above.

33 *In the Askov case*, the appellants were charged with conspiracy to commit extortion in November 1983. A, H and M were also charged with several related offences and detained in custody for almost six months before being released on recognisances. G was released on a recognisance shortly after his arrest. All counsel agreed on a date early in July 1984 for the preliminary hearing, but it could not be completed until September. A trial was then set for the first available date, in October 1985. The case could not be heard during that session, and was put over for trial to September 1986, almost two years after the preliminary hearing. When the trial finally began, appellants moved to stay the proceedings on the ground that the trial had been unreasonably delayed. The trial judge found that the major part of the delay following the appellants’ committal stemmed from institutional problems and granted the stay. The Court of Appeal found: (1) no misconduct on the part of the Crown; (2) no indication of any objection by the appellants to any of the adjournments; and (3) no evidence of any actual prejudice to the appellants. It accordingly set aside the stay and directed that the trial proceed. But the Supreme Court found that the delay was prima facie excessive – indeed, grossly excessive. The Court further found that the defence never caused the delay nor agreed to it; the delay had been caused by the prosecution. Taking all those factors into consideration, the Court concluded that the delay could not be justified and was, therefore, unreasonable.
In laying down the factors to be considered in determining what constituted *reasonable time*, the court reviewed the position of the law in both the US and Canada and discussed in detail the raison d’être of the right to fair trial within a reasonable time. He explained the position of the law as follows.

**Judicial consideration of the principle of providing a trial within a reasonable time**

In the US, the Sixth Amendment ensures that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial”. The US Supreme Court considered the issue in *Barker v Wingo*.34 Barker, who was charged with murder, was brought to trial five years after the murder had been committed. The delay was caused by the necessity of trying an accomplice beforehand. This prerequisite trial was extremely complicated: the accomplice was tried no less than six times. During this ongoing process, Barker initially had agreed to continuances or adjournments. He only began to assert his right to a speedy trial three-and-a-half years after the charges had been laid.

The court held that a flexible approach should be taken to cases involving delay and that the multiple purposes or aims of the Sixth Amendment need to be appreciated. Powell J, giving the reasons for the court’s findings, recognised the general concern that all persons accused with crimes should be treated according to fair and decent procedures. He particularly noted three individual interests which the right was designed to protect, namely to –

• prevent oppressive pre-trial incarceration
• minimise the anxiety and concern of the accused, and
• limit the possibility that the defence would be impaired or prejudiced.

However, Powell J went on to observe that, unlike other constitutional rights which only had an individual interest, the right to a speedy trial involved the added dimension of a societal interest. He found that a delay could result in increased financial cost to society, and could have a negative effect upon the credibility of the justice system. Furthermore, it was noted that a delay could work to the advantage of the accused. For example, the fostering of a delay could become a defence tactic designed to take advantage of failing memories or missing witnesses, or could permit the accused to manipulate the system in order to bargain for a lesser sentence. Specifically, he stated that the right to a speedy trial was –35

… a more vague concept than other procedural rights. It is, for example, impossible to determine with precision when the right has been denied. We cannot definitely say how long is too long in a system where justice is supposed to be swift but deliberate. As a consequence, there is no fixed point in the criminal process when the State can put the defendant to the choice of either exercising or waiving the right to a speedy trial.

35 (ibid.:521).
In order to balance the individual right and the communal aspect of the Sixth Amendment, the US Supreme Court adopted an approach of ad hoc balancing “in which the conduct of both the prosecution and the defendant are weighed”. The balancing is undertaken by reference to four factors identified by Powell J as the test for infringement of the right to a “speedy” trial. They are as follows:

- The length of the delay
- The reason for the delay
- The accused’s assertion of the right, and
- Prejudice to the accused.

The first factor is the triggering mechanism or threshold determination of the excessiveness of the delay. If that delay appears prima facie excessive, the court then has to consider the three remaining factors to determine whether the accused has been deprived of the Sixth Amendment right.

After his definition and exposition of the factors to be taken into consideration on an application for a stay of proceedings, Powell J proceeded to explain that, before that step was undertaken, it was necessary to determine what might be distilled from the cases as to the purpose or aim of Section 11(b).

**Purpose of Section 11(b)**

Powell J explained that Section 11(b) explicitly focused upon the individual interest of liberty and security of the person. Like other specific guarantees provided by Section 11, this paragraph is primarily concerned with an aspect of fundamental justice guaranteed by Section 7 of the Charter. He stated the following in this regard:

> There could be no greater frustration imaginable for innocent persons charged with an offence than to be denied the opportunity of demonstrating their innocence for an unconscionable time as a result of unreasonable delays in their trial. The time awaiting trial must be exquisite agony for accused persons and their immediate family. It is a fundamental precept of our criminal law that every individual is presumed to be innocent until proven guilty. It follows that on the same fundamental level of importance, all accused persons, each one of whom is presumed to be innocent, should be given the opportunity to defend themselves against the charges they face and to have their name cleared and reputation re-established at the earliest possible time.

Furthermore, he added that community interest had a dual dimension:

> First, there is a collective interest in ensuring that those who transgress the law are brought to trial and dealt with according to the law. Second, those individuals on trial must be treated fairly and justly. Speedy trials strengthen both those aspects of the community interest. A trial held within a reasonable time must

36 (ibid.:530).
benefit the individual accused as the prejudice which results from criminal proceedings is bound to be minimized. If the accused is in custody, the custodial time awaiting trial will be kept to a minimum. If the accused is at liberty on bail and subject to conditions, then the curtailments on the liberty of the accused will be kept to a minimum. From the point of view of the community interest, in those cases where the accused is detained in custody awaiting trial, society will benefit by the quick resolution of the case either by reintegrating into society the accused found to be innocent or if found guilty by dealing with the accused according to the law. If the accused is released on bail and subsequently found guilty, the frustration felt by the community on seeing an unpunished wrongdoer in their midst for an extended period of time will be relieved.

There are as well important practical benefits which flow from a quick resolution of the charges. There can be no doubt that memories fade with time. Witnesses are likely to be more reliable testifying to events in the immediate past as opposed to events that transpired many months or even years before the trial. Not only is there an erosion of the witnesses’ memory with the passage of time, but there is bound to be an erosion of the witnesses themselves. Witnesses are people; they are moved out of the country by their employer; or for reasons related to family or work they move from the east coast to the west coast; they become sick and unable to testify in court; they are involved in debilitating accidents; they die and their testimony is forever lost. Witnesses too are concerned that their evidence be taken as quickly as possible. Testifying is often thought to be an ordeal. It is something that weighs on the minds of witnesses and is a source of worry and frustration for them until they have given their testimony.

It can never be forgotten that the victims may be devastated by criminal acts. They have a special interest and good reason to expect that criminal trials take place within a reasonable time. From a wider point of view, it is fair to say that all crime disturbs the community and that serious crime alarms the community. All members of the community are thus entitled to see that the justice system works fairly, efficiently and with reasonable dispatch. The very reasonable concern and alarm of the community which naturally arises from acts of crime cannot be assuaged until the trial has taken place. The trial not only resolves the guilt or innocence of the individual, but acts as a reassurance to the community that serious crimes are investigated and that those implicated are brought to trial and dealt with according to the law.

The failure of the justice system to deal fairly, quickly and efficiently with criminal trials inevitably leads to the community’s frustration with the judicial system and eventually to a feeling of contempt for court procedures. When a trial takes place without unreasonable delay, with all witnesses available and memories fresh, it is far more certain that the guilty parties who committed the crimes will be convicted and punished and those that did not, will be acquitted and vindicated. It is no exaggeration to say that a fair and balanced criminal justice system simply cannot exist without the support of the community. Continued community support for our system will not endure in the face of lengthy and unreasonable delays.
Factors to take into account in determining whether or not there has been an infringement of the right to a speedy trial

As stated earlier, four factors have generally been recognised as constituting the test to determine the infringement of the right to speedy trial. It might be useful to expatiate on the requirements and applications of each of these factors.

The length of the delay

Prima facie evidence of an unreasonably prolonged delay will necessitate an enquiry into possible infringement of the individual’s right to a speedy or trial within a reasonable time. In certain jurisdictions such as the US, this factor constitutes the triggering mechanism or threshold determination of the excessiveness of the delay. In other jurisdictions, this factor is to be balanced along with the others. However, very lengthy delays may be such that they cannot be justified for any reason.

Explanation for the delay

This category may be subdivided and discussed under two areas, namely systemic delay and conduct of the accused.

(a) The conduct of the Crown or state

Generally speaking, this category comprises all of the potential factors causing delay which flow from the nature of the case and the conduct of the Crown or state, including officers of the Crown or state, as well as the inherent time requirements of the case. Delays attributable to the actions of the Crown or state or its officers will weigh in favour of the accused. Thus, adjournments initiated by the Crown or state, the unavailability of judges, and the misplacement of files by the prosecution are all examples where the action or the lack thereof by the Crown or state officers may weigh against the Crown or state in the assessment of the reasonableness of the delay.

Under this heading, the complexity of the case should be taken into account. Complex cases such as the Caprivi Treason Trial, which require a longer time to prepare, greater expenditure of resources by officers of the state, and the longer use of institutional facilities, will justify delays longer than those that would be acceptable in simple cases.

(b) Systemic or institutional delays

Delays occasioned by inadequate resources or systemic/institutional limitations should also weigh against the state. Various variables will determine this factor and need to be determined objectively. The state bears the onus of justifying inadequate resources resulting in systemic delays, for it is the responsibility
of the state to bring the accused to trial. The courts have always insisted that
the lack of institutional resources cannot be employed to justify a continuing
unreasonable postponement of trials. In *Mills v The Queen*, Lamer J noted as
follows in this regard:\(^{37}\)

> In an ideal world there would be no delays in bringing an accused to trial and
> there would be no difficulties in securing fully adequate funding, personnel and
> facilities for the administration of criminal justice. As we do not live in such a
> world, some allowance must be made for limited institutional resources.

However, he added that the lack of institutional facilities can never be used as
a basis for rendering the right to trial within a reasonable time meaningless. In
the same case, he added the following:\(^ {38}\)

> It is imperative, however, that in recognising the need for such a criterion we
> do not simply legitimate current and future delays resulting from inadequate
> institutional resources. For the criterion of institutional resources, more than
> any other, threatens to become a source of justification for prolonged and
> unacceptable delay. There must, therefore, be some limit to which inadequate
> resources can be used to excuse delay and impair the interests of the
> individual.

(c) The conduct of the accused (or delay attributable to the accused)

As stated earlier, it is the responsibility of the state to bring the accused to trial
within a reasonable time. The courts in the *Askov*\(^ {39}\) and *Mills*\(^ {40}\) cases explained
that it followed from this responsibility and the right to trial within a reasonable
time that any enquiry into the conduct of the accused should in no way absolve
the state from its responsibility to bring the accused to trial. Nonetheless, there
is a societal interest in preventing an accused from using the guarantee as a
means of escaping trial. It should be emphasised that an enquiry into the actions
of the accused should be restricted to discovering those situations where the
accused’s acts either directly caused the delay, or the acts of the accused are
shown to be a deliberate and calculated tactic employed to delay the trial. These
direct acts on the part of the accused, such as seeking an adjournment to retain
new counsel, of course need to be distinguished from situations where the delay
was caused by factors beyond the accused’s control, or a situation where the
accused did nothing to prevent a delay caused by the state and the burden
of proving that the direct acts of the accused caused the delay falls upon the
state.

The court added that, since the protection of the right of the individual is the
primary aim of Section 11(b), the burden of proving that the direct acts of the

\(^{37}\) 1986 1 SCR 863 at 935.

\(^{38}\) (ibid.).

\(^{39}\) *R v Askov* (1990) 2 SCR 1199; and *Mills v The Queen* 1986 1 SCR 863 at 935.

\(^{40}\) *Mills v The Queen* 1986 1 SCR 863 at 935.
accused caused the delay has to fall on the Crown, and that this would be true except in those cases where the effects of the accused’s action are so clear and readily apparent that the intent of the accused to cause a delay is the inference that has to be drawn from the record of his/her actions.

W A I V E R

The accused may be deemed to have waived his/her rights to a trial within a reasonable time by consenting to or concurring in a delay, and this needs to be taken into account. However, for a waiver to be valid it has to be informed, unequivocal, and freely given. The accused also needs to have full knowledge of the rights involved, and the effects the waiver will have on those rights.

The failure of an accused to assert the right does not give the state licence to proceed with an unfair trial. Failure to assert the right would be insufficient in itself to impugn the motives of the accused. Rather, there needs to be something in the conduct of the accused that is sufficient to give rise to an inference that the accused has understood that s/he had a right to trial within a reasonable time, understood its nature, and has waived the right provided by the constitution in question. Although no particular magical incantation of words is required to waive a right, the waiver should nevertheless be expressed in some manner. Silence or lack of objection cannot constitute a lawful waiver. The matter was put in these words by Dickson J, as he then was, in Park v The Queen: 41

No particular words or formula need be uttered by defence counsel to express the waiver and admission. All that is necessary is that the trial judge be satisfied that counsel understands the matter and has made an informed decision to waive … Although no particular form of words is necessary the waiver must be express. Silence or mere lack of objection does not constitute a lawful waiver.

The burden of showing that a waiver should be inferred falls upon the state.

An example of a waiver or concurrence that could be inferred as such is the consent by counsel for the accused to a fixed date for trial.

P R E J U D I C E T O T H E A C C U S E D

There is a general and, in the case of very long delays, an often virtually irrebuttable presumption of prejudice to the accused resulting from the passage of time. Where the Crown or state can demonstrate that there was no prejudice to the accused flowing from a delay, then such proof may serve to excuse the delay. It is also open to the accused to call evidence to demonstrate actual prejudice to strengthen his/her position that s/he has been prejudiced as a result of the delay.

41 (1981) 2 SCR 64 at 73–74.
The issue of what constitutes a fair hearing within a reasonable time was also considered in the Zimbabwean case of *In Re Mlambo*.42 The applicant was arrested in 1986 and charged with theft. He appeared in court and was released on bail after two weeks in custody. He subsequently appeared in court on 12 occasions until August 1987, when his legal representative complained about the lengthy delay in bringing the matter to trial and made strong representations that a date for trial be set. Thereupon the prosecutor promptly withdrew the charges and the applicant was advised that he could be charged at a later stage. In August 1990, the applicant was summoned to appear in court on substantially the same charges. On several occasions, his legal representative wrote to the clerk of the court requesting copies of various documents which the state intended to produce at the trial. When the date of trial arrived and the copies of documents had not been furnished, the applicant's legal representative sought a postponement of the trial, which was granted. At the resumed hearing, the applicant's counsel asked the court to stay the proceedings on the grounds that the applicant's rights under Section 18(2) in the Declaration of Rights in the Constitution of Zimbabwe had been infringed by the delay in bringing the matter to trial. The prosecution made no attempt to explain the delay and the magistrate dismissed the application. On the following day, the matter resumed before another magistrate, who agreed to refer the matter to the Supreme Court in terms of Section 24(2) of the Constitution.

The Supreme Court held that a reasonable time was necessary for the state to be ready for a trial, which period varied from case to case. It further held that the distinction between what was or was not a reasonable period not could not be drawn too sharply.

Gubbay CJ, delivering the judgment of the full Bench of the Supreme Court, endorsed the approach of the European Court of Human Rights in *Eckle v Germany* (*Federal Republic*)43 and *Foti v Italy*.44 He restated the factors as follows: 45

The factors to be considered in a determination of whether an accused person has been afforded a fair hearing within a reasonable time: In *Fikilini v Attorney-General* 1990 (1) ZLR 105 (SC) at 112G this Court approved of the factors identified by Justice Powell in his landmark judgment in *Barker v Wingo*46 as amongst those to be taken into account in assessing whether an accused has been deprived of his constitutional right to a speedy trial. He stated them at 530-2, as follows:

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43 (1985) 5 EHRR 1.
44 (1983) 5 EHRR 313.
45 See also *United States v Van Neumann* 474 US 242 (1986) at 247. These factors received the imprimatur of the Privy Counsel in *Bell v Director of Public Prosecutions of Jamaica and Another* [1985] 2 All ER 585.
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The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance. Nevertheless, because of the imprecision of the right to speedy trial, the length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case. To take but one example, the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge.

Closely related to length of delay is the reason the Government assigns to justify the delay. Here, too, different weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defence should be weighed heavily against the Government. A more neutral reason such as negligence or overcrowded courts should be weighed less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the Government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.

We have already discussed the third factor, the defendant’s responsibility to assert his right. Whether and how a defendant asserts his right is closely related to the other factors we have mentioned. The strength of his efforts will be affected by the length of the delay, to some extent by the reason for the delay, and most particularly by the personal prejudice, which is not always readily identifiable, that he experiences. The more serious the deprivation, the more likely a defendant is to complain. The defendant’s assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right. We emphasise that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.

A fourth factor is prejudice to the defendant. Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pre-trial incarceration; (ii) to minimise anxiety and concern of the accused; and (iii) to limit the possibility that the defence will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system. If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defence witnesses are unable to recall accurately events of the distant past. Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown.
The onus

As stated earlier in the case of Fikilini v Attorney-General, it is for the applicant to persuade the court that the delay complained of exceeds what is reasonable. The degree of persuasion required of him/her is to show that the delay is prima facie unreasonable, or, in the words of Powell J in Barker v Wingo, “presumptively prejudicial”. It is that which triggers the enquiry into the other factors that go into the balance. It is the threshold at which the court may look to the state for an explanation. It is, of course, neither possible nor desirable to identify precisely the length of delay which will trigger the enquiry. Each case is to be viewed in the light of its own particular circumstances in order to determine whether the delay is prima facie unreasonable.

Assessment of reasonableness

In the Zambian case of John Chisimba, for example, the overall length of the delay is 12 years, which is more than adequate to trigger an enquiry: it is “presumptively prejudicial”. It is submitted in the premise, therefore, that the disposition of this case will ultimately turn on the proof of the other factors such as –

• explanation for the delay, particularly systemic or institutional delay and delays attributable to the accused
• waiver, and
• prejudice to the accused.

Considering the length of the delay and the explanation thereof – that the prosecution had misplaced the victim’s file, one is obliged to conclude that the state’s conduct indicates a sustained unconcern to proceed as quickly as possible against the accused. It is submitted that the explanation for the delay is as totally unacceptable as it is reprehensible. That the entire delay was attributable to the actions of the state weighs heavily in favour of the accused. Therefore, unless some strong basis can counter this factor – the length of delay, which becomes clear from an examination of other factors – it will not prove possible to tolerate it.

Next to be set in the scale is the frequency and force of the objection to the delay. Here, evidence is to be deduced to establish that there was nothing in the conduct of the victim or his/her defence counsel that can be viewed as a waiver of the applicant’s constitutional guarantee. It needs to be proved that concerted efforts were made by the victim or his/her counsel to object to the delay. With regard to the fourth factor, evidence also needs to be elicited from the applicant that the delay had caused him/her actual prejudice. This may relate to unavailability of witnesses and other evidence that collectively

47 1990 (1) ZLR 105 (SC) at 117 D–E.
49 The People v John Chisimba, 2TO/09/95, Zambia.
impairs the ability to present an adequate defence to establish the trial prejudice. It also needs to be borne in mind that a very long delay such as this inherently gives rise to a strong presumption of prejudice to an accused. In the Heidenrich case in Namibia, this was how Hannah J put it:

The right, therefore, recognises that, with the passage of time, subjection to a criminal charge gives rise to restrictions on liberty, inconveniences, social stigma and pressures detrimental to the mental and physical health of the individual. It is a truism that the time awaiting trial must be agonising for accused persons and their immediate family. I believe that there can be no greater frustration for an innocent charged with an offence than to be denied the opportunity of demonstrating his lack of guilt for an unconscionable time as a result of delay in bringing him to trial.

The right also recognises that an unreasonable delay may well impair the ability of the individual to present a full and fair defence to the charge.

Where the state can demonstrate that there was no prejudice flowing from the delay, then such proof may serve to excuse it.

Balancing all the factors leads one irresistibly to submit that the effect of this extraordinarily lengthy delay is such as to deny the applicant/victim the right to a fair hearing of his/her case. Justice so delayed is an affront to the individual, to the community, and to the very administration of justice. The charge against John Chisamba is murder and, therefore, far from trivial; and there can be no doubt that it would be in the best interests of society to proceed with the trial of those who are charged with the commission of serious crimes. Yet, that trial can only be undertaken if the guarantee under Section 18(1) of the Zambian Constitution has not been infringed. In this case it has been grievously infringed. In the premise, it is unconceivable how a hearing can be allowed to take place. Any conclusion to the contrary would render meaningless a right enshrined in the Constitution as the Supreme Law of the land.

**The appropriate remedy**

As stated earlier, both the Constitutions of Namibia and Zambia protect and guarantee the right of the accused to a fair trial within a reasonable time. A cause of action for alleged violations of the right will necessitate an application for a declaration of the violations. The order for the remedies will have to be made to the courts in both countries that have jurisdiction over constitutional matters, namely the High Court and the Supreme Court.

In criminal law jurisprudence, there are two schools of thought on the appropriate remedy to be ordered in cases of violation of the right to fair trial, whether an order for a stay of prosecution (an order to abort the trial) or an

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50 S v Heidenrich (NmHC) 1996 (2) BCLR 197 (NmH): 1998 NR 229 at 235 A–C.
order for a speedy trial. In *R v Askov*, the court granted a stay of proceedings. In the *Mlambo* case, the court granted a permanent stay of proceedings, but added that an order that the charge be dismissed would be tantamount to a pronouncement of innocence. In the Namibian case of *S v Heidenrich*, Hannah J stated the following in this regard:

> [O]nce the main of the sub-article 12(1)(b) of the Constitution of Namibia, which provides that the accused shall be released in the event of the violation of right, has been identified as being not only to minimise the possibility of lengthy pre-trial incarceration and to curtail restrictions placed on an accused who is on bail but also to reduce the inconvenience, social stigma and other pressures which he is likely to suffer and to advance the prospect of fair hearing, then it seems to me that “release” must mean release from further prosecution for the offence with which he is charged. It is only by giving the term this wider meaning that the full purpose of the sub-article is met. Release from custody or from onerous conditions of bail meets part of the purpose of the sub-article.

In another Namibian case, namely *S v Uahanga and Others*, the accused had originally been charged in March 1995. Thereafter the matter had been postponed several times. By the time the matter was to be heard in October 1995, the state requested a further postponement. When the matter was postponed in July that year, it had been recorded that October was to be the final postponement. On the day in October when the matter was to be heard, witnesses were available, but there seemed to be a problem with the availability of prosecutors. It appeared that at least two prosecutors were not involved in trials, but the state alleged that it could not proceed. The magistrate acquitted the accused, invoking Article 12 of the Namibian Constitution, which provides for the right to speedy trial. On appeal, the High Court held that the accused were entitled to a speedy trial in terms of Article 12 of the Namibian Constitution. The delay had not been unduly long, but the High Court held that the explanations for the continual postponements had been unsatisfactory. The High Court found that the conduct of the prosecution had been slovenly and that the accused had been correctly acquitted by the lower court.

However, in *Van As and Another v Prosecutor-General*, a three-member High Court bench in interpreting *release* in Article 12(1)(b) of the Namibian Constitution – which provides to the effect that, where a criminal trial has not taken place within a reasonable time, the accused may be released – the Court held that “release” in Article 12(1)(b) could not be equated with *acquit*, and that it merely meant that an accused would be released. The High Court also held that this did not preclude the prosecution from rearresting the accused at a later stage and reviving the proceedings. The court added, however, that

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51  *R v Askov* (1990) 2 SCR 1199.
54  1998 NR 160.
55  2000 NR 271.
this interpretation did not lose sight of the fact that the prosecution should not be allowed to benefit from its ineptitude. The court accordingly held that Article 12(1)(b) did not provide for a permanent stay of criminal proceedings.

The Supreme Court’s interpretation of “release” in Article 12(1)(b) in the case of Margaret Malama-Kean v The Magistrate of the District of Oshakati NO and the Prosecutor General NO)\(^{56}\) is the latest and most comprehensive formulation of the nature and forms of release as contemplated by the framers of the Namibian Constitution. The court confirmed the premise that those that those competent criminal courts with the necessary jurisdiction should, in an appropriate case of unreasonable delay, have the power and responsibility to order a permanent stay of prosecution as at least one of its discretionary powers. The Supreme Court further indicated that a permanent stay of prosecution was not the only order contemplated as constituting the discretionary powers of the criminal courts, and that a particular form an order for release from the trial took would depend not only on the degree of prejudice caused by the failure of the trial to take place within a reasonable time, but also that court’s jurisdiction in considering the issue and making the order. O’Linn AJA, delivering the Supreme Court judgment, described the various forms of release as follows:

The question however still remains what is the full significance of an order – “shall be released from the trial”.

It is clear that the remedy provided in art. 12(1)(b) – “shall be released” [–] is couched in mandatory and peremptory terms. Nevertheless it does not seem to me that only one form of release from the trial would meet the peremptory requirement. The following forms of release from the trial, will in my view all be legitimate forms meeting the peremptory requirement:

(i) A release from the trial prior to plea on the merits, which does not have the effect of a permanent stay of the prosecution and is broadly tantamount to a withdrawal of the charges by the State before the accused had pleaded.

This form of release will encompass:

(a) Unconditional release from detention if the accused is still in detention when the order is made for his/her release;

(b) Release from the conditions of bail if the accused had already been released on bail prior to making the order;

(c) Release from any obligation to stand trial on a specified charge on a specified date and time if the accused had previously been summoned or warned to stand trial on a specified charge, date and time.

(ii) An acquittal after plea on merits.

(iii) A permanent stay of prosecution, either before or subsequent to a plea on the merits.

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In the South African case of *McCarthy v Additional Magistrate, Johannesburg*, the court decided that a party asserting an unreasonable delay in prosecution was required to show more than average systemic delay, and that an indefinite stay of prosecution would seldom be granted in the absence of extraordinary circumstances.

**Conclusion**

Both Namibia and Zambia are sovereign states with Supreme Courts as their final courts of appeal; therefore, foreign authorities are not binding, only persuasive. But the authorities referred to above are not from the courts of only one jurisdiction: these authorities all confirm that a stay of proceedings is an appropriate remedy to be ordered when the right to fair trial has been violated. Considering the length of the delay in the Zambian case, for example, coupled with the non-availability of the case records, it is inconceivable that the state would wish to continue with the proceedings. Constitutional bail has already been granted by the trial court and, therefore, further detention of the victim in a case of this nature will amount to the court disobeying its own orders, and would be an affront to the Zambian criminal justice system. Appropriate remedies provided for by the Criminal Procedure Code of Zambia need to be investigated and ascertained, and should be brought in line with a more just system, such as those that apply in the municipal laws of South Africa and Namibia, which have specific legislative provisions relating to remedies to be granted in cases of violation of the right to fair trial.

Victims of violations of the right to speedy trial are also entitled to invoke the civil jurisdiction of the superior courts to apply for a declaration of the violation of their rights and due compensation. But, in practice, in order to succeed in the claim for compensation, sufficient evidence must be adduced to establish quantifiable loss. Evidence such as job loss, loss of conjugal and matrimonial rights, and deprivation of family life will be relevant and necessary.

Namibia and Zambia are both signatories to the ICCPR and the Charter. Furthermore, Zambia, for example, has internalised the norms and standards of the International Bill of Rights in her domestic laws, and more specifically, in the Constitution of Zambia, Article 18(1) of which protects the right to fair trial within a reasonable time. It is submitted, therefore, that the Zambian law enforcement agents are bound not only by the treaty obligations of the above-mentioned international instruments, but also by the provisions of their own Constitution, the Supreme Law of the land, to give effect to those international standards and norms.

Applying the principles of law dealing with the right to fair trial within a reasonable time to the *Chisimba* case, for example, will lead to the conclusion

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57 2000 (2) SACR 542 (SCA).

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that there was obviously an unreasonable delay by the state and, hence, the triggering threshold requirement is satisfied. If enough evidence is adduced to establish trial prejudice, then a clear case of the infringement of the rights of the victim exists. In the premise, therefore, the victim is entitled to approach the Constitutional Court of Zambia for redress. The remedies of stay of proceedings and release should be available to the victim.

In terms of applying to the treaty bodies whose protocols Zambia has ratified, the victim prima facie has jurisdiction before such bodies, but with the proviso that the exhaustion of domestic remedies requirement has to be complied with – except, of course, where no domestic remedies are available, or there is unreasonable delay on the part of the Zambian courts in granting remedy.