

THE UNIVERSITY OF ZAMBIA

FACULTY OF LAW

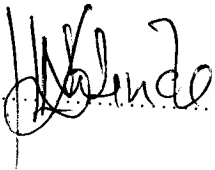
I recommend that the obligatory Essay prepared under my supervision by Anthony Kasonde

Entitled

**THE LAW RELATING TO RIGHTS OF DETAINEES IN
ZAMBIA: THE CASE OF KAUNDA AND 79 OTHERS.**

Be accepted for examination. I have checked it carefully and I am satisfied that it fulfills the requirements relating to the format as laid down in the regulations governing obligatory essays.

SIGNED:



DATE:

11th May, 2000

**MR. LEONARD NKOLE KALINDE
SUPERVISOR**

A B S T R A C T

“ We should not, however, be paralyzed by this gap between our aspirations and the reality of world affairs. There is no alternative but to rededicate ourselves continuously to promoting universal respect for rights universally recognized. We all know too well the price to be paid if we falter.”

Per : Javier Perez De Quelar

DEDICATION

To the memories of my loving and very special mother, Bertha White Sokontwe Mutale, my uncle Archbishop Elias Mutale from whom I drew my greatest source of inspiration, and my grandmother, Monica Lombe Mutale for your words of wisdom which are still fresh in my mind to this day.

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First, and foremost to my dear wonderful I God for letting me reach this far notwithstanding the many huddles along the way.

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Finally, for those I have failed to mention please do not despair here is space to add your name _____.

PREFACE

Zambia is one country where detainees (both ordinary and political) have not had it well. From the time a small nation with a handsome population became independent in 1964 right through to 1973 when it became a one-party state, and from 1990 when plural politics were once again re-introduced up until now, Zambia has experienced a relatively fair skirmishes. Among them the Lumpa uprising, the Rhodesian Unilateral Declaration of independence (UDI); three attempted coup plots, food riots etc. All these events have led to different detentions ranging from normal detentions (i.e those dealt with under the ordinary and normal law) to political detentions (i.e those detained by the President under the extra- powers he assumes in a state of emergency). Be that as it may, the effect and impact on those detained has always been traumatic. These people have come out bitterly complaining, calling and referring to these confinements as horror. Apart from the conditions, detainees have almost always complained of torture and inhuman treatment that they are subjected to.

The coming of the new government, the Movement for Multi-Party Democracy (MMD) in 1991 brought new hope since it purported to champion human rights for all. However, before it could even settle down, the Zero Option, Black Mamba, and the 1997 court attempt episodes all produced a number of persons that were detained. These coupled with ordinary cases of detentions all produced evidence which shocked even the die-hards cadres of the MMD government- the police force was becoming more and more brutal, it needed to be checked.

It is in these premises, that this essay titled "The law relating to rights of detainees in Zambia: the case of Kaunda and 79 others" has been undertaken. It is hoped to undertake a detailed study especially in view of the fact that the command has categorically denied that the police are involved in abuses, particularly torture. The police service has even gone further to state that any police officer involved in such vices will be prosecuted, as if to dismiss any allegations of torture as being unfounded and baseless. However, whatever shape the debate might take, one thing is clear: the rights of detainees in

Zambia are sparsely respected later on observed. Despite laws protecting detainees, their rights are scarcely recognised once they cross the dark doors into the chambers of horror.

The above notwithstanding, Zambia has a code of human rights which forms part three of its constitution. Moreover, it is party to the various human rights international statutes which statutes, inter alia, spell out the rights of detainees. However, compliance with the exacting requirement for the protection of human rights spelt out in these instruments can only be secured, in the final analysis, by a determined, resolute and uncompromising application of these standards to all aspects of Zambia's social, political and economic programmes and activities.

It must be stressed here, though, that the point being underscored is not the incorporation of basic human rights into conventions (for this has been done from time immemorial, and besides human rights are guaranteed not by conventions but by their humanity), or constitutions (for some countries which have not done this are performing far much better than those that have). Instead, the crucial and fundamental issue now is the existence of conditions conducive to implementation of the rights which exist in relevant legislative materials.

The issue of treatment of detained persons in Zambia, therefore, is not new but has been topical for some time now. This is particularly so when regard is had to the fact that when legislation confers the power to detain without trial, as the Zambian preservation of public security Act does, it principally authorizes the invasion of the individual's most prized fundamental liberty- the liberty of personal freedom. Evidently, abuse is eminent in such a set up, and predictably the power of detention and restriction is glaringly extensive and frightening since, as the great historian of all a times, Lord Acton, once stated, "power tends to corrupt, and absolute power corrupts absolutely."

Respect for human rights is, therefore, imperative. This essay takes as its premise the fact that this respect should be awarded to all persons (including detainees) irrespective of race, language or position. Detainees because of the situation they are found in are

likely to have their rights flouted, abused or denied. They are confined in prisons, they are defenceless, they are excluded from the outside world. On top of this, however, over-zealous law enforcement officers and excited politicians see this as an opportunity to torment the harmless citizen or political opponent, as it were. This essay, therefore, sets to point out the crucial point that these detainees, despite their circumstance, are not guilty, and thus for all intent and purpose should be treated as such.

This paper shall, therefore, in seeing to it that rights of detainees are not only recognised but also respected and observed take both an academic and practical approach to the problem at hand. It is the author's hope that when all is said and done, a lot of improvement will be done not only to conditions obtaining in cells but also to the status accorded the detainees. Indeed, it is hoped that this paper will propose not only what is deserved for detainees but also what is deserved by detainees. In examining this topic, though, it is hoped that all the stakeholders will be highlighted and their roles spelt out. Only then will one know what his/her role is in ensuring success in our endeavour to improve treatment of these socially excluded people. This is crucially cardinal because much as some of us might think that the issue at hand does not concern us, it might be true for now, but as Stephen Lungu alias Captain Solo stated, in urging the Director of Public prosecutions, the Attorney-General and the President to improve prison conditions, "no one knows who the next tenant in prison would be."

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INTRODUCTION

This paper is conveniently divided into five parts. The first chapter is basically an overview of the law of detained persons generally. In this part, the author has endeavoured to effectively and succinctly describe and distinguish a detained person from a free person. This is done to enable the reader appreciate the distinction, which in fact forms the foundation of this paper. It is purely on this premise that one can understand and assimilate why a lot of people and interested human rights groups become so vociferous when it comes to treatment of detained persons. Further, the chapter has highlighted police powers to arrest and detain and how they impact on individual liberty.

Chapter two explores how far Zambian laws have gone into providing for the rights of detained persons. It must be grasped from the outset that providing for rights is one thing and their observance quite another. To this effect, we have not only ended at examining statutory provisions but have in fact endeavoured to see how much these provisions have been adhered to by way of case analysis of both reported and unreported cases.

It is now a notorious fact, and is evident from the efforts being made by various international bodies such as the United Nations, the International Court of Justice and the Organization of African Unity, just but to name three, that the promotion, protection and observance of human rights (including those of detainees) is a central concern of the international community. In this regard, it will be appreciated that the international regime is ready to pierce through the most prized veil of sovereignty and compel individual states to do that which it has undertaken to do in accepting to be party to various international agreements. It is in this vain, that our chapter three takes a detailed look at how international conventions and declarations (to which Zambia is a party) have gone to protect rights of detained persons.

It can not be over-emphasized that one can only fully appreciate the proper functioning of a system once one gets in there or takes time to talk to people that have been or are

actually in the system. In this regard, it is the author's considered view that in order to appreciate best the life of a detainee one must share his/her moments with a detainee. The author's paper, therefore, turns to this aspect in chapter four when he takes practical and exclusively interviews with detainees, past and present. These interviews are crystallized in detainees who were held in connection with the 1997 coup attempt.

Finally, the fifth and last chapter presents the comments and recommendations offered by the author with a strong urge to authorities that, as we enter the "true" new millennium, a new chapter of respect and observance of human rights must be opened so that abuses are left to rot in the dust bin of history. This paper is, therefore, presented to help authorities and everyone involved move towards that. Thereafter, the conclusion emanating from the hitherto discussion shall ensue.

CHAPTER ONE

1.0 INTRODUCTION

In this chapter, we shall endeavor to explore the law of detained persons generally. It is cardinal to grasp from the outset that the object of this paper generally is to ascertain how far the Zambian authorities have gone in not only recognizing but also applying the minimum standards prescribed by international Human Rights instruments vis-à-vis treatment of detained persons. In this regard, the scope of this paper is not only limited to the so-called "political detainees" but also encompasses all types of detentions perpetrated by the powers that be. However, the author is alive to the fact that, more often than not, authorities are prone to violate the rights of political detainees in order to vindicate the perceived enmity between those in power (and hence armed with a tool to command those having custody of the said detainees) and those outside the realm of that power. To this end, the issue of whether or not the detainee belongs to the ruling party (or government even) does not arise. What is of relevance, though is whether or not one has the power to detain. Indeed, this is paramount because it has been demonstrated in the past, that even those high-ranking ruling party officials can and in fact have found themselves detained¹

We shall commence our discussion of chapter one by looking at the police powers to arrest and subsequently detain. In this regard, we shall distinguish lawful arrest and detention from unlawful ones, and also ascertain the impact of these acts on a person's liberty. Therefore, in the second part, we shall embark on distinguishing a detainee from an accused and a free person. The essence of this part, of course, is to show why so many human rights groups interested non-governmental organizations (NGOs) and some donor countries advocate so much for the rights of these socially excluded persons. Finally, we shall endeavour to answer the question whether or not detentions are mandatory. In this vain, we shall highlight which offences call for mandatory detentions and which ones are bailable. Also, in so doing, we shall bring to the fore why authorities insist on detaining suspects in some situations. Lastly, we shall conclude our discussion of this chapter to the hitherto topic.

1.1 **WHO IS A DETAINEE?**

It is imperative to note from the outset that whereas in a literal sense a detention can be effected by virtually any person exercising some form of control over another in an inferior position, for instance a prefect at school over a commoner, we are here concerned with detentions effected by people or officials in lawful public authority. In this regard, the term detention as used in this paper shall refer to detentions effected by the Police, the Drug Enforcement Commission, Anti-Corruption Commission, Immigration and Zambia Revenue Authority officials, and indeed agents of the Executive wing of the Government. Further, it is cardinal to appreciate that private citizens can also assume powers to detain, like public officials, where there is reasonable cause to do so. Be that as it may, it is an indisputable fact that, in a majority of cases, the actual and note worth cases of detentions end up with the police. In this regard, it is only prudent to examine the police's power to arrest and subsequently detain.

The concept of arrest can be defined in so many ways but perhaps Black's definition under scores the point when he states that to arrest is:

"To deprive a person of his liberty by legal authority. Taking under real or assumed custody of another for the purpose of holding or detaining him to answer a criminal charge"²

The arrest, it must be further noted is accomplished by placing such arrested person under actual restraint or control of the person making the arrest, or by the person voluntarily submitting himself to the custody and control of a person making the arrest.³ However, it is imperative for the arresting authority to communicate to the arrested person the fact of his or her being arrested. Thus in order for the arrest to be completed, it is crucial that the person arrested knows that he is actually under arrest. It, therefore becomes fundamental and necessary for the police officer making the arrest to actually inform the person of his intention to arrest⁴.

It is evident from the hitherto definition of arrest that once it has been effected, it impinges on a person's liberty. Owing to this fact, the law relating to arrest is predominantly statutory. It follows that whenever a police officer arrests someone there has to be some authority or basis backed by law. Accordingly, for any arrest to be lawful, it must be done in accordance with the law and anything falling short of the requirements will be an unlawful arrest (i.e. void in law) and hence a clear infringement of the individual's rights to liberty. This wanton disregard of the law leads to litigation and punitive compensation is pronounced if proved.⁵ It is fundamentally for this reason that arresting officers are required to exercise caution and professionalism in conducting their duties. To this end, it has been observed that:

“It is therefore important that the decision to arrest be effected cautiously and only when it is necessary. To this effect, the police should when making an arrest act in accordance with the law and should not use their discretionary powers vested in them arbitrary to the detriment of the individuals”⁶

Further, it is imperative and paramount to appreciate the fact that in so far as the police are given powers to arrest, they also have powers to detain the person so arrested. Detention for purposes of our discussion, occurs when a person is remanded in custody or at the police station before being charged. Once the person affected is charged, the difficulty is substantially reduced in that such a person may be entitled to apply for bail when he/she appears before the court. It must, however, be borne in mind that the decision of bailing or remanding an arrested person in custody for bailable offences is discretionary. This discretion though, in the absence of extenuating factors⁷, is exceedingly limited - suffice it to say that the proper course for courts to take is to grant bail. This does not only marry well with the maxim that justice must not only be done but be seen to be done. It also reduces the agony and trauma of the affected person vis-à-vis prison conditions.⁸

However, it is cardinal to note that some offences in Zambia ⁹ are non-bailable, and worse even some situations does arise which allow authorities to detain persons for a long time without charge.¹⁰ Evidently, in such instances the court's hands are tied and hence they cannot exercise their inherent jurisdiction of granting bail.. It is undoubtedly the period in custody before being charged, or after being charged but with a non-bailable offence or indeed with a bailable offence but where bail is refused, when the investigation is being actively pursued that creates enormous problems in so far as rights of detainees are concerned. A detention is, therefore a very serious matter as far as the individuals rights to liberty are concerned.

As noted with arrests, for a detention to be lawful too, it must be done in conformity with the law. There should be valid grounds for detaining a person i.e. grounds can entitle any reasonable person to effect a detention. Consequently, a police detention is unlawful an initial if grounds there do not exist at the time of such detention. Thus in Chipanga Vs Attorney-General ¹¹, the court observed that:

“A person physically in Zambia or under Zambian territorial jurisdiction may be deprived of his liberty only if that deprivation is sanctioned by law; in the absence of some legal justification for the deprivation of a person's liberty whether legislative or under common law that deprivation is unlawful”.¹²

It must be emphatically noted that the issue of existence or non-existence of grounds of detention is crucial, for a detention which is prime facia lawful can subsequently become unlawful and vice versa ¹³ due to the non-availability or availability of the said grounds.

We should, however, be alive to the fact that in Zambia it is slowly becoming a trite practice for the police to detain innocent citizens in custody on the pretext of assisting the police with their investigations. These innocent souls are kept in detention against their will for a long time before being set free without even a single charge. In fact such people are never even formally arrested as procedurally required.

What is even more frightening, and of fundamental concern to us now is a complete lack of basis for such detentions and indeed, the length of time such detainees have to undergo. The recent case of a Luanshya woman ¹⁴ who was picked up by the police to assist them locate her son who was on the run is illustrative of this concern. The named woman was subsequently detained and subjected to mental and physical torture as well as to inhuman and degrading treatment - notwithstanding the fact that she was not formally arrested. At the end of a two-week detention, the said woman was set free with absolutely no charge at all. The situation is even more worrying when those detained are illiterate and thus unaware of their rights. In such instances one can not help it but to pray to a super natural being for intervention otherwise most police officers are geared to keep them incarcerated until what they (the police) are looking for is achieved. It is because of such situations that it has lucidly been stated that:

“The police do detain persons for questioning a practice euphemistically referred to as ‘assisting the police with their inquiries such detention can last for several days’”.¹⁵

We have thus far shown that the law clothes certain officials with the power to detain. We have also distinguished legal detentions from that used in common parlance. We have also noted that ultimately the power to detain end up in police hands hence our examination of their powers to arrest and detain. We further went on to distinguish lawful arrests and a lawful detention from unlawful ones. However, and most importantly, we noted that both of these acts (i.e. arrest and detentions) impinge greatly on a persons’ liberty hence the need to act diligently, and with care and caution. Having done that, we are now going to distinguish a detainee from accused and free person vis-à-vis- rights to be accorded to them.

1.2 **A DETAINEE DISTINGUISHED FROM AN ACCUSED AND “FREE” PERSON**

We have already defined a detainee as that person who is remanded in custody or some official place by some official authority usually before being charged. The issue which now falls to be considered is whether or not such a person is different from a merely accused person or indeed a ‘free’ person. This is imperative because it is ultimately to

such distinctions that the powers that be will have to look up to in their treatment of these socially excluded people.

On the other hand, an accused person is one who has been formally charged with a punishable offence i.e. to say one who is alleged to be guilty of a punishable offence laid before a court having jurisdiction to inquire into the alleged crime. Put in common parlance, an accused person is that person who is alleged to have broken the law. It is cardinal however, to appreciate from the on set that Zambia's law as regards reception of accused persons is that such individuals are deemed innocent until proven guilty by a competent court of law.¹⁶ In the circumstances, and to all intent and purposes an accused person is no different from a 'free' person per se. Both categories of persons stand innocent before the courts, and indeed in the eyes of the law. In these premises, the treatment of such person's call for no distinctions at all be it in legal or non-legal environments since the law itself provides for none.

As discussed, above, the power of the police to arrest also carries with it a somewhat corollary power to detain a person so arrested. The reader is, of course, advised to be alive to our definition of arrest given above. That it is an act of depriving a person of his/her liberty by legal authority. That such an arrest is taken under real or assumed custody of another for the purpose of holding or detaining him to answer a criminal charge. It is thus apparent from this definition that the main purpose of depriving someone of his liberty is to compel him/her to answer a criminal charge. In effect, what this entails is that, as per Zambia's constitution, such an arrested person is innocent until proven guilty by a competent legal tribunal. Put it in other words, such a detained person is free but for the confinement.

It is thus evident from the foregoing that (save in unlawful detentions) an arrest precedes a detention. Normally what is supposed to happen is that when a person is arrested his particulars are taken and registered at a convenient place, usually at the police station. He/she is then put in cells to compel his/her attendance in court within 24 hours of arrest¹⁷ or at most a reasonable time regard being had to the obtaining circumstances of the case in casu.

However, it need not be over emphasized that the police officers are also authorized by law to release an accused on bond provided sureties are available, and an offence alleged to have been committed is one which, but for lack of a competent court at hand, would have entitled an accused to bail. This, however, now appears a fallacy because police bonds are rarely given in practice on merit. Instead, one has to know someone of influence above or around the arresting officer to be able to be entitled to a bond. In the absence of such influence, therefore the police are geared and determined to stretch the law beyond its limits.¹⁸ In these premises, therefore one who is arrested with aailable offence is only left with the courts, as a bulwark of justice, to grant him one. Despite this, however, we are alive to the fact that although some offences areailable and the law establishing a general presumption in favour of bail, this can be refused in prescribed circumstance.¹⁹ The net result, therefore is that an accused person who is denied bond and subsequently bail becomes a detainee along side those who are alleged to have committed unailable offences. These, in turn, join another class of detained persons popularly referred to as "political detainees".²⁰

In the circumstances, therefore we can safely state that there is no distinction between an accused person and a free person save to say that the former in that state is alleged to have done something contrary to what the law provides. Further, it has been shown that an accused person can either be left in that state or be detained to compel his/her attendance at court. What however, is of significance to us is that there is really no distinction in law among these three (3) classes of persons warranting distinct treatment. A detainee is not guilty of any offence alleged or otherwise, and on this premises he/she deserves rights accorded to other persons outside those confinements. It is, of course, appreciated that because of the confinements these detainees become weak and defenceless, cut and excluded from the outside world. This though is no excuse and justification for flouting, abusing and denying their rights. This should not be the time and opportunity for overzealous policemen and excited politicians to torment and harass the harmless citizen or indeed political opponent. It is thus only prudent to appreciate the fact that despite their unfortunate circumstance they (the detainees) are not guilty until proven so by a competent court of law.

It is fundamentally and ultimately because of this sanctity principle that concerned non-governmental organizations (NGO's) and human rights activists have and continue to come out so strong on the rights of detainees. It has for long been recognized that if there is anything that money cannot buy is a person's liberty. It is basically for this reason that caretakers of these socially excluded persons are fore warned never to subject these innocent persons to untold misery when they are no different from them but for circumstances. There should be no doubt by now that the right to liberty is the individual's most prized fundamental liberty. Small wonder Price J. countenanced this argument when he stated in Mpanza Vs the Minister of Native Affairs²¹ that:

“The right invaded is one of the most important rights that can be enjoyed by any person”.²²

It is aptly manifest from the foregoing that we have now compared and contrasted between a detained person and an accused and free person. We have lucidly shown that there is really no difference save to observe that, in a detention, a person is confined to a restricted place to compel his/her attendance at the hearing of his criminal matter - or, indeed, where the law obliges a person so arrested to be detained until his/her case is disposed off. However, be that as it may, it has been noted that both the accused and detained persons are presumed innocent until the contrary is proved hence their being on equal footing with the free person. The questions which, therefore, falls to be considered now are: why should a person be detained and whether or not all accused persons should be detained?

1.3 IS DETENTION MANDATORY?

Our discussion has thus far shown that the law in some instances authorizes detentions of persons until their cases are disposed off. Section 123(1) of the Criminal Procedure Code, CAP 88 of the laws of Zambia is instructive of this point when it provides, by way of a proviso that:

“Provided that any person charged with -

(i) murder, treason or any other offence carrying a possible or mandatory capital penalty:

(ii) misprision of treason or treason felony; or

(iii) Aggravated robbery;

shall not be granted bail by either a subordinate court, the high court or supreme court or be released by any police officer”.

This proviso is indeed self-explanatory and hence does not require lengthy discussion on the same. It entails that if one is arrested and charged with any of these capital offences then in so far as the law is concerned such a person shall be remanded in custody.

Furthermore, under Article 30(1) of the Constitution CAP 1 of the Laws of Zambia, the President, acting in consultation with Cabinet is empowered to declare a State of Emergency. Under such a situation the Preservation of Public Security Act, CAP 112 of the Laws of Zambia, comes into effect. On the invocation of this Act, it must be appreciated, the police and the Executive assume extra legal powers to do what they cannot do under the normal situation. Thus, authorized police officers²³, do not need a warrant to search any premises or arrest anyone: people can be detained for up to twenty-eight days without charge²⁴. In addition, the President is also granted extraordinary powers to detain any individual indefinitely²⁵. In such situations all that the law requires is a notice which must be published in the Government Gazette specifying the name, the place and law under which detentions were made within fourteen (14) days²⁶.

It is cardinal to appreciate that section 123 (4) of the Criminal Procedure Code also imposes mandatory detentions on those detained on specified charges when it states that:

“Notwithstanding anything in this section contained, no persons charged with an offence under the State Security Act shall be admitted to bail either pending trial or pending appeal, if the

Director of Public Prosecutions certifies that it is likely that the safety or interests of the Republic would thereby be prejudiced”²⁷

Evidently, in such instances, persons accused of offences under this Act, for instance espionage, and where the Director of Public Prosecutions (DPP) declares such persons a danger to public safety, such persons are on this premise, excluded from Society until their prosecution is at an end. Further, another Act worth noting which provides for compulsory detention is the **Narcotic Drugs and Psychotropic Substances**, CAP 96 of the Laws of Zambia. Under this Act, every drug trafficking and drug manufacturing offence is treated as a cognizable offence for the purposes of the Criminal Procedure Code.²⁸ In this connection, Section 43 of CAP 96 provides that:

“Whenever any person is arrested or detained upon reasonable suspicion of his having committed a cognizable offence under this Act, no bail shall be granted when he appears or is brought before any court.”

It is thus apparent that in all of the situations cited above, the law makes detention of persons arrested mandatory. The Police officers have no power to issue out bonds, and the Court’s powers in this regard are but at their lowest ebb.²⁹

However, other than situations referred to above, the law’s position on suspects is flexible i.e. it gives a discretion on the powers that be to decide on the question of fact whether to effect a detention or not. In this respect, detentions become discretionary, and very subjective, and indeed arbitrary where police officers are concerned. Small wonder bail applications are always head-high on the majority of Criminal cases before the Zambian Courts - just as habeas corpus³⁰ applications are on an increase than ever before in these courts.

We have already established that the rationale underlying the concept of detention is to compel the appearance of the accused person to answer a criminal charge leveled against him/her. We have also noted that other than for this reason, an accused person can only be detained and denied bail in any of the following circumstances:

- (a) that there are substantial grounds for believing that the accused, if released, would commit an offence while on bail or;
- (b) that the accused, if released, would interfere with witnesses or;
- (c) to prevent escape of the accused person before the hearing of his case.

Therefore, it should go without saying that, in the absence of any of these grounds, an accused person charged with a bailable offence should be granted one. This, of course, does not only reduce congestion in the already over crowded police cells and prisons but also prevents the accused person (an innocent person in law) from being subjected to unhealthy and deplorable conditions even before he/she is convicted. By saying this author is not in any way suggesting that convicted persons deserve being kept under such conditions. To the contrary, it is submitting that they also deserve better conditions. However, if such are the conditions prevailing and authorities are reluctant or even adamant on changing for the better, it is only plausible to say that people with alternatives (i.e. those accused with bailable offences) should be let out to enjoy the better alternative - at least during the time that they are deemed innocent.

However, the obtaining situation in practices makes sad reading. This is not only because accused persons are not accorded the bail they rightly deserve but most importantly because even people not formally arrested as required by law and whose positions reveal no valid ground under which any competent authority can arrest later on detain - are being detained. It is also true to state that it is common practice in Zambia for the police to take people into custody simply to put questions to them as regards a particular offence the police might be investigating at the time and in the process ascertain whether such person can be charged with the same offence. This undoubtedly exhibits a high degree of unprofessionalism on the part of the police service in that their weak and poor tools of investigation are reflected by impinging on other people's human rights. These, no doubt are clear and wanton infringement of citizen's constitutional rights which are protected and hence need to be respected and guarded against.

Further, while appreciating the fact that the police are vested with powers to conduct preliminary investigations of a crime without impediment, we hasten to add that they

have mostly abused this power. For instance, the police have out-stretched their power to detain to encompass the detention of people for the sole purpose of questioning; helping the police with investigations, and as a "lien" until the absconding or purported fugitive suspect is apprehended (sic). These purported extensions of detention powers are clearly unjustified and a violation of the individuals' rights to liberty. The law is manifestly clear and lucid on this issue. One can only be arrested for an arrestable offence i.e. an offence expressly created by law so that the police have no legal justification to detain in such cases, as noted above, unless an accused person be arrested in respect of a criminal charge and informed of the reason thereof.

In the circumstances, the courts have faced little difficulty in holding that individuals held and detained under these flimsy grounds are entitled to compensation for false imprisonment and unlawful detention.. Thus, in the recent case of Getrude Munyosi and Attorney - General Vs Catherine Ngalabeka³¹ in which the Respondent, a resident of Luanshya, was at the material time a mother of a young man aged 21 years. On 20th September 1994, she was picked from her mother's house by the first Appellant, a woman constable in the Zambia Police Force based at Luanshya Police Station, and taken to her house. At the house, the first Appellant searched her house. The search was to look for items purportedly stolen by the Respondent's son. After finding nothing in the Respondent's house, the first Appellant demanded that the Respondent directs them to the whereabouts of her son. Thereafter, the Respondent was ordered to escort the first Appellant to Luanshya Police Station where she was detained in the police cells without charge until 17.00 hours the following day when she was released.

Meanwhile, at the Police Station she was told that she would only be released if she produced her son. Upon her release, therefore, she was told to look for money and go out in search of her son. She accordingly got an advance from her employers and went out looking for her son. She first went to Lusaka, then Ndola rural and finally Serenje but without success. On 20th October 1994, she received a call asking her to report at the said police station in room No 43. The call was made by the first Appellant. The Respondent got to the said room and found the first Appellant who inquired as to whether she had found her son to which she replied in the negative. There upon, the first

Appellant handcuffed her and threatened her with assault if she did not produce her son. Despite protestations from her mother that she was a sickling, she was again locked up in the police cells. She stayed there for three days before being transferred to Remand Prison. The Respondent was yet again not charged with any offence.

It was established as a fact that during her detention in September she spent the night in a dirty and filthy cell which had a blocked toilet with urine and human excretes all over the floor. That she was not provided with any beddings. Instead, she had to use her chitenge material to cover herself. Further, that she was not given any food and she was not allowed to receive food from relatives,. Lastly, that she was also not given an opportunity to bath. The conditions during her second detention were basically the same. At remand prison, she shared beddings with a female prisoner and was eating meals prepared for convicted prisoners up until her release on the 26th October, 1994.

Moreover, the learned Deputy Registrar, in the Court below, found as a fact that at all the occasions when the Respondent was detained she was released without being charged with any criminal offence. To this end, the trial court found that the circumstances surrounding the Respondent's detention were undoubtedly very grave, dubious and revealed a gross violation of the Respondent's rights by an over-zealous woman constable. In these premises, the first Appellant was found guilty of having subjected the Respondent to cruel and inhuman treatment of the worst kind. The court, therefore ordered compensatory damages of K15,000,000.00. The Attorney - General appealed against both the finding and the award.

In dismissing the appeal, the Supreme Court observed that:

“In our view, this is the worst case of false imprisonment and unlawful detention involving a woman plaintiff by a woman constable who should have been more humane. ...indeed, the plaintiff was not duty bound to look for her son at whatever cost. It was the duty of the police.”³²

In fact in this case, the Supreme Court referred to the case of Re Siuluta and Three Others³³ and affirmed the High Court's decision that the police can only arrest for offences under the law. In this, connection, suspects are held to help with investigations as allowed by law. They have no power to arrest persons for the purposes of making inquiries. Their Lordships thus concluded by stating that in Zambia there is no law to detain anyone as hostage at ransom to force a suspect to come to a police station.

Evidently, it is such worst cases of contumelious disregard of people's rights that seem to be on the upswing despite the purported police reforms³⁴. We shall endeavour to bring out as many cases as possible involving violations of detainees rights as we explore the law providing for detainees in Zambia and internationally in chapters two and three respectively.

1.4 CONCLUSION

We have endeavoured to bring out the police's power to arrest and subsequently detain. It has been established as a fact that the law provides a procedure of how an arrest is to be effected and most importantly that such an arrest has to be backed by a written law. Further, we noted that the police and other public officials are also vested with the power to detain suspects so arrested. However, because of the impact detentions have on a person's liberty it was found prudent that the detaining authority exercise great caution, care and professionalism before effecting a detention especially in cases that involve bailable offences.

We also endeavoured to show that apart from the effect of confinement, there is no distinction between a detainee on one hand and the accused and free person on the other. This was premised on the fundamental fact that the Supreme law of this land, the Constitution, clearly stipulates that every person is presumed innocent until proven guilty. On this basis, it is our contention that detained persons be as free as "free persons" save for the issue of liberty but they are as much entitled to guaranteed rights as persons outside these social confinements.

Further, we brought to the fore the fact that some offences carry with them mandatory detentions i.e. to say for which the law expressly prohibits bail. Thus, a person arrested for such an offence is liable to be detained until his case is disposed off. However, we have noted that majority of cases are bailable, and hence do not warrant detentions. Be that as it may, the situation on the ground is quite different. Police stations and prisons are filled with detainees accused of bailable offences and yet the police are reluctant to grant bond later on charge these people so they are brought before the court of law who will be able to grant bail and hence ease their hardships.

Finally, we established the fact that despite the law being clear on arrests and detentions, the police's attitude runs to the contrary. There are arbitrary cases of arrests and detentions that do not deserve such and hence end up being a sham, frivolous and at most a contemptuous abuse of other people's rights. Chapter two shall, therefore proceed to examine Zambia's legislation relating to detentions. This is aimed at bringing to the fore what Zambia's law specifically states on specific detentions, and whether or not the powers that be are adhering to the same.

END NOTES

1. For example, Princess Mirriam Nakatindi Wina, the Movement for Multi Party Democracy (MMD) National Chairperson for women's affairs and its member of Parliament for Kanyama and close ally of President Chiluba found herself at a wrong end when she was picked up on January 28, 1998. This signified a start to her month's long incarceration.
2. Henry Campbell Black Black's Law Dictionary West Publishing Company, Minnesota, 1983
3. This was aptly demonstrated by the Post Managing Director, and Editor in Chief Fred Mmembe and the then Special Projects Manager the late Bright Mwape when they surrendered themselves to authority to authority after a bench warrant was issued by the then Speaker of the National Assembly Dr. Robinson Nabulyato.
4. Section 19 of the Criminal Procedure Code, CAP 88 of the Laws of Zambia.
5. Article 13 (4) of the Constitution, CAP 1 of the Laws of Zambia.
6. Raymond and Dahl, Procedure and the Law of Arrest., Search and Seizure Marwaukee Hammersmith Karl Meyer and Company, 1961 @ p. 26.
7. These include evidence that there are substantial grounds for believing that the accused, if released, would fail to surrender to custody or commit an offence while on bail or interfere with witnesses.
8. In most cases the courts have considered issues of congestion, communicable diseases and deplorable conditions obtaining in police cells and prisons when deciding whether to grant bail or not.
9. See Section 123 (1) of the Criminal Procedure Code and Section 123 (4) thereof. Section 43 of the Narcotic Drugs and Psychotropic Substances, CAP 96 of the Laws of Zambia is instructive of this point also.
10. As when a State of Emergency has been declared under Article 30 of the Constitution CAP 1 of the Laws of Zambia. This Article gives powers tot he President to invoke powers of the Preservation of Public Security Act, CAP 112 of the Laws of Zambia.
11. 1976 Z.R. 224
12. Ibid @ p. 241

13. For example in the Case of Donovan Gray Vs the Attorney - General HP/1461/99 unreported, Justice Chitengi had little difficulty in compelling counsel from the Attorney - General's chambers to concede that the police had held the Appellant, illegally for 4 days before being charged on the 5th day when upon his detention became justified in law.
14. Gertrude Linyonsi and Attorney - General Vs Catherine Ngalabeka SCZ judgment No 23 of 1999.
15. J. A. Andrews, Human Rights in Criminal Procedure Wantins Nijhaff Publishers, London, 1982 @ p. 34.
16. Article 18 (2) (a) of the Constitution, CAP 1 of the Laws of Zambia.
17. Section 33 (1) of the Criminal Procedure Code, CAP 88 of the Laws of Zambia.
18. In Warren Misteard Vs Attorney - General unreported, for example the police had held the applicant for about 5 days over a civil case and refused to grant him police bond or charge him which would have entitled him on appearance before the courts of law and hence to bail. Only when a habeas corpus application was made did the police charge and release the applicant on day six.
19. This, bail may be refused if it is proved that there are substantial grounds for believing that the accused or commit an offence while on bail or interfere with witnesses.
20. This class is referred to later in the discussion.
21. 1946 W. L. D. @ 225.
22. Ibid. @ p. 229.
23. These include officers of or above the rank of Assistant Inspector of Public Security Act, CAP 112 of the Laws of Zambia.
24. This is contrary to Section 33 (1) and Section 108 of the Criminal Procedure Code which prescribes that suspects be charged within twenty-four (24) hours of arrest or reasonable time practical under the circumstances. Article 13 (3) of the Constitution also talks about undue delay vis-à-vis accuser's appearance before the court.
25. See section 3 (3) (a) of the Preservation of Public Security Act, CAP 112 of the Laws of Zambia as read together with regulation 33 (1) of the same Act.
26. In almost all of the cases recorded, Gazette notices are published albeit well after the limit.

27. This power, though, has been used arbitrary and not objectively. and since these cases concern the state, the DPP's have on several occasions, as will be shown later, allowed themselves to be used by Politicians ever in worthless cases not even involving the safety of the nation.
28. See section 23 (1) of the Criminal Procedure Code, CAP 88 of the Laws of Zambia.
29. The law empowers that courts, though to grant what is referred to as "constitutional bail" in instances where a person's liberty is seen to be arbitrary curtailed. See Article 13 (3) of the Constitution.
30. This is a prerogative unit directed to person who detains another in custody and commends him to produce the body of the detainee before the court.
31. Unreported, SCZ judgment No 23 of 1999.
32. Ibid. @ p. 5
33. 1977 Z R 14.
34. For instance this state department was changed from Zambia Police Force to Zambia Police Service in order to make it more humane and community oriented.

CHAPTER TWO

2.0 INTRODUCTION

This chapter sets to explore Zambia's law on detained persons. What this entails, basically is that we shall endeavour to examine various pieces of legislation providing both for detention of persons and their treatment thereof. This examination, of course will not be done in a "vacuum" Kind of arrangement i.e. it is not only the black letter of the law that is going to be considered but indeed how these legislations have been used. It is only prudent to take such a critical practical stance or else we shall be devoid of seeing how these powers have impacted on the Zambian Society.

The reader is reminded to bear in mind that as noted earlier on in the general introduction to this paper, the concern for human rights for all has dominated the international fora in the recent past. It has indeed been recognized that to reduce on the spate of wars, encourage friendship and promote democracy, respect for and observance of human rights for all is paramount. Small wonder various human rights groups and concerned non-governmental organizations (NGOs) have gone further to call on the donor community, the International Monetary Fund (IMF) and the World Bank to tie assistance, particularly balance of payments support, to clear and firm benchmarks of Zambia's progress in the protection and promotion of human rights to cut down on what is seen as non-stop violation of people's rights. This call has been so widely echoed because it has been realized that is but the only strategic use of aid to promote human rights and good governance in a country where aid is crucial for sustenance of the economy.

Clearly, this has and is being done to send a strong message to the powers that be of how fundamental respect for and observance of human rights is. It is however, cardinal to note that not only do we need to change or effect new legislation in this regard but also the necessary machinery has to be put in place towards the realization of the objects of such legislation. Furthermore, it is imperative that the attitude of authorities concerned ¹ change to reflect the new desired goals. It cannot be over emphasized that situations have at times arisen where despite world class legislation, implementation has failed or

gone otherwise because of the declared static attitude of authorities invested with the power to implement. In fact, as we shall discover soon, the problem is not so much with the law² but with the law user.

In light hereof and regard being had to our discussion in the proceeding chapter, it becomes evident that this concern for human rights is for all regardless of their status. In this regard, and particularly for purposes of this chapter, we contend that detainees, too, deserve accordance of human rights. We have already established that, save for the confinement, they are as much innocent and hence free as us. In this connection, there is no need and justification to deny them enjoyment of the basic rights, which they so badly need - especially in view of their new precarious situation.

We shall thus start our examination of this chapter with the Supreme law of this land itself, i.e. Zambia' constitution. We shall then proceed to show what the Criminal Procedure Code and other Acts of Parliament have provided for in this regard. Finally, we shall conclude our discussion. It must be noted however, that in discussing the legislations referred to above we shall refer to various cases by way of practical approach. However, it must be noted that the selection of cases is not meant to be a comprehensive list of human rights violations against the detainees. Rather, the cases are mainly used for two main purposes: first, to show how easily human rights of detainees can and have been violated in Zambia even by those who are meant to protect and uphold them. Second, by highlighting these instances of human rights violations, we hope to show that there is a link between the powers of the authorities concerned, e.g. the police, and human rights. Accordingly, abuse of these powers is more likely to lead to infringement of human rights. The question, which will subsequently be answered, therefore, is to what extent have the authorities observed and respected the universally accepted human rights when dealing with detainees' human rights?

2.1 THE CONSTITUTION OF ZAMBIA

It is prudent to appreciate from the on set that the machinery of justice works with many wheels such that, quite apart from judges and magistrates, many more are employed in the administration of justice, and their duties vary as does their status.³ Among these people are included police officers, prison warder, prison officers, officers-in-charge, commanders-in-chief of prisons i.e. the whole hierarchy of prison and police administration. Thus, when a prison or police officer oversteps his power or does not act within the limits imposed on him by law, he is abusing his powers. There are many possible forms of abuse of powers by the police and prison officers as this chapter shall reveal. We now accordingly explore what the supreme law of the land provides.

As already alluded to in the preceding chapter, it must be noted that detainees are not without some safeguards of their basic human rights. In this regard part III of the constitution of Zambia which is chapter one of the laws of Zambia, sets out the Bill of Rights of this country. It opens with a landmark provision, which provides that:

“It is recognized and declared that every person in Zambia has been and shall continue to be entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed, sex or marital status, but subject to the limitations contained in this part, to each and all of the following, namely:

(a) life, liberty, security of the person and the protection of the law;.....”⁴

It is evident that this provision succinctly under scores the issues we are concerned with in this paper. That is it deals with protection of the detainee’s life, liberty, security of his person, and indeed ensures protection of the law. It must be emphasized that the said Article 11, for the avoidance of doubt, expressly prohibits discrimination in the accordance of fundamental rights and freedoms of the individual on the basis of race, place of origin, political opinions, colour, creed, sex or marital status. Further, this

Article does not discriminate against detained persons. In fact the wording in Article 11 is so lucid on this matter when it states that "every person in Zambia". It is submitted beyond doubt that this phrase is meant to be inclusive rather than exclusive. This Article, though, is subject to certain limitations. However, it is imperative to appreciate that the limitations envisaged in this part are designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest. Be that as it may, it is clear that this Article under discussion is all embracing rather than specific. We shall now turn to consider specific articles of the constitution.

Article 12(1) of the constitution provides that:

"A person shall not be deprived of his life intentionally except in execution of the sentence of a court in respect of a criminal offence under the law in force in Zambia of which he has been convicted".

Clearly, the exception envisaged in this Article is one where one has been sentenced to death by a competent court of law. Thus, a person or officer who executes pursuant to such an order is said to be within the law and hence is protected first by the enabling law itself and indeed by the constitution. Furthermore, the constitution goes on to protect persons or officers who deprive another person of his/her life in any of the following cases:

- (a) in the defence of any person from violence or in the defence of property;
- (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
- (c) for the purpose of suppressing a riot, insurrection, mutiny or if he dies as a result of a lawful act of war;
- (d) in order to prevent the commission by that person of a criminal offence.⁵

However, it must be noted that for a person or officer to escape liability he/she must be able to fit his/her justification within any of the instances alluded to above. Most importantly, though, such a person must be able to demonstrate that his/her use of force was not excessive regard being had to the circumstances of the case but it was reasonably justifiable.

The situation on the ground, however, leaves much to be desired. The right to life, despite being of paramount importance, since it has no substitute, seems not to be respected or observed by the powers that be as arbitrary killings being recorded shall reveal. The police, indeed seem to have taken the law in their own hands and appear not to care about the consequences since they are hardly prosecuted whenever there is a killing, anyway-as the returns on civilians killed by the police shall show soon. Consequently, in recent times, many suspects have died in police custody in suspicious circumstances, often after brutal interrogations.⁶

It seems the police have no regard for detainees' right to life. This is aptly demonstrated by the charts 7 below obtained from the Police Force Headquarters showing the number of extra judicial killings of criminal suspects between 1993 and 1998. It must be noted that the returns are done on a provincial division basis but, for purposes of this discussion, we have picked out three provinces: two from the urban and hence pro-civilized provinces and one from the rural part of Zambia.

LUSAKA DIVISION

YEAR	NUMBER OF PERSONS KILLED BY POLICE	NUMBER OF OFFICERS ARRESTED
1993	12	1
1994	24	2
1995	13	2
1996	29	1
1997	43	1
1998	67	3
Sub-total	<u>188</u>	<u>10</u>

(Returns on civilians killed by the Police in Lusaka Province - a Zambia Police Force Headquarters publication)

COPPERBELT DIVISION

YEAR	NUMBER OF PERSONS KILLED BY POLICE	NUMBER OF OFFICER ARRESTED
1993	7	2
1994	11	2
1995	14	1
1996	11	4
1997	10	3
1998	22	1
Sub-total	<u>75</u>	<u>13</u>

(Returns on civilians killed by the Police in the Copperbelt Province - a Zambia Police Force Headquarters publication)

WESTERN DIVISION

YEAR	SHOT	DEAD	WOUNDED	NUMBER OF OFFICERS ARRESTED
1993	Nil	Nil	Nil	Nil
1994	1	Nil	1	Nil
1995	2	2	Nil	1
1996	1	1	Nil	1
1997	4	3	1	1
1998	6	4	2	2
Sub-total	<u>14</u>	<u>10</u>	<u>4</u>	<u>4</u>

(Returns on civilians shot at by the Police in Western Province – a Zambia Police Force Headquarters publication).

These returns clearly show incidences of illegal and unjustifiable police killings. It is worthwhile to note that although the returns have a column showing number of officers arrested which ultimately show officers arrested in connection with detainees' deaths. This appears to be a mockery of the whole system because, for instance only the officer arrested in 1993 from Lusaka Decision was actually prosecuted, convicted and sentenced. Others have gone scot free as if to confirm that their actions are justified. This can, however, be attributed to the fact that the very senior officers who are supposed to take action are the ones who tend to protect the junior officers and end up releasing them. The arrest of these overzealous police men seem to be just a cover up to show the public how affected the service is by such killings. In fact the returns above only reflect a few cases reported to the command. Many killings have gone unreported and usually covered up by the police. This is particularly so in situations where the relatives are unconcerned or not aware and the media's attention is not captured.

What is of more concern to the author is the manner in which suspects are killed. In most cases these people do not even pose a threat yet policemen would not hesitate to shoot on sight. For instance, the killings of two youths found stealing at Chainama

Orchard was uncalled for as the two suspects were clearly unarmed.⁸ This is a mere violation of the right to life and a clear abuse of power by the police in that they are by law allowed to use force, but have tended to use such even in uncalled for instances. This is aptly illustrated by a story carried in the Post Newspaper wherein it was reported that:

“Police gunned down a man they found urinating along Lumumba Road near the new Soweto Market. According to eye witnesses, the deceased was urinating in a nearby ditch when two police officers accosted him asking him to accompany them. One man is said to have attempted to bolt after which one of the police officers drew a pistol and fired killing him on the spot.”⁹

It is not disputed that Article 12 (b) authorizes the police to use force, which might result in death in order to effect a lawful arrest. However, the same Article talks about reasonable force with regard to the situation. Further, one is at pains to see what crime the deceased could have committed to warrant his killing save for the minor offence of loitering which only calls for payment of a small amount as an admission of guilty.

One is further reminded of deaths arising from torture of detained persons in cells. One prominent person to have died as a result of severe torture is Cuthbert Ng'uni and opposition member of parliament. He was picked up and detained along with other United National Independence Party (UNIP) officials in connection with the Zero Option case which was an alleged coup plot that the government claimed the opposition had organized in 1993.¹⁰ When Ng'uni was taken for treatment he was diagnosed with injuries as a result of severe torture which ultimately took his life. Further, there was another report of torture to death of a young lady by Matero Police in their endeavour to get further information as to who leaked the examination papers to her.¹¹ This scenario is no different from a reported case of torture to death of 26 year old Violet Tembo by police officers at Lusaka in Los Angeles Police post around August 1999.¹² Violet, who

was detained on July, 23, 1999 to help police locate her run-away security guard husband one Ackim Ngoma, died on August, 2 six days after her release.

It can thus be seen from the above cases that the right of life has not been adequately protected or observed especially amongst the detainees hence infringing on their human rights. We shall now proceed to consider another provision of the constitution.

Article 13 (1) states that:

“A person shall not be deprived of his personal liberty except as may be authorized by law.....”

The article then goes on to state about ten situations when derogations may be permitted. These include, inter alia, in execution of a sentence or order of a court; to compel attendance of a person in issue before a court; upon reasonable suspicion of his having committed or being about to commit a criminal offence; for the purpose of preventing the spread of an infectious or contagious disease; to ensure protection of the community in case of a person who is or is reasonably suspected to be of unsound mind or a vagrant etc.

Further Article 13(2) provides that:

“Any person who is arrested or detained shall be informed as soon as reasonably practicable in a language that he understands of the reasons for his arrest or detention.”

While sub-article 3 places an obligation on the detaining authority to move swiftly so as not to indefinitely deprive a person of his/her liberty when it states that:

“Any person who is arrested or detained –

- (a) for the purpose of bringing him before a court in execution of order of a court;
- (b) upon reasonable suspicion of his having committed or being able to commit a criminal offence under the law in Zambia and who is not released shall be brought without undue delay before a court; and if any person arrested or detained under paragraph (b) is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial”

The release contemplated above especially one, which involves attachment of certain conditions to ensure appearance at a later date is what is commonly referred to as Constitutional bail. This type of bail allows the court to compel the detaining authority to release a person who is held for a long time without trial despite the type of charge ¹³.

Finally sub-article 4 provides for payment of compensation where a person is unlawfully arrested or detained:

“Any person who is unlawfully arrested or detained by any other person shall be entitled to compensation therefor from that other person”.

It is strange to note that despite the law being lucid and unambiguous in Article 13 and the many number of derogations notwithstanding, authorities still opt to ignore the black letter of the law and instead seem to venture in unlawful detentions. As noted in the previous chapter, the police do have wide powers of arrest and subsequently the power to

detain the persons so arrested. As far as these powers are concerned, their abuse is likely to lead to the violation of the rights to liberty and security of persons. It should be noted that the police in their execution of duties come in daily contact with individuals and, as such, if not checked, the powers of arrest and detention can be the most abused. It is apparent, as cases shall show soon, that suspects are often detained on flimsy charges that could otherwise be dealt with without the need of committing them into custody. This practice has led to depriving the concerned persons of their liberty, and hence contrary to the letter and spirit of Article 13 (1). Further, there is strong evidence pointing to the fact that Police officers are more interested in obtaining confessions from suspects rather than embarking upon professional independent investigations which would yield proper and usable evidence. This is lucidly confirmed by an incident, which happened in Matero, Lusaka where 6 youths were picked up on trumped up charges.¹⁴ the end result of this biased way of investigating, of course, is that innocent persons are arrested and subsequently detained. This however, is uncalled for and indeed can be prevented.

It is, of course not disputed and cannot be over emphasized that the crime wave in Zambia has gone up, hence the need for the law enforcement officers and security agents to apply effective methods of combating and investigating crime. This, though, does not entail extorting for confessions from suspects. Instead the proper course to take is that once an offence is suspected to have been committed or a complaint is made to the law enforcement officers, it becomes their duty to investigate the crime as fully as possible. And to pursue every line of inquiry which may help to throw some light on it irrespective of whether any particular line appears prejudicial or favourable to the suspect. This is what is meant by professional independent investigations.

In these premises, it was observed a long time ago by Mr. Justice Leo Baron, as he then was, in the case of The People Vs Christian Mwambona¹⁵, that:

“It is not the function of law enforcement officers to secure convictions. Such officers are supposed to conduct impartial inquiries into cases reported to them. They should gather all the facts including those favourable to a suspect and then make a decision as to whether to arrest the suspect or not”.

In this regard, casual or slipshod investigations or investigations which ignore line of inquiry which might exculpate the accused (whether raised by the accused himself or emerging during interviews with other witnesses), far from advancing the prosecution case, can serve only to cast doubt on it and on the bona fides of the officers concerned. Put it in other words, it is the function of the law enforcement officers to seek out as much evidence as they can and to lay it all before the court. We now proceed to examine how law enforcement officers have actually handled cases falling under this ambit.

In this regard, cases from two interested human rights groups ¹⁶ shall suffice.

Case No 1.

Mr. Zambwe's brother Joseph Miti was arrested on 16th June, 1997 and charged with possession of stolen goods. He was locked up at Matero Police station and up to the time the case was being reported, i.e. on 17th July, 1997, he had not been taken to court nor had they set the dates of trial. This prompted Mr. Zambwe to seek legal help from Zambia Civic Association who intervened.

This case, of course reveals wanton disregard of a detainee's rights as provided by Article 13 (3). The suspect was kept in cells for a period of one month without being taken to court or indeed having the dates set for his trial. This was a pure case of unlawful detention in that though the suspect was charged he was supposed to be brought before the court within a reasonable time to answer his charges. That this did not happen, the only plausible explanation is that after the suspect was detained the police then went into full swing to "fish" for evidence. Suffice it to say that at the time of arrest there was not a single reason that would have prompted a reasonable law enforcement officer to arrest.

Case No. 2

On March 21, 1998 a Legal Resources Foundation client's son was arrested by police on flimsy accusations that he had stolen a bicycle belonging to a police officer at Northmead police post. Police, however, were said to have failed to charge the suspect or to release him. Consequently, the detainee was held at the police post container for three days. He was subsequently released.

The case in cause reveals yet another instance of police abuse of their powers. This is a situation, which can be dealt with without committing the suspect to custody later on for such a long period of time. A person is detained on flimsy grounds and kept in cells for three nights without charge all in the name of authority. Clearly, just because the police have the powers to arrest, does not mean they should go about arresting people even when the need does not arise. However, this is all in the mind since if the police officers are wary of the need to protect and observe human rights, such flimsy instances could be done away with. As noted earlier, and this needs not much emphasis, the liberty of the person is very important and only when the necessary situation arise, can a person be deprived of his liberty. Thus, though there is a rise in crime and the corresponding need to curb it, the courts will not hold an unlawful detention to be in the execution of law enforcement officer's duties ¹⁷.

Case No. 3

In August, 1997, a Legal resources Foundation's client was unlawfully detained on fictitious and suspicious allegations of threatening violence. On the material day, the man had gone to the police station to inquire why the police were exhibiting a causal disposition in investigating a report of missing child which had been made to them by the man's aunt. He was then caused to be detained and remanded in custody for five days. He was subsequently released without any formal charge being made against him and without any statement having been taken from him.

It must be stressed that the identity of the victims in the last two cases has been withheld on their requests for fear of victimization. However, ridiculous as these cases may appear, their impact on innocent and unconvicted citizens is enormous. Citizens are

held at will and kept in filthy and deplorable places for no reason at all. Small wonder authorities are in constant defiance of Article 13 (2) of the Constitution in that such persons are never informed of the reasons for their arrest or detention. It is not strange anyway, because such people are never lawfully arrested or detained in the first place and hence the need to comply with the law does not even arise. Such, therefore, is the situation obtaining on the ground in the various parts of Zambia. While bemoaning such a situation one would have hoped that this is the only bad facet of the law enforcement officers vis-a-vis detained persons. However, that is far from it as there is a number of cases revealing torture and dehumanizing experience in police cells at the expense of those detained even on flimsy grounds. We shall now venture to consider those cases.

Article 15 of the Constitution provides that:

“ A person shall not be subjected to torture, or to inhuman or degrading punishment or other like treatment”.

It is paramount to note that this is the only provision of the Constitution guaranteeing a freedom, which is non-derogatory. This is so in what is regarded as normal situations and in precarious and volatile situations. Thus, notwithstanding that the country is at war or in a State of Emergency no authority is permitted to go against the spirit of this provision. Naturally, one would expect that this is the most safeguarded and jealously preserved provision of the constitution and hence the most observed. Unfortunately, though the situation on the ground dictates that this provision of the law is more observed in breach than in conformity.

It is imperative to appreciate from the outset what the terms “torture” “inhuman” and “degrading punishment/treatment” mean so as to have a clear picture of what we are discussing. However, one has to bear in mind that these are terms of art and hence no universal definition is intended to be given hereunder.

The term "torture" has been taken to mean "any act by which severe pain or suffering, whether physical or mental is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession. Punishing him for an act he or a third person has committed or is suspected of having committed or intimidating or coercing him or a third person or for any reason based on discrimination of any kind when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."¹⁸

However, as noted elsewhere in this paper, torture was defined as:

"an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment".¹⁹

In this regard, the key elements for torture to be effected are "aggravated" and "deliberate." This however, calls for another question of what is meant by cruel, inhuman or degrading treatment? It should be pointed out however, that the Zambian Constitution and, indeed, International human rights instruments have not delved into providing accepted definitions of these terms. To this end, different international experts and organizations include under this rubric such practices as corporal punishment, force-feeding, internment in dark cells, close confinement, reduction of diet, solitary confinement, interrogation under duress, castration of sexual offenders, restraint by means of shackles or other pain-causing devices.²⁰

Therefore, one can have an idea of what these terms mean and hence understand the justification to defend every person from such treatment. As noted, however, it is quite regrettable to note that in Zambian cells and prisons there are various and prevalent instances of torture and inhuman treatment of detainees. To get a clear picture, it is advisable to look at some of these cases. We propose to look at both old and new cases involving these vices so as to show how law enforcement officers are determined to continue with their pattern of brutalizing detainees unabated.

In the case of Chimba Vs Attorney General ²¹, five plaintiffs were detained under the Preservation of Public Security Regulations. The Plaintiffs were held in small, dark dirty cells with an earth latrine on the floor. Their clothing was completely removed, they were half-starved, and they were interrogated under bright lights, slapped, punched and kicked. Judgement in this case was given for each of the Plaintiffs individually against the Defendant on the grounds of assault and battery. In delivering judgement, Scott J. stated that:

“The treatment of the Plaintiffs was made doubly wrongful because of the way they were held and the deprivation suffered as well as the mental and physical treatment to which they were subjected”²².

Similarly, in the case of Re Puta ²³ which followed about nine years later, the petitioner was denied food while in detention. His interrogation manifestly included actual torture and resulted in bruises, cuts and swollen glands. He also alleged that he was made to sleep in a crowded cell with urine on the floor and that his requests to see a doctor were denied and at some point he was kept in solitary confinement although he had not committed any of the scheduled offences. The petitioner accordingly claimed damages in respect of the inhuman treatment he was subjected to. Delivering judgement of the court judge Sakala as he then was, held that:

“At any rate the claim is for damages arising from physical and mental ill-treatment. In the circumstances, having accepted the Petitioner’s story, I hold that he is entitled to an award of damages for the inhuman treatment.”²⁴

The case of Mwaba Vs Attorney-General ²⁵ is also instructive of the point. The Plaintiff was detained in a filthy cell of minute proportions with little or no light or ventilation, forced to remain in the nude, subjected to torture, interrogated in a dark room with bright lights directed into his eyes, punched and slapped, given little and insufficient food and

water and forced to remain awake for long periods of time. Moodley J held that the plaintiff had been subjected to torture, inhuman and degrading treatment contrary to the constitution and went on to award the plaintiff damages while condemning in unqualified terms the treatment meted out to the plaintiff.

These barbaric acts continued to a large extent so much so that one would be forgiven to conclude that legislation had been passed providing for torture, cruel, inhuman and degrading treatment. The powers that be remained mute on the happenings hence giving an impression that tacit approval was given unreservedly. This promoted wide spread calls from members of Parliament (who appeared to enjoy some semblance of freedom of speech at the time) to authorities to remedy the situation. Then M.P, for Kawambwa Titus Mukupo, for example while describing these forms of brutality against detainees said that:

“Humanistic Zambia was building torture chambers at a time the world was becoming liberal in the treatment of inmates.”²⁶

Further another M.P.²⁷ charged that prisons warders were perpetrating “Nazi-type atrocities against inmates and detainees and that tortures practiced in prisons were intolerable. He went on and listed some atrocious and gruesome tortures in prisons, which included poking iron objects into the private parts of inmates and detainees.

It is thus discernible from the above authorities that cells and prisons in Zambia have been and (as will be seen soon) continue to be places of indiscriminate beatings, torture, and many other inhuman acts. It is therefore not strange that a government and state-controlled newspaper observed way back that:

“An arrest in Zambia has over years become synonymous with a beating from policemen”²⁸

This is, without a single doubt, true even today as recent cases shall reveal. However, as we still examine old cases it is prudent to note that quite a part from the aspect of torture it will be found that detainees are subjected to unhygienic living conditions which ultimately amount to mental and physical torture or ill-treatment.

The quality of the food given to detainees is so unhygienic and almost the exact opposite of what is provided for in the second schedule under the Preservation of Public Security (Detained Persons) Regulations. Thus, in the case of Mundia Vs Attorney General ²⁹

The Plaintiff alleged that while in detention he never received food as given in the second schedule. He could not get any meat, and it became impossible to live on boiled vegetables or beans without cooking oil as it was on a number of occasions. He went without milk sometimes for over a month and was only given milk after the doctor recommended that he should be given milk, because he was suffering from stomach pains. Similarly in the Chimba case, cited above, it was found as a fact that the five applicants therein were for periods varying between seven and ten days held in very small empty, completely dark and dirty cells with an earth latrine on the floor. Their clothing was completely removed; they had no clothes and no blankets. They were half starved and given little or no water to drink and none to wash. They were each interrogated in a dark office on a number of occasions, under three bright lights threatened with death mutilation, and slapped and kicked. Other than the first applicant, they were photographed naked. The first plaintiff reached the stage of mental breakdown. This [prompted Scott J. who delivered judgement to observe that:

“The motive of the Government servants was irrelevant.
They acted in an oppressive and unconstitutional manner.
They should never forget that they are the servants of
the people... This court condemns, in unqualified terms
the treatment of those detained persons and considers this to
be a case demanding exemplary damages, in such an amount as
should ensure that directions are given that there being no repetition.
The award takes full account of the degrading and humiliating
treatment and the duration of it” ³⁰

This practice, though remained unaltered as was confirmed by Honourable Benjamin Yunia Mwila, a former detainee, and now Environment Minister in the MMD government. He described the food supplied by the prison authorities as unhygienic and disgusting such that most other detainees, like himself, were forced to get all their means and drinking water from their families or relatives which proved to be very expensive exercise.³¹

The prison or cell conditions themselves are also unhygienic due to their filthy states such that it is difficult to think how human beings can be expected to live there for a long period of time. The cell's leaking roof, filthy walls, out of order and cob webbed lighting system and the stiffening scent of urine emanating from the cells³², cast a dark cloud on the detainees' hopes of ever receiving justice on time. In light hereof, it is not strange that a former regional commander of prisons³³ recognized the failure of prisons as far back as 1988 when he made a scathing attack on these institutions. He observed that:

"At the moment, the conditions in prisons are below standard to say the least even an animals' lair is more accommodating"

Having shown how Article 15 of the Constitution has, in the past, been violated with impunity, we shall now resort to examine how detainees of the recent past have been treated vis-à-vis Article 15 of the constitution.

It has been submitted that Zambia had been under a state of emergency almost immediately after independence up until 1991. In this light, it is almost obvious to predict that there were a lot of detentions especially political detentions. The attitude of law enforcement officers has also been laid down bare as one lacking professional touch. It, therefore follows that a combination of these factors was lethal on the liberty of the individual, later on a detainee. It was therefore not surprising that Article 15 of the Constitution was illegally derogated from by the overzealous law enforcement officers so that widespread abuses were rife. When the MMD came into power in 1991 and a state of emergency lifted coupled with the promise of championing human rights for all, a lot

of people had a sigh of relief and hopes that the new arrangement would change the order of things.

However, two years down the line and things started being sour. In 1993, several opposition leaders especially from United National Independence Party (UNIP) were arrested and detained ³⁴ on allegations of being involved in subversive activities and belong to a clandestine organization code-named the Zero Option. Resulting from this several of those detained were subjected to torture, cruel inhuman and degrading treatment contrary to the constitutional provisions. The impact of this treatment was so grave that it resulted in the death of one of the detainees. This was actually the death of UNIP M. P. Cuthberth Ng'uni who reportedly died of a ruptured kidney on September 21, 1994. ³⁵ what was interesting to note however, was to see how this case collapsed in court. The prosecution's case so bad that not even a person picked from the Executive wing of the government to be a judge would convict any of the accused persons. Small wonder four years down the line, Republican President FJT Chiluba, still had vivid memories of the proceedings of the case. Thus, after the October, 1997 attempted coup in assuring the nation that substantial justice would be done he said that:

“We had the Zero Option, maybe we moved too fast and lost the case in court. This time the evidence is there” ³⁶.

Clearly two issues are discernible from this statement. One that the state was not ready at the time of arrests, detentions and subsequent prosecution of the accused. The second issue, which is correlative of the first, is that there was virtually no evidence. Whatever, debate there maybe the ultimate thing is that the liberty of innocent citizens was invaded illegally and most importantly that, in their innocence, they were subjected to degrading treatment and torture for an offence that never was. Another thing worth noting from the 1993 detentions is that the State opened a Pandora's box to ill treatment of detainees. The complaints against police abuse seem to have decreased between 1991 and 1993 but after the 1993 saga the law enforcement officers seem to have gained tacit approval to derogate illegally from Article 15 of the Constitution.

A few years later bombs rocked the country ³⁷ and arising from this several opposition members who in fact were almost substantially the same people arrested in the Zero Option, were arrested and detained. They were also accused of engaging in subversive activities. This time through a group code-named "Black Mamba" The detainees herein, spent a lot of months in detentions and also complained of torture and mal-treatment while there. This case also proved a disaster for the Persecution team in court as it was characterized by *nolle prosequi*. ³⁸ The few accused persons that saw its end were acquitted as allegations and accusations were found to be baseless. ³⁹

As already stated, the 1993 events opened a Pandora's box of police brutality and this was not merely restricted to so called political cases. In April, 1997 for example, six youths from a nearby township in Matero, police on suspicion that they had committed murder picked Lusaka. ⁴⁰ The six namely, Malisa Mubabga (20) Dingiswayo Zulu (29) , Enerst Chanda (23), Patrick Muitelele (22), Joseph Mwanza (22) and Thomas Kapepete an airman with Zambia Airforce, were picked up in different "raids" on Saturday April 23, 1997. They all gave separate accounts of what transpired but what was notorious in all their stories was an element of torture and the inhuman treatment, which they were subjected to. They alleged that while in the cells they were beaten with metal bar, and suspended in the air while sitting on a metal bar so that the head is pushing downwards. This is what is popularly known as "akampwela" or "see-saw". They also alleged that they were whipped with three types of sjamboks while their knees and feet where hit with a ledge hammer. The six accused stayed in cells with inadequate food and water for six days without appearing in court. They were subsequently cleared of the charge by way of an identification parade. However,, what is grave and apparent is that the six suffered for nothing. They were picked up in a single operation and were forced to stay in a dirty and packed cell. A cell where inmates were forced to defecate in plastic bags as the single cell toilet was only open twice at twelve hourly intervals. They were also forced to eat food within the unsanitary and unhygienic conditions of the cell.

There is also a case of Steward Mwatende aged 41 aged 29 who was picked up by seven police officers from his house number 31A Mindolo Police camp at around 22.30 hours on 27th May, 1998. He was picked up together with four other suspects in connection

with house breaking and burglary cases, which had been occurring in the camp, and for escaping from prison. He was remanded in custody for two days. During that time, Mwatende was subjected to severe beatings by the interrogation officers who took to the bush where they lit fire between his legs and was badly burnt. He lost consciousness a number of times before he died.

There is another case involving a ZESCO employee one Makoma Mutale who, in October 1998 had lost his potency after police torture.⁴² He was subsequently awarded K6,5 million compensation by Lusaka High Court Judge Florence Mambilima who in her judgement observed that Mutale lost his sexual power after he was tortured while in custody. She noted that despite denials by the police officers who had executed the torment medical reports showed otherwise. The court found as a fact that Mutale went into police custody while in good health and walked out with a lot of injuries, suggesting torture. Justice Mambilima further observed that the behaviour of officers Sunday Bwali, timothy Makomba and Baldwin Silavwe, while trying to make Mutale admit to having stolen the spare parts from ZESCO, left a lot of to be desired. The three handcuffed him, and suspended him of a metal bar. Using a stick and fan belt, Makumba and Bwali started beating him in the chest and ribs until blood started oozing from the mouth and the nose. When he did not tell them what they wanted they took him to a bathroom where there was a bath filled with cold water. While he still handcuffed Silavwe held him by the neck and put his head under water while Makumba whipped his legs with a green horse pipe. The following day Mutale was taken to the CID office and this time they brought a cable and connected it to a socket. Bwali handcuffed Mutale's hands and live wires from the cable were put round his fingers. They blind folded him with a black cloth after which he heard noise and then fell unconscious, he noticed blood on his fingers thereafter and concluded that he been seriously beaten and subjected to electric shocks. On 20 November, 1993 Mutale was charged with theft and release on police bond but was eventually found with no case to answer.

An examination by a UTH doctor confirmed that Mutale had circular wounds caused by a source that produced heat, and loss of function of upper limbs. Mutaless' wife also

testified that ever since the incident, her husband was always sick and was unable to meet his conjugal obligations.

The case of Grade 12 pupil at Matero girl's secondary school who was arrested on 12th November 1998 on suspicion of having examination papers before hand deserves to be mentioned also ⁴³. Bertha Mugamanzila died in a police cell at Matero Police Station after being taken there by officials from the Examinations Council of Zambia. The family spokesman Justin Choonka said that on that morning Bertha left home to go and write her Grade 12 mathematics final examination. She was, however, found with a small piece of paper by the invigilator which piece contained two mathematical calculations. The teachers confirmed that these calculations were not answers to any question in the final mathematics papers. She was however, subsequently removed from the examination room and handed over to the Headmistress who in turn handed her over to the police.

Her brother-in-law, Noel Masadza, who got to know of Bertha's problem went to check on her at the police station. He offered her some food but she refused. She was looking tired with red eyes a sign that she has been beaten and had been crying. He requested the police to let him take her to the clinic but he was refused from doing so. He was instead told to look for the arresting officer who was nowhere to be seen. Two hours later Bertha collapsed. The arresting officer appeared and allowed Mr. Masadza to take her to the clinic where he was told that she was already dead. There was no sign of breathing, heartbeat or pulse at the time she was being carried into the car. This means, therefore that she died at the police station. On Monday 16th November, 1998 a post mortem was conducted by Dr Garg, which was witnessed by a family hired doctor. The doctors both agreed that Bertha died of cerebral congestion and an abnormal build up body fluid in the tissues in the body, causing oedema. They both confirmed a high degree of impact to the head.

Evidently, the above cases though not exhaustive in themselves show a great disregard of the country's supreme law. The police seem not daunted to stop the abuse of citizens' rights. While agreeing with the basic principle of justice being seen to be done, we find

that the police have sued the maximum to dispense instant justice without assessing the merit of the case before them. What is even more worrying is the extent of force applied to innocent and defenceless individuals irrespective of sex and age. Indeed, in Zambia we have stopped counting those who have been subjected to torture while in prison/cells. The trend now is to count those who have escaped these dreaded institutions untouched. It is gratifying therefore to hear that the command has instituted a reform programme, but its impact has not been felt as torture continues to be used in police cells. That the powers that be have conceded that there is a high degree of torture in cells will be shown later in his page.⁴⁴ We shall now proceed to conclude our consideration of the constitution.

Article 18 of far as it relates to this discussion provides for the presumption innocence of the accused person in every criminal offence. It is submitted that this was discussed at length in the preceding chapter and hence shall be dealt with here. On the other hand Articles 25, 26, 30 and 31 shall be dealt with in chapter four as we discuss the high water- mark case study of this paper.

Meanwhile, it is prudent to refer to Article 28 before winding up our discussion of the constitution in so as it relates to rights of detainees. This Article relates to enforcement of protective [provisions i.e. the court's protection of citizens against officials going against the provisions of the constitution. This Article provides verbatim that:

“... if any person alleges that any of the provisions of Article 11 to 26 inclusive has been, is being or is likely to be contravened in relation to him, them without prejudice to any other action with respect to the same matter, which is lawfully available, that person may apply for redress to the High Court which shall:-

- (a) hear and determine any such application
- (b) determine any question arising in the case of any person.... and which may, make such order, issue writs and give such directions as it may consider appropriate for the purpose of

enforcing or securing the enforcement of any of the provisions of Article 11 to 26 inclusive”.

Evidently, we have seen from a perusal of the above cases that a lot of detainees only get the intervention of the court upon release. The institutions are arranged in such a way that it is difficult to apply to court once his/her rights are threatened particularly that the law enforcement officers are determined to keep detainees from any judicial remedy for as long as possible. Be that as it may, the Article has nonetheless helped many a detainee especially through the issuance of writs of habeas corpus which undoubtedly expose law enforcement officers against abuses. We now proceed to discuss other Zambian legislation on the rights of detained persons.

2.2 THE CRIMINAL PROCEDURE CODE

The Criminal Procedure Code (CPC) is chapter 88 of the Laws of Zambia and like the names suggests, it provides for the procedure to be followed in criminal proceedings be it in or outside court. However, for purposes of this discussion, we shall discuss it from three angles viz. arrest, disposal and bail. It will be reckoned that arrest and bail were dealt with substantially in the last chapter. We shall accordingly not delve into the nitty grits of those issues save to refer to them by way of causal comment.

Section of 18 of the CPC provides of persons reasonably suspected of committing or about to commit or having committed an offence. It is prudent to note that the Act uses the word “reasonable” so that the basis is made objective as opposed to being subjective. This is crucial for reasons already given above i.e. that the liberty of the individual and one’s freedom of movement must never be curtailed without justifiable reason.

An arrest, as already precedes a detention and so it is always cardinal to make a person so arrested beware that he actually arrested. The law provides further in sub-section 2 that if a person resists an arrest, a police officer may use all means reasonably necessary to effect the arrest. It is to be noted that here again, the law uses objective test so that the police officer is aware that the force used must be proportionate to the circumstances the case. Thus, for example, it will not be reasonable for a police officer, in his/her

endeavour to rid Lusaka of street kids pursuant to an order of the Minister in charge, to open fire at fleeing kids. Such an act is not only awful considering the nature of the offence alleged to have been committed but has also a telling effect on innocent citizens around. For example, it was reported that in August, police in Lusaka shot dead a 10 year old girl in the process of trying to gun down a wanted criminal in Bauleni compound.⁴⁵ Then police spokesman Beenwell Chimfwembe confirmed the shooting of the girl. It is undoubtedly in these premises that a prominent writer observed that:

“To authorize a police officer to killing an unarmed thief who steals the young of a goat, there being no other way of preventing his escape is contrary to reason”⁴⁶.

Arising from the power to arrest is the power to either detain or dispose off the person so arrested. Generally the police are empowered bylaw⁴⁷ to release any person so arrested upon that person offering security and, indeed on condition that the offence alleged is bailable. Despite this being the law, however, the police are generally not willing to grant bonds to persons so arrested. This has a corresponding effect of causing the avoidable congestion in the already congested filthy cells. The situation is also dehumanizing considering the fact that there are no facilities for feeding suspects at police stations. Consequently, it is the families of the detainees who are made responsible for the provision of food at the police cells. This, therefore becomes a paradox where a person is arrested in a place where she/he has no relative or friends.

Be that as it may the law provides that where the police decides to detain a person so arrested, that person shall be brought before the courts of law within 24 hours or at most within reasonable time practical. Sections 30, 33 and 208 are instructive of this point. The reason for such is to prohibit arbitrary detention of persons and to ensure that police officers will not be tempted to abuse detainees' rights if they know such will be exposed the next day in court. However, the situation on the ground leaves much to be desired. People are kept for long periods both in cells and prisons without being brought to court. The issue of first incarcerating individuals and then setting out to “fish” for evidence is also on the increase. This is clearly a violation of the detainees' rights. The police

should be called upon to adhere to the provisions of this Act if justice is to be seen to be done.

It is prudent to note further that over and above the police's power to grant bond to an arrested person, the court is also empowered to grant bail in bailable offences. Section 123 is relevant in this regard. As discussed in chapter one though, this is a discretionary power, the courts have in majority of cases granted bail. However, it remains to be noted that a matter has to be in court. What this entails is that an application can only be entertained once a matter is before the relevant court so much so that in so far as a matter is not before a court in issue then that court can never entertain such an application. Clearly, this provision is defeated in so far as detainees are not charged and brought before the courts of law. Detainees, as observed in the case shown above, are kept for long periods in cells and subjected to anguish, mental and physical torture when clearly the law entitles such people to bail while their cases are going on.

2.3 THE NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT

The problem of drug trafficking has become acute in Zambia. The country has been dubbed the regional money laundering center and one of the leading trans-shipment points for illicit drugs such as cocaine, heroine and methqualone, bound for Southern African and Europe. Sadly even is that Zambia is no longer a transit point for drugs, it is increasingly becoming a consumer of dangerous as well. To this end, the Drug Enforcement Commission is the institution that has been established to combat drug trafficking. It is created under the Narcotic Drugs and Psychotropic Substances Act, chapter 96 of the Laws of Zambia.⁴⁸

Under the Act, in issue every drug trafficking and drug manufacturing offence is by section 23 regarded as a cognizable offence for the purpose of the CPC so that a police officer or any person empowered may arrest a person suspected without warrant. What is even more frightening is that any person arrested pursuant to this Act is not entitled to bail.⁴⁹ In a society where the law enforcement officers are professionals and have respect and regard for other people's rights, this presents no problems at all. However, in a country like Zambia where provisions of the law are used to settle old scores coupled

with ill treatment of detainees such provisions are unwelcome and only perform more on fettering of people's rights. Thus, there have been cases where some DEC officers have abused their power by arresting and prosecuting people on the basis of flimsy evidence. In one case, ⁵⁰ Ndola magistrate, Edson Tembo criticized the DEC for allowing itself to be sued by the public to settle personal differences. This was accusing in which he acquitted Ndola businessman Steven Mbambika of charge of trafficking in 115 grammes of marijuana with an estimated street value of K28,750. The DEC had not carried out thorough investigations before deciding to prosecute.

In another case ⁵¹ the DEC detained a baby in order to compel its father to give himself up. In May, 1998 six month old Dalitso Tembo was detained and starved for a day by the DEC who were pursuing his father Marich Tembo of Ibex Hill in Lusaka. Clearly, such behaviour constitutes a violation of human rights of an innocent child. It is also evident that the DEC, in conjunction with the police have failed to crack down big drug cases involving influential people in preference for smaller cases which do not have adverse political implications on the DEC top brass. This, therefore poses a big problem on innocent citizens who are arrested detained and ill treated for long periods for no case at all.

2.4 OTHER LAWS AND REGULATIONS

The other laws providing for detained persons in Zambia are to be found in the Emergency Powers Act. The Preservation of Public Security Act and the Preservation of Public Security Regulations. However, since such legislations relate more to political detentions than otherwise, we shall deal with them in chapter four.

Similarly, our considerations of the Prisons Act shall pend until we reach that chapter. This is prudent under the circumstances we shall use this Act as a guide against which to measure whether or not the treatment of the treason accused did conform to the standards prescribed locally and otherwise.

2.5 CONCLUSION

We have hitherto shown what Zambia's law on detained persons provide. We started our discussion by perusing at lengthy what the supreme law of the land stipulates. We then moved on to explore the Criminal Procedure Code and the Narcotic Drugs and Psychotropic Substances Acts respectively. We have in this light shown that these legislation's particularly the Constitution sanctily provide for the protection of every person's inherent 'human rights. It has been submitted that the phrase "every person" includes detainees. However, despite the said provisions protecting rights of detainees whilst in incarcerations a perusal of cases obtaining both in the second and third republics show a wanton disregard with imputy, of detainees rights. We have lucidly shown that all rights and freedoms providing for detainees such as the right to life and freedom are not respected, later on observed. Thus, such rights to life and freedom from torture which are so sacred and paramount are disregarded almost at will.

Furthermore, the provisions in the Criminal Procedure Code providing for speedy prosecutions of cases are not adhered to. The result, naturally is that detainees are kept longer than required by law in unhygienic conditions. The obvious consequence is the over congestion of cells and prisons, deplorable standards and failure to curb rising diseases. Indeed this chapter has shown that the behaviour of law enforcement officers leaves much to be desire. These officers are more than determined to carry out instant Justice on whomever is suspected. Whether that suspect would be proved innocent is another issue which does not arise in the circumstances and hence immaterial. The situation is so serious and alarming and so colossal is the amount of money the government is paying out in form of damages and compensation on victims of circumstances. It is, therefore satisfying that the command has since 1994 introduced police reforms in order to change the image of the police. However, six years down the line and the impact of the reforms are yet to be felt. Most police officers are still steeped in the old culture and old methods. We shall now move on to consider what various international human rights instruments provide in this area of law.

END NOTES

1. This will be alluded to more in the author's recommendations to the power that be.
2. Although it must be state that there are son provisions of law which must be harnessed with International Legislation in order to ensure adequate protection of the right to l iberty.
3. Hans W. Baade, Robinson O. Everettee, Eds. African Law: New Law for New Nations, New York, Ocean Publishers Inc. 1963 P. 41
4. Article 11 (a) of the Constitution of Zambia.
5. Article 12 (a) (b) and (d) of the Constitution of Zambia.
6. Human Rights Case Files – Legal Resources Foundation – 1996 to 1998, Lusaka.
7. These are Returns on Civilians Killed by the Police and obtained from Force Headquarters between 1993 and 1998.
8. Times of Zambia 27, September 1997 @ P.1
9. The Post Newspaper, 23rd October, 1997 "Police Shoot Urinating Man" @ P. 3.
10. The case, however, collapsed in court when the state overwhelmingly failed to push the case beyond the starting point.
11. The Post Newspaper 13th November, 1998 "Police Torture to Death a Matero Girls Pupil @ PP. 1 and 8.
12. National Mirror, December 18 – 29 1999 "Police Cells a Sorry Sight" @ P. 7
13. The author contends that this bail extends to unabailable Offences since the test is whether or not there has been unreasonable delay in prosecuting of a case
14. This case is aptly discussed later on in this chapter
15. 1971 ZR 171.
16. We shall consider cases from Zambia Civic Association and Legal Resources Foundation. It should be noted, though that some of the victim's names were withheld from the two societies for fear of victimization – see Afronet Zambia Human Rights Report 1997, April, 1998 Lusaka.
17. The Lawyer's Newsletter. A publication of the Law Association of Zambia, January – June 1993 Vol 1 No 2 @ P. 14.
18. Article 1 of the Convention Against torture and other cruel inhuman degrading treatment or punishment 1984.
19. Article 1 (2 of the 1975 Declaration on the Protection of all Persons from being subjected to Torture and other cruel, inhuman or degrading treatment or punishment.
20. Leah Levin, Human Rights: Questions and answers Paris, UNESCO Press, 1981 @ P. 54.
21. 1972 ZR 165
22. Ibid. @ P 209
23. 1973) ZR 113
24. Ibid. @ P. 120
25. 1974) ZR
26. Parliamentary Sessions March 1982.

27. Choma M. P. Daniel Munkombwe at Parliamentary Sessions, February 1989
28. Sunday Times of Zambia, 11th June, 1989
29. 1974) Z.R. @ 168
30. 1972) Z. R. 165 @ 178
31. Interview with Benjamin Yunia Mwila
32. Observational views by the author of Lusaka Central Police Cells around December 1999
33. Then Regional Commander for Prisons Charles Njunga quoted in the Times of Zambia issue of 7th October, 1988.
34. A State of Emergency was declared also to enable the state deal with the situation
35. The injury was reportedly sustained in prison when police tried to force him sign a confession during the March to May 1993 State of Emergency. See Kaweche Kaunda and Tiayonse Kabwe. Curthberth Ng'uni – Torture and Death of an Honourable M.P. in Zambia (Lusaka: Own Voice Publishers 1994).
36. Public rally addressed by the President on 30th October 1997.
37. Though a majority of them were diffused before exploding which gave an impression that they were stage managed and since the police bomb experts would go straight to the point of location.
38. This is an entry made on the Court record by which the Persecutor declares that the state will proceed no further. The effect is that the court discharge the accused, without questioning the Prosecutor of the reasons, but the state reserves the right to re-arrest and prosecute the accused on the same charges whenever it feels like.
39. See the case of Inyambo Yeta and 7 others Vs the People 1996?HP/2886 (Unreported).
40. See Afronet Zambia Human Rights Report 1997, April, 1998 Lusaka PP. 59-62
41. See Afronet Zambia Human Rights 1998, March 1999, Lusaka P. 20
42. Ibid. P. 19
43. Ibid. PP. 23-26
44. When we discuss actual treatment of detainees in Zambia vis-à-vis Kaunda and 70 others, and the establishment of the commission to probe allegations of torture.
45. Optic PP. 20-21
46. Cyprian O. Okonkwo, The Police and the Public in Nigeria, Law in Africa, Sweet and Maxwell London, 1966 @ P. 38
47. Section 103 of the CPC, Cap 88 of the Laws of Zambia.
48. Section 4 of the Act
49. Ibid. Section 43
50. See Afronet Zambia Human Rights Report 1998, march, 1999 @ P. 55
51. Ibid. @ PP. 55-56

CHAPTER THREE

3.0 INTRODUCTION

This Chapter shall endeavour to explore fully what the international human rights instruments provide vis-à-vis detained persons. It must be appreciated from the on set that the concept of human rights has taken center stage ever since events of the second world war. Human life and dignity had been disregarded and violated throughout history. During the period of the first and second world wars, human rights were grossly violated by totalitarian regimes which were determined and responsible for the elimination of selected groups people because of their race, religion or nationality.¹ This was obviously easy to do since the international community at the time could not compel the said regimes. If they did, these states would plead the principal of national sovereignty which prevented other states or organizations from interfering in matters which were purely national-and hence within the sole and exclusive domain of the state concerned.

It was only in the aftermath of the second world war that the world, for the first time, through the United Nations recognised and gave universal value to the concept of human rights. This was particularly because they realised the dangers of a repetition of the preceding events-that they would be truly devastating and cause irreparable damage once permitted to recur. In this connection, the "veil" of sovereignty was discarded.

Accordingly, the world's statesmen concluded and rightly so that the previous wars were caused by excessive abuses of human rights. This, therefore, prompted them to form the United Nations. The spirit of the UN was the drive to protect human rights and provide a dynamic basis for the development of the law.

The concept of human rights, it is prudent to grasp, has two basic ingredients. These being: moral rights and legal rights. Moral rights are rights inherent and inalienable in all men and women by virtue of their being human. These rights are derived from the "humanness" of every human being, and they aim at ensuring the dignity of every human being.⁴ The definition of human rights as moral rights has its foundation in the Natural

law theory which implies the concept of a body of rules that ought to prevail in society. Legal rights, on the other hand, are rights which are established according to the law-creating process of societies, both national and international⁵ The basis of these legal rights is the relationship between man and the state, i.e, that men and women consent to being governed by the state. The distinction must be appreciated and observed.

With that background in mind, we shall begin our discussion by perusing through what is now collectively referred to as the international bill of rights⁷ We shall then proceed to examine the African Charter on Human and Peoples' Rights before looking at the code of Conduct for Law Enforcement Officials. Thereafter, we shall endeavour to zero in on instruments relating to prohibition of torture. Finally, we shall explore Standard Minimum Rules for the Treatment of Prisoners, and lastly conclude.

3.1 RELEVANT INSTRUMENTS IN THE INTERNATIONAL BILL OF RIGHTS:

(a) Universal Declaration of Human Rights:

It is undoubtedly notorious by now that one of the most cardinal and manifest mission of the United Nations, as outlined in the 'preamble to the UN Charter' is to ensure protection and observance of human rights for all. This is of course paramount to the realization of the United Nations objective – that is the preservation and maintenance of international peace and security. The United Nations first step to implement its mission came in 1948 when the General Assembly adopted the Universal Declaration of Human Rights. Though it was, and still is, not a legally binding instrument, the Universal Declaration of Human Rights (hereinafter referred to as the Declaration) commands such a tremendous moral and political authority that it has been widely accepted and incorporated into domestic law in several jurisdictions. The Declaration is rather comprehensive and has to some extent affected the content of national law, occasionally being expressly invoked by Tribunals. Since the Declaration is not a legally binding instrument, most of its provisions constitute general principles of law and elementary considerations of humanity. However, though the Declaration in its nature is not legally

binding, it was stated in the proclamation of Tehran of 1968 by the International Conference on Human Rights that:

“The Universal Declaration of Human Rights states a common understanding of the people’s of the world concerning the inalienable and inviolable rights of all members of the Human family and constitutes an obligation for the members of the international community.”⁸

It is undoubtedly in these circumstances that the Declaration has been described as constituting the core of universal human rights guarantees.⁹ This is fortified by its preamble which states that the:

“... recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world...”¹⁰

However, it should be stressed that, whatever may be the nature of the document, one thing is certain that it does have some force, whether legal or moral.

The Declaration begins with a fundamental provision, which states that all human beings are born free and equal in dignity and rights.¹¹ Further Article 2 prohibits the use of discrimination in the accordance of rights and freedoms. In this regard, no one is to be treated differently just because such a one has for example a high political status. Similarly, detainees are not supposed to be discriminated against in the way they are treated as compared to either “free” citizens or inter se.

The protection of the right to life is provided for in Article 3, which states that:

“Everyone has the right to life, liberty and security of person”.

This right as noted in the previous chapter is the supreme right of the human being. It follows, therefore that the arbitrary deprivation of life by the authorities of the state is a matter of utmost gravity. This ultimately entails that law enforcement officers may not resort to lethal force – such as using live ammunition at innocent citizens – unless their own lives or the lives of others are in immediate danger and less extreme measures cannot avert the danger.

Article 5 of the Declaration prohibits torture generally when it provides that:

“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”

It is paramount to appreciate that at the time of adoption of this Declaration, torture was rife in many parts of the world in particular as a method to obtain evidence for judicial proceedings. In Europe, for instance, this practice assumed large proportions as it was used by the then prevalent totalitarian regimes as one of the mainstays of their powers. It is thus against such a background that the prohibition of all such practices was explicitly included in the Declaration. That such totalitarian regimes have gone with time, it should go without saying that torture is also supposed to face extinction of itself without even being outlawed. However, as evidenced in the last chapter torture is still being practiced in Zambia and a host of other countries hence the express legislation.

On the authority of Article 5, no person, however, strongly suspected of criminal acts, should be subjected to any such acts as prohibited. In fact, as will be revealed soon there are no circumstances, which are permitted by international law as justifying the law enforcement officers to go against this provision. In this connection, Article 6 is hand when it provides that everyone has the right to be recognized everywhere as a person before the law. Thus everyone, be it free or detained, everywhere, be it in a mansion or in a cell must be recognized as a person before the law which law affords human rights to all. In this regard, countries are prohibited from treating detained persons like animals. In any case, Article 11 of the Declaration provides for treatment of accused persons as innocent until proved guilty according to law in a public trial at which he has had all the

guarantees necessary for his defence. This effectively means that it should not be according to a single person's whim or caprices to declare a person guilty and mete out the punishment instantly as some law enforcement officers are in a habit of doing.

The Declaration also provides for equality before the law and for equal protection of the law.¹² The other category of human rights which is by far commonly violated by law enforcement officials as revealed in the last chapter, is the one enshrined in Article 9 of the Declaration. This Article prohibits arbitrary arrest, detention and exile. In practice, what this means is that law enforcement officers, or indeed any person, may only arrest an individual on a criminal charge if they genuinely and reasonably suspect that he or she has committed a crime. An objective test is used so that when faced with such a question, a competent tribunal should substitute an arresting officer in issue with an average man in society and determine whether or not such a one could have arrested regard being had to the prevailing circumstances. This is paramount especially if one takes into account the impact that curtailing of one's liberty has on the individual. Thus, if arbitrary arrests and subsequent detentions are not checked this can have serious repercussions on people's rights. People with dissenting views and imaginary enemies can almost always find themselves behind bars and the rule of law thrown into disarray.

It must be further noted that the Declaration, unlike the Zambian Constitution, makes no derogations from the rights and freedoms provided. Instead, it is left to the courts to determine what situation permits what. This, it is submitted is but the perfect way of guaranteeing rights and freedoms instead of giving on one hand and taking away on the other. The effect of a derogation in the Declaration though is to be found in Article 29 which stipulates that in the enjoyment of his rights and freedoms everyone shall have regard to his/her duties to the community – that is he/she must recognize and respect the rights and freedoms of others. Finally, the Declaration prohibits destruction of any of the rights and freedoms set forth therein whether by the state or group or any person.¹³

(b) The International Covenant on Civil and Political Rights (ICCPR)

The ICCPR came into force on 23rd March 1976 while Zambia only acceded to it in 1984 and hence is bound to it. Ideally it provides substantially similar provisions as enunciated in the Declaration. The ICCPR, however, tries to clearly define the rights and indicates those rights that are derogable and the circumstances under which derogation is permissible from the non-derogable rights. It must be further emphasized that the ICCPR, apart from providing for rights already proclaimed in the Declaration, also deal with rights not proclaimed in the Declaration and vice-versa. It is for this reason that the human rights documents of the United Nations are better treated as complimentary to one another.

Article 4 of the ICCPR is a derogatory clause, which permits state parties to derogate from non-derogable provisions in time of public emergency, which threatens the life of the nation. We shall revert to this provision in the next chapter, but for now it is only prudent to comment that state parties may only take measures derogating from their obligations to the extent strictly required by the exigencies of the situation.¹⁴ It must be stated, however, that the ICCPR expressly and lucidly permits no derogation's from some provisions.¹⁵

Article 6 (1) of the ICCPR echoes Article 3 of the Declaration and adds,

“This right shall be protected by law and no one shall be arbitrarily deprived of his life”.

Clearly, the requirements that the right shall be protected by law and that no one shall be arbitrarily deprived of his life mean that the law must strictly control and limit the circumstances in which a person may be deprived of his life by the authorities of a state. Thus, where the action of the police is disproportionate to the requirements of the law enforcement in the circumstances of the case, any person who loses his/her life in such a situation is said to be arbitrarily deprived of his or her life. Therefore, the killings, perpetrated by law enforcement officials in the last chapter are clearly a violation of the

spirit and letter of this convention which Zambia voluntarily acceded to in 1984 and hence is clearly bound to.

Further, Article 7 of the ICCPR repeats Article 5 of the Declaration verbatim except it adds that:

“In particular, no one shall be subjected without his free consent to medical or scientific experimentation”

This addition only goes to strengthen the argument that, just like free persons, detained persons also have basic rights and thus should never be treated as objects. To this end, their “do’s and don’ts” must be respected. It must also be added that the ICCPR derogation clause does not extend to this Article and hence state parties should adhere strictly to the provisions of Article 7 of the Convention.

The ICCPR also states that:

““Everyone has the right to liberty and security of person. No one shall be subjected to arbitrarily arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law”¹⁶

The Article further provides that anyone arrested shall be informed at the time of arrest, of the reasons for his or her arrest and shall be promptly informed of any charges against him/her.¹⁷ The ICCPR further emphasizes the right of the accused and/or detainee when it provides.

“Anyone arrested or detained on a criminal charge shall be brought promptly before a judge ... and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody...”¹⁸

As can be deduced from the above cited provisions, the rule of law, and enforcement of the law act as deciding factors in the limitations of this right. Outside this ambit, the

right should not be violated. In Zambia however, practice has shown us that a lot of people are arrested without being informed of the reasons for their arrests. Also, it was shown in the preceding chapter that arrested persons are detained for long periods without being brought to court. What is even more painful is that such detained persons are released prematurely (that is before being brought to court) but after being tormented for days in filthy cells. The norm in practice also appears to be that law enforcement officers take detention to be the general rule so that the majority of those arrested end up being detained even where there are no circumstances to justify incarceration.

The ICCPR goes on to protect rights and freedoms of detained persons when it stipulates that:

“All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”¹⁹

This provision calls upon law enforcement officers to treat detained persons as fellow human beings that is with respect and dignity. This is crucial because, as noted above, human rights are endowed in all persons by virtue of being born human beings. In this regard, the fact of compulsory confinement should not entitle authorities to subject such persons to mal-treatment. Article 10 of the ICCPR goes on to stipulate fundamental principles in the treatment of detained persons. Thus it provides that accused persons shall be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons. However as the next chapter shall reveal, Zambian authorities have long abandoned this requirement. We have heard people complaining of having been placed together with hard core criminals while in detention. Treatment, save in obvious cases,²⁰ of unconvicted persons leaves much to be desired. They are fed much the same diet as convicted prisoners, and share virtually everything together. For example, at Lusaka Remand Prisons, popularly known as “Chimbokaela” only those convicted of capital offences are given a separate cell. These others are compelled to mix because of shortage of space.²¹

It is further imperative to make mention of Article 14 of the ICCPR in particular sub-article 3 which provides that, in the determination of any criminal charge against him/her; everyone shall be entitled to some minimum guarantees in full equality, which includes inter alia that that someone must be informed promptly and in detail in a language which he/she understands of the nature and cause of the charge against him/her and to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing. But, most importantly is that that someone must be tried without undue delay. Evidently, these provisions are meant to protect a detainee so that he/she is not held arbitrarily. That he/she is not made to start speculating as to why he/she has been incarcerated. It is thus imperative to be informed promptly of the charge so that an answer and/or an alibi, if any can be advanced. In Zambia, these provisions have not always been adhered to. The law enforcement officers have preferred arresting and detaining someone and then setting out to "fish" for evidence. It is ultimately because of such practices that a lot people are arrested and subsequently detained but only a few are consequently charged. Further, in some cases where the law enforcement officers have purported to charge detained persons, the charges have been declared vague. Thus, in Re-Chiluba²² which involved the case of the current Republican President, FJT Chiluba, the applicant had sought for the issue of a writ of habeas corpus adsubjicindum. He alleged that the ground of detention, which was furnished to him, was vague. The ground alleged that he addressed meetings at named places at which he desired a change of government. In granting the application sought, Moodley J. held that the ground alleged was vague and went on to state that the statement of the ground of detention furnished to the applicant must contain sufficient information to direct the applicant's mind thereto in order to enable him to know what was being alleged against him, and to bring his mind to bear on it, so that he would be in a position to make adequate or meaningful representation to a tribunal.

It must also be noted that contrary to the spirit and letter of the Convention, the Zambian authorities have on many occasions tried to frustrate the work of counsel so much so that the detainee is on many occasions, unable to communicate with his/her lawyer²³ and hence being denied time and opportunity and indeed facilities for the preparation of his defence. On May 1, 1998 Legal Resources Foundation²⁴ Lawyer, Geoffrey Mulenga,

was detained at the Flash Bus Stop Police Post in Lusaka for advising police officers to stop beating a bus driver they had stopped for violating traffic regulations. He was charged with interfering with police duties. In July, the same year, a prominent Lusaka Lawyer, Nellie Mutti, complained before Lusaka High Court Judge, Peter Chitengi that Police Chief Inspector Ronald Simbeye had, on 29th June, 1998, threatened to arrange for her abduction for defending accused persons who he thought were guilty. State Advocate Colonel S. Mtonga told Judge Chitengi that he had admonished Simbeye when he heard him issuing the threats. The Judge ordered an investigation of the abduction threats. He said he would instruct High Court Registrar to write to the Police Inspector General to thoroughly investigate the matter.

It is axiomatic that the harassment of lawyers is a serious erosion of the rule of the law. It also seriously undermines the Constitutional and universal guarantee of a fair trial, which requires that an accused person should be represented by a lawyer of his choice. Law enforcement officers by harassing lawyers, are in effect warning lawyers against representing certain clients who are thought to be anti-government. Predictably, not all lawyers are willing to risk their liberty and life for the sake of their clients. Infact, there is a handful of lawyers who are interested in taking up so called "political cases". Illustratively, when Princess Mirriam Nakatindi Wina, who is MMD Chairperson for Women's Affairs, was wrongfully arrested and detained, she was represented by the same overstretched lawyers.

Finally, we hasten to add that another International Instrument contained in the International Bill of Rights and worth mention in this discussion is the **Optional Protocol to the International Covenant on Civil and Political Rights**. However,, this instrument is only relevant to our discussion to the effect that it enables the Human Rights Committee set up in part IV of the ICCPR to receive and consider communications from individuals claiming to be victims of violations of any of the rights set forth in the ICCPR. In this regard, this protocol is fundamentally cardinal in so far as rights of detainees are concerned. It specifically serves two purposes. First it enables detainees to take their cases of human rights violations further than national courts which most cases are timid and only interested in preserving the status quo. Second it enables

detainees to sue for violations which though not provided for in national legislations are nonetheless provided for in international instruments and in so far as state parties have ratified or acceded to the convention in issue, they are as much bound as if they have reduced the effect of the provisions under consideration in their national laws.

3.1 **African Charter on Human and People's Rights:**

The African Charter on Human and People's rights ²⁵ (hereinafter referred to as the Charter) has also a number of provisions which relate to rights of detainees. Even though most of the civil liberties relating to detainees, are substantially the same as those alluded to in instruments discussed above, the special nature of the charter is seen in its non-derogable nature of its provisions regardless of the situation obtaining. Zambia, it is imperative to note, is a signatory to the charter.

Article 4 of the Charter opens up with a declaration to the effect that human beings are inviolable. That every person shall be entitled to respect for his life and the integrity of his person. And that no one be arbitrarily deprived of this right. It is lucidly by now that this right is protected by all the instruments alluded to above. It thus, goes to show how crucial this right is and the kind of respect that has to be attached to this right.

Ironically, the situation in Zambia does not reflect this kind of attitude from the law enforcement officers. A number of people have and continue to lose their lives due to overzealous officers who have no regard for the integrity of a detainee. The recent death of a Lusaka Youth is illustrative of this point.²⁶ Augustine Chama died in custody after being tortured by Chunga Police post officers in Barlastone park area while his three other colleagues were nursing wounds sustained from torture by the same officers. Chama 21, of Matero Compound, in Lusaka died on November 30, 1999 late in the night after being continuously tortured for three days in the bush near Barlastone Park farms. He was arrested by police two weeks prior to his death prior to his death for going to see his friend who was detained by police for the theft of household items in the same compound. At the police post, the police accused him of being a thief and asked for his house number and other personal details. Chama left the police post, but the police

followed him in the night and told his parents that they wanted him to follow them for questioning.

In an interview with the author one of the detainees, Gilbert Mvula Banda, said Chama was put in the same cell with them and they underwent beatings every day from the policemen. Displaying deep cuts in his hands and marks where he was handcuffed, Banda said they were usually put on a swing and head butted by the policeman who were soliciting a confession. Another detainee, Andrew Banda said:

“They used to beat us and pierce sharp instruments in my hand.

At times they would put us on a swing with heads down and then whip us.”

What was even more frightening is that the police tried to hide Chama's death, and hence being in even more contravention of international human rights instruments which demand a quick report once a suspect is shot dead or a detainee dies in a confinement. This aptly shows that most of our police officers pay little regard to human rights issues. The case shows wanton disregard of a person's integrity and is a brute and barbaric way of treating a fellow human being.

The Charter further prohibits all forms of exploitation and degradation of man particularly in acts of torture, cruel, inhuman or degrading punishment and treatment .²⁷ The Charter, it is prudent to note does not allow any derogations in this regard. We shall not delve into discussing this provision since we have already alluded to it before and shall soon be discussing instruments relating to torture. Article 6, on the other hand secures every individual's right to liberty and declares that except for reasons and conditions previously laid down by law no one may be deprived of this liberty. Most importantly, the charter through this Article, provides that no one may be arbitrarily arrested or detained. As already shown by a myriad of cases above, this freedom has been fundamentally breached with impunity. We have seen a number of persons who have been arrested and arbitrarily detained for cases not warranting such actions. Law enforcement officers have on a number of occasions used personal considerations to effect these detentions instead of looking at issues objectively. Also, on many occasions,

these officers have used the perceived enmity between influential ruling party officials and private citizens to vindicate against the latter. The case of Imasiku Mutangelwa is instructive of this point. Mutangelwa is leader of the Baroste Patriotic Front (BPF) a group, which advocates for the secession of Western Province from the rest of Zambia as purportedly agreed between the former Zambia President, Dr Kaunda and the British representatives. Mutangelwa was arrested and detained on charges of causing death by dangerous driving, an offence allegedly committed long before he associated himself with BPF. His case was supposed to be heard in Mongu where it happened but was mysteriously transferred to Lusaka. However, the Lusaka High Court also ordered the transfer of the case back to Mongu to alleviate costs, which were to be incurred by the witnesses. When all this was happening (over a period of five months) Mutangelwa was remanded at Lusaka Central Prisons. He claimed by arbitrarily detaining him and the failure of the police to prosecute him amounted to his being mentally tortured. He further stated that:

“They are infringing on my rights because they have tied me by grabbing my passport. So I can not move. This can be compared to Kangaroo laws whereby if they fail to beat you in the ring, they drag you into the water.”²⁸

The Charter has taken the issue of human rights further by providing in Article 25 that state parties shall have a duty to promote and ensure, through teaching, education and publication, the respect of the rights and freedoms contained in the Charter. And to see to it that these freedoms and rights as well as corresponding obligations and duties are understood. This, of course is crucial if people particularly law enforcement officers are to grasp and appreciate internationally accepted standards of human rights. The situation on the ground dictates that a lot of law enforcement officials, particularly the police, have not a slightest idea of human rights as provided either locally or internationally. What is even more astonishing is that even those law enforcement officers who have passed through law school or indeed those that have done courses in human rights are also involved in the dehumanizing acts on fellow individuals.

The culture of violence has continued to be propagated and to torment the police service. For a long time now police officers have used brute force in performing their duties. Even the training, until recently, focused on drill and the use of force. Recruits were not given sufficient training in investigation methods or the law. The Police reforms introduced in 1994 are, therefore, a "blessing" and are meant to correct these shortcomings but, no doubt, it will take time for positive effects of the reform approach to be felt. Most police officers are still steeped in the old culture and old methods. It is, therefore, relieving to hear that the police service has introduced a course on human rights at their Lilayi College:

At Lusaka Central Police are geared to see that the Police Service upholds internationally accepted standards of human rights. To ensure that this is done, at our police college we have introduced to our curriculum a syllabus on human rights²⁹

Because it will benefit the officers who need it most, that is those in the police service who still hold the view that the police is a force department of the state, and are reluctant to change.

Article 26, on the other hand, implores upon state parties to allow establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the Charter. Zambia has, to this effect, established the Permanent Human Rights Commission headed by Lombe Chibesakunda, a Supreme Court Judge. This Commission was set up by Act Number 39 of 1996 and was mandated, inter alia, to visit prisons and places of detention or related facilities with a view to assessing and inspecting conditions of the persons held in such places and make recommendations to redress existing problems.³⁰ However even though this Commission represents a milestone of the country's commitment towards protection of human rights and democracy, many observers have labeled it as a "toothless bulldog". This is only because its mandate does not go beyond recommendation level but also because it does not have the power to even implement or perform what it is mandated to do. For example, after the 1997 coup attempt, the Commission was blocked

for more than ten days by the police from gaining access to the thirty – days old detainees that were being interrogated (and some reportedly tortured) at Zambia Police Force Headquarters. The Commission on November 4, 1997 after the detainees were transferred to the prison system, announced that it would immediately visit all detainees.

³¹ But on November 7, 1997 it was turned away from Lusaka Central Prison which action was clearly in contravention of its mandate. A Commission press statement protested the obstruction.³²

It is, therefore, clearly evident from the foregoing that what is needed is to go beyond mere paper work. It is not enough to merely establish institutions on paper but all the necessary machinery for its proper operation must be put in place and relevant authorities alerted and sensitized. The Commission was set up, for example, without even a single office structure and has been operating since its launch in March 1997 on borrowed premises. First, it was at an office in the Magistrates Court, then with two rooms at the Intercontinental Hotel and additional office space at Long Acres Government Lodges, and now at Mulungushi House annex. All this goes to show that no background work was done prior to establishment of the Commissions and was probably hastily set up just to please the donor community. Another related weakness of the Commission is that it is not fully independent. Questions remain about its autonomy, especially as its members are appointed directly by the President and without any statutory requirement or input from civil society on who is appointed. The lack of financial independence and the background of a number of the commissioners are additional constraining factors. ³³ in light hereof, it is questionable whether such an institution can live to its expectations.

3.0 Code of Conduct for Law Enforcement Officials:

It is imperative to note and appreciate that quite apart from the treaty standards, many United Nations Resolutions have been adopted which also formulate international standards of relevance to our study. Predominant among them is the Code of Conduct for Law Enforcement Officials.³⁴ This instrument acknowledges that the proper functioning of law enforcement officials is essential not only for an effective criminal justice but also for the protection of fundamental human rights of individuals.

The resolution adopting the code states that the nature of the functions of law enforcement in the defence of the public order, and the manner in which those functions are exercised have a direct impact on the quality of life of individuals as well as of society as a whole. While the General Assembly of the United Nations was conscious of the cardinal task that law enforcement officials were performing, it also noted the potential for abuse that the discharge of their duties entailed. The code stipulates the principles and pre-requisites for the humane performance of law enforcement functions. Among them is that, like all agencies of the criminal justice system, every law enforcement agency should be representative of and responsive and accountable to the community as a whole. This is paramount because it ultimately reduces police brutality on innocent members of the community. In this regard, the Zambia Police developed a five -year implementation plan.³⁵ The document recognizes that causes of abuse of police powers are on the increase, and there are no measures in place to check this. In its own document, the Zambia Police has also admitted that it lacks knowledge of constitutional and human rights law.

The targeted period has almost come to an end³⁶ but the Zambia Police Force, which was aiming at becoming a service has maintained and in some cases strengthened its military and political outlook. Recent actions clearly suggest that the force is not accountable to the Zambian community, nor a review board, an ombudsman, a citizen's committee nor any combination thereof, nor any other reviewing agency. Instead, it is only accountable to a section of the community, namely, the MMD. In fact, recent recruitment to the police service emphasized MMD membership as pre-requisite. The former Inspector General of Police, Francis Ndhlovu, had repeatedly said that he was only accountable to the appointing authority, in this case, the Republican President. This is clearly in conflict with the code under consideration, which requires such officers to be subjected to public scrutiny. The result is obvious, various abuses are propagated. The situation in Zambia is further compounded by the police's change of heart on strengthening its human rights record. The police has shelved its plan to persuade the government to create an independent Police Complaints Authority which, if established, would deal with matters such as death, torture, ill treatment, and unlawful detention

arising out of police operations. Because of the absence of such an independent tribunal on complaints against police, the police has also failed to keep proper records on complaints and investigations, and does not give feedback on complaints from the public. This has resulted in inaccurate and harmful information being given to the public by the police. For example, on 6 November 1998, the day of death of former Finance Minister Mr. Ronald Penza, police spokesman Beenwell Chimfwembe, gave false information to the British Broadcasting Corporation (BBC) that police had killed Penza's killers. Chimfwembe has since been removed as spokesman.

It is also to note from the outset the code's underlying premise is that those who exercise police powers, especially the powers of arrest or detention, should uphold the rights of all persons. Thus, Article 1 as read together with Article 2 provides that police officers shall at all times fulfil the duty imposed upon them by law by the exercise of their powers. That in the performance of their duties they shall respect and protect the rights and maintain and uphold the human rights of all persons. It is the duty of the police to protect the individual and the community at large as a central focus so that the interests of the individual and the community are protected. Naturally, ill treatment of individuals and inhuman and degrading treatment can not be said to be acceptable. It must be stressed, for the avoidance of doubt, that the code also protects those protected in national and international law. The principles examined earlier are thus to be protected and upheld by police officials.

The code also curtails the powers of the police by emphasizing that they may only use force when strictly necessary and to the extent required for the performance of their duties. The provision, therefore, emphasizes that the use of force should be exceptional and no force going beyond what may be used. It can not be doubted that situations envisaged here are those that occur when trying to arrest a suspect. It is only in rare cases that detainees would behave in such a way as to enable the police to invoke the use of force. However, as noted in the previous chapter, the police have used unreasonable force on innocent and defenceless detainees in cells not to repel violent advances of these

detainees but merely to extract confessions. And because the beatings are so severe, deaths have resulted in most cases.

The police have even gone further to use firearms in their endeavour to show off their authority. This, no doubt, is also unreasonable force, which in most cases is unjustifiable. The code regards the use of firearms as an extreme measure. Every effort, therefore, should be made to exclude use of firearms. In general, firearms should not be used except when a suspected offender offers armed resistance or otherwise jeopardizes the lives of others and less extreme measures are not sufficient to restrain or apprehend the suspected offender. It is manifest that the code and other international instruments seek to almost outlaw the use of firearms on suspects. In this regard, only a minute opportunity is extended to law enforcement officials to shoot. The practice in Zambia, however, has reached alarming levels. We have given some examples of instances where the police have unjustifiably opened fire. This has prompted the locally established Permanent Human Rights Commission to totally condemn the use of live ammunition or any other offensive weapon when apprehending unarmed persons.³⁷ despite such condemnation and the general outcry from members of the public, the police seem unconcerned and have continued their killing business unheeded.

In the wake of Penza's death for example, a total of eight suspects were killed by the police most of them in mysterious shootings. What is even more surprising is that the number of people who raided Penza's home on the fateful day were six but the number of suspects killed by police had reached eight, and still others were arrested and are currently still appearing in court. This, therefore, shows that the command is generally in agreement with shoot on sight arrangements. That the government is comfortable with such killings is clearly demonstrated and discernible from the comments of the Minister of Home Affairs, Peter Machungwa, and his predecessors Katele Kalumba and Chitalu Sampa respectively. Honorable Machungwa in defending the police had stated that police were human beings as well and needed to protect their lives if confronted with dangerous criminals.³⁸ He further went on to implore upon the civil society not to unnecessarily criticize his officers as they were demoralized by this. Honorable Katele Kalumba, on the other hand is on record as having said that:

“The crime situation in the country warranted force by police officers as criminals were armed to the teeth not with toy guns but automatic military weapons”.³⁹

Honorable Sampa was clearly the worst of them all when he directed the police to shoot suspected criminals on sight.⁴⁰ These comments are, no doubt bad for a country that proclaims itself as champion of human rights. On the ordinary police officer they serve as tacit approval of his/her actions and hence does not feel restrained to repeat the act. Ultimately, such comments reduces a nation into a police state and encourages the police to do acts which amounts to extra judicial summary execution.

The code also prohibits torture.⁴⁰ The provision is mainly derived from the Convention Against Torture but as this is the substance of the next instruments to be discussed, we shall leave issues of torture for that part.

3.2 INSTRUMENTS RELATING TO PROHIBITION OF TORTURE

i **Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading treatment or Punishment**

This is the earliest single instrument dealing exclusively on torture and other cruel, inhuman or degrading treatment or punishment. It was adopted by the General Assembly of the United Nations and came into force on 1st December 1975. The Declaration on the Protection of All Persons, from being subjected to Torture and other cruel, inhuman or degrading treatment or punishment (hereinafter referred to as the Declaration) defines torture as follows:

“...torture means any act by which severe pain or suffering, whether physical or mental, is internationally inflicted by or at the instigation of a public official on a person for such

purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of have committed, or intimidating him or other persons. It does not include pain or suffering arising only from inherent in or incidental to, lawful sanctions to the extent consistent with the standard Minimum Rules for the Treatment of Prisoners”⁴²

The Declaration goes on to state that torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.⁴³ However neither the Declaration nor any other international instruments has endeavoured to define cruel, inhuman or degrading treatment or punishment. This, therefore has been left to the concern of national courts, and as shown in several cases cited in the last chapter, the courts have on Kindred occasions declared the treatment by law enforcement officers to be cruel, inhuman and even degrading. In a recent case, for example, the Lusaka High Court declared some provisions of the Penal Code as brutal, inhuman, barbaric and degrading.⁴⁴ This was in the case of John Banda Vs The People ⁴⁵ in which the appellant appeared against a sentence of 10 strokes of a cane after he had pleaded guilty to malicious damage to government property. He contended that 10 strokes of the cane was too brutal, inhuman and barbaric. He, therefore urged the court to declare the sentence null and void as it conflicted with his constitutional right against torture, inhuman and degrading treatment or punishment under Article 15 of the Zambian Constitution. The appellant also urged the court to abolish corporal punishment as it infringed on his rights. In so doing, the appellant was inviting the court to declare Section 24 (c) of the Penal Code, which provides that:

“The following punishments may be inflicted by a court: ...
Corporal punishment...”

and Section, 27, 46 which provides for situations under which Corporal punishment may be meted out, unconstitutional.

Judge Elliot Chuulu, in upholding the appeal said that the sentence was inappropriate and wrong in principle looking at the particulars of offence and further held that corporal punishment should be done away with as it was degrading an individual. In this regard, Judge Chuulu observed that Sections 24(c) and 27 of the Penal Code which provide for Corporal punishment contravened Article 15 of the Constitution – the Supreme law of the land – and so they should be declared null and void. He then declared the two sections that way and ordered that they be severed from the penal code.

Judge Chuulu's landmark judgement, should, of course, be commended for representing another stride in the fight against human rights abuse. It is, however, regrettable that the declaration was long overdue. Corporal punishment has been in the Zambia Statute books from as far back as 1st November 1931, and has been meted out indiscriminately. The enactment of the 1964 independence constitution, which contained the first Bill of Rights for Zambia, and the Declaration against torture of 1975 did not help matters. This, therefore, means that the Zambian Authorities had been acting in contravention of both the Supreme Law of the its land and against the International instrument to which the country is a signatory. This is particularly frightening when one considers how receptive the Zambian government has been vis-à-vis corporal punishment laws. It is in these premises that institutions like prisons and schools have willy-nilly undertaken to effect such punishments not knowing that the same has been outlawed by the Supreme law of the land. Be that as it may, authorities of such institutions can hardly be to blame since their enabling laws (from which they derive authority) have been orchestrated in such a way as to expressly condone such barbaric and inhuman acts.

Article 2 of the Declaration creates an offence of torture when it provides that:

“Any act of torture or other cruel, inhuman or degrading treatment or punishment is an offence to human dignity and shall be condemned as a denial of the purposes of the charter of the United Nations and as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights.”

This provision, without doubt, represents a milestone in ensuring that law enforcement officers refrain from engaging in acts prohibited by law. It presupposes that officials implicated in such acts will be investigated and prosecuted if found wanting. Such prosecutions and subsequent convictions, if found guilty, shall entail imprisonment and/or loss of employment and benefits. This will obviously deter law enforcement officers from engaging in such activities and hence reduce or even wipe out completely torture from Zambian cells and prisons.

In Zambia, however, the state has lamentably failed to adhere to this provision. The Penal Code, which stipulates a number of offences and their punishments, does not even by implication create any offence to this effect. Further, there has never been a case where a law enforcement officer was prosecuted for torture or mal-treatment of detainees. What is even more bizarre is that even within their employment structure these law enforcement officers are not made accountable for the colossal amounts that government has to pay out in terms of compensations for torture, cruel, inhuman or degrading treatment or punishment. Small wonder Supreme court Judge, Ernest Sakala, in upholding judgement for exemplary damages ⁴⁷ dismissed the argument propounded by the Principal State Advocate that this police officer in question who committed the wrong would not feel it. In expressing his sense of shock with the arrangement, Judge Sakala observed that:

“This court cannot accept the suggestion that in a case of this nature exemplary damages serve no purpose because the woman

constable who committed the wrong would not feel it. If this is the truth of Government institutions, there is a very serious omission in the whole system. As far as this court is concerned the 1st defendant is a servant of the state. What they do to her for causing such heavy loss to government coffers is their own business. But we regret that the money will come from the tax payer.”⁴⁸

The Judge was on firm ground when he pointed out that this is a serious omission in the whole system. An official who disregards what the law says and does the contrary with great malice does not deserve to go Scot free because indeed, as the State Advocate submitted she would not feel it and, in most cases, probably does not even attend court proceedings in person and hence is indifferent to the proceedings and their outcome. Consequently, the behaviour of such an official is scarcely expected to improve for the better.

Finally, Article 3 prohibits states from using such circumstance as a state of war, or a threat of war, internal political instability or any other public emergency as justification of torture. What this entails is that prohibition of torture and other acts in that regard is absolute and hence no derogation can be entertained for whatever reason. Accordingly, no law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment, nor may any law enforcement official invoke superior orders or exceptional circumstances, as adumbrated above, as justification for so doing.

Despite the absolute prohibition of torture, however, the norm in Zambia appears to allow some “hidden” derogation. As was revealed by cases of torture discussed above, law enforcement officials in Zambia have and still continue to violate the provisions of this Declaration with impunity. Only recently, it was reported that a 22 year old co-tax driver of Chilenje South Compound one Mwakapatish Mutabiko was badly beaten by Lusaka Central Police Officers while in detention.⁴⁹ What was even more absurd about the police officers’ action was to

deny Mutabiko a police medical report. As can be guessed from the pattern of circumstances articulated in the previous analytical cases, Mutabiko was detained for ten days by police for suspected car theft and subsequently beaten using a sjambok. He was released thereafter but without being charged. Another very recent case alleging torture by the police is that involving Amon Oscar Chirwa Banda aged 23 years. Banda is alleged to have murdered Major Wezi Kaunda – an opposition party activist and son of former President, Dr Kaunda. Appearing before acting Principal Resident Magistrate, Mukuka Mulabaka, Banda refused to acknowledge whether or not he understood the charges against him but instead, removed his shirt to show the Magistrate he was in great pain and therefore could not take plea.⁵⁰ Banda had alleged that he was under constant interrogation and beatings from merciless police officers he can hardly remember.

It is thus evident from the cases hitherto presented that torture or other cruel, inhuman or degrading treatment or punishment continues to be rife among Zambia law enforcement officers. The acts seem to be steadily increasing unabated, and what is even more worrying is that these acts are done indiscriminately whether in high level political cases or indeed petty offences. As fate has it, the majority of those that undergo through this barbaric and untold misery are often times either not charged or found not guilty by courts of law. Compensation or not, the scar is already done on a person's life. His/her mind becomes perpetually disturbed hurt and depressed – some people have these torments haunting them to their death.

ii **Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment**

The Convention Against Torture and Other Cruel, Inhuman or Treatment or Punishment (hereinafter referred to as CAT) was adopted and opened for Signature, ratification, and accession by the United Nations General Assembly ⁵² On 10th December 1984. Zambia only became a signatory two years ago, when in August, 1998, it acceded to the convention. Whereas the basic provisions are substantially the same as those provided for in the 1975 Declaration ⁵³, CAT

goers further to impose obligations on State parties to ensure that institutionalized acts of torture are wiped out and its perpetrators punished. CAT further imposes duty on state parties to ensure that complainants of torture are effectively heard and redress provided. It has, however recognized that acts of torture will go unabated If not proper training is provided for law enforcement officers and other interested parties hence the provision.

Article 2 provides that each state party still takes effective legislative, Administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction. Sub-section 2, on the other hand, removes any justification for torture by providing that no situation however threatening may excuse state parties to torture any person. Evidently, it is seen that the tenor of the provisions of CAT is one of non-compromise. The right of protection from torture and inhuman treatment cannot be derogated under any circumstance. It is undoubtedly in these premises that sub-section 3 provides that one can not plead superior authority as justification of violating the provisions of CAT. Therefore, Junior officers are supposed to be equipped with adequate knowledge so as to appreciate that acts of torture are outlawed, and that no situation nor authority can command them to do otherwise. That if they go against the spirit of CAT, they do so at their own peril.

The CAT further puts an obligation on each party to ensure that all acts of torture and attempts thereof are made offences under its local criminal law. Similarly, complicity or participation in acts of torture are supposed to be criminalized under national laws.⁵⁴ It is also provided that proportionality vis-à-vis punishments for these offences must be paid regard to.⁵⁵ Evidently these provisions are aimed at alleviating if not eradicating all cases of torture by law enforcement officials. Sadly, for Zambia, no legislation has been passed to this effect despite the gravity and upswing of cases of torture as this paper has revealed and is still revealing. In fact, the powers that be have not even attempted to initiate even a bill in Parliament.⁵⁶ The corresponding result of such inertia is predictable: it gives a carte blanche to law enforcement

officials to continue with imperishable vices of torture and other acts of degrading treatment.

Article 10 imposes an obligation on state parties to ensure that law enforcement officers and others persons involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment are sufficiently educated and information regarding prohibition against torture included in their training. This is paramount and needs no emphasis especially if regard is had to the fact that knowledge is power. While it is not absolutely true to state that ignorance of human rights provision in this regard is the sole cause of such vices, it cannot be an over statement to conclude that this ignorance has immensely contributed to torture cases.

The CAT further imposes obligations on state parties to ensure that: prompt and Impartial investigation is carried out whenever there is reasonable ground to believe that an act of torture has been committed, the complaint and witnesses are protected against all ill-treatment or intimidation as a consequence of his/her complaint or any evidence given, the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for all full rehabilitation as possible, and also that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings.⁵⁷ These provisions are strictly aimed at protecting the victim of torture. In Zambia, however, the state machinery is such that victims are not protected and the burden is not made any easier especially where no physical evidence is provided. The situation is further compounded by the fact that Zambia courts despite being aware that police sometimes use brutal methods to obtain confessions from suspects have deliberately let the law, which promotes such vices to prevail. Thus, although such involuntary confessions are inadmissible in evidence, consequential discoveries made as a result of such confessions are admissible. This, apart from being a paradox, expressly contradicts Article 15 of CAT, and

also gives an impetus on law enforcement officials to continue or even resort to such practices. This is where the problem is because in certain jurisdictions, such as the USA, such discoveries are inadmissible as being tainted by the involuntary confessions.

However, the above provisions notwithstanding, one would say that perhaps the remarkable achievement of CAT lies in its establishment of the Committee Against Torture.⁵⁸ The committee has been set up to investigate cases of torture in any member state whenever it has reliable information to that effect. In this regard a state party involved is obligated to cooperate with the committee and to ensure that the committee undertakes its examination unhindered. The effect of such a committee in a country, like Zambia, where the state has failed to observe many of the provisions, discussed above cannot be over-emphasized. It is, therefore not strange that Zambia had hitherto⁵⁹ entered a reservation on Article 20. This article provides for a United Nations Committee to investigate Well founded reports of systematic abuses. It is obviously a cardinal provision which should not have made a government which boasts of a good human rights record to wait for so many years before being pushed to accept it⁶⁰ It is, therefore our contention that the Zambian government had acted in bad faith, and that here is no political will from the government to implement the provisions of this instrument. Zambia should acknowledge the importance of international laws to which it is party, and must never operate in "dubious" ways which seem to undermine its international commitments and the effectiveness of international human rights law.

3.3 **Standard Minimum Rules for the Treatment of Prisoners**

This instrument which, for convenience, we shall refer to as the Minimum rules does not prescribe strict rules or conditions which all nations must follow without fail. Instead, in view of the great variety of legal, social, economic and geographical conditions of countries of the world, it is aimed to serve as stimulus of a constant endeavour to overcome practical difficulties in their way of their

application. It must be appreciated further that the minimum rules as a whole, represent the minimum conditions which are accepted as suitable by the United Nations.

Article 6 (1) of the Minimum Rules prohibits discrimination in the application of the rules. This provision however, as the case of Kaunda in the next Chapter shall reveal, is not strictly adhered to. Article 8 stipulates that different categories of prisoners shall be kept in separate institutions or parts of institutions taking into account their sex, age, criminal record and indeed the legal reason for their detention. The situation on the ground, however, is quite pathetic. A lot of detainees complain of having been put together with not only convicted prisoners but also hard core convicted criminals. Thus, those suspected of having committed capital offences are housed in the same cells as those with smaller offences.⁶¹

The minimum Rules also provide that where sleeping accommodation is in individual cells or rooms, each prisoner shall occupy by night a cell or room by himself⁶² Clearly, such a provision is meant to ensure that hygiene is observed and contagious diseases curtailed. However, the situation in Zambia leaves a sorry sight. And the media is awash with reports of prisons in the country accommodating more inmates than the existing infrastructure can contain. For instance, there are about 1,080 inmates at Kamfinsa Prison in Kitwe, more than twice the number meant for the place⁶³ This problem is not just with Kamfinsa Prison but has been identified with almost all prisons in Zambia. At Lusaka Central police cells, Officer in Charge Ben Mwananakwa,, conceded that one cell which is supposed to accommodate between 5 and 10 suspects had more than 20 suspects.⁶⁴ This overcrowding, has not only caused "wear and tear" to the already worn out and age-old infrastructure,, but is fertile ground for TB and a host of other infectious diseases. It has also provided breeding ground for many pests like cockroaches, bed bugs, and lice that render sleep to inmates something of a nightmare.

While it is now appreciated that the deplorable conditions of most Zambian prisons is not “news” anymore, it is a well known fact that it is still an area of concern. This is why many health practitioners have also from time to time warned of diverse health hazards that could occur if the situation were left unresolved. The Zambian authorities however, feel undisturbed by all these reports, and seem to give tacit approval of the status quo. It is undoubtedly in this regard that Honorable Machungwa, then as Deputy Home Affairs Minister, in response to queries about congestion, filthy and deplored conditions of Zambian prisons responded in a less mature manner that:

“Prisons are not luxuries where inmates should stay like they are in masions.”⁶⁵

Article 12 is also another provisions of the Minimum Rules that authorities have opted to breach with impunity. This provision states that the sanitary installations shall be adequate to enable every prisoner to comply with the need of nature. However, many cases reported elsewhere in this paper have revealed poor sanitary conditions and especially blocked sewer lines which poses a health hazard to inmates. For example, at the time of the author’s visit to Lusaka Central Police cells,⁶⁶ the Officer in Charge Ben Mwananakwa disclosed that the station has seven cells but two were permanently locked because of a blocked sewer system. However, though the command used the word “permanently” it is contended that this was a misnomer and that he meant the cells were temporarily locked and liable to unlocking as soon as the number of suspects have swelled. This is based on the experience with other prisons ⁶⁷ where detainees stay in unsanitary conditions and are made to feed in those very conditions.

The Minimum Rules further provide for institutions harbouring prisoners to be properly maintained and kept scrupulously clean at all times. While it is accepted that detainees may be used to do such work as is suitable for proper maintenance of their environment, it is regrettable that the authorities do not provide tools for performance of such tasks. Thus, a former detainee, Kelly Chanda Kwaba,

revealed that detainees are forced to clean toilets with bare hands, and with no chemicals whatsoever –hence the rise in mysterious diseases.⁶⁸

Article 20 of the Minimum Rules, which stipulate that every prisoner shall be provided by the administration at the usual hours with food of nutritional value adequate for health and strength, of wholesome quality and well prepared and served, is directly contravened by authorities in Zambia. On average, prisoners have one meal (with nshima and beans or cabbage) only per day usually at 16 hours. The inmates complain that the food is not of nutritional value at all and moreover no cooking oil is used. The food is prepared under the most unsanitary of conditions in dilapidated summer houses.

The Minimum Rules in Article 22 (2) stipulates that sick prisoners who require specialist treatment shall be transferred to specialized institutions or to civil hospitals. The rules presuppose that minor cases will be attended to at clinics established in the prisons. However, what were once clinics stocked with drugs are now empty desolate buildings. The continued presence of clinical officers who have been seconded to the Prison Service by the Ministry of Health is also threatened with the introduction of health boards.

The Board may decide to withdraw their staff from prison hospitals. What makes the problem even more acute is that the clinics do not only cater for prisoners but for other people in their prescribed catchment areas. In Central Province, the money provided⁶⁹ for health care services for all prisons is K1 million per month, an amount far below the required amount of a single prison. The clinics further do not have a single doctor meaning that one clinical officer has to cater for an average of over 700 inmates. Where inmates are referred to hospitals (which are not plain sailing despite the complications of a problem) they still have to buy their own medicine. Prisoners do not have an income and most of them are detached or even abandoned by their families and therefore, cannot afford to buy medicines – so they have to rely on their bodies own defence systems to survive.

The Minimum Rules also allow prisoners to communicate with their family and reputable friends at regular intervals both by correspondence and by receiving visits.⁷⁰ Also the Rules provides that Prisoners shall be kept informed regularly of the more important items of news.⁷¹ However, these provisions are also compromised. Detainees have often complained of being refused visitors.⁷² In fact, in most cases relatives and reputable friends (even the press) are not told where their relation is held.⁷³ All this is calculated to deny the detainee visits to which he is entitled to and hence being tormented mentally. Moreover, in certain cases detainees are precluded from informing their families of their detentions hence they are incarcerated without their families and friends knowing.

Furthermore, the Minimum Rules stipulates that detainees may, if they so desire have their food procured at their own expense from the outside.⁷⁴ Also the rules provide that detainees shall be allowed to be visited and treated by his own doctor. We have had reports, however, to the effect that detainees are prevented from getting food from outside under very flimsy grounds.⁷⁶ Some detainees have also been denied specialty treatment even in instances where doctors have recommended they be specially examined.⁷⁷

3.4 CONCLUSION

We have brought to the fore the fact that the United Nations, in it endeavour to maintain peace and promote human rights, has concluded several human rights instruments. For purposes of this paper, however, we have only picked a selected number. These instruments to which Zambia is either a signatory or has acceded, are binding on member countries despite some of them having no enforcement machinery. Indeed International law, by the principle of *Pacta Sunt Servanda*,⁷⁸ demands that states obey instruments they freely enter into. However, contrary to the provisions stipulated in these instruments Zambian authorities have literary observed breaches with tacit approval. Law enforcement officers have continued to arbitrary arrest, detain and ill-treat suspects in clear contravention of of international instruments.

In the circumstances, and regard being had to the fact that there are more breaches of international instruments than conformity, it is as if Zambia is not bound by any of these instruments. This lack of political will by the powers that be was further demonstrated by reservations entered on vital provisions and lack of reporting on measures taken (as demanded by various instruments) to ensure proper and adequate performance of the instruments. This failure was recently confirmed by Legal Affairs Minister Vincent Malambo who said that he was embarrassed that Zambia has failed to report to the United Nations in its measures taken on major human rights treaties.⁷⁹ But in the usual political rhetoric way the Minister did not want his country to be seen failing alone when he said:

“I am embarrassed as an African because we have failed as African countries to report on the continent’s Human Rights charter.”⁸⁰

We shall now proceed to consider, in the next chapter, how both the local and International instruments were applied to a recently well published case involving Former President, Kenneth Kaunda, and other eminent members of society.

END NOTES

1. Leah Levin, Human Rights, Questions and Answers, UNESCO, France, 1981 @ p. 13
2. Preamble to the charter of the United Nations
3. Article 1 (3) of the Charter of the United Nations
4. Leah Levin, Human Rights, Questions and Answers UNESCO, France, 1981 @ P.11
5. Ibid.
6. Zambia, for example did not participate in the preparation of the Universal Declaration of Human Rights but has only acceded to it.
7. This consists of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Covenant on Economic, Social and Cultural Rights and the 1966 Protocol and the 1989 Second Optional Protocol attached to the Covenant on Civil and Political Rights.
8. Katarina Tomasevick, Women and Human rights, Zed Books Ltd, London, 1993, P. 100
9. Ibid.
10. Universal Declaration of Human rights, General Assembly Resolution 217 (111) of 10th December 1948.
11. Article 1 of the Declaration
12. Ibid. Article 7
13. Ibid. Article 30
14. International Covenant on Civil and Political Rights general Assembly Resolution 2200 (XXI) of 16th December 1966, Article 4 (1)
15. Ibid. Article 4 (2)
16. Ibid. Article 9 (1)
17. Ibid. Article 9 (2)
18. Ibid. Article 9 (3)
19. Ibid. Article 10 (1)

34. General Assembly Resolution 34/169 which was adopted on 17th December, 1979
35. This was code-named "Strategic Development Plan 1995 2000
36. And its initiator former Inspector general Francis Ndhlovu retired
37. Human Rights Commission "Press Statement" August 26, 1997
38. The Legal Resource Foundation News, November 13 of November 1999, @ p. 7
39. Afronet Zambia Human Rights Report, 1998, Lusaka March, 1999 @ P. 13
40. This was widely reported in all the dailies during his reign as the Minister responsible for Domestic Affairs
41. Article 5 of the Code of Conduct for Law Enforcement Officials
42. Article 1 (1) of the Declaration
43. Ibid. Article 1 (2)
44. The Post Newspaper of 25th November 1999 @ p. 4
45. High Court case (unreported) for Lusaka Principal Registry
46. Of the Penal Code, Cap 87 of the Laws of Zambia
47. In the case of Gertrude Munyonsi and Attorney-general Vs Catherine Ngalabeka already cited and discussed above
48. Ibid. @ P. 6
49. The Post Newspaper Wednesday 24th November 1999 @ 3 "Police torture suspect denied medical report"
50. The Post Newspaper Wednesday, 1st December 1999 @ 8
51. It is widely believed, for example that one time politician and Businessman Valentines Shula Musakanya never recovered from the torture and ill-treatment he was subjected to in the second Republic until his death in the early 1990s
52. Resolution 39/46 and came into force on 26th June 1987
53. Just discussed above
54. Article 4 (1) of CAT
55. Ibid. Article 4 (2)

56. The reader must bear in mind that it is not easy to introduce a private members bill, latter on see it to enactment. Various such attempts have been frustrated. However, discussion of such instances are beyond the scope of this paper
57. See Articles 12, 13, 14 and 15 of CAT
58. Article 17 of CAT
59. Government withdraw the reservation it had entered on Article 20 of CAT on February 19, 1999
60. Zambia was slow and reluctant to accede to the CAT. Succumbing to acceding appeared to be a result of international pressure from Zambia's multi-lateral and bilateral donors. It is basically the same pressure which has forced the government to withdraw the reservation on Article 20
61. Observation made by the author of Lusaka Central Prisons popularly known as Chimbokaila
62. Article 9 (10 of the Minimum Rules
63. Times of Zambia, Saturday, March 18, 2000 "The day Kamfinsa was fumigated"
64. National Mirror, December, 18 – 24, 1999 @ P. 7 "Police cells a sorry sight"
65. Times of Zambia, 26th August, 1996
66. This was around November/December 1999
67. For example Chimbokaila prisons
68. This was in interview with the author, Mwaba is a 4th year Agricultural Science student at the University of Zambia
69. Afronet, Zambia Human Rights Report 1997 April, 1998 Lusaka @ P. 47
70. Article 37 of the Minimum Rules
71. Ibid. Article 39
72. This is mostly common in instances where the suspect has been badly tortured by the Police and is in such a condition as would impute torture to a visitor

- 73. This was a major complaint of relatives of treason accused particularly when the suspects were just detained
- 74. Article 87 of the Minimum Rules
- 75. Ibid. Article 91
- 76. In several cases, as in the case of the 1997 reasons accused, the Officer-in Charge has cited prevention of transmitted diseases like dysentery. However, this was not plausible since outside food is more nicely attended to than prison food.
- 77. The case in point is that of Princess Nakatindi Mirriam Wina who, on many occasions, was denied access to see a specialist. See the Post Newspaper, 9th December, 1999 "I was Stripped Naked, Lost my Pregnancy says Nakatindi."
- 78. This is the principle which basically means that agreements entered into in good faith and voluntarily members should be respected
- 79. Times of Zambia, 4th April, 2000 "Zambia Fails to Report to the UN on Torture
- 80. Ibid. @ P. 3

CHAPTER FOUR

4.0 INTRODUCTION:

Having thoroughly gone through a myriad of cases revealing serious abuses of rights of detained persons in various places of confinement in Zambia, it is aptly lucid that the Zambian law enforcement officers have either deliberately not paid heed to both local and international instruments prohibiting the same or are highly ignorant as regards what constitute improper treatment of these secluded people.

Be that as it may, the powers that be have strongly refuted these claims of abuses by law enforcement officials. The Government has, instead, alleged that those claiming that there is torture and ill-treatment of detainees in cells are merely politicking – and cheaply¹ Ironically, the Republican President² has on several occasions praised the police as:

“doing a commendable job under very difficult circumstances”³

It was, therefore, very difficult to grasp what the situation really was under those circumstances since one could not easily tell as to who was telling the truth. The fact that little or no media attention is captured especially in “low profile” cases does not help matters. This scenario gives an impetus to the concerned authorities to hide things under the carpet.

The case of former President, Dr. Kenneth Kaunda, and 79 others⁴, therefore, provided a litmus paper against which to measure whether indeed law enforcement officials are abusing their powers in so far as detainees are concerned or not. The status of the figure head implicated⁵, that of his co-accused, the nature of the offence and events prior to the fateful day⁶ where all fundamentally crucial as to attract full-pledged media attention. In this connection, events transpiring and revolving around the said treason accused were aptly covered from the day of their arrest up until their last appearance in court.⁷ To this end, the treatment they were subjected to, the conditions under which they lived were exposed not only by the detainees themselves but by Several other interested parties

including a government-established institution.⁸ The impact of the said revelation were so telling that the government finally conceded to abuse of authority by its servants.⁹

We shall, therefore, proceed to examine this case in detail. To effectively do this, we shall start by discussing the emergency laws – which have been, and were infact used to detain the accused in casu. We shall then proceed to analyse the prison conditions before touching on the crucial and controversial topic of torture. Finally, we shall conclude our discussion.

4.1 EMERGENCY LAWS VIS-À-VIS DETENTIONS WITHOUT TRIAL:

We have already noted in this paper that although the constitution guarantees various rights and freedoms to an individual, certain rights and freedoms are not absolute and hence can be derogated from under certain circumstances¹⁰ especially where the life of the nation is threatened. Evidently under such circumstances, the state must of necessity arm itself with adequate power to preserve itself. In this regard, it has been widely argued and contended that it is only when the safety of the state is assured that individual rights can be realised.¹¹ To this effect, most of the African States which became independent from British rule had provisions in their independence constitutions designed to preserve the safety of the new nation from either an actual public emergency or indeed a threatened one which might befall a nation. This, in fact was the argument fortified by the Attorney-General for Zambia in the celebrated case of Felia Kachasu vs. Attorney-General¹² when he said that:

“The rights of the individual depend for their very existence and implementation upon the continuance of the organised political society, i.e. the organised society established by the Constitution. The continuance of that society itself depends upon national security for without security any society is in danger of collapse or overthrow. National security is thus paramount not only in the interest of the state but also in the interests of every individual member of the state and measures designed to achieve and maintain that security must come first and,

subject to the provisions of the constitution, must override, if need be, the interests of individuals and of minorities with which they conflict.”¹³.

In times of emergency, therefore, the state is said to assume “extra legal powers” i.e. it obtains additional powers¹⁴ to enable it combat some enormous danger. Inevitably, the use of these powers has serious implications for individual rights and freedoms which are often curtailed or abrogated in order to accommodate these extra powers acquired.

It is cardinal to appreciate from the outset that a declaration of an emergency¹⁵ brings into operation two statutes namely the Emergency Powers Act¹⁶ and the Preservation of Public Security Act¹⁷. Both Acts, in effect, empower the President to make regulations for the preservation of public security. However, the Acts, despite their coverage of similar activities, are intended for different situations altogether. The Emergency powers Act, for example, can only be invoked when a full state of emergency is declared¹⁸ whereas the Preservation of Public Security Act is invoked when a threatened or semi-emergency is declared. Also, whereas under the Emergency Powers Act, the President is empowered to, inter-alia, make regulations both for the detention of persons or the restriction of their movement and for the deportation and exclusion from the Republic of aliens¹⁹, the President is only empowered under the Preservation of Public Security Act to, among other things, make provision for the prohibition, restriction and control of assemblies, and indeed make regulations for the detention or restriction of persons.²⁰ Finally, whereas the Emergency Powers regulations have to be affirmed by a resolution of the National Assembly for them to take effect during an emergency,²¹ the Preservation of Public Security Regulations, on the other hand, are valid for three months despite there not being tabled before the National Assembly.²²

In light of the foregoing, therefore, it should not be strange to the reader that all detentions in Zambia made in the name of and by the President since independence to 1991 were made under the Preservation of Public Security regulations-the country was under a threatened state of emergency all that period of time.

The Preservation of Public Security regulations empower detaining authorities to make orders for the detention or restriction of persons on being satisfied that their actions are likely to endanger the public security. In this regard, a person may be detained either by the President²³ or by a Police Officer of or above the rank of Assistant Inspector²⁴. The Courts have ruled that the two regulations provide for two different detentions: in the once case, the detaining authority is a police officer and the period of permissible detention is limited to twenty-eight days.²⁵ The purpose of this regulation basically is to make inquiries. In the other case, the detaining authority is the President, the period of permissible detention is unlimited and the purpose is to exercise control for the preservation of public security.²⁶ Since the two regulations are distinct, it is not possible to challenge the validity of a detention order under one of the regulations as a result of the unlawfulness on the other detention order.²⁷

As a result of the realisation that the exercise of the powers contained in the said regulations abridge individual liberties, the Constitution provide for safeguards to restricted or detained persons. These are contained in Article 26 of the Constitution, which Article specifies the procedure to be followed by the detaining authorities. Thus, the Article provides that the detainee shall be furnished with the grounds upon which he/she is detained or restricted as soon as reasonably practicable and in any case not more than fourteen days after the commencement of his/her detention or restriction. It also provides for publishing of a gazette notice within the same period stating the name of the person detained or restricted, the place of detention and the provision of the law under which his restriction or detention is authorised. The Article further provides that a detainee if he so requests at any time during the period of such restriction or detention but not earlier than three months after the commencement thereof, shall have his case reviewed by an independent and impartial tribunal.

Regarding the first requirement of furnishing grounds, it was held in Joyce Banda vs. Attorney-General²⁸ that in fact there are two necessities which stem from completely different bases. The first necessity which stems from a fundamental principle of the common law is that the ground must exist for a detention at the time of such a detention. This was followed in the Re Chiluba case already considered above. The application of

this requirement is not affected by the specific inroads made by the regulations or any other law authorising the deprivation of liberty. Thus, if no ground exist at the time of a detention, such a detention is unlawful ab initio. It follows, therefore, that the release of a detained person does not relieve the person responsible for a deprivation of liberty of the obligation to justify it in any case where its unlawfulness has been put in issue.²⁹

Apart from the necessity for the existence of grounds, there is the further necessity to furnish them within 14 days. The emphasis here is upon the obligation to furnish grounds as soon as is reasonably practicable rather than within 14 days. Although there is no constitutional obligation as such to furnish grounds in respect of a detention which has been revoked within 14 days, grounds, nevertheless should be furnished subsequent to the revocation to establish the bona fide of the detention.³⁰ The courts have further laid down that if grounds are not furnished within 14 days of its commencement, the continued detention thereafter is unlawful. This is an obligation imposed by the statute on the detaining authorities. It must be stressed that the computation of time of furnishing grounds is exclusive of the day on which the actual detention order was signed and that the period of 14 days should be calculated thereafter.³¹ Thus, in Chipango vs. Attorney-General³² the applicant was detained under Regulation 33(1) but received his grounds of detention after 16 days and his name was not published in the Gazette within one month (as the law then was). The Court held that the conditions that were contravened were constitutional conditions that were contravened were constitutional conditions subsequent to arrest and were mandatory. Failure to comply with them rendered the detention order invalid.

It is further provided in the same Article 26 that the grounds must be specified "in detail" and in the language the detainee understands. Grounds³³ are specified in detail if they are framed in such a way that the detainee is enabled to make an adequate representation against his detention on such grounds. The implication here is that it is a matter of fact in the particular circumstances of each case what and how much detail must be given. However, a ground which is vague, roving and exploratory is insufficient to enable a detainee to bring his own mind to bear upon any acts or words. Thus, in Mutale vs. Attorney-General³⁴ the High Court granted the application because merely stating that

the detainee conspired with others in Zambia to commit crimes was so vague that he could not make meaningful representation since he would not know which crimes exactly were being referred to.

As a further safeguard for a detainee's rights, it is provided that upon the request of the detainee and after he had been in detention for 3 months, an independent and impartial tribunal appointed by the Chief Justice may review his detention.³⁵ The said Article further provides that the detaining authority shall be obliged to act in accordance with any such advice offered by the tribunal appointed in that regard. However, these provisions are directly contradicted by provisions of the Preservation of Public Security Regulations. Thus the Regulations while also providing for the Tribunal³⁶ provides that a person's detention shall be reviewed not more than one month after the commencement of his detention. What this entails is basically twofold: first, that a detainee shall not clock a month without his case being reviewed, and second that the revision will be done with or without the detainee's request. These, of course, are very welcome provisions especially when one considers the trauma one goes through whilst in detention. However, these are reduced to mere decorations when the Regulations provide that the President shall not be obliged to act in accordance with any such recommendation as may be made by the tribunal.³⁷ Indeed, such a provision does not serve any purpose apart from encroachment. It is nothing but a case of giving on one hand and taking on the other.

It must be stressed for the avoidance of doubt that by section 5(2) of the Act³⁸ and indeed the Constitution itself any law, regulation or order must be in conformity with the constitution otherwise it is invalid to the extent of the inconsistency.

A number of reasons have been advanced to explain why the security powers have been abused by the authorised. First and foremost, in the two Acts³⁹ the term "public security" is not defined. The Acts merely give a description of the activities which are embraced by the term.⁴⁰ The courts have discussed the meaning of the expression in a number of cases. In Mudenda vs. Attorney-General⁴¹ for example, it was held that the term public security covers even the suppression of an economic crime like illegal trafficking.

However, in Kaira vs. Attorney-General⁴² the Court was sceptic about the proximity of the relation between illegal externalisation of money⁴³ and public security. The Court observed, instead, that the emphasis is on the preservation of the safety of the community rather than on its economic prosperity or otherwise.

It is ultimately because of this lack of specific definition of the term that there has been abuses of security powers. National security has been construed widely since the definition itself is couched in very wide terms which are not exhaustive but merely illustrative. Thus, it is for the detaining authority's discretion to determine whether a person's activities are prejudicial to public security or not. The executive has a subjective discretion in the matter and it cannot be challenged in courts of law. However, in Chisata and Lombe vs. Attorney-General⁴⁴ it was acknowledged that despite the satisfaction of the authority being subjective and discretionary, it must be reasonable in the circumstances. Moreover the detention must not be punitive but precautionary.⁴⁵

Besides the absence of a specific definitions of the term public security, there is the other aspect of the President's power to declare an emergency. The circumstances which would constitute an emergency, besides war, are not provided for by the constitution thus leaving it to the subjective discretion of the President. Regrettably too, the Zambian constitution does not define what a state of emergency is. The nearest definition (or at least its nature) is to be found in the preservation of Public Security Act ⁴⁶ which provides that:

“If the President is satisfied that the situation in Zambia is so grave that it is necessary so to do, he may, by statutory instrument, make regulations to provide for the detention of persons.”

Strictly speaking, there is no laid down procedure for ascertaining whether a given situation is grave to warrant a declaration or not. The inevitable effect of this

unrestrained power is that emergency powers pursuant to the declaration can easily be abused by those in authority to detain political opponents on flimsy grounds. In the first Republic, for instance, when Simon Mwansa Kapwepwe resigned from UNIP to form his own party,⁴⁷ he became very popular⁴⁸ that Dr. Kaunda felt threatened. The subsequent electoral alliance between ANC and UPP and a planned merger convinced UNIP that its days in office would soon be over.⁴⁹ Thus as a prelude to one-party imposition, Dr. Kaunda on 4th February, 1972 banned the UPP and ordered the detention of Kapwepwe and several of his supporters on the premise of preserving the country's threatened peace and security.⁵⁰ This detention was subsequently challenged in Kapwepwe and Kaenga vs Attorney – General.⁵¹ although it turned out to be unsuccessful.

In dismissing the contention that the President can be challenged on his declaring a state of emergency, Baron J.P. observed that:

“It is not open to the Courts to debate whether it is reasonable for there to be in existence a declaration...”⁵².

His lordship's reasoning was followed by Justice Kabalata in a most recent case of Mung'omba vs. Attorney – General⁵³ when he observed that:

“.....as to whether the court is in a position to inquire into reasons for the proclamation of a state of emergency, I find that the President is not obliged to furnish such reasons for making the declaration and such inquiry would, in my view, be ultra vires the powers of this court.....”

The impact of the above holdings is that the declaration of an emergency is not justiciable and hence cannot be questioned in court. These powers invested in the President pose one of the greatest threat to the liberty of the individuals in that the President has uncontrolled powers to deprive a person's liberty on mere belief that his activities are prejudicial to state security.⁵⁴ Incidentally, this abuse has continued even in

the Third Republic. The President has continued to use the emergency powers to silence what the ruling party perceives as "enemies of the nation."⁵⁵ In this regard, these powers are used mostly for all the wrong reasons viz. to entrench political power and to eliminate dissent.

Furthermore, the fact that the constitution does not provide grounds for a declaration of a state of emergency implies that the freedom of liberty is liable to curtailment by use of the emergency laws even when the matter involved is purely criminal. This danger was bluntly demonstrated in the Court's approach on the interpretation of emergency law provision in Rao vs. Attorney-General.⁵⁶ In this case, the Supreme court considered whether it was permissible for the state to detain without trial any person suspected of being involved in "economic crimes" such as illegal trafficking in and smuggling of semi-precious stones. Regulations derived from the Preservations of Public Security Act provided for detention without trial on grounds of "public security". According to the legislation, this includes securing the safety of persons and property, the maintenance of supplies and services essential to the life of the Community and the prevention and suppression of violence, intimidation, disorder and crime. The court concluded by holding that crimes which tended to cripple the economy of Zambia should be treated as a threat to public security and thus fell within the scope and meaning of the regulations.

Evidently, the effect of the above decision⁵⁷ is that it gave the executive wide and novel powers of detention, and ultimately much more latitude for abuse. Given the variety of situations encompassed and the differing political circumstances in which declarations are made, it is difficult to define what constitutes a state of emergency. However, it is a generally accepted norm that the only circumstance which justify derogations of individual freedoms are those which threaten the life of the nation.⁵⁸ In this context, the African Conference has noted that it is only possible to specify certain conditions without which a state of emergency can not be proclaimed, the main one being that:

"The regular operation of authority is impossible; but that so long as a situation exists where the authority can operate and the problems can be overcome, a state of emergency may not be declared."⁵⁹

The right of a state to derogate from certain individual rights during and emergency situation is well established in international law.⁶⁰ Thus, whilst various human rights instruments recognise a declaration of public emergency and the derogation of certain human rights provisions as perfectly lawful, they insist that they meet certain conditions which are internationally accepted. In this connection, Article 4 of the ICCPR is handy. The said Article is vital in that it sets international standards as to when a declaration may be made by stating in no uncertain terms that this can only be done when the life of the nation is at stake, and further that state parties can only derogate from their obligations in so far as is strictly required by the exigencies of the situation.

Moreover, it is imperative to appreciate that under international law, the declaration of a state of emergency in any country and its suitability is contingent upon conforming to basically four cardinal elements viz.:

- i. the public emergency must be actual or imminent;
- ii. its effects must involve the whole nation (although arguably the emergency may be localized);
- iii. the continuance of organized life of the community must be threatened, and
- iv. the crisis must be exceptiona.⁶¹

The above are common tenets in most international instruments concerned with the promotion and protection of human rights and fundamental freedoms. The proposal by the United Nations commission on Human Rights to the Economic and Social Council (ECOSOC), for instance, contained the expression "in time of war or other public emergency." And, as already noted, the ICCPR also emphasises on "public emergency" being present before a declaration can be made. The American Convention on Human Rights under Article 27 also puts "In time of war or public danger", and so does the European Convention on Human Rights under Article 15.

It can not be disputed that we have already underscored the right and duty of a government to use emergency and security laws in time of national crisis. However national emergencies, it is submitted, do not justify systematic abuses of individual's freedoms any more than personal emergencies permit individuals to commit crimes. Accordingly, both international and domestic laws must strive to lay down limits to the declaration of a state of emergency in an attempt to safeguard individual freedoms. Thus, even if the declaration is justified, it does not necessarily mean that the use of wide ranging emergency powers and measures is warranted. Instead, a link is required between the facts of the emergency and the measures chosen to deal with it. It must be pressed that under some conventions⁶², although individual state parties may decide the nature and extent of the emergency powers, there is a court⁶³ established to determine if any action has gone beyond that which is strictly required by the exigencies of the situation. This, no doubt, provides not only a useful safeguard but also restrains arbitrariness on state parties and also ensures international publicity on the use of emergency powers.

Regarding a public emergency when it is imminent but not yet present at the time in the landmark case of Denmark, Norway, Sweden and Finland, where the absence of convincing proof of the existence of an actual public emergency was the main reason for the commission's rejection of the claim of the respondent government. Thus inspite of the existence of social unrest provoked by the communist party which wanted to usurp power, the Commission held that:

"The Commission has not found that the evidence adduced by the Respondent government shows that a displacement of the lawful government by force was imminent."⁶⁵

In the circumstances, the crisis or public danger (actual or imminent) must be exceptional in the sense that the normal measures of restrictions permitted by law for the maintenance of public safety, health and order, are plainly inadequate as established in the Greek case. Applying this standard to declarations of state of emergencies in Zambia, it is manifestly clear that no proper exceptional situation has ever existed from the first

Republic right through up until now.⁶⁶ If anything, what has mostly existed in Zambia can not even be equated to the happenings in Greece at the time. This scenario in Zambia has naturally culminated in grave abuses of the derogation clauses enshrined in international human rights instruments.

In many instances, members of the human rights committee when reviewing state reports, in accordance with international standards, have expressed the view that in some cases that degree is not attained. A state of emergency declared in Chile, for example, was considered not to be justified by the circumstances. Several members of the committee noticed that the government of Chile was continuing without justification to apply measures intended for exceptional conditions of internal unrest.⁶⁷ It is thus evident that a state of emergency declared in non-compliance with international standards is unjustified and is a blatant disregard, and non-respect for human rights of the citizens so affected.

The power to take derogatory measures is subject to certain other conditions one of which is the rule of proportionality or necessity. Basically, this rule derives from the fundamental theory that the authority of governments to curtail rights in times of public crisis is limited by the overriding provisions of Article 29(2) and 30 of the Universal Declaration of Human Rights.⁶⁸ Therefore, the constraint of severity envisages that where ordinary measures under the specific derogation clauses would be adequate to deal with the public danger, the derogation measure can not strictly be considered necessary. In this respect, in the Lawless case⁶⁹ administrative detention without trial was held to be justified.⁷⁰

The United Nations committee on Human Rights has gone further to underline in its general comment on Article 4 of the ICCPR and its practice that the concept of "public emergency" has a temporal nature. As has been alluded to earlier, one of the greatest problems in situation of emergencies is the permanent character that derogations assume in some countries. What this entails is that when a country take measures to suppress human rights of its citizens, those measures must be temporary so much so that once those exceptional circumstances have disappeared, the limitation clause, should be

sufficient to deal with the problem of public order. The Zambian experience has, however, observed these requirements in the reserve. The period 1964 – 1990 saw Zambia undergo a perpetual state of emergency which saw the state abrogate its obligations as provided by the ICCPR. The 1993 and 1997 states of emergency are also clear examples of how the Zambian government is determined to make the declarations of a permanent character.⁷¹ This is Indeed very critical particularly since in Africa, the real practical threat posed by emergency powers to individual freedoms is not so much their use per se as their abuse. Many governments have sought to use such powers improperly in order to entrench their own political power and to eliminate political dissent.

4.2 PRISON CONDITIONS

(i) ARREST OF KAUNDA AND OTHERS

On October 28, 1997, Zambians woke to a voice from their national radio station announcing the overthrow of the government by a group called “Operation Born Again”. The speaker identified himself as “Caption Solo” and claimed to speak on behalf of a “national redemption council” who’s aim was to “save our nation from collapse”. The radio broadcasts began just after 6 a.m., when ‘Solo’ whose true identity is Stephen Lungu, claimed his troops had surrounded the radio station and State House.⁷² In his five-hour broadcast “Solo” fiercely accused the Chiluba government of massive corruption which, he claimed, was main reason for the military intervention.

However, there were never rebel troops around state house and loyal troops promptly surrounded the radio station. A commando unit quickly overwhelmed the rebel soldiers and around fifteen soldiers were immediately arrested and at least one rebel soldier was fatally shot. What became evident even before the President addressed the nation was that Solo’s efforts had failed and that the government was still intact. Although the government appeared fully in control and immediately after the coup attempt downplayed what occurred, President Chiluba declared a state of emergency ⁷³ on October 29 following a special cabinet meeting. It was justified by the authorities as facilitating

police investigations into the matter. The truth though is that the political decision in the form of a state of emergency by the executive was expected,⁷⁴ but what was not expected was the recklessness exhibited by security forces and in particular the police. The excessive and extreme action of the police must be seen against the background of tacit approval from the executive, who have on many instances praised the police for their barbaric activities.

After the coup attempt, the government moved fast against soldiers and civilians suspected of involvement in the coup. As many as 108 detainees were held,⁷⁵ although by late January 1998 the government began to release a small number. Notable among those arrested were civilians: Dean Mong'omba⁷⁶ who was picked up by eight police officers at his office in Lusaka's Northmead on October 31, 1997;⁷⁷ his personal secretary Priscilla Chimba, was arrested on November 12, 1997 at her home;⁷⁸ sixty-seven year old freelance journalist, author and UNIP member, Frederick Mwanza, was arrested early on November 14, 1997 by a group of police⁷⁹; On December 23, UNIP's head of physical security, Moyce Kaulung'ombe, was detained by police and questioned about the coup attempt. Two days later, on christmas day, his boss Kenneth Kaunda was detained. Some one hundred heavily armed police, some of them in a troop carrier, surrounded his Lusaka home just three days after he returned home after two months travel abroad.⁸⁰ Princess Mirriam Nakatindi Wina⁸¹ was detained by police on January 28, 1998.⁸² Finally, prominent Zambian businessman, Rajan Mahtani, was one of the few civilians who failed to escape the wrath when he was on June 3, 1998 arrested and detained in connection with the coup attempt.

(ii) RIGHT TO BE CHARGED PROMPTLY

We have already seen from both local and international statutes that the law demands that detained persons be charged promptly. In fact, the statutory maximum period a person can be detained in Zambia is 24 hours before presenting them to court.⁸³ However, we have also seen that the state of emergency gives latitude to law enforcement officers to keep suspects in detention for longer than the statutory 24 hours without charge. The

state of emergency also suspends certain rights of individuals for the purposes of security and gives law enforcement officers wider powers of arrest. Thus, authorised police officers do not need a warrant to search any premises or arrest anyone: people can be detained for up to twenty-eight days without charge. The president is also granted extraordinary power to indefinitely detain any individual.⁸⁴

In the premises, all of the suspects held in connection with the coup attempt, with the exception of a few that were subsequently released,⁸⁵ had to spend long periods in prison without being charged. For example, Dean Mung'omba and 72 other soldiers spent about four months in prison before they were finally charged with treason on February 25, 1998; while Kaunda, Kaulung'ombe and Princess Wina spent about two months each. It must be noted that Mahtani was the odd one out by spending only 5 days before he was charged because he was arrested on 3rd June, 1998 way after the state of emergency was lifted,⁸⁶ and hence it was very easy for him to apply for a writ of habeas corpus.

It is thus evident that Zambia went against its obligations under international law to charge suspects promptly. In particular, it violated the provisions of Article 4 of the ICCPR which, inter alia, states that whereas rights such as the right to life and freedom from torture or cruel, inhuman or degrading treatment or punishment and right to recognition as a person before the law are non-derogable, other rights and freedoms may only be limited "to the extent strictly required by the exigencies of the situation," and in a manner not "inconsistent with the state's other obligations under international law". Clearly, to keep a person for 4 months in incarceration without charge when the life of the nation is no longer at stake (as if it had been) cannot be said to be within the exigencies of the situation.

Furthermore, the constitution of Zambia permits the derogation of rights that are non-derogable under the ICCPR. In this respect, the UN Human Rights Committee, in its concluding observations on Zambia's report on compliance with the ICCPR, noted that:

"The lack of clarity of the legal provisions governing the introduction and administration of a state of emergency, particularly Articles 30 and 31 of the

constitution, which would permit derogation's contravening the state party's obligation under Article 4, paragraph 2, of the covenant. The Committee is also concerned that the derogation of rights permissible under Article 25 of the Constitution goes far beyond that permissible under Article 4, paragraph 2, of the covenant."⁸⁷

To this end, the committee recommended that the authorities adopt legislation to bring the domestic regime, including Article 25 of the constitution, into harmony with the state party's obligations under Article 4 of the covenant. In view of this, and because of pressure from the international donor community for the government to drop provisions for state of emergency, President Chiluba assured the donor community that the government would work out laws to deal with situations that may require a state of emergency:

"Necessary legislation would be made to deal with such cases in their proper perspective."⁸⁸

However, it is regrettable that no such laws have been legislated to date.

(III) (iii) **RIGHT TO FAIR TREATMENT**

Our examination of local and international statutes have also revealed that discrimination of any kind is prohibited in the treatment of persons before the law. The Zambian Constitution has even gone further to define discrimination as meaning:

"Affording different treatment to different persons attributable, wholly or mainly to their respective descriptions by race, tribe, sex, place of origin, marital status, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description."⁸⁹

In this regard, the Prisons Rules provide that discipline and order shall be maintained with fairness as if to affirm rule 6(I) of the standard minimum rules for the treatment of prisoners (to which Zambia is a party) which states that rules therein shall be applied

impartially. However, in total contrast with these provisions the Zambian authorities exhibited a high degree of discrimination in the way some treason accused were treated. For example, UNIP leader and former Republican President Dr. Kaunda was moved from Mukobeko Maximum Security Prison in Kabwe to his home in Lusaka's Kalundu on December 31, 1997. Clearly, the reason for this house arrest was due to Kaunda's political status which reason come within the ambit of discrimination as envisaged in the constitution. Much as it is appreciated that the President is given powers⁹¹ to detain any person at a place of his choice, such discretion must be used fairly and reasonably. In the case in casu, for example, Dean Mung'omba and Princess Nakatindi Wina were reportedly in poor health,⁹² and hence one would have expected that such treatment would be accorded to them but alas it never was. In fact, when President Chiluba was asked as to whether the same treatment would be extended to Mung'omba. He replied saying as far as he was concerned Mung'omba is not known (internationally) so much so that those who were lobbying for the release of Kaunda never referred to Mung'omba⁹³(sic).

(IV) RIGHT TO RECEIVE LEGAL SERVICES, VISITORS AND FOOD

Apart from being provided for internationally, and generally by the constitution, the Prisons Act⁹⁴ specifically provides for the right to legal services, visitors and indeed food. Thus, Rule 135⁹⁵ stipulates that a detainee shall be permitted visits by legal advisers who may interview him/her in sight but not in the hearing of a prison officer. However, in the case of the treason accused such provisions were perpetually flouted in that many of the detainees were denied access to their lawyers. In other cases, the work of a lawyer was seriously impeded and undermined through interference, frustration and intimidation. Mung'omba, for example, was held incommunicado at Force Headquarters in Lusaka for 4 days despite repeated attempts by his lawyers to gain access.⁹⁶ The situation was much the same with his secretary, Priscilla Chimba, who was initially denied legal representation.⁹⁷ Other detainees, such as Mwanza, Kaunda and Princess Nakatindi Wina also complained against the same⁹⁸ It was strange to note, though, that Kaulung'ombe was about the only person who was granted immediate access to his lawyers.

As if the foregoing were not enough, lawyers representing some of the treason accused faced a tough time to go about their business. Notables among them were Robert Simeza, Mwangala Zaloumis and Sakwiba Sikota. All of them complained of harassment with Simeza adding that some death threats were issued to him.⁹⁹ Zaloumis, the only lady of the three said lawyers was so traumatised that she made a number of phone calls to relevant authorities including the Minister of Legal Affairs who replied through his Attorney-General saying:

“The Police have not placed any lawyer engaged in the on-going habeas corpus cases under surveillance and that you should be completely free to act for any client of your choice without let or hindrance. My government is fully committed and is cognisant of the United Nations Basic Guidelines on the Role of lawyers which include, inter lia, that all lawyers should not be victimised for acting on behalf of persons opposed to the government.”¹⁰⁰

However, the letter notwithstanding, the fact is that these were calculated moves by state agents to frustrate the lawyers involved so that the treason accused could be left defenceless.

The prison rules also allow detainees to receive visits and to be provided with facilities for seeing their relatives and friends.¹⁰¹ However, the trend during the detention of the treason accused is that most of them were held incommunicado from both relatives and friends contrary to the provisions of both local and international statutes. Dr. Kaunda, for example, was denied visits from his close relatives and friends during his first few days at both Kamwala Remand Prison and Mukobeko Maximum Security Prison.¹⁰² Thus, even though ex-Tanzanian President, late Julius Nyerere, was allowed to visit him at Mukobeko,¹⁰³ Britain's Minister of State at the Foreign and Commonwealth Office for Africa and Human Rights, Tony Lloyd, who attempted to obtain assurances that he would gain unhindered access to Kaunda was refused this which culminated in his cancelling a planned three-day visit to Zambia.¹⁰⁴

Similarly, Princess Nakatindi Wina, complained of the same treatment. She too was denied access to her relatives in fact her husband, a well known politician and MMD National Chairman, Sikota Wina was also blocked at one time from seeing her.¹⁰⁵ What was even more devastating is that even when she was admitted to Kabwe Mine Hospital and later transferred to Lusaka's Maina Soko Military Hospital, she still experienced hardships in seeing her relatives.¹⁰⁶ And, in contravention of rule 44(2)¹⁰⁷ she was denied chance to attend the burial of her late brother despite having applied through the Permanent Human Rights Commission, and her being in Lusaka for medicals at the time. Instead, and with no notice she was picked up by security agents on the same day and transferred to Kabwe.¹⁰⁸

That food is imperative for human survival is not in dispute, it is fundamentally for this reason that the prison rules apart from providing a schedule for the same also provides and emphasises the need for quality food in a number of provisions.¹⁰⁹ However, a number of detainees complained bitterly over not only the quality of food but also the total contrast between what is provided for in the first schedule to the prison rules and what was actually obtaining. For example, the detainees were served only on meal a day (at 16:00 hours), and this usually was Nshima with boiled beans or cabbage cooked mostly with no cooking oil.¹¹⁰

This clearly is in total contrast with the fresh meat, or fish or dried fish prepared with red palm oil or vegetable cooking oil as provided for in the schedule.

Most of the detainees, in the circumstances, found refuge in section 87 of the Prisons Act which permits detainees to maintain themselves i.e. by way of buying or receiving outside food.¹¹¹ This though was almost curtailed by the officer in charge of Lusaka Central prisons who, in his endeavour to see that the detainees were punished, banned them from receiving outside food on the pretext of preventing cholera and dysentery from spreading to the prisons.¹¹² However, as Judge Banda ruled in this preliminary issue, the authorities' reasons were not plausible since *prima facie* food from outside was better prepared, clean and warm as opposed to prison food which was poorly prepared and was mostly cold.

(V) **RIGHT TO SEEK MEDICAL ATTENTION**

This is another right which is substantially provided for both in the Prisons Act¹¹³ and in the rules.¹¹⁴ The provisions seek to have detainees attended to frequently at places of their confinements by a certified medical practitioner, and empowers authorities to refer complicated cases to hospitals. What obtained in practice, however, was amazing. Princess Nakatindi Wina, for example, suffered from anxiety attacks and high blood pressure and had also complications from a hip operation but despite all these, she faced problems in securing health services.¹¹⁵ At one time while admitted at Maina Soko Military Hospital and still in a tricky condition, authorities ordered that she be returned to Mukobeko,¹¹⁶ which was done, but due to deteriorating health she was transferred to Kabwe Mine Hospital.

Another detainee who was seriously ill and in poor health was Major Musonda Kangwa but efforts to get him treated at the University Teaching Hospital were blocked.¹¹⁷ To this end, he stated in paragraph 17 of his affidavit supporting an application for a unit of habeas corpus that:

“from 2nd to 15th November, 1997, I was not allowed to receive visitors, food, medical treatment and access to my legal counsel in violation of my rights as a detained person.”¹¹⁸

Other detainees who were denied access to the hospital included Captain Godwin Chungu, Major Mukoma, Sergeant Ntapisha, Private Jere and Sergeant Norman Tembo.¹¹⁹ Dean Mung’omba was also denied medical attention despite his weak and fragile condition. Justice Lombe Chibesakunda, the PHRC chairperson observed:

“that some of the detainees at Chimbokaela.....who included Dean Mung’omba, Major Bernington Mukoma and Sergeant Norman Tembo, complained of starvation, lack of medical treatment and congestion of the cells. Prison officials under took to ensure that medical attention was provided to detainees who needed it.”¹²⁰

Mung'omba, who it was later learnt had contracted TB while in jail,¹²¹ became very weak and thin that one day while being taken to court, he fell off the ladder of a police escort vehicle and in the process spraining and injuring his left foot and right knee.¹²²

The foregoing shows a lack of political will on the part of those vested with authority. Legislation is there but the power that be opted to do it their way. The detainees apart from their liberty being curtailed also had their health put in jeopardy. The authorities, therefore, willingly disregarded the provisions of the law when they denied detainees access to health services.

(VI) PLACES OF DETENTIONS AND CONDITIONS THEREOF

Apart from being held incommunicado, most of the detainees were held in places which were kept secret from relatives and close friends of the detainees which was also in conflict with laid down provisions. In fact, even if authorities deny that informing detainees' relatives of places where detainees are kept is not their responsibility (which it is anyway). They will still be in contravention of the provision stating that detainees must be afforded adequate facilities to enable them communicate with the "outside world". Evidently, most of the detainees were hindered in their attempt to even inform their lawyers where they were being held. Thus, for example, after spending a night at Kamwala Remand Prison in Lusaka, Kaunda was moved to Mukobeko in Kabwe, without his lawyers being informed, later on his relatives. The situation was same with Mung'omba, Mwanza and many other soldiers whose lawyers and families never knew where they were held until they appeared in court for their respective habeas corpus applications.¹²³

The condition of prisons where detainees were kept were pathetic, to say the least.²⁴ They failed to conform not only to international standards but also to our own standards as set out by the Prisons Act. Congestion was the order of the day which made impossible for authorities to conform to the principle of separation of prisoners. Thus, detainees were kept together with convicted prisoners, and in some cases hard-core convicts. Dr. Kaunda narrated his experience thus:

"The police treated me fine in my house. The worst bit was straight after my arrest. I spent the night in Kamwala Remand. As you know

conditions are sordid there for everybody. I got no sleep as there were thirty other in mates in a tiny cell built for five”¹²⁵

Indeed, because of the congestion in prisons, poor sanitary conditions, and an unhygienic environment, diseases were rife and the number of detainees complaining of poor health was just amazing.¹²⁶ Sanitation is fundamental to life in general and in particular, to such institutions as prisons. Its provision is used as a yardstick in measuring development while the lack of it is seen as a feature of under-development. As it were, a decent toilet in most of the prisons where detainees were kept was seen as an un-known luxury largely because of over population, which has outstretched available resources or what is left of them.

4.3 TORTURE OF THE TREASON-ACCUSED : MYTH OR REALITY?

There is not a dispute that torture and other cruel, inhuman or degrading treatment or punishment is forbidden under Article 15 of the constitution. It must be stressed also that this Article is non-derogable. A further examination of international statutes also revealed that torture is forbidden, and that no situation can justify its use. Despite this background though, one complaint of the detainees which stood uncontradicted throughout their detention period is rampant torture and ill-treatment of the treason accused. Despite repeated denials from the authorities, physical evidence countenanced the hitherto allegations. In fact, if there was a way authorities would have preferred to hid detainees from the eyes of society and torture them to death but alas writs of habeas corpus applications saved most of the detainees a great deal. It is at such hearings that most of them got court orders to seek medical attention and where torturers were reprimanded.

In light of the foregoing, there was growing international anxiety for the government to carry out independent investigations into these allegations. The Human Rights Committee on Zambia observed that

“complaints of ill-treatment must be investigated effectively by competent authorities. Those found guilty must be held responsible, and the alleged

victims must themselves have effective remedies at their disposal including the right to obtain compensation.”¹²⁷

Further, the committee urged the Zambian government to

“take the necessary steps to ensure that torture, ill-treatment and illegal detention do not occur and that any such cases are duly investigated by an independent authority in order to bring before the courts those accused of having committed such acts and to punish them if found guilty”.¹²⁸

As if this was not enough, the government established PHRC, at its press conference in Lusaka also confirmed incidents of torture of detainees particularly at Kamfinsa, Lusaka Central, Kamwala Remand and Mukobeko Prison and stated that:

“The Commission condemns the actions of police officers who were responsible for inflicting physical torture on detainees ... and calls upon police authorities to take appropriate action against such officers, and ensure that the same conduct does not repeat itself in the future.”¹²⁹

Finally, when the donor community tied their balance of payment support to good governance and observance of human rights there was even more pressure for the Zambian government to put its house in order. This ultimately led to the appointment of the **Commission of Inquiry, to probe torture allegations** on persons suspected to have been involved in the October 28, 1997 attempted coup, headed by Judge Japhet Banda.

As stated earlier, most of the detainees who testified presented evidence which was consistent and unshaken before the Commission. Captain Godwin Chungu, who testified first, alleged that he was tortured and kept without food and water for seven days.¹³⁰ He said he was picked up on November, 1 1997 and taken to police service headquarters where five officers allegedly took turns in torturing him. Captain Chungu further testified that he could not, as a result, see properly in one eye and now walked with a limp in the left leg whose ligament was severed during torture. He said he was on some occasions stripped naked and whipped with hosepipes and wire cables during police interrogations. That he was at times placed on a swing as they handcuffed his hands

beneath the legs, placing a metal rode under the legs and suspending the metal between two tables. On his second night, an interrogator stuffed a thick cloth in his mouth, pushed a lit cigarette in his left nostril and closed the right one making him choke.

Princess Nakatindi Wina alleged before the Commission that prison warders at Mukobeko prison stripped her naked and attempted to inspect her vagina using their hands.¹³¹ She also alleged that during detention she lost her three-months pregnancy as a result of mental torture and poor prisons conditions. In her testimony she stated that:

“ I was asked to declare if I had anything. I was later searched and stripped naked and left me completely in a status of a newly born baby. And the same young female warder demanded to search my vagina using her hand. I refused on grounds that she was young and that it was unhygienic for her to search my vagina using hands without any gloves”.¹³²

Princess Nakatindi Wina, who said she had not felt the same after her detention, also claimed that she sustained an eye injury as a result of the bulb and heat in the cell.

In the same vain, Army Staff Sergeant James Kabwela testified¹³³ that after recording a statement from him at police headquarters, he was ordered to take out his shirt and covered his face. Then one of the officers hit him on the right ear with a hard object and he fell down. Thereafter, the officers took turns whipping him until he started crying and pleading with them. He further claimed that the police denied him a medical report to help him seek medical attention as his eardrum was injured as a result of the beating.

Another detainee who claimed to have been tortured and ill-treated is Dean Mung'omba. In his testimony he alleged to have been stripped naked before being terribly tortured by drunken and strangely excited cops.¹³⁴ He claimed deputy commissioner of police (now commissioner) Emmanuel Lukonde and the then assistant commissioner of police (now deputy director of the Drug Enforcement Commission) Teddy Nondo used metal bars, a variety of whips, burning cigarettes and having them smashed into his skin and other

painful ways to have him admit to being a financier of the 1997 failed coup. Describing the act he underwent as absolute barbarism, Mung'omba said all this happened at police headquarters in Lusaka the very day he was picked up. He further alleged that for all the whole five days of detention at police headquarters there was no food or water provided to him. In his own words, he narrated that:

“They hooked my tied legs and hands on a metal bar hanging between two tables and in this position they whipped me terribly. This situation immediately cuts blood supply to the hands and legs. The cops then started pounding my hands and legs with a metal bar and this went on for 15 minutes.”¹³⁵

He further testified that he was suspended in a way that allowed the head to fall backwards:

“After being suspended they would simply pull the metal bar from between the two tables where I hung, thus letting me drop to the floor”.

This, he claimed, made him unable to walk and so crawling became the alternative. That the said torture made him lose the sense of feeling, develop continuous lapses, severe headaches, dehydrated and dizzy.

Acquitted coup suspect Major Bilex Mutale also testified that he had his body cut with a letter opener while the same instrument was used to cut a deep alphabetical letter “P” on his body.¹³⁶ He further alleged that once during the torture, which was done at Zambia Police Headquarters, he was blind folded, hand cuffed, folded into the letter “C” shape and suspended on a swing as policemen repeatedly whipped him:

“After the whipping the blinds were removed and I found remains of fresh broken pieces of logs on the floor, leaving me to guess that is what was used to beat me. I also found a big red cable in the corner, a metal and other instruments”.¹³⁷

He claims the torture had left him permanently affected physically and that he could no longer stand for many hours, and that besides he lost his denture (artificial teeth) which dropped in the process of being beaten. Major Mutale further disclosed that after six days of torture without food and water, police took him and other suspects to Lusaka Central prison where authorities declined to admit him saying they needed a medical report. He was then taken back to police headquarters and the following day transported to Kamfinsa Prison where they dumped him before prison authorities raised any queries about his condition.¹³⁸

The above represents only a minimal number of cases of those presented before the Torture Commission. If they are "hooked up" stories then the detainees involved must take up drama – they will score plusses. However, the truth of the matter is that both physical and mental torture¹³⁹ were practised. This is founded on evidence quite apart from physical evidence on the detainees but on independent professional medical opinion.¹⁴⁰ Also, the report submitted to the Torture Commission by the PHRC revealed that some coup suspects were tortured.¹⁴¹ Moreover, even though the Torture Commission is yet to submit its report, its commissioner, Judge Banda, conceded that some of the evidence presented before it by the coup suspects is true.¹⁴² He said they had seen exactly what was presented before them by the victims:

"What we have seen confirms much of the evidence brought before us by the victims."

He cited high levels of congestion, poor medical services and inadequate food as some of the serious evidence observed by his commission during its tour.

The foregoing, therefore, confirms that law enforcement officers did use torture to solicit for confessions from suspects in clear violations of the supreme law of the land and a host of international statutes. Indeed, offices implicated are very senior giving an impression that they are qualified lawyers or indeed have done some courses in human rights. The issue of ignorance of the law therefore, does not even arise (even if it did, it

will be no defence). Ironically, most of the victims claimed to have been tortured from Zambia Police Headquarters which houses the office of the Inspector-General of Police. This plus the fact that two officers¹⁴³ who were prominently named as torturers have since been promoted only confirms the impression that such acts must be seen against the background of tacit approval from the executive. Furthermore, the illegal activities of law enforcement officers on most of the treason accused only go to fortify our findings, elsewhere in this paper, against ordinary detainees. Indeed, the only difference here is that there was much publicity - and possibly more commands from up above. In these premises, a claim alleging that torture takes place on a significant scale in Zambia is a valid one. Evidence presented in this paper should lead the powers that be to an inescapable conclusion that serious abuses are occurring on a daily basis and that senior officers (if only they are not involved) are not sufficiently concerned about these violations. Torture is, therefore, real in Zambia.

4.4 CONCLUSION

The chapter has discussed and shown that the Zambian Constitution, and a host of other international statutes¹⁴⁴ permit the government to declare a state of emergency whenever the life of the nation is at stake. That once such is declared extra powers are given to both the police and the president which powers impact more on the liberty of individuals. We also noted that no specific criterion is put before a declaration can be invoked save the consultation of cabinet.

We further discussed and discovered that a host of provisions accorded to detainees by the Prisons Act were not complied with in so far as treatment of the treason accused were concerned. Finally, it has been shown that most of the suspects in the 1997 coup attempt were actually physically and mentally tortured. That this torture took a systematic pattern which most of the detainees were subjected to in the authorities' endeavour to solicit and extract confessions.

END NOTES

1. Then Home Affairs Minister, Chitalu Sampa, National Mirror of Zambia (Lusaka), August 17- 23, 1997
2. Mr. Fredrick J.T. Chiluba
3. Zambia Daily Mail, August, 28, 1997, "Chiluba challenges Kaunda and Chongwe to prove that they were shot".
4. 1998/HP/
5. A former President of the Republic for 27 years, former Chairman of the Non-Aligned Movement, Southern African Development Co-ordinating Committee, Frontline States and the Organisation of African Unity respectively, a pioneer of African Politics and indeed a notable world influential statesman.
6. Zambia had been the scene of a serious human rights crisis since the government forced a radical amendment to the 1991 constitution through the MMD dominated parliament in May 1996 rejecting demands that major constitutional reforms be agreed by a constituent assembly and subjected to a referendum, as proposed by the Mwanakatwe Constitutional Review Commission in 1995. Notable events also included mass demonstrations, failure to dialogue between the main opposition parties and the government and indeed the Kabwe shooting in which Dr. Kaunda and Dr. Rodger Chongwe were seriously wounded.
7. Although the coverage was substantially reduced when former President, Dr. Kaunda, was released from incarceration.
8. The Permanent Human Rights Commission. See Human Rights Commission "Press Conference addressed by Chairperson Supreme Court Judge Lombe Chibesakunda", HRC/PC/91/1 Hotel Intercontinental, Nalikwanda Room, December 1, 1997.
9. This was demonstrated by the establishment of the commission of inquiry into allegations of torture, abuse or violations of human rights on the persons suspected of involvement into the October 28, 1997 attempted coup.
10. See Article 25 of the Constitution of Zambia.
11. And that a lack of it presents internal problems e.g. the Rwanda Episode.
12. 1967)Z.R 167
13. Ibid e.p 169
14. Which it does not have under a normal situation.
15. Articles 30 and 31 of the constitution.
16. Chapter 108 of the Laws of Zambia.
17. Chapter 112 of the Laws of Zambia.
18. Section 2 of the Emergency Powers Act
19. Ibid Section 3(2)(a)
20. Section 3(2) and (3) of the Preservation of Public Security Act.
21. Section 5(2) of the Emergency Powers Act.
22. Section 5(3) of the Preservation of Public Security Act.
23. Regulation 33(i) of the Preservation of Public Security Regulations
24. Ibid Regulation 33(6)
25. The law normally dictates that suspects must be charged within twenty-four hours of arrest.

26. Sharma vs Attorney-General 1978)Z.R 163
27. Re-seegers 1974)Z.R 210
28. 1978)Z.R 233
29. Ibid @ p239
30. See: Obiter per Cullinan J. in Re puta 1973)Z.R 133 and also in Re cain 1974) Z.R 154
31. Mung'omba vs Attorney-General 1981) Z.R 183
32. 1971 S.J.Z 55
33. As was alluded to in the re Chiluba Case.
34. 1976) Z.R 86
35. Article 26(I) (c) of the constitution of Zambia.
36. Regulations 33 (7)(I) of the Preservation of Public Security
37. Ibid Regulation 33(II)
38. I.e. the Preservation of Public Security Act.
39. The Emergency Powers Act and the Preservation of Public Security Act.
40. See section 2 of the Preservation of Public Security Act.
41. 1979)Z.R 246
42. 1980)Z.R 42
43. It must be noted that restrictions on the transfer of money has since been removed.
44. 1981)Z.R 35
45. Elefheriadis vs Attorney-General 1975)Z.R 69
46. Chapter 112 of the Laws of Zambia, see section 3(3)(a)
47. United Peoples Party (UPP)
48. This was particularly evidenced by his winning the Mufulira Parliamentary Seat in 1971 despite being in prison at the material time.
49. 1972) Z.R 248
50. Ibid @ p.263
51. 1997) SCZ, J17 (unreported).
52. Zimba LS PhD Thesis p.30
53. The detention of several UNIP members in the now infamous Zero Option and Black Mamba cases and the detentions of the 3 civilians in connection with the 1997 failed coup are all instructive of this point.
54. 1989)Z.R 27
55. Even though such crimes are no longer tenable today, because of change of legislation, is that more often than not a timid judge would want to get the easy

- way out by deciding in favour of the state even in straight forward cases where issues of public security need not arise.
56. Hatchard J, Individual Freedoms and States of Emergency in the African Context – the case of Zimbabwe, Villers Publications Ltd, London 1993
 57. African Conference on the Rules of Law, 1961 @ p 162
 58. As was lucidly illustrated in the last chapter.
 59. European court of justice, 1969, para. 3321
 60. To which Zambia is not a party, e.g. European Convention on Human Rights, but with provisions which are superb.
 61. The European court of human rights, which is the final authority.
 62. European Court of Justice 1969)332-3167
 63. Ibid @ p. 3359
 64. Instead, what obtains in practice is that state of emergencies are declared merely to settle old scores with political opponents, and hence such declarations does not and cannot pass the test set in international human rights instruments.
 65. UN General Assembly A/34/40 Report of the Human Rights Committee 1981) paragraph 28
 66. Upon which are based elaborate provisions of Article 5(I) of the ICCPR
 67. 1967) European Court of Justice para. 3321
 68. Lawless was detained under part II of the offences against the state (amendment) act 1940. The Commission decided are against him that such measures were strictly required within the meaning of Article 15(I) of European convention on Human Rights.
 69. This is mainly because even though the Zambian Constitution has through Article 30(2) stipulated a 7 days period as the duration of a state of emergency unless ratified by parliament where upon it can be extended for a further period of three months, almost always parliament has renewed the state of emergency which is received with astonishment particularly because even initial declarations by the president are found unjustifiable
 70. Which is the official residence of the Zambian Republican President
 71. This was published in statutory Instrument no.121 and contained in Gazette Notice no. 80 of 1997.
 72. Especially if regard is had to past declarations and reasons attending there to.

73. The detainees were remanded at Lusaka Central Prison, Lusaka Remand Prison, Mukobeko Maximum Prison and Kamfinsa Prison.
74. The leader of the Zambia Democratic Congress.
75. Police had sought to arrest Mung'omba in November 1996 after he had called for violent opposition to the government following his defeat in the Multi-Party Elections. He went into hiding for a while and the police had not pressed further action.
76. She was released but later re-detained on allegations of having attended two meetings held by Dean Mung'omba and army officer Major Musonda Kangwa in September 1997 at which the two men allegedly plotted the coup attempt. She was however, released on February 28 without government comment.
77. Mwanza writes mostly for the state owned and government controlled newspaper, the Times of Zambia, like Chimba he was also released on February 25 without formal comment by the government.
78. Kaunda was in Johannesburg when the coup attempt occurred and had condemned the attempt immediately to the media. However, Zambia's information Minister on October 29 accused Kaunda of making inflammatory statements a day before the attempted coup. Minister Mpamba said "A day before he left, he said there would be an explosion in Zambia. We do not ignore every inflammatory statement". SAPA news agency, October 29, 1997.
79. The MMD National Chairperson for women's Affairs and a Member of Parliament is the only senior member of the ruling party who was detained.
80. It is alleged that she was arrested because on October 30, 1997 she gave a speech at a huge pro-government rally in support of President Chiluba at which she blamed Chiluba for not listening to her warnings that there might be a coup plot against him – suggesting to the government that she had prior knowledge.
81. It must be stressed though that the law does, in exceptional cases, allow detentions for more than 24 hours but emphasises that even then the detainee must be brought to court as soon as is reasonably practical.
82. The constitution only states that under a state of emergency a notice must be published in the government gazette giving the name, the place and the law under which detentions were made within fourteen days.
83. Notable among them were Priscilla Chimba and Frederick Mwanza plus a few other soldiers so much so that by mid-April 82 people had been charged from the 108 that had initially been arrested.
84. The President lifted the state of emergency on March 17, while parliament ratified the lifting a week later on March 24, 1998.

85. Concluding observations of the Human Rights Committee: Zambia 03.04.96
CCPR/C/79/A99.62 point 22.
86. Afronet file, issue no.5 , March 1998.
87. Article 23(3) of the Constitution of Zambia
88. See Rule 3(2)(b) of Chapter 97 of the Laws of Zambia
89. By regulation 33(5) of the preservation of Public Security Regulations
90. Mung'omba was reported to have contracted TB and his reported torture made his health worse off. See, the Post Newspaper, April, 2, 1998. While Prince Nakatindi Wina was in and out of hospital for example she was charged with treason in her hospital bed on March 5, 1998.
91. ZNBC radio, Lusaka, in English 10:00 gmt, December 31, 1997.
92. Chapter 97 of the Laws of Zambia.
93. Of the Prison Rules.
94. His lawyers only gained access to their client when he appeared in court on November 4, 1997 to challenge his detention.
95. See Post Newspaper, December 16, 1997.
96. See, Human Rights watch, "Zambia; No model for Democracy", vol. 10 no. 2(A), May 1998 pp.29-31
97. Ibid @ pp.43 – 44
98. Letter to Zaloumis from Attorney –General. January 30, 1998, ref: MLA/4/5/3 conf.
99. See, Regulations 128, 131 and 138 of the Prison Rules.
100. See, The Post Newspaper, December 27, 1997.
101. Possibly because of Chiluba's high regard for Nyerere.
102. Foreign and Commonwealth Office, "Press Release: Mr. Lloyd's visit to Zimbabwe". In this Lloyd stated that, "It is with regret that I have cancelled my visit to Zambia. My wish is to see Britain and Zambia working together on the basis of shared respect for democratic principles and the rule of law. But it would be wrong for me to visit so long as Kaunda remains in custody but un-charged, and in the absence of a commitment from the Zambia authorities that I will be able to see him".
103. See the Post Newspaper, December 9, 1999 @ p5 " I was stripped naked, lost my pregnancy, says Nakatindi.

104. Ibid @ p.5
105. See, Standard Minimum Rules for the Treatment of Prisoners.
106. See, Human Rights Watch interview with Princess Nakatindi's son, Wina Wina, Lusaka April 20, 1998 and also Post Newspaper article opcit.
107. See, for example, regulations 17, 64, 65 and the first schedule.
108. Interview the author had with a number of detainees.
109. This exercise though good is very expensive especially for detainees whose families are far away from the prisons hence some detainees are compelled to eat prison food.
110. See, the Post Newspaper, November9, 1998.
111. See, for example, setions 18, 19, 20, 21 and 71.
112. See, Rules 16, 25, 47, 51, 108 and 139.
113. Interview of Princess Nakatindi Wina by the author, Lusaka February 23, 2000.
114. See the Post Newspaper March 21, 1998 "Chiluba orders return of the Princess to Mukobeko.
115. See, the Post Newspaper, April 7, 1998.
116. High Court of Zambia, "matter of Major Musonda Kangwa, an Application for a writ of Habeas Corpus Ad subjiciendum", Sworn before commissioner for Oaths, Lusaka, November 21, 1997.
117. See note 98 supra @ 38
118. Permanent Human Rights Commission, "Press Release", HRC/PR/02/97, November 9, 1997.
119. See, post Newspaper, April 7, 1998.
120. See, the Post Newspaper, December 10, 1999 "I was stripped naked, testifies Mung'omba". @ p.5
121. See, note 98 supra @ p.29
122. The author visited some of the prisons in December 1999.
123. Interview the author had with Dr. Kaunda, Lusaka, September 19, 1999.
124. Interview the author had with Justice Lombe Chibesakunda the PHRC chairperson, Lusaka, August 28, 1999.

125. U.N Centre for Human Rights, Human Rights and Pre-trial Detention p.36
126. Concluding observations of the Human Rights Committee: Zambia 03.04.96, CCPR/C/79/Add.66
127. Human Rights Commission "Press Conference, Addressed by chairperson Judge Lombe Chibesakunda" HRC/PC/97/1, Hotel Intercontinental, Lusaka, December 1, 1997.
128. See, Times of Zambia, December 7, 1999 "Army Captain relives torture ordeal".
129. See the Post Newspaper, December 9, 1999 "I was stripped naked, lost my pregnancy, says Nakatindi".
130. Ibid @p.5
131. Ibid @p.7
132. See, the Post Newspaper, December 10, 1999 "I was stripped naked, testifies Mung'omba. Ibid
133. Ibid @ p.5
134. See, the Post NewsPaper, December 10, 1999 "Major Mutale seeks arm accommodation".
135. Ibid
136. See, Times of Zambia, December 10, 1999 "Mung'omba relives torture ordeal".
137. Mung'omba and Princess Nakatindi Wina, for example, were kept in prison for more than 12 months and yet they were never mentioned or implicated in the case until close of case.
138. See, note 98 supra @ p.32
139. See, the Post Newspaper, December 7, 1999 "I will not testify, says Captain Solo".
140. This was after touring both Lusaka's Kamwala remand and Lusaka Central Prisons. See, the Post Newspaper, December 16, 1999.
141. These are Teddy Nondo, now Deputy Commissioner of DEC and Emmanuel Lukonde, now

CHAPTER FIVE

5.0 CONCLUSION

This paper has revealed that Zambia, just like any other country, is not immuned from criminal acts of both its citizens and non-citizens. That it is fundamentally for this reason that the police service (or law enforcement officers in general) has been given powers to arrest and subsequently detain. However, it was noted that, because of the impact of such acts of individual liberty, the police must exercise care and caution in the performance of their duties.

It was also noted, as a prelude of this discussion, that detainees are presumed innocent until proven guilty by a competent court of law. Therefore, to all intent and purposes, treatment must reflect just this. Alas, this is sadly not the case in most cases. Instead, law enforcement officers are determined to mete out punishment, by way of prolonged detention and ill-treatment, even before the courts have decided on the merits of the case. To this end, it was found that most police stations and prisons are filled with detainees whose alleged offences are bailable, yet the police are reluctant to grant bond or even speed up cases so that such detainees are bailed out by the court. The resultant of this practice is notorious - the ever talked about problem of overcrowding in these places of confinements.

Another reason which was seen as leading to over-crowding or congestion in cells, is the police abuse of their powers to arrest and detain. Frivolous cases not warranting arrests, later on detentions, top the list of police records especially in police stations in the outskirts of main towns. The reason for this is found two fold: first in these stations is where one is likely to find low - grade police men, and second the knowledge of human rights by the inhabitants is almost zero. We have further shown that local statutes, in particular the constitution, provide for the protection of individual rights in many a number of provisions. That these individual rights relate or indeed are accorded to every person. However, a perusal of most of the cases hitherto recorded reveal that there is a great deal of discrimination against detained persons in that most of the rights are illegally not

accorded to them or if they are, they are wantonly violated and disregarded. This is obviously done, as stated above, to satisfy the individual policemen's ego of having "acted" on a detainees regardless of whether or not such a detainee is eventually found innocent (as it happens often times). In the premises, it has been revealed that due to such attitudes, the government has been, and continue to lose colossal amounts of money in terms of compensation and/or damages awarded to those victims of various vices of law enforcement officers ranging from illegal detention, false imprisonment, and malicious prosecutions of inhuman treatment and the most dreaded vice of torture.

We also noted that there has generally been an international or global move towards protection of detainees' rights. In this regard, various international statutes have been concluded, and are in operation. Zambia, it was stated, has either signed, ratified or acceded to most of them and hence is bound by the principle of *pacta sunt servanda* notwithstanding any domestic justification it may want to raise. However, despite this status quo, the essay has revealed that Zambia has conformed more to these statutes in terms of breaches than otherwise. Most of the cases involving both ordinary and political detentions have revealed a consistent pattern of violations of human rights which give an impression that either the provisions of most of these statutes are unknown or just do not mean anything to authorities. What is even more frightening is that senior police officer have been implicated in most serious allegations of human rights abuse. That no recorded case of prosecution involving, say, a police officer accused of torture has taken place, in the recent past, only goes to show tacit approval of the command of such acts of barbarism.

It is gratifying to note though, that the command has introduced police reforms in an endeavour to change the image of the police and make it more community oriented and hence user-friendly. Regrettably, since these reforms were introduced, back in 1994, not much has changed. In fact, it is not a misstatement to state that apart from the name (from police force to police service) the rest is the same old inhuman and brutal police people have known as the case of Kaunda and 79 others

has shown. Indeed, the case of Kaunda has only served to prove that the law enforcement officers are not daunted by whatever public outcry there has been and are determined to proceed with their inhuman acts unabated. It is in these circumstances, that the recommendations that follow are given to be able to help the powers that be observe, respect and adhere to protection of detainees' civil liberties (which though but a part of the whole concept of protection of human rights for all generally is, nonetheless, fundamental) and hence make Zambia a better place to live in.

5.1 RECOMMENDATIONS

This paper has brought to the fore the undeniable truth that detainees in Zambia are generally mal-treated. The reasons for this inescapable fact, as the paper has shown, are varied. The author, therefore, now attempts to offer some proposals which can help authorities better respect and observe rights of detainees in Zambia.

The first recommendation touches on law reform. While the author is of the view that the law relating to rights of detainees per se is not bad or lagging, in Zambia, the best view is that attempts should be made to improve on the status quo, since law is not static and must exist to serve the aspirations of the people. One legislation which needs a complete overhaul is the one relating to a state of emergency. It was revealed that the impact of a state of emergency on individual liberty is frightening. This is fundamentally due to a myriad of reasons among them lack of a proper criterion to follow before declaring a state of emergency, and almost lack of judicial control on the executive wing of government during such situations.

The recommendations here are twofold: one is to bring local legislation into harmony with international legislations especially the ICCPR to which Zambia is a party, and two, to establish a constitutional court which should be vested with authority to deal just with human rights and constitutional issues. This undoubtedly, if given the autonomy as a normal court will help keep the government on its toes. This court can help dilute the *carte blanche* which our President wields by making sure that such authority is used for the situations envisaged by the international statutes. On the other hand, it is the author's proposal that if established, such a court be given powers to visit prisons and police cells and compel authorities to bring "deserving" cases before them.

One further serious loophole of our law is that whereas the supreme law of the land unreservedly prohibits torture and other inhuman or degrading treatment or punishment, there is no statute which creates an offence for non-compliance. This is not only in conflict with Article 4 of CAT which calls on state parties to ensure

that all acts of torture are offences under its criminal law, but also serves as an impetus to law enforcement officers who are assured that no penal sanctions will attach to their barbaric acts. It is, therefore, the author's recommendation that a law be passed which will make torture, and other forms of inhuman treatment and attempts thereof criminal. This, obviously, will serve as a deterrent on would be torturers because of the consequence of their action, which is not there now.

Another area of law reform which would have an ultimate of promoting rights of detainees is to outlaw receipt of information obtained through torture. It was overwhelmingly established that authorities use all forms of brutal methods in order to extract confessions or incriminating evidence from detainees. Zambian law is such that whereas confessions obtained through this illegal method is inadmissible consequential discoveries are themselves admissible. It is such seemingly incentives which give authorities the urge to want to use this method. However, if the situation was like in USA where "fruits of a poisonous tree are treated as such" very few cases of torture will prevail since authorities will not be "helped" in their investigations, anyway.

In the same vain, it is the author's view that the law regulating use of nolle prosequi be revisited. The situation now is such that the police can arrest and detain a person on very flimsy grounds. Keep that person in incarceration as long as they can. Subject that person to all sorts of abuse and untold misery, but once a trial commences, at any time before judgement is passed, enter a nolle. The effect of that is that the courts must discharge that person without question. The liberty of the person will have been infringed under the "veil" of the law. In this connection, it is the author's recommendation that Parliament enact legislation which should empower the courts to inquire into reasons for entering a nolle prosequi. In this way, abuse will be alleviated, if not wiped out, while at the same time protecting the rights of the detainee.

Over and above law reform, there are still some areas which need highlighting in our endeavour to protect detainees' rights. Throughout the discussion one aspect

was outstanding: the impunity with which the law enforcement officers abused their authority vis-a-vis treatment of detained persons only goes to show lack of accountability for their actions. In this regard, it is recommended that the command establish some form of a tribunal or citizen's committee which will be in the style of an ombudsman. This tribunal can then hear and determine individual complaints against individual officers so that each and every officer is accountable for his/her action.

This tribunal will predictably, serve two purposes: on one hand it will be able to absolve a police officer's action as being intra vires his duties and hence not liable or if he is that public policy demands that his liability be absolved by the police service. On the other hand, it will also be able to hold individual officers' acts as ultra vires their duties or powers and hence personally accountable. If this latter ruling is passed, and in the event that a victim of the abuse has taken his/her case to court and is successful, any amount of money awarded must then be borne by the individual officer. This will obviously help reduce police brutality towards detainees.

Furthermore, the face of the police service can change if only the highest command, the Inspector - General, was accountable. Under the present arrangement, the I.G is almost only accountable to the appointing authority - the President. This has the effect of politicising the police service so much so that at the end of the day, it is only seen largely as a militia wing of the ruling party. This obviously can considerably change if the I.G was appointed by an independent authority, say the public service commission and ratified by Parliament. This process/procedure will give the incumbent enough autonomy and security to perform his/her duties diligently and impartially. Of course, this will have a spill over benefit to detainees in that there will no longer be politically motivated ill-treatment, and besides their "cries" will be the only insecurity the I.G will have, hence he/she will be compelled to improve the rights of detainees.

The prison conditions also revealed an eyesore of problems through out our discussion. That our prisons are filthy, deplorable, congested, and in a state of disrepair was glaringly indisputable. Also conspicuous is the fact that most prisons in Zambia were built in the colonial era, and hence do not conform to standards of a modern prison system. Thus, whereas the number of prisoners have been increasing, there has been no corresponding expansion or significant renovation made to the overused and run down prison buildings thereby causing serious overcrowding and health problems for inmates. Consequently, there is no categorisation, in most of the prisons, between, say convicted and unconvicted prisoners.

It is the author's recommendation, in this regard, that to lessen on congestion associated with long remands, restrictions on the granting of bail should be removed especially for petty bailable offenses. Further, and in this connection, unreasonable amounts asked for the granting of bail should be stopped as most Zambians are poor, and therefore, can not afford to pay large sums of money for bail. In addition, the use of custodial sentences should only be resorted to when all other remedies have failed, were minor offences are concerned. The parole release measures must also be efficiently practised and relied upon if the congestion is to come down.

On its part, the government apart from ensuring that its prosecutors are always in court to ensure speedy trials of detainees, must also look into the issue of rehabilitating the dilapidated prison structures, to at least make sure that these institutions are habitable. It will be recalled from our discussion that apart from the inhuman conditions in these prisons, the institutions are user - friendly. For example, the physical torture is always associated with police officers and not prison officials. In this regard, once prison conditions are improved, it is the author's proposals that suspects intended to be kept over night be transferred to the prisons, to lessen on the abuse.

Finally, it must be acknowledged that the establishment of the Permanent Human Rights Commission is a very welcome move. It is hoped that this commission will have physical access to detainees and recommend for action immediately to the authorities concerned. However, if events of the 1997 coup suspects are anything to go by, then it will not be a misnomer to refer to the commission as a toothless bulldog. This is because it was hindered from doing what it is empowered to do, and did not appear to have alternatives to this apart from condemning authorities' action. For example, the commission was prevented from seeing the detainees until after several days later.

Furthermore, the commission, like any other statutory body, has no enforcement mechanism and is, therefore, reliant on the will of the government to act positively. Predictably, the commission has received and dealt with many complaints and made recommendations to the powers that be. But these are yet to be acted upon.

It is, therefore, our recommendation that the commission, because it is better placed to investigate and check abuses, be given the enforcement power. This will make it possible for the commission to summon the human rights violator for questioning, and even mete out enforceable orders - which can be subject to review by say the High court. This will ultimately ensure that most of the abuses especially as regards detainees are discouraged for fear of reprisals.

It is the author's view that once the above proposals and recommendations are carried out, Zambia will have gone a milestone in recognising and observing detainee's rights since ultimately even the treatment will change for the better. Then, we will not only be treating a detainees as a person before the law but we shall also be doing that which is deserved by a detainee.

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