



VOLUME III

**LEGAL FRAMEWORK AND CASE
DETERMINATIONS**

9 AUGUST 2022

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I. Preface - Legality of State Actions

Introduction

Law was enforced and courts operated throughout this period and various government bodies purported to be acting lawfully. The Commission has nevertheless found that there were both illegalities and arbitrariness in the enforcement of the legal framework as set out in the case determinations of this Volume. In the following, the Commission provides an overview of the legal basis for its findings in case determination turning upon the applicable legal framework and also identifies for each legal period under consideration the elements of the various human rights violations it was mandated to investigate that needed to be established for the Commission to have determined that a human rights violation occurred.

Approach of the Commission in identifying and assessing legality

The Truth, Reconciliation and National Unity Commission Act, 2018 (“Act”) directs that the Commission shall “abide by universally recognised legal principles and human rights norms” and is “to observe applicable and appropriate rules of natural justice and international fair trial standards”.¹ The Commission has considered that these principles must guide the Commission’s determination of the cases before it as to whether the conduct alleged constitutes a human rights violation under its Act.²

The Commission has thus considered that the reference to “universally recognised legal principles and human rights norms” within section 3(9) of the Act directs the Commission to consider international human rights standards as the substantive applicable law, while the reference to “applicable and appropriate rules of natural justice and international fair trial standards” within section 6(8)(a) of the Act primarily concerns the procedures for the Commission’s determinations, particularly where it is determining perpetrator status.³

The Commission notes that while each alleged human rights violation will be assessed by reference to universally recognised legal standards and human rights norms, that enquiry does not render the domestic legal framework in which the alleged violation took place irrelevant.

¹ TRNUC Act, secs. 3(9), 6(8)(a).

² *Id.*, section 2(8).

³ Hearing of Attorney-General Frank Ally, TRNUC, 6 July 2020 (“This law is giving you the opportunity for you to fly right over whatever thing had been done by a law, and will tell the Commission, Commission you can make whatever findings that you feel if there was...if there are violations of human rights. This was the reason why there have been the Truth, Reconciliation Commissions in those countries. In South Africa also apartheid was legal, it was legal, but it was obvious for the national reconciliation of South Africa that the law that made apartheid legal infringed - it was a gross violation of one's human rights and therefore when it made a finding it did not take it into consideration. So you are not there to take into consideration if a law was a lawful or it was not. You are here to see whether that action taken in relation to that complainant is a violation or not, and when you will define that violation you will have to define it in relation to that definition and that provision which tells you have to look at universal human rights.”).

The domestic legal framework is instead an important starting point for the examination as to whether the act complained of was legal and then whether it breached human rights standards and norms.

In this respect, one important universally recognised human rights norm relevant to the Commission's identification of the substantive standard, but also pertinent to issues of natural justice and fair trial standards, is the prohibition of the retroactive application of the law. Pursuant to this principle, the conduct complained of must have been criminalised by some source of law that was previously applicable, which was sufficiently accessible, and foreseeable to the individual. At the heart of this principle is the notion of fairness. A person should not be held to account for conduct that was not criminal at the time it took place.

The Commission considers that this principle of non-retroactivity is equally applicable to its consideration of allegations that an act constituted a violation of human rights. As human rights are evolving rights, the Commission considers that when determining whether the conduct complained of breached international human rights standards, fairness requires it to assess that conduct by reference to human rights principles applicable at the time of the alleged violation.

Accordingly, the Commission has considered, where relevant, the domestic legal framework under which the alleged act occurred and the consistency of that framework with "universally recognised legal principles and human rights norms" at the time of the act complained. This approach rendered the Universal Declaration of Human Rights applicable in all cases along with early co-existing principles of customary international law. As explained below, the Commission also found that the core human rights treaties, which entered into force globally around the time of the Coup d'état, were applicable during specific temporal periods in Seychelles.⁴

Applicable international human rights principles

Although during and immediately following the Coup d'état, namely during the period 1977-1979, international human rights law was itself still relatively nascent, there were certain general principles and norms already accepted on the international level pertaining to topics discussed throughout this report and the Commission's determination of cases. Such principles were embodied in instruments and treaties like the Universal Declaration of Human Rights (UDHR),⁵ the United Nations Charter,⁶ the International Covenant on Civil and Political Rights

⁴ The Commission notes that it was brought to its attention late July 2022 of the application of the Declaration of the Rights of Man and the Citizen, (See Annex 1).

⁵ Universal Declaration of Human Rights [UDHR], G.A. Res. 217 (III), 10 December 1948.

⁶ Charter of the United Nations, 24 October 1945, 1 U.N.T.S. XVI.

(ICCPR),⁷ and the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁸

1. Treaties

The ICCPR and ICESCR were ratified by Seychelles on 5 May 1992. By this fact alone, the presumption is thus that these two core human rights treaties did not apply in Seychelles at the time of the Coup d'état or ensuing one-party State. However, the Commission recalls that at the time of independence in 1976, Seychelles assumed all the international treaty obligations of the Government of the United Kingdom, which included these two core human rights treaties.⁹ After the Coup and early in the time of the one-party State, the Government of Seychelles attempted to repudiate these commitments and sought to withdraw from these treaties on 22 October 1979.¹⁰

Despite this attempted repudiation, the Commission has found that the provisions of the core human rights treaties remained in force in Seychelles during at least specific periods of time, for the protection of the human rights of Seychellois citizens. The Commission recalls the view of the UN Human Rights Committee, the body tasked with monitoring implementation of the ICCPR, that "international law does not permit a State which has ratified or acceded or succeeded to the Covenant to denounce it or withdraw from it".¹¹ In particular, the Commission reaffirms that "the rights enshrined in the Covenant belong to the people living in the territory of the State party... [and] such protection devolves with territory and continues to belong to them, notwithstanding change in government of the State party, including dismemberment in more than one State or State succession or any subsequent action of the State party designed to divest them of the rights guaranteed by the Covenant".¹² The Commission recalls that this General Comment was issued as a reaction to the attempt of North Korea to withdraw from the ICCPR in 1997, which the Human Rights Committee denied and which the UN Secretary-General found was not legally possible; instead, the Secretary-General relied on Article 54 of the Vienna Convention in affirming that withdrawal from the ICCPR was only possible by the consent of all States parties, and thus circulated the exchange of written communications between the DPRK and himself to all States parties and signatories for their views. The consent of all States parties has apparently not been forthcoming to date, and in the meantime, the

⁷ International Covenant on Civil and Political Rights [ICCPR], 16 December 1966, 999 U.N.T.S. 171.

⁸ International Covenant on Economic, Social and Cultural Rights [ICESCR], 16 December 1966, 993 U.N.T.S. 3.

⁹ See "Exchange of Notes Constituting an Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Seychelles concerning Treaty Succession," 29 June 1976.

¹⁰ See "Letter from the Minister for Foreign Affairs of the Republic of Seychelles to the UN Secretary-General," 22 October 1979.

¹¹ See CCPR General Comment No. 26: Continuity of Obligations, 8 December 1997, U.N. Doc. CCPR/C/21/Rev.1/Add.8/Rev.1, para. 5.

¹² *Id.*, para. 4.

DPRK has still legally been a party to the ICCPR, and its obligations, including its reporting obligations, have continued.¹³

Therefore, the Commission is of the view that Seychelles' attempted denunciation of the ICCPR and ICESCR in 1979 was similarly without legal effect; it continued to be bound by those obligations and continues to be so bound to the present. Nevertheless, even if the denunciation were possible, under treaty law these treaties would have continued to be in effect for 12 months from the date of the 22 October 1979 communication by Seychelles.¹⁴ As such, while the Commission reiterates that it was likely not possible under international law for Seychelles to have repudiated its international obligations under the ICCPR and ICESCR, in order to give its case determinations more credibility and its recommendations on reparations more likelihood at being granted, the Commission considers that at the very least, these core human rights treaties were in effect in Seychelles—and are thus applicable in the Commission's case determinations¹⁵—from the date of independence, 29 June 1976, through to 22 October 1980, and then from the date of ratification, 5 May 1992, to the present.

2. Customary international law

Regardless of Seychelles' commitments under the two core human rights treaties, the State had commitments under the UN Charter from the time of independence from the United

¹³ See Elizabeth Evatt, *Democratic People's Republic of Korea and the ICCPR: Denunciation as an Exercise of the Right of Self-Defence*, 5 AUSTRALIAN JOURNAL OF HUMAN RIGHTS 215 (1999).

¹⁴ See Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331, art. 56(2) which requires a party to give not less than 12 months' notice of its intention to denounce or withdraw from a treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal. Although Seychelles has not ratified the Vienna Convention on the Law of Treaties, the Commission recalls that the principles in that Convention are widely recognised as reflecting customary international law, which is binding on all States, including Seychelles. The Commission finds that Article 56 of the Vienna Convention is applicable as the ICCPR contains no provision regarding its termination and does not provide for a means of denunciation or withdrawal.

¹⁵ The Commission notes that it took this conservative approach to the case determinations as noted due to the stated belief that such would make those legal determinations more legitimate in the eyes of international onlookers and, more importantly, in the eyes of the Government of Seychelles who bears ultimate responsibility for ensuring the payment of reparations to victims. However, the Commission notes that while this was the approach taken in the case determinations, which accordingly did not rely on the ICCPR, e.g., as authority during the period in which Seychelles sought to repudiate it, the Commission nevertheless uses these core human rights treaties as a means of assessing the legality of the laws and decrees passed in Seychelles during the time of the one-party State. In that regard, the Commission reaffirms the evolutive nature of human rights and the consensus-based, authoritative nature of these treaties which had entered into force globally at the time of the Coup d'état of 1977. The Commission notes that as President Albert René would have known of these treaties, and did know, as he sought to repudiate the Seychelles' commitments under them in 1979, it was an intentional choice of his to reduce or eliminate those protections, diverge from the majority of the world, and seek to establish his own constitutional and legal regime apart from the international law that had been created and to which his country had been bound. The Commission has found that in many ways, the actions of the President and others empowered by his laws violated international law, and it has thus qualified those violations as illegalities in the present chapter and throughout this Report.

Kingdom,¹⁶ and was additionally bound by customary international law, which the UDHR has widely been seen to reflect. Such customary international law and *jus cogens* norms function not only to proscribe or validate certain conduct, but also to describe “considerations of morals and of international good order”.¹⁷ The Commission has thus relied on the provisions of the UDHR in its case determinations as a way of citing the corresponding and underlying principles of customary international law, especially during the period of 1980-1993, during which time the country was governed by the 1979 Constitution Decree, which did not contain fundamental rights protections, and was potentially without the protections of the core international human rights treaties.

3. General principles of law

Similarly, the Commission has recognised and from time to time applied “general principles of law recognised by the community of nations,” as another accepted source of international law.¹⁸ Such principles are generally pulled from a comparative survey of national laws and practices in regard to the legal issue in question, and are thought to comprise of normative standards as determined by a confluence of “civilized nations”.¹⁹ While the framework for including such principles as a source of law is relatively recent, having been more formally used by international bodies like the International Court of Justice and International Criminal Tribunal for the former Yugoslavia, the reasoning behind them—comparing states’ practices to ascertain, on balance, whether a law or practice was generally accepted—can arguably be applied to any time period. As this is a similar idea to customary law and the conception of human rights as flowing from inherent human dignity, discussions of “general principles of law” are therefore included sporadically throughout this report and the Commission’s case determinations, as seen in the “elements of violations” documents.

4. Regional human rights framework

Regionally, the African Charter on Human and Peoples’ Rights,²⁰ which was adopted in 1981 and entered into force in 1986, similarly recognises rights relevant to the transitional justice context, such as non-discrimination and equality, equal protection of the law, right to life and

¹⁶ Seychelles joined the United Nations as a Member State on 21 September 1976. See UN DEP’T OF PUBLIC INFO., *United Nations Member States*, Press Release ORG/1469, 3 July 2006, available at <https://www.un.org/press/en/2006/org1469.doc.htm>.

¹⁷ Int’l Law Comm’n [ILC], *Yearbook of the International Law Commission: Documents of the tenth session including the report of the Commission to the General Assembly*, Vol. II, pp. 40-41 (1958).

¹⁸ See Statute of the International Court of Justice [ICJ], art. 38(1)(c), 26 June 1945, 59 Stat. 1055, T.S. No. 993 at 25; ICCPR, art. 15(2) (“Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.”).

¹⁹ See FABIÁN RAIMONDO, *GENERAL PRINCIPLES OF LAW IN THE DECISIONS OF INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS 2* (2008) (“by definition, general principles of law are abstractions of legal rules from national legal systems...”).

²⁰ African Charter on Human and Peoples’ Rights [Banjul Charter], OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58, adopted 27 June 1981, entered into force 21 October 1986.

dignity, right to liberty and security of person, right to freedom of movement, the collective right to national peace and security, and the guarantee of independence of the judiciary, among other provisions. However, because Seychelles did not ratify the Charter until 1992, the Commission did not rely strongly on regional human rights principles, though in general they are greatly increasing in relevance and use today.

Legal and Constitutional frameworks and critiques

1. The legal regime in Seychelles prior to the Coup d'état

By the adoption of the Seychelles Act 1976, the UK Parliament gave Seychelles independence on 29 June 1976.²¹ The subsequent Seychelles Independence Order 1976 contained the Constitution of Seychelles, which took effect from that date.²² Importantly, the Seychelles Act left in place colonial laws and Acts of Parliament of the UK as necessarily modified, adapted, and qualified to conform to the Act,²³ and gave the President of Seychelles the power to make by order any amendments to existing laws or Acts of Parliament before 28 December 1976, in order to bring them into conformity with the Act.²⁴

The Constitution established a parliamentary democracy.²⁵ Chapter III defined fundamental human rights and freedoms. It closely resembled the International Covenant on Civil and Political Rights²⁶ and the European Convention on Human Rights.²⁷ However, it fell short of the standards in these instruments in some areas, for example, in the protection of the right to life,²⁸ the protection of the right to personal liberty,²⁹ conditions of detention,³⁰ non-

²¹ Seychelles Act 1976, Cap. 19, 27 May 1976, sec. 1.

²² Seychelles Independence Order 1976 SI 1976/894 (U.K.), sec. 1(2), sch I (hereinafter "Constitution of 1976").

²³ *Id.*, sec. 4.

²⁴ *Id.*, sec. 4(3).

²⁵ Constitution of 1976, Chapter V.

²⁶ International Covenant on Civil and Political Rights [ICCPR], 16 December 1966, 999 U.N.T.S. 171. The ICCPR entered into force on 23 March 1976, only a few months before the Constitution of 1976. See *infra* for a discussion of the applicability of this treaty to the context of Seychelles.

²⁷ Council of Europe, The European Convention on Human Rights [ECHR], Strasbourg: Directorate of Information, 4 November 1950, *entered into force* 3 September 1953. The UK became a party to the ECHR on 3 September 1953. While this treaty is geographically inapplicable to Seychelles, the Commission notes that its provisions have been widely respected and perceived as persuasive authority by many human rights experts. Further, the ECHR was evidently in the minds of the drafters of the 1976 Constitution of Seychelles.

²⁸ Article 13 does not contain the specifications in Article 6(1) of the ICCPR that the right to life shall be protected by law or that no one shall be arbitrarily deprived of life.

²⁹ Article 14 authorises deprivation of liberty on the vague grounds of "reasonable suspicion of [being] likely to commit a breach of the peace" and it does not include any *habeas corpus* provision corresponding to Article 9(4) of the ICCPR and Article 5(4) of the ECHR.

³⁰ The 1976 Constitution does not contain a provision corresponding to Article 10(2) of the ICCPR, which requires states to separate convicted and accused persons, and juvenile and adult detainees.

retroactivity in criminal responsibility and punishment,³¹ the rights to freedom of expression and freedom of assembly and association,³² the definition of “discriminatory”,³³ the declaration of a state of public emergency,³⁴ and the protections for those detained during such a state of public emergency.³⁵ Despite these shortcomings, Chapter III of the 1976 Constitution provided, at least on paper, important rights. Also, significantly, Article 26 sets forth a procedure whereby someone alleging a contravention might apply to the Supreme Court for redress.

2. The Coup d'état and its aftermath

The Coup d'état of 5 June 1977 was a clear violation of the Constitution of 1976. James Mancham, as the lawful President,³⁶ alone had the power to make a declaration of an emergency or threatened emergency under Article 28. Not only did the Coup unlawfully depose the sitting President, but it was not bloodless but rather resulted in grave human rights violations. Some of those responsible committed offences in contravention of the Penal Code, including murder under Article 193, common assault under Article 235, assault occasioning actual bodily harm under Article 236, abduction under Article 241 and unlawful confinement under Article 248.³⁷

Proclamation No. 2 of 1977 was passed on 13 June 1977, just one week after the Coup. It began by noting that “the situation in Seychelles was so grave that it was necessary for the preservation of public security so ... [that] France Albert René [has] taken over as President

³¹ Article 19(4), which provides for non-retroactivity in criminal responsibility and punishment, does not include a provision permitting a lighter penalty if provided by law such as is contained in the third sentence of Article 15(1) of the ICCPR. In addition, Article 19(4) does not follow Article 15(2) of the ICCPR and Article 7(2) of the ECHR in allowing for the trial and punishment of acts or omissions that constituted crimes under international law at the time of their commission.

³² Articles 21 and 22 authorise restrictions on the rights to freedom of expression and freedom of assembly and association respectively in order to achieve social goals or for the benefit of others, except where they “are *shown* not to be *reasonably justifiable* in a democratic society” (emphasis added). This is a lower threshold than that of being “*necessary* in a democratic society” (emphasis added) in Articles 19, 20 and 21 of the ICCPR and Articles 10 and 11 of the ECHR.

³³ The definition of “discriminatory” in Article 24(2) only contains some of the dimensions in Articles 2 and 26 of the ICCPR and Article 14 of the ECHR.

³⁴ Pursuant to Article 28, the President could at any time declare by Proclamation that either a state of public emergency exists, or “a situation exists which, if allowed to continue, may lead to a state of emergency.” The latter basis was vague and susceptible to abuse. By contrast Article 4(1) of the ICCPR only permitted states to take measures derogating from their obligations “[i]n time of public emergency which threatens the life of the nation”.

³⁵ Whilst Article 25 sets forth protections for persons detained during such an emergency, the Constitution does not provide that measures that would infringe the human rights protections in Chapter III should be strictly required by the exigencies of the situation or that there should be exemption for protection of the right to life, protection from slavery and forced labour, protection from torture, cruel, inhuman or degrading treatment or punishment and non-retroactivity of legal provisions on criminal responsibility and punishment. In these respects, it fails to meet the standards in Articles 4(1) and 4(2) of the ICCPR and Articles 15(1) and 15(2) of the ECHR.

³⁶ 1976 Constitution, art. 31(1).

³⁷ See also Case Determination No. 001: Dorothy Chang-Him et al.; No. 122: Roch Jeanny; No: 146 & 496 Winsley Joubert and Hagson Fred.

all powers of the Government of Seychelles”.³⁸ Section 1 formally vested presidential powers in René.³⁹

Pivotal to this Proclamation is how the President suspended the Constitution of 1976. Except as set out below, all provisions in the 1976 Constitution were suspended “temporarily,” with retroactive effect from 5 June 1977.⁴⁰ Section 2 of the Proclamation nevertheless more or less left intact provisions on the following subject to “such adaptations and modifications as necessary or as the context requires”: citizenship; protection of fundamental human rights; offices and functions of the President and Ministers, excluding Articles 32-39 and 42, 43(2), 44, 45 and 48; the Courts, Judges, Attorney-General; the Civil Service, excluding the Public Service Commission; Schedules I, II, and IV to the Constitution; and finance.

Proclamation No. 2 was in violation of the 1976 Constitution in that it purported to replace the President without following the procedures for removal and election of a successor set forth in Articles 32, 34, 35, 36, and 37, and purported to alter the Constitution in violation of Article 72, which requires a specific procedure and threshold number of votes in favour of such change in the National Assembly.

It was notable that Proclamation No. 2 left in place the human rights protections referenced in the 1976 Constitution, discussed above, as multiple arbitrary detentions, enforced disappearances, and other violations happened during this period, in contravention of those guarantees.⁴¹ The open door of “such adaptations and modifications as necessary” functionally upset the principle of supremacy and the traditional hierarchy of laws and statutory interpretation—in which ordinarily any laws passed would be interpreted in light of the Constitution—and made the Constitution secondary, to be interpreted in light of this presidential proclamation and any subsequent “laws” and decrees passed by President René.

Pointing out that the Coup d’état was in violation of the 1976 Constitution and that Proclamation No. 2 purported to establish a new legal regime in breach of the Constitution raises the question whether *all* legislation after 5 June 1977 should be condemned as legally invalid.

The Commission notes that this very issue was addressed in 1981 by the Court of Appeal of Seychelles in *Ramnikal Valabhji v. Controller of Taxes*.⁴² The appellant challenged notices of income tax under an Income Tax Decree of 1978, on the grounds, *inter alia*, that the Income Tax Decree, and in effect, all legislation enacted in Seychelles in 1977 and 1978 by the

³⁸ Proclamation No. 2 of 1977, 13 June 1977, Preamble.

³⁹ *Id.*, sec. 1.

⁴⁰ *Id.*, sec. 2.

⁴¹ *See, e.g.*, Case Determination No. 001: Dorothy Chang-Him et al.

⁴² *Ramnikal Valabhji v. Controller of Taxes*, summarised in 7 COMMONWEALTH L. BULL. 1249 (1981).

President as sole legislative authority after the Coup d'état, which led to revocation of the 1976 Constitution, was unconstitutional and invalid, and therefore of no effect. The Court rejected the Appellant's position for several reasons. It referred to the importance of not allowing a gulf to open between what the executive arms and the judiciary believe to be the legal basis of authority in the country. It stated that there appeared to be a consensus or at least a strong preponderance of opinion that once the regime is firmly or irrevocably in control, it becomes a lawful or legitimate government and entitled to the authority that goes with that status. The Court also accepted the position that when a regime is firmly established and accepted as legitimate, this legitimation is extended back to cover legislation enacted by the regime from the inception of its control.

In particular, the Court of Appeal noted that "the smoothness and efficacy of the revolutionary transition that the new regime had by the 28th June 1977 received such widespread and unqualified acceptance and consent that it was already a legal authority at that time".⁴³ The Court thus held the regime—as well as the Income Tax Assessment Decree of 1978 and all decrees passed in 1977 and 1978—to be constitutional and valid due to the fact that the regime had become legitimate by virtue of public acceptance by that point in time.

The Court of Appeal decision referred to the approach of the legal theorist Hans Kelsen, though it is by no means clear that it was appropriate to do so.⁴⁴ Possible philosophical ramifications do not diminish the relevance and value of assessing the legislation adopted by the René regime in light of the provisions of the 1976 Constitution, which were left effectively unaltered, and, later, the 1979 Constitution as relevant, as well as emerging international standards.

The Commission acknowledges that its own recognition or labelling of Albert René as the President of Seychelles during and directly following the Coup could also be said to carry certain ramifications from a standpoint of legitimacy. However, the Commission here and in its case determinations has stressed that its use of the title of President is not an official recognition or endorsement that there was a lawful transition of power on the night of the Coup—to the contrary, the Commission has expressly found that there was not—or indeed that the regime was the legitimate and lawful Government in power in the Seychelles at all material times under the Commission's mandate. Considering the above case of *Valabhji* and the evidence the Commission has received indicating that former Prime Minister René and his Coup-installed Government seemed to be accepted as the governing body very quickly after

⁴³ *Id.* at 14 (opinion of Hogan, P.).

⁴⁴ *See, for example*, J.W. HARRIS, *LEGAL PHILOSOPHIES* (Second Ed., Oxford University Press, 1977).

the Coup,⁴⁵ the Commission considers that Mr. René was accepted as President at least in the four years following the Coup,⁴⁶ if not immediately on or following 5 June 1977.

Also on 13 June 1977, President René passed the Preservation of Public Security Regulations, 1977. The Regulations allowed the Commissioner of Police or Minister of State to requisition any vehicle which they considered necessary for the transportation of persons, materials, or goods and the owner or driver had to acquiesce or face being charged with an offence.⁴⁷ Those same officials could also seize without compensation any vehicle if the owner or driver failed to comply with these provisions.⁴⁸ Moreover, the movement and transport of persons could be regulated,⁴⁹ and authorities could enter onto private land to further the purposes of the Regulations.⁵⁰ If the individual possessing the land refused entry, the individual could be guilty of an offence and would not be entitled to compensation for any damage done to the land by the authorities.⁵¹

As a matter of constitutional law in place at the time, these provisions were highly problematic. First, the requisitioning of private vehicles by the above State officials as allowed by the Regulations would probably have violated the human rights provisions of the Constitution of 1976, which remained in force. Article 17 of that Constitution provided protection against deprivation of property, except in certain circumstances, including four conditions that must be met.⁵² The first condition was actually quite broad, allowing the taking or acquisition of private property when such is “necessary or expedient in the interests of defence, public safety, public order, public morality, public health, nature conservation, town and country planning or the development or utilisation of any property in such a manner as to promote the public benefit”.⁵³ Under such broad grounds, the requisition provision of the Regulations would probably be constitutional, insofar as it could have qualified as being done in the interests of defence or public order. However, the Regulations provided no further reasoning or basis for the requisitioning of vehicles in this regard, and arbitrary enforcement would have run afoul of the Constitution. In addition, three further conditions had to be satisfied under the 1976 Constitution for the taking to be permissible: there must have been reasonable justification for

⁴⁵ The Commission recalls that despite the Coup itself not being bloodless, the immediate aftermath revealed that the population was relatively docile and obedient, stayed home, and took the directives issued over the radio by René. While there were some exceptions to this, *see* Case Determination No. 001: Dorothy Chang-Him et al., the Commission considers the lack of any notable demonstrations, rioting, or challenges to René’s authority, *e.g.*, to indicate a broadscale acceptance by the population of that authority and unconstitutional promotion from Prime Minister to President.

⁴⁶ *See Valabhji, supra.*

⁴⁷ Preservation of Public Security Regulations, 1977, Regulations 4(1), 4(2).

⁴⁸ *Id.*, Regulation 4(3).

⁴⁹ *Id.*, Regulation 6.

⁵⁰ *Id.*, Regulation 7(1).

⁵¹ *Id.*, Regulation 7(2)-(3).

⁵² Constitution of 1976, art. 17.

⁵³ *Id.*, art. 17(1)(a).

the hardship caused to the individual being deprived of their property,⁵⁴ prompt payment for adequate compensation must have been provided,⁵⁵ and the opportunity to appeal or challenge the acquisition must have been afforded the person.⁵⁶ Thus, to the extent that enforcement of the requisition provision of the Regulations comported with Article 17 of the 1976 Constitution, the provision may have been proper, though if any one of the four conditions were not fully observed—or the provision was enforced in an arbitrary way, as is likely given the state of disarray and human rights abuses occurring at the time—the provision would have failed constitutional muster.

Second, under the same constitutional principles, the provision of the Regulations that allowed officials to seize without compensation any vehicle the owner of which refused to comply with the above provision directly violated the 1976 Constitution as being contrary to the requirement that adequate compensation be promptly paid for the taking or acquisition.

Third, the provisions in the Regulations allowing entry onto private land and lack of compensation for damage caused in the event of refusal of entry also may have violated the 1976 Constitution. Article 18 provided that “Except with his own consent, no person shall be subjected to the search of his person or his property or the entry by others on his premises.”⁵⁷ There were a few exceptions to this protection, including one on the same broad grounds of defence interests, public safety, etc., as in Article 17;⁵⁸ search or entry on those bases might make the provision permissible under the Constitution. There were also some protections provided by the Regulations, such as the requirement that persons who had property seized (and complied, or did not struggle) would be entitled to compensation for loss or damage suffered.⁵⁹ However, the Regulations allowed entry onto private land merely to further “the purposes of these regulations”⁶⁰ without specifying any of the bases set forth in Article 18 of the Constitution and for that reason could be susceptible to abuse or unconstitutional application.

In addition to these provisions on property and land, the Regulations contained broad restrictions on the right to freedom of expression, enshrined in the 1976 Constitution⁶¹ and left

⁵⁴ *Id.*, art. 17(1)(b).

⁵⁵ *Id.*, art. 17(1)(c)(i).

⁵⁶ *Id.*, art. 17(1)(c)(ii).

⁵⁷ *Id.*, art. 18(1).

⁵⁸ *See id.*, art. 18(2)(a) (allowing search of or entry onto premises “in the interests of defence, public safety, public order, public morality, public health, the administration of Government, town and country planning, nature conservation, the development or utilisation of mineral resources including oil, or the development or utilisation of any other property in such a manner as to promote the public benefit”).

⁵⁹ Though even this did not go far enough, as the amount of compensation would be fixed by the President and any award would be unappealable. Preservation of Public Security Regulations, 1977, Regulation 14.

⁶⁰ *Id.*, Regulation 7(1).

⁶¹ Constitution of 1976, art. 21 (protection of freedom of expression).

intact by subsequent modifications. Pursuant to Regulation 9(1), it was an offence under the Regulations to

do any act or speak or write or publish anything likely (a) to be prejudicial to the public safety or the maintenance of public order or which is likely to disturb the public tranquility or which is likely to be or which is prejudicial to the maintenance or distribution of essential services; or (b) to undermine the authority of, or public confidence in, the Government of Seychelles.

Regulation 10 provided that it was also an offence to publish any report or statement “likely to cause alarm or despondency or to be prejudicial to the public safety, the public tranquility, the maintenance of public order or the maintenance or distribution of essential services.”

Under Article 21 of the 1976 Constitution, laws could hinder the freedom of expression in the “reasonably justifiable” interests of defence, public safety, public order, the nebulous “public morality,” or public health; or for the purpose of “protecting the reputations, rights and freedoms of other persons ..., [or] preventing the disclosure of information received in confidence,” among other narrower grounds.⁶² Notwithstanding these broad grounds, the language in the Regulations was nevertheless unreasonably broad. After all, prohibiting members of the public from speaking anything “likely” to be prejudicial to the state does not foster the spirit of the freedom of speech and expression described in the Constitution; and terms like “public tranquility”, “undermine the authority of, or public confidence in, the Government” or “alarm or despondency” were not clearly defined or likely able to be objectively assessed. Although the Regulations did mention the grounds of public safety and public order, purporting to comply with Article 21, they were in some other respects so vaguely worded that they would arguably have permitted prohibitions that would not been “reasonably justifiable” under the Constitution.

On 28 June 1977, the Seychelles (Constitution) Proclamation 1977 became law, repealing Proclamation No. 2 of 1977 just two weeks after the passing of that Proclamation.⁶³ The Seychelles (Constitution) Proclamation 1977 outright revoked the Seychelles Independence Order, 1976, and the 1976 Constitution.⁶⁴ Upon the effect of the Proclamation, the Constitution of Seychelles consisted of provisions of the former Constitution of 1976 with a new list of variations and deletions set out in the Schedule to the Proclamation.⁶⁵ Again, due to the manner in which the Proclamation was passed and the constitutional changes it triggered as set out below, the Commission considers that this Proclamation was unconstitutional and thus unlawful, similar to Proclamation No. 2.

The Seychelles (Constitution) Proclamation 1977 removed virtually all safeguards for declarations of public emergency, including the 21-day expiration period and the powers of the

⁶² Constitution of 1976, art. 21(2).

⁶³ Seychelles (Constitution) Proclamation, 28 June 1977, para. 8.

⁶⁴ *Id.*, para. 7.

⁶⁵ *Id.*, para. 2.

National Assembly to extend or revoke the public emergency.⁶⁶ However, the Proclamation again kept the remainder of the human rights protections of the 1976 Constitution in place.⁶⁷ It greatly expanded the powers of the President. It did away with the elaborate system of presidential elections in the 1976 Constitution and replaced the then-existing Article 32 with simply “An election to the office of President shall be held in such manner as is prescribed,” without any further indication of when or how such would be done.⁶⁸ The legislature was completely abolished and legislative powers were vested in the President.⁶⁹ And in what was perhaps a moment of pride or arrogance, the constitutional provision naming James Mancham as the first president was amended to read “The first President under this Constitution shall be France Albert Rene”.⁷⁰ By this time, the deposed Mancham had already been President for almost a year, arguably rendering such a provision more emotional than logical or functional, creating another legal fiction.

After the amendments from the Seychelles (Constitution) Proclamation 1977, there were few checks on executive power left. Among the articles removed from the 1976 Constitution in this regard was Article 35, which contained checks on executive power and provisions for removal of the President for constitutional violations or gross misconduct. Legislative checks on the President’s salary were removed,⁷¹ and alterations of the President’s salary while still in office were now allowed, when previously such had been prohibited by the same provision.⁷²

During the period of roughly two years following the entry into force of the Seychelles (Constitution) Proclamation 1977, legislation was adopted which was not compatible with the international human rights standards that were emerging around this time, and which indicated the methodical dismantling of the colonial legal and constitutional framework, and rights protections, in Seychelles.

For instance, the Preservation of Public Security (Emergency Powers) Regulations, which were adopted on 3 May 1978, gave the President extensive powers in a number of areas if he was satisfied that their exercise was necessary for the preservation of security.

There were also several provisions that severely limited the right to freedom of expression. Regulation 11(1) provided that it was an offence to endeavour, whether orally or otherwise, to

⁶⁶ *Id.*, Schedule (“Article 28: Delete paragraph (2), (3), (4) and (5).”).

⁶⁷ Apart from the amendment to Article 28 mentioned above, the only revision to Chapter III of the Constitution that the Seychelles (Constitution) Proclamation, 1977 made was the replacement of “Parliament” by “the Republic” in Article 17(6). *Id.*, Schedule (Article 17 provisions).

⁶⁸ *Id.* Schedule (Article 32 provisions).

⁶⁹ *Id.* (Chapter V provisions).

⁷⁰ Seychelles (Constitution) Proclamation (Article 31 provisions).

⁷¹ *See id.* (Article 40(1) was to read, “The President shall receive such salary and allowances as may be prescribed [omitted: ‘by resolution of the National Assembly’] which shall be a charge on the general revenues of the Republic.”).

⁷² *Id.* (Article 40 provisions).

“influence public opinion in a manner prejudicial to the public safety, the public tranquility, the maintenance of public order or the maintenance of supplies and services essential to the life of the community” or to “do any act, or have any articles in his possession, with a view to making or facilitating the making of any such endeavour.” Regulation 11(2) enabled the President to make provision for the prevention or restriction of publications if he was satisfied that they would have the prejudicial effects set forth in Regulation 11(1). Regulations 12 and 13 which also limit freedom of expression are almost the same as Regulations 9 and 10 of the Preservation of Public Security Regulations 1977 of 13 June 1977. As discussed above in relation to these earlier Regulations, despite the relatively broad exceptions to the right to freedom of expression, such restrictions on this constitutional right were arguably too far-reaching to be constitutional. These provisions would likely not fall under the enumerated exceptions of “reasonably justifiable” interests of defence, public safety, public order, public morality, and the others listed above.⁷³

Regulation 2(1) empowered the President to order a person’s detention in vaguely described circumstances for an undefined period of time.⁷⁴ A Decree, adopted a few days later, provided for a Detention Review Tribunal to review the detention of those held during a period of public emergency.⁷⁵ The Tribunal consisted of three members of whom the President appointed two.⁷⁶ The review was to take place no later than one month from the date of detention and thereafter during the period of detention at intervals of not more than six months.⁷⁷ The Tribunal was only empowered to make recommendations to the President concerning the necessity or expediency of continuing the detention.⁷⁸ These provisions were in fact consistent with the provisions of the 1976 Constitution which were applicable during states of emergency.⁷⁹ However, the very limited access to review of detention might well not have met the human rights standards that were developing around this time.⁸⁰

Moreover, despite the above mandatory language requiring the Tribunal to review detainees’ cases, the Tribunal apparently was perceived to be exceedingly slow-moving; according to Seychellois lawyer Bernard Georges, members of the Tribunal may have met once or twice

⁷³ Constitution of 1976, art. 21(2).

⁷⁴ Almost exactly a year later a regulation was also adopted which in the same terms gave the President the power to order detention in vaguely described circumstances and for an undefined period of time. Preservation of Public Security (Detention) Regulations 1979, 4 May 1979, Regulation 2(1).

⁷⁵ Decree to establish a Review Tribunal to review the case of persons subject to a detention order, 19 May 1978 (Detention Review Tribunal 1978).

⁷⁶ *Id.*, para. 2.

⁷⁷ *Id.*, para. 3(2).

⁷⁸ *Id.*, para. 6.

⁷⁹ Constitution of 1976, arts. 25(1)(c), 25(2).

⁸⁰ Authoritative human rights bodies attached importance to the availability of binding judicial review of those detained during an emergency. *Lawless v. Ireland (No. 3)* (App. No. 332/57) ECHR, Judgment, 1 July 1961, para. 37; *Habeas Corpus in Emergency Situations (Article 27/2 and 7(6) of the American Convention on Human Rights)*, Advisory Opinion OC-8/87, Inter-American Court of Human Rights, Series A No. 8, 30 January 1987, para. 43.

with the detainees, but by the time the Tribunal acted, the detainees tended to be released.⁸¹ The Commission has heard that persons often remained in detention long after transmittal of recommendations to the President,⁸² which is further evidence of inefficiency.

The Commission also recalls that Seychelles had during the time period between 1977-1979 criminal procedure and penal codes in force that were left in place from British colonial rule, some (such as the rules of evidence) dating as far back as the late 19th century.⁸³ While the codes were nominally unmodified by Proclamations, Constitutions, and other instruments that claimed to not alter “existing laws,” and so putatively left in force and able to be invoked, this was only to the extent that the provisions of the codes were compatible with the Proclamation or Constitution in question. Moreover, the codes were not generally heavily relied upon, cited, or used to form the basis for detentions and other acts by the René regime as much as the Proclamations, Decrees, and Regulations discussed above; and as there were frequent states of emergency, during which time the code provisions were disregarded, the Commission felt it could generally not invoke these codes as an authority in its case determinations, except as where context required.

However, the Commission does note that despite a code being legally subject to the Constitution or even the Proclamations, the codes did provide some basic due process protections in the midst of laying out intricate criminal law systems. For example, the Criminal Procedure Code contained provisions on making arrests,⁸⁴ the power of police to detain boats, vehicles, and persons upon suspicion of stolen items;⁸⁵ the right to appeal judgements;⁸⁶ right to trial by jury;⁸⁷ and writs of habeas corpus,⁸⁸ which included the power of the Supreme Court to direct that any person improperly detained be set free.⁸⁹ The Penal Code also included provisions on the power of entry, arrest, and search in the context of “unlawful society” circumstances,⁹⁰ as well as the power to search in the context of “offences against morality”.⁹¹ Both the Criminal Procedure and Penal Codes provided freedom from double jeopardy.⁹² As such, these provisions nominally provided due process and other basic rights protections, but

⁸¹ See Testimony of Bernard Georges.

⁸² See, e.g., Press Release of President René, 20 June 1978; Final Report, “1978 Detentions” (“The other point which raised the most questions concerned the plot to stage a counter-coup and the 20 people being detained in connection with the plot. The President said that the Review Tribunal set up to study the case had finished its work and government is studying the recommendation. For the moment, he added, Government has decided not to release the detainees yet.”).

⁸³ See Laws of Seychelles, Title V A, Cap. 46: EVIDENCE (21 January 1882).

⁸⁴ Laws of Seychelles, Title V A, Cap. 45: CRIMINAL PROCEDURE CODE (1 February 1955), section 10.

⁸⁵ *Id.*, sec. 15.

⁸⁶ *Id.*, secs. 140, 274, 295.

⁸⁷ See generally *id.*, “Procedure at Trial” secs. 230-273.

⁸⁸ *Id.*, sec. 339.

⁸⁹ *Id.*, sec. 339(1)(b).

⁹⁰ Laws of Seychelles, Title V B, Cap. 73: PENAL CODE (1 February 1955), sec. 70.

⁹¹ *Id.*, sec. 142.

⁹² *Id.*, sec. 21; CRIM. PROC. CODE, *supra*, sec. 115.

to the realities of the stacked courts and broader corruption in the legal and political systems, the protections these codes offered were limited.

3. The Constitution of 1979

On 23 March 1979, President René passed a new Constitution into law by decree.⁹³ It became the Constitution of Seychelles with effect from the appointed day of 5 June 1979.⁹⁴

This Constitution differed from that of 1976 in several major respects. While it contained no constitutional bill of rights or specific protections of fundamental human rights, it did mention in the Preamble several of the rights from the earlier Constitution, declaring an intention

to secure the enjoyment by every person in Seychelles of certain fundamental rights and freedoms, namely – the right to life, liberty and security of person; the right not to be subjected to torture or to cruel, inhuman or degrading treatment; the right to equality before the law without discrimination and the right to the protection of the law; freedom from arbitrary arrest or detention, or from exile; freedom from unreasonable searches; ... freedom of movement within Seychelles; freedom of thought, conscience and religion ...; freedom of opinion and expression; freedom to assemble and associate peacefully in accordance with the law; ... a right to property not inconsistent with the institution and development, as aforesaid, of a socialist system.⁹⁵

These rights were putatively “subject only to limitations reasonably justifiable in a democratic society and designed to ensure that the enjoyment of those rights and freedoms by an individual shall not prejudice the rights and freedoms of others or the public interest.”⁹⁶ However, on account of section 7 and paragraph 8 of Schedule 3, the legal impact of the declaration in the Preamble of an intention to secure the enjoyment of human rights was limited. Section 7 provides as follows:

The Constitution is the supreme law of Seychelles and any law that is inconsistent with it is, to the extent of the inconsistency, invalid and ineffective.

Section 8 provides as follows:

1. The Preamble to this Constitution expresses general principles and although it may be used as an aid to interpretation of this Constitution it shall be read subject to other provisions of this Constitution.
2. The Preamble to this Constitution shall not be treated as part of the Constitution for the purposes of the operation of section 7, but where any law is reasonably capable of being understood or given effect to in such a way as not to be inconsistent with the Preamble it shall be so understood and given effect to.

⁹³ Constitution of the Republic of Seychelles Decree 1979, Decree No. 14, 23 March 1979.

⁹⁴ *Id.*, sec. 4.

⁹⁵ Schedule to the Constitution of the Republic of Seychelles Decree 1979, Constitution of the Republic of Seychelles (23 March 1979), Preamble [hereinafter “Constitution of 1979”].

⁹⁶ *Id.*

It follows that a law that is inconsistent with the Preamble alone is not *per se* invalid or ineffective. However, the Preamble can assist in understanding and interpreting the provisions of the Constitution and the scope of specific powers thereto. In this respect, the Commission considers that the People of Seychelles, through the Preamble, expressed their intention that any limits of the fundamental freedoms there identified would only be those “reasonably justifiable in a democratic society”. Nevertheless, the Commission notes that as with any preamble, these provisions and the rights protections they mentioned did not form part of binding law in Seychelles. As such, the fundamental rights that were previously actual articles of the 1976 Constitution were relegated to preambular status in the 1979 Constitution and were unenforceable and thus effectively removed core human rights protections from the citizens of Seychelles. The Commission thus reiterates that throughout its case determinations, it did not and could not rely on these preambular provisions of the 1979 Constitution as a legal authority underpinning the basis of the human rights that it determined were violated. Instead, during the period that that Constitution was in force, the Commission relied on international law, including the ICCPR and ICESCR through to October 1980, and customary international law thereafter, both to find the human rights violations under its mandate and to ascertain the consistency of domestic laws with international human rights principles.⁹⁷

The Commission also notes that the 1979 Constitution contained no mention of emergency powers or declarations of states of emergency. Rather, substantial powers remained with the President. The President was Head of State and Commander-in-Chief of the Armed Forces.⁹⁸ The executive authority of Seychelles vested in the President and was to be exercised in accordance with the Constitution.⁹⁹ Under the 1979 Constitution, the term of office of President was five years,¹⁰⁰ with a limit of four terms.¹⁰¹ Of course, President René was in office until 2004, some seven years past this 20-year constitutional limitation.

The President was also empowered to make various key appointments, notably of members of the judiciary.¹⁰² He could temporarily appoint puisne judges to the Supreme Court under certain conditions,¹⁰³ and permanently appoint Justices to the Court of Appeal.¹⁰⁴ Such influence on the workings of the judiciary, even if temporary at the Supreme Court level, allowed René to stack the courts, or at least make the judges and justices politically dependent on him, thereby weakening the independence of the judicial branch. Moreover, according to testimony and documents received by the Commission, following the adoption of this Constitution other laws

⁹⁷ See, e.g., Hurst Hannum, *The status of the Universal Declaration of Human Rights in National and International Law* 25 GEORGIA J. OF INT’L AND COMP. L. 287-397 (1995).

⁹⁸ Constitution of 1979, section 17.

⁹⁹ *Id.*, sec. 18(1).

¹⁰⁰ Constitution of 1979, art. 20(1).

¹⁰¹ *Id.*, art. 21.

¹⁰² *Id.*, secs. 26(2), 31(1), 67(1), 68(1), 68(2), 74(1), 75(1), 75(2), 99(1).

¹⁰³ *Id.*, sec. 68(2) (providing that the President may temporarily appoint puisne judges where the office is vacant, the puisne judge is not able to perform, or the Chief Justice advises the President that such is required).

¹⁰⁴ *Id.*, sec. 74(1).

were passed that further constrained the power of judges, such as the Lands Acquisition Act, 1977.

Importantly, the 1979 Constitution provided that Seychelles would be a one-party state, with all political activity other than that of the national or local governments happening under the auspices of the Seychelles People's Progressive Front (SPPF).¹⁰⁵ It reinstated, at least in name, a legislative system beyond the President, with the establishment of a People's Assembly of 23 elected members,¹⁰⁶ each of whom of course had to be a member of the SPPF.¹⁰⁷ The new Constitution mandated a presentment process wherein bills would be passed by the Assembly and then assented to by the President.¹⁰⁸ However, the legislative power of Seychelles was still vested "in the President and in the Assembly",¹⁰⁹ allowing René to retain his hold on the legislative power as established by the earlier Seychelles (Constitution) Proclamation 1977 and perpetuating the blurring between these two political branches.

4. The period in which the 1979 Constitution was in force

The Commission recalls that France-Albert René, himself a lawyer by training, cloaked everything he did as President in a veneer of legality. During the time of the Second Republic, therefore, an intricate legal framework was laid whereby a proclamation or "Act" would be passed, which would then be the basis for regulations, which would be the basis for specific detention orders.

The 1979 Constitution remained in force until 23 June 1993. During this period, the René administration passed many emergency regulations, the general basis for which was evidently the 1979 Constitution. For instance, about one week after the mercenary coup attempt in November 1981, the Preservation of Public Security (Detention) Regulations, 1981, were passed.¹¹⁰ The Regulations essentially re-established the provisions of the earlier Detention Regulations of 1979, which by this time had been revoked.

The Detention Regulations of 1981 re-operationalised Section 4(2) of the Preservation of Public Security Ordinance, allowing exercises of the power to detain.¹¹¹ The President, being

¹⁰⁵ *Id.*, sec. 5.

¹⁰⁶ *Id.*, sec. 36(1)(a).

¹⁰⁷ *Id.*, sec. 37(b).

¹⁰⁸ *Id.*, sec. 58(1).

¹⁰⁹ *Id.*, sec. 57.

¹¹⁰ Preservation of Public Security (Detention) Regulations, 1981, S. I. 110/81 (Cap. 36), 4 December 1981 [hereinafter "Detention Regulations of 1981"].

¹¹¹ Preservation of Public Security Notice, 1981, S. I. 109/81 (Cap. 36). The Commission recalls that the Preservation of Public Security Ordinance was first passed in the Colony of Seychelles in 1965. Preservation of Public Security Ordinance (Cap. 36), Ord. No. 1-1965 (11 January 1965). The Ordinance was a basis for emergency powers of the then-Governor of Seychelles (later changed to "President"), to be made available in a

satisfied that any person had engaged in acts which might, in the President's opinion, be "prejudicial to public safety" and maintenance of public order, could under the Regulations make detention orders directing that specific individuals be detained.¹¹² Detainees subsequently saw their rights to liberty, freedom of movement, and due process decrease substantially: they could be moved from one place to another in Seychelles at the direction of the President, and would be guilty of an offence if they attempted to escape or help another individual targeted for detention.¹¹³ Detention orders under the 1981 Detention Regulations were essentially akin to arrest warrants; police could use them as authority to arrest and detain those named.¹¹⁴

If the President determined that public safety and the maintenance of public order so required, the Emergency Powers Regulations allowed him to make an order against any person directing that that person be removed to and be required to remain (and even live) in such place as he directed. In these "removal orders", the arrest or detention could be done by police "or any other person or class of persons duly authorised and empowered by the President,"¹¹⁵ during the transfer period "until arrangements have been completed to the satisfaction of the President for [the person's] proper accommodation at such place."¹¹⁶ Empowering others outside law enforcement, including the army, to make arrests can be problematic in terms of identification and due process principles, and the Commission has found that this provision essentially provided a *pro forma* justification for prolonged detention at the pleasure of the President. This then led to and compounded the widespread public mistrust in the Seychelles—of not only police and government actors, but also of neighbours and community members.

The Regulations also provided for "restriction orders," which were similar to those enacted under the above Preservation of Public Security Ordinance and thus can be conceptualised under a similar constitutionality and human rights analysis, whereby the President could prohibit certain persons from entering or leaving areas in Seychelles specified in the order.¹¹⁷ Restriction orders provided the general authority of the police to arrest or detain persons;¹¹⁸ in the event of noncompliance by individuals named in the orders, those individuals could be

tiered system, ranging from assuming control of the media and food supplies to the power to detain and even to require persons to work. In particular, if the situation became so grave that the Section 3 powers were inadequate, the Governor (later changed to President) could declare by notice in the *Gazette* that additional powers under Section 4(2) would come into effect for as long as the Governor deemed necessary, enabling the Governor/President to make regulations in order to 1) detain persons, or 2) require persons to do work or render services. A fundamental basis for the power to detain, Section 4(2) served as the foundation for many of the regulations and detention orders authorised by René and his ministers, many orders directly citing that provision.

¹¹² Detention Regulations of 1981, *supra*, sec. 2(1).

¹¹³ *Id.*, sec. 2(2)-(3).

¹¹⁴ *Id.*, sec. 2(3).

¹¹⁵ This was true of detention orders as well. *See id.*

¹¹⁶ *Id.*, section 4(4).

¹¹⁷ *Id.*, sec. 5.

¹¹⁸ *Id.*, sec. 5(6).

detained.¹¹⁹ The President could vary or change the restriction orders at any time—potentially arbitrarily—“so as to permit the person therein mentioned to enter or leave any area which he is prohibited from entering or leaving and may attach to the permission conditions as to security for good behaviour or otherwise, and may also vary, cancel or add a condition requiring such person to report himself.”¹²⁰ The President could essentially pick and choose how and to whom he wanted to publish or provide notice of these orders and any subsequent changes to them.¹²¹ Read together with a companion provision that stipulated that the order in question would be effective from the date of making the order, *i.e.* immediately,¹²² this notice power would have potentially resulted in insufficient access by the public to laws (including those possibly in force against them) and effectively arbitrary application by virtue of the lack of notice.

Finally, if the President determined that public safety and public order so required, he could under the Regulations make an order requiring any person to “give security in two or more sureties in such amount and for such time as may be specified in the order to keep the peace and to be of good behaviour, or for indemnifying public funds for all costs, charges and expenses incurred in [the President’s] regard, or for both such purposes...”¹²³ An amalgamation of the other three species of order, security orders were also a basis for arrests and detentions, as well as for moving or removing persons as per the order.¹²⁴ In the context of the political and social climates at the time, with the many states of emergency declared, this type of order essentially amounted to forced payments by private citizens to the government

5. Legislation permitting the compulsory acquisition of land in the period until 1993

First, again starting with the leftover colonial framework still in place at the time of the 1977 Coup d’état, the Acquisition of Land for Public Purposes Ordinance gave the Governor of Seychelles (later the President) the power to compulsorily acquire private land on behalf of the government.¹²⁵ The acquisition had to be for a public purpose, upon an offering of compensation based on market value, and notice had to be given in advance.¹²⁶ The Ordinance also provided for a basic complaint review procedure, though it did not conceive of any appellate process or methods to appeal a decision about land acquisition.

¹¹⁹ *Id.*, sec. 5(5).

¹²⁰ *Id.*, sec. 5(7).

¹²¹ *Id.*, sec. 8(1) (“When an order is made ... the President or other authority making the order ... shall cause notice of such order or direction to be given in such manner as he thinks necessary for bringing it to the notice of all persons who, in his opinion, ought to have been given of the order or direction.”).

¹²² *See id.*, sec. 8(2).

¹²³ *Id.*, sec. 8(1).

¹²⁴ *Id.*, sec. 8(2)-(3).

¹²⁵ Acquisition of Land for Public Purposes Ordinance, 1968 (Cap. 227).

¹²⁶ *Id.*

At the time of Independence, the Seychelles Independence Order and Constitution of 1976 provided certain more defined property rights. Namely, Article 17 mandated no deprivation of property except in specific circumstances, including pursuant to a public purpose and upon payment of prompt and adequate compensation.¹²⁷ Likewise, the Civil Code of Seychelles in effect at the time provided that no person shall be forced to part with property save for a public purpose and upon payment of prompt and adequate compensation.¹²⁸

In May 1977, the Lands Acquisition Act came into effect, under which Ministers could acquire private lands on behalf of the state,¹²⁹ purportedly for a public purpose and upon prompt payment either decided by agreement or assessed at that time on an open market value basis.¹³⁰ The landowner had the right to contest the legality and validity of the acquisition, and could do so before a court.

One year later, in August 1978, the Act was amended, fundamentally changing the way of assessing compensation for state acquisitions.¹³¹ The value of the buildings was estimated separately apart from the underlying value of the lands: for buildings, the basis continued to be market value; for land not containing buildings, the land was valued based on the average income derived from it.¹³² This would have enabled the state to acquire large properties cheaply and then redistribute them at a premium, in contravention of Article 17 of the 1976 Constitution. The Commission has heard evidence suggesting that the Government did this on a great scale, using such bases as the Lands Acquisition Act to acquire property sometimes even when the owners were in forced exile. In addition, development prospects, or the actual “market value” of land, were ignored, and the notion of the situs or differences in geographical areas or neighbourhoods was effectively destroyed by the disjointed lands-buildings valuation style.

In 1981, the Tenants’ Rights Act was passed,¹³³ which provided a range of rights for “statutory tenants,” *i.e.*, individuals who occupied the premises of another’s land as their home and could acquire security of tenure and the right to purchase the land.¹³⁴ The Act set in place an application process whereby tenants could apply to the Registrar of Tenants’ Rights, a position appointed by the President,¹³⁵ to become a statutory tenant. A statutory tenant had the power to purchase registered premises subject to a mortgage in favour of a government body, namely

¹²⁷ Constitution of 1976, art. 17.

¹²⁸ Civil Code of Seychelles, 1976, art. 545.

¹²⁹ Lands Acquisition Act, 1977, Act 10 of 1977, section 3(1), *repealed by* Act 9 of 1996.

¹³⁰ *Id.*, sections 4(1), 6, 10(1), 13(1).

¹³¹ See Bernard Georges, *Land Acquisition by Government in Seychelles – 1977 to Present*, 12 September 1992, section 1.2.4 (Annex 2).

¹³² Lands Acquisition Act, *supra*, Second Schedule (Assessment of Compensation).

¹³³ Tenants’ Rights Act, Cap. 235, Act 24 of 1981 (1 January 1982), *repealed by* Tenants’ Rights (Repeal) Act, Act 7 of 1992 (13 April).

¹³⁴ *Id.*, secs. 3(1), 6(1), 7(1), 14.

¹³⁵ *Id.*, sec. 10(1).

the Seychelles Planning Development Corporation,¹³⁶ which was repayable over 20 years in monthly instalments.¹³⁷ Upon purchase by the statutory tenant, the Corporation paid the previous owner most of the assessed value of the premises in the form of a bond.¹³⁸ The Act also provided that where it appeared to the Registrar necessary in order to give an applicant ownership and use rights, the government could compulsorily acquire the premises.¹³⁹ Similarly, where there were adjacent dwellings or congested premises, impinging the viability of granting statutory tenancies for the existing dwellings, the government could compulsorily acquire those premises as “necessary to give tenants adequate premises in accordance with the object of this Act.”¹⁴⁰ The government would then transfer the land to the applicant-tenant subject to a mortgage.¹⁴¹ The government derived this power from the Lands Acquisition Act,¹⁴² though compensation for these acquisitions was to be made under the Tenants’ Rights Act in the form of bonds.¹⁴³ This regime thus contemplated a system wherein the government could acquire lands, especially those of owners absent for having left on forced exile, for almost nothing (by bond), and then establish mortgage agreements with the Seychelles Planning Development Corporation.

In 1983, there were further modifications to the Lands Acquisition Act: among them, the “public purpose” element was changed to the broader and more elusive “national interest” phrasing.¹⁴⁴ The right to challenge acquisitions was fully removed, that section now providing “No person shall challenge the validity or legality of any acquisition of land under this Act on any ground whatsoever and no court shall, in any proceedings and on any ground whatsoever, have jurisdiction to pronounce upon the validity or legality of such acquisition.”¹⁴⁵ In addition, the President was authorised to pay compensation by bond instead of by cash,¹⁴⁶ which allowed the government to compulsorily acquire land much more quickly and delay payments, in general hindering accountability. These provisions again would have contravened the 1976 Constitution; however, by this time, the Constitution of 1979 was in effect, sans the fundamental human rights chapter. There was thus nothing constitutionally inhibiting such provisions or actions from being taken.

Final modifications were made to the Lands Acquisition Act in 1987. This wave of amendments removed even the Supreme Court’s power to hear challenges to the legitimacy of

¹³⁶ The Seychelles Housing Development Corporation would then pay the amounts into the Consolidated Fund of the government. *Id.*, sec. 35(3).

¹³⁷ *Id.*, secs. 26(1)(d), 34, Sch. 7 para. 1(c).

¹³⁸ *Id.*, secs. 34, 39.

¹³⁹ *Id.*, sec. 17(1).

¹⁴⁰ *Id.*, sec. 17(2).

¹⁴¹ *Id.*, sec. 17(5).

¹⁴² *Id.*, sec. 17(3) (providing that acquisitions under this section would be deemed necessary or expedient in the national interest under section 4(1) of the Lands Acquisition Act).

¹⁴³ *Id.*, sec. 17(4).

¹⁴⁴ Georges, *supra*, sec. 1.2.5.

¹⁴⁵ Lands Acquisition Act, *supra*, sec. 7(1).

¹⁴⁶ Georges, *supra*, sec. 1.2.5.

acquisitions; courts then proceeded to treat the issue as a nonjusticiable question,¹⁴⁷ deferring to the government's decisions, such as by accepting the separate lands-buildings valuation scheme.¹⁴⁸ This had the predictable effect of greatly reducing the judiciary's role and availability in land matters. Most disputes after this point centered on issues of assessing compensation or interest on bank loans, rather than challenging the legality or legitimacy of the acquisition itself.¹⁴⁹

6. The restoration of legal norms of human rights

The 1993 Constitution¹⁵⁰ was pivotal in the René regime and Seychellois history for re-introducing a multiparty system of governance to the country.¹⁵¹ It nevertheless continued to give the President significant powers of appointment, including in relation to the judicial branch.¹⁵² The Commission recalls that the new Constitution was, broadly speaking, the culmination of the turbulent 1980s and the many directly preceding months of internal and external pressure on the Executive as set out in Volume II of this Report.

As has been independently documented, President René and the S.P.P.F. from the beginning saw the drafting process as a Party matter, and so established a controversial Constitutional Commission composed only of members of the budding political parties “in order to determine the strength of the different political groups and the due weight they should carry in formulating a new constitution.”¹⁵³ René's choice to have the political parties themselves draft the constitution, while possibly perceived by some as an attempt at unity or collaboration, proved to be symptomatic of the imbalance of power between the parties and the scope of René's control. As the Commission has found and noted at several places throughout this Final Report, the deep linkage of government and ruling party—a legacy of the one-party state—has evidently percolated into the Seychellois society of today, having effectively prevented free and fair elections for years.¹⁵⁴ In this way, and combined with the public perception of René having staffed various parts of the government with those loyal to him, the political composition of the Constitutional Commission early on quite possibly played a role in contributing to the pervasive and continuing sense of mistrust on the part of the populace.

¹⁴⁷ *Id.*, sec. 2.

¹⁴⁸ *Id.*, sec. 1.2.6; see also *Robert Poole v. Government of Seychelles*; *Chamery Chetty v. Government of Seychelles*.

¹⁴⁹ Georges, *supra*, secs. 2.1.1, 2.1.3.

¹⁵⁰ Constitution of the Republic of Seychelles, Constitution of the Republic of Seychelles (Preparation and Promulgation) Act, 1992, Act. 2 of 1992 (21 June 1993) [hereinafter “Constitution of 1993”].

¹⁵¹ See generally *id.*, Ch. VI, Part 1 (National Assembly); art. 84 (leader of the opposition); Schedule 4 (Legislature: Proportionately Elected Members).

¹⁵² *Id.*, arts. 62, 127, 128.

¹⁵³ *Id.*, at 605.

¹⁵⁴ Most recently in 2015, as determined by domestic and international onlookers.

Many of the complainants and witnesses coming before the Commission have referred to the post-1993 period as a time of greater human rights protections, a more impartial judiciary, and better governmental checks and balances. While such may not always have been true in practice, as many of the cases before the Commission allege serious human rights violations occurring after 1993, the Commission views this public perception as emblematic of a significant step forward for the country as a newly democratic (at least in name) society. Illustrative in this regard was Chapter III of the 1993 Constitution, which contained the Seychellois Charter of Fundamental Human Rights and Freedoms, including both fundamental rights and duties.¹⁵⁵

Fundamental rights, such as the right to life¹⁵⁶ and the right to be treated with dignity and not subjected to torture or cruel, inhuman, or degrading treatment or punishment,¹⁵⁷ were again protected as fully operational articles. A Constitutional Court was also formed to hear grievances relating to violations of constitutional rights.¹⁵⁸

Article 18, on the right to liberty and security of person, reintegrated some of the earlier provisions of the Seychelles Independence Order and 1976 Constitution, while removing some of the bases for arrest or detention that had been authorised under those legal acts. Namely, while the 1976 Constitution had authorised detention for persons “upon reasonable suspicion of [the person’s] being likely to commit a breach of the peace” without many other safeguards,¹⁵⁹ now persons “on reasonable suspicion of ... being about to commit an offence” could only be constitutionally arrested or detained for the purposes of investigation or prevention of the offence or in order to produce the offender before a court.¹⁶⁰

The new protections also set in place basic due process rights, such as the rights to be informed of charges and to be given chance to contest them, the right to trial by court within “a reasonable time,” and separation of convicted persons from those not convicted in places of detention (as well as adult/minor and male/female separation), among others.¹⁶¹

The foregoing due process protections were in addition to other fair trial guarantees laid out in Article 19, such as the right to an independent and impartial hearing, presumption of innocence, right to counsel and to an interpreter, and *in absentia* trials in very limited circumstances.¹⁶² The 1993 Constitution also instilled broader civil and political rights, such as the rights to take part in public affairs, to vote and be registered as a voter, to be elected to public office and

¹⁵⁵ Constitution of 1993, Ch. III.

¹⁵⁶ *Id.*, art. 15(1).

¹⁵⁷ *Id.*, art. 16.

¹⁵⁸ *See id.*, art. 46.

¹⁵⁹ Constitution of 1976, art. 14(1)(j).

¹⁶⁰ Constitution of 1993, art. 18.

¹⁶¹ *Id.*, art. 18(3)-(16).

¹⁶² *Id.*, art. 19.

participate in public service, and freedom of movement and residence, among others.¹⁶³ The right to equal protection of the law without discrimination was also again constitutionally enshrined.¹⁶⁴

There were more detailed and protective provisions regarding land acquisition. Article 26 declared that every person has a right to property, subject to certain limitations such as enforcing a court order or judgement, in satisfaction of a penalty or tax, or in the public interest, among others.¹⁶⁵ That article also contained four conditions that had to be met for the state to be able to compulsorily acquire private property, as follows: 1) reasonable notice of the state's intention and purpose of acquiring the property must be provided to persons with an interest in the property; 2) the taking must not only be necessary in the public interest, but more specifically must be "for the development or utilisation of the property to promote public welfare or benefit or for public defence, safety, order, morality or health or for town and country planning"; 3) reasonable justification must be given for any hardships resulting to persons with a property interest; and 4) the state must pay prompt and adequate compensation.¹⁶⁶ Persons with interests in the property acquired also now had a constitutional right to file suit in the Supreme Court either directly or in appeal from other administrative decisions, and could again challenge the legality of the acquisition.¹⁶⁷

In addition, a Schedule to the Constitution set forth an undertaking to persons whose land had been compulsorily acquired under the Lands Acquisition Act 1977.¹⁶⁸ The State undertook to consider all applications by such persons made within 12 months of the coming into force of the Constitution with a view to transferring back the land to the original owner or providing compensation for the land acquired.¹⁶⁹ In calculating the compensation, the value of the land acquired could be taken to be its market value at the time the Constitution came into force.¹⁷⁰

The Seychellois Charter of Fundamental Human Rights and Freedoms also contained a section labelled "State of Emergency and Savings".¹⁷¹ Under the new emergency provisions of Article 41, the President could declare a state of emergency by Proclamation where he believes a grave threat to national security or public order has arisen or is imminent, or a "grave civil emergency" has arisen or is imminent.¹⁷² While it was not clear from the text what a "grave threat" or "grave civil emergency" might include, the provision nevertheless carried tighter

¹⁶³ *Id.*, arts. 24, 25.

¹⁶⁴ *Id.*, art. 27.

¹⁶⁵ Constitution of 1993, art. 26.

¹⁶⁶ *Id.*, art. 26(3).

¹⁶⁷ *Id.*, art. 26(3)(e).

¹⁶⁸ *Id.*, Schedule 7, Part III, art. 14.

¹⁶⁹ *Id.*, Schedule 7, Part III, art. 14(1).

¹⁷⁰ *Id.*, Schedule 7, Part III, art. 14(2).

¹⁷¹ *Id.*, Ch. III, Part 3.

¹⁷² *Id.*, art. 41(1).

safeguards. The declaration of public emergency would be valid for seven days;¹⁷³ the President must send justification for the declaration to the Speaker of the National Assembly, who would then have to bring the facts and circumstances before the Assembly for its consideration;¹⁷⁴ and only when approved by the National Assembly could the declaration continue for up to three months,¹⁷⁵ the National Assembly retaining the right to revoke it at any time beforehand.¹⁷⁶

During a period of public emergency, a law may provide for the taking of such measures as are strictly required to meet the exigencies of the situation.¹⁷⁷ However, pursuant to Article 43(3), no such law may be inconsistent with certain non-derogable basic rights including the right to life (Article 15); right to dignity and freedom from torture (Article 16); freedom from slavery and forced or compulsory labour (Article 17); right to be informed at time of arrest of certain due process rights (Article 18(3)); presumption of innocence and other due process guarantees in criminal proceedings (Article 19(2)-19(6)); right to freedom of conscience, thought, and religion (Article 21); and right to equal protection of the law (Article 27).¹⁷⁸

Pursuant to Article 48, moreover, the Charter should be interpreted in such a way to not be inconsistent with the international human rights obligations of Seychelles, and domestic courts were to take judicial notice of relevant international instruments, reports, and expressions of views of bodies administering or enforcing those instruments (specifically human rights conventions), as well as constitutions and constitutional jurisprudence of other democracies. By the time the 1993 Constitution came into force, Seychelles had become a party to the International Covenant on Civil and Political Rights (ICCPR),¹⁷⁹ the International Covenant on Economic, Social and Cultural Rights (ICESCR)¹⁸⁰ and the African Charter on Human and Peoples' Rights (ACHPR).¹⁸¹ Therefore by application of Article 48 the Charter of Fundamental Human Rights and Freedoms was to be interpreted so as not to be inconsistent with these conventions. The Charter in fact overlapped with them to a considerable degree.

As a matter of international law, therefore, the ICCPR provides that there can be no derogation even in time of public emergency from provisions like those listed in Article 43(3) of the 1993 Constitution; the latter thus largely comports with the ICCPR. The Human Rights Committee has since elaborated on this principle, however, widening the scope of rights included in the

¹⁷³ *Id.*, art. 41(2).

¹⁷⁴ *Id.*, art. 41(3).

¹⁷⁵ *Id.*, art. 41(4).

¹⁷⁶ *Id.*, art. 41(5).

¹⁷⁷ *Id.*, art. 43(2).

¹⁷⁸ *Id.*, art. 43(3) (providing that Articles 15, 16, 17, 18(3), 19(2)-(6) and (11), 21, and 27 were non-derogable even in a state of public emergency).

¹⁷⁹ ICCPR, *supra*.

¹⁸⁰ ICESCR, *supra*.

¹⁸¹ African Charter on Human and Peoples' Rights [Banjul Charter], OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58, adopted 27 June 1981, entered into force 21 October 1986, ratified 30 April 1992.

non-derogation list of the ICCPR and making clear that certain peremptory norms of international law are also included in the list.¹⁸² Although Seychelles includes most of the rights in this wider list in its 1993 Constitution, some holes nevertheless can be seen: for instance, neither the right to *habeas corpus*¹⁸³ nor the right of a person charged with an offence by an independent and impartial court established by law¹⁸⁴ were included in the basic rights to be preserved in a period of public emergency pursuant to Article 43(3) of the 1993 Constitution.¹⁸⁵

Where the emergency law declared pertained to detention of persons, certain due process actions were required under the 1993 Constitution. These included a written statement furnished to the person detained explaining the grounds for detention,¹⁸⁶ notice in the *Gazette* of the detention not more than seven days after the detention commenced,¹⁸⁷ and access to legal counsel.¹⁸⁸ In addition, the detention review tribunal was now empowered to order the release of detainees,¹⁸⁹ whereas under earlier provisions it was only authorised to make recommendations. However, the tribunal review process could still happen “not more than a month” after the detention commenced.¹⁹⁰ The lack of access to judicial review of detention for the full length of time permitted here would be inconsistent with international human rights norms. As has already been indicated, the Human Rights Committee is of the opinion that in a public emergency the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention must not be diminished.¹⁹¹ In *Aksoy v. Turkey* in 1996, the European Court of Human Rights similarly held that 14 days of detention without judicial intervention in a public emergency was “exceptionally long”.¹⁹² In finding that it gave rise to a violation of the European Convention on Human Rights, the Court gave weight to the insufficient safeguards available to the applicant, in particular, the denial of access to a lawyer, doctor, relative or friend and the absence of any realistic possibility of being brought before a court to test the legality of the detention,¹⁹³ neither of which were guaranteed in a state of public emergency in the 1993 Constitution of the Republic of Seychelles.¹⁹⁴

¹⁸² UN Human Rights Committee [CCPR], *General Comment No. 29: Article 4: Derogations during a State of Emergency*, 31 August 2001, U.N. Doc. CCPR/C/21/Rev.1/Add.11 [hereinafter “*General Comment No. 29*”].

¹⁸³ Constitution of 1993, art. 18(8).

¹⁸⁴ *Id.*, art. 19(1)

¹⁸⁵ *General Comment No. 29*, para. 16.

¹⁸⁶ Constitution of 1993, art. 43(4)(a).

¹⁸⁷ *Id.*, art. 43(4)(b).

¹⁸⁸ *Id.*, art. 43(4)(d).

¹⁸⁹ *Id.*, art. 43(4)(e).

¹⁹⁰ *Id.*, art. 43(4)(c).

¹⁹¹ *General Comment No. 29*, para. 16. The Inter-American Court of Human Rights also considered that the right to challenge the lawfulness of detention should not be suspended in a public emergency. Inter-American Court of Human Rights, *Id.*, para. 43.

¹⁹² *Aksoy v. Turkey* (App. No. 21987/93) ECtHR, Judgment, 18 December 1996, para. 83.

¹⁹³ *Id.*, para. 83. Cf. *Brannigan and McBride v. UK* (App. No. 14553/89; 14554/89) ECHR Judgment, 25 May 1993, paras. 61-65.

¹⁹⁴ The right of *habeas corpus* may be denied in a state of emergency. Constitution of 1993, arts. 18(8), 43(3). The right to consult a legal practitioner exists but apparently only in relation to proceedings before the detention review tribunal. *Id.*, art. 43(4)(d).

Conclusion

From the perspective of domestic law, the highest legal authority is the Constitution. During the period from the Coup d'état of 1977 until the 1990s, the Constitution of Seychelles was by no means a constant. The 1976 Constitution, which entered into force on 29 June 1976, provided a basis for parliamentary democracy as well as significant human rights protections, though in this latter respect it fell short of some of the requirements of international conventions that were binding on other States at the time. Whilst Proclamation No. 2 of 1977 and the Seychelles (Constitution) Proclamation 1977 provided the legal underpinnings for the usurpation and consolidation of power by France-Albert René, they kept much of the human rights framework of the 1976 Constitution in place. The Constitution which took effect on 5 June 1979 and remained in force till 1993 appeared to downgrade human rights and all but remove their protection in Seychelles, in violation of the State's duty to ensure the protection of human rights.

In the early 1990s, the tide turned in favour of more extensive human rights protection. The 1993 Constitution removed the ambiguity about the status of human rights and provided protections that closely corresponded to those in major relevant international conventions. In 1992, Seychelles became a party to the ICCPR, ICESCR, and ACHPR, and the Constitution gave their provisions authority under domestic law. The constitutional schema of checks and balances became more effective under the 1993 Constitution, including with the creation of such institutions as the Constitutional Court and Ombudsman Office. However, despite these positive changes to the legal framework, as is evidenced by the case determinations contained in Volume III of this report, and the Commission's reasoning concerning the scope of its mandate contained in Volume I of this report, the mindset created by the one-party State imbued the Executive, legislature, and judiciary, and human rights violations underpinned by discrimination on political grounds continued almost unabated for decades to come. In that regard, the foundational principle of the René regime's "*ek nu pa ek nu*" was firmly embedded in the psyche of the Seychellois people and remained rampant within the arms of Government.



ELEMENTS OF VIOLATIONS

II. General Provisions¹⁹⁵

Standard of Review:

In hearing testimony, receiving evidence, and making determinations of fact, the Commission utilises the balance of probabilities threshold to determine whether the evidence presented is more likely than not true.¹⁹⁶

Applicable Law:

For the period of the First Republic, 1976-1979, the Commission considers that the applicable legal framework for purposes of case determinations includes but is not limited to the following: Constitution of 1976; Penal and Criminal Procedure Codes; Police Force Act 1959; International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; and the customary international law principles reflected in the Universal Declaration of Human Rights.

State Responsibility:

International Human Rights Law (IHRL) divides States' obligations into two categories: negative and positive. Negative obligations outline a States' requirement not to act in a way that violates human rights, while positive obligations outline a State's requirement to take affirmative steps to implement measures that protect individuals from violations of their rights by State organs and other private persons or entities.¹⁹⁷ As noted by the International Law Commission (ILC) in 1975, States commit internationally wrongful acts when:

1. Conduct consisting of an action or omission is attributable to the State under international law; and
2. That conduct constitutes a breach of an international obligation of the State.¹⁹⁸

Therefore, there are two methods by which Seychelles may bear responsibility for a human rights violation under the Truth, Reconciliation and National Unity Commission Act, 2018 ("Act"): (1) the State is directly or indirectly involved in machinating the violation (*i.e.*, the violation is committed by the government, or is directed or sanctioned by a State actor, or is condoned by the government, whose omission allowed the violation to happen); or (2) the State

¹⁹⁵ This section applies to all violations enumerated in the Truth, Reconciliation and National Unity Commission Act, 2018 (TRNUC Act).

¹⁹⁶ See TRNUC, Rules of Procedure and Evidence (2018).

¹⁹⁷ U.N. Hum. Rts. Comm. General Comment No. 31, U.N. Doc. CCPR/C/21/Rev.1/Add.13, at ¶ 8 (May 26, 2004).

¹⁹⁸ *Year Book of the International Law Commission*, (1975) 25 July 1975, Official Records of the General Assembly, 30th Sess. Supp. No. 10 A/10010/Rev.1. [hereinafter "*the Draft Articles*"].

failed to prevent or investigate¹⁹⁹ the violation following its commission. Because reparations flow from a violation of human rights by the State, in case determinations, this means that the legal language and all findings are couched in terms of Seychelles' responsibility for the violation in question.

Perpetrator:

Perpetrator is defined in both the TRNUC Act and under IHRL.

1. Truth, Reconciliation and National Unity Commission Act: A “perpetrator” is “a person who the Commission has found to have committed any violation²⁰⁰ and includes a person who has given an order, or materially assisted someone, to commit a violation”.²⁰¹ A “violation” relates to the required political nexus to the 1977 Coup d'état: under the TRNUC Act, the Commission is only empowered to investigate alleged violations committed “during or in relation to” the Coup.²⁰² While the determination of this criterium is fundamentally an admissibility determination that will have already been completed, *prima facie*, by the time a case determination is heard, the Commission must be able to trace this political link through the violations found in each case and, if the *prima facie* admissibility determination cannot be supported, the claim must be dismissed before the merits are analysed and determined. The definition of perpetrator contained within the TRNUC Act is applicable to all of the violations examined further below.
2. IHRL: While the above definition from the Act is controlling for purposes of case determinations, the Commission is also bound to comply with universally accepted legal principles and human rights norms.²⁰³ According to international law, and flowing from the above concept of State responsibility, a perpetrator must be a State actor or a non-State actor that could implicate a State's involvement in “internationally wrongful acts”.²⁰⁴ State responsibility may be attributed to State actors, including State organs and other State institutional, functional, or control-based conduct.²⁰⁵ In addition to the Act's definition, the State nexus is another definitional layer: a perpetrator must also be a State actor or non-State actor that could implicate the State's involvement.

¹⁹⁹ The Commission considers that Article 6 of the Police Force Act 1959 stipulates the functions of the SPF to ensure “law and order, the preservation of peace, the prevention and detection of crime, and the apprehension of offenders”. Similarly, Article 25(2) of the same provides that “it shall be the duty of every police officer [...] to prevent the commission of offences and public nuisances, to detect and bring offenders to justice, and to apprehend all persons whom he is legally authorized to apprehend and for whose apprehension sufficient ground exist”. The Commission notes that the role of the police to detect crime necessarily includes conducting investigations that would theoretically lead to criminal prosecutions. Moreover, under international law, the duty to investigate arises with regard to the State's obligation to ensure and protect human rights.

²⁰⁰ Truth, Reconciliation and National Unity Commission Act, sec. 2(8) (2018) (defining “violation” as any “human rights abuse committed during, or in relation to, the Coup d'état of 5 June 1977 . . .”) [hereinafter “TRNUC Act”].

²⁰¹ TRNUC Act, at sec. 2(2).

²⁰² *Id.*, sec. 2(8).

²⁰³ *Id.* at sec. 3(9).

²⁰⁴ See generally, Int'l Law Commission [ILC], *Draft Articles on Responsibility of States for internationally wrongful acts* (2001), available at https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

²⁰⁵ G.A. Res. 56/83, ch. II (Dec. 12, 2001).

According to the Responsibility of States for Internationally Wrongful Acts Report, State responsibility may be attributed²⁰⁶ to a State for: (1) “conduct of any State organ”;²⁰⁷ (2) “conduct of a person o[r] group of persons or entities” exercising elements of governmental authority; (3) “conduct of an organ which has been placed at the disposal of a State by another State”; (4) “conduct of organs acting outside their competence or contrary to instructions”.²⁰⁸

The conduct of a person or entity which is not an organ of the State but which is empowered by the law of that State to exercise elements of the governmental authority is also considered an act of the State under international law.²⁰⁹ In the case of Seychelles and the Coup d’état of 1977, the focus of Seychelles’ responsibility is thus on both the State of Seychelles itself and bodies that were authorized to exercise governmental authority such as parastatal elements that exercised or retained certain public, governmental, or regulatory functions.²¹⁰

Victim:

According to the TRNUC Act, “[v]ictim means a person who has suffered any harm or detriments as a result of any violation”.²¹¹ In general, victims may be recognised even without the identification or apprehension of the suspect.²¹² For purposes of the Commission’s determinations, representatives of victims or close surviving relatives of deceased victims may also file complaints and recover reparations on behalf of the victim.²¹³

Unlawful:

The United Nations Human Rights Committee (HRC) has defined “unlawful” as something that has been done or imposed (whether that be a killing, detention, etc.) that is not “in accordance with such procedure[s] as are established by law”.²¹⁴ This includes violations of both domestic law and international law. In 1975, the ILC suggested that a

²⁰⁶ There are three categories for State attribution: (1) institutional (structural and agency-based) links, (2) functional links, and (3) control-based links. Institutional links are based on the status of an entity within a State and attribution is automatic because the link between the physical actor and the State is organic and absolute. Acts by de jure State organs are attributable to the State prima facie due to the principle of the unity of the State.

²⁰⁷ *Draft Articles, supra* note 10, at art. 5 (defining “State organ” in art. 6 as “the constituent, legislative, executive, judicial or other power, whether its functions are of an international or an internal character and whether it holds a superior or a subordinate position in the organization of the state”).

²⁰⁸ *Id.* at arts. 7-10.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ TRNUC Act, at sec. 2(7).

²¹² G.A. Res. 40/34, at annex sec. A(1) (Nov. 29, 1985); G.A. Res. 60/147, at art. 8 (Dec. 16, 2005) (emphasising that “[a] person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim”).

²¹³ TRNUC Act, at sec. 3(5).

²¹⁴ U.N. Hum. Rts. Comm. General Comment No. 35, U.N. Doc. CCPR/C/GC/35, at ¶ 22 (Dec. 16, 2014) (explaining liberty and security of persons).

State would be in breach of its international legal obligations even if the act was “lawful by internal law”²¹⁵

If domestic laws restrict the character and nature of relevant international laws, then those domestic laws must seek to solely promote a legitimate purpose, such as “morality”, “general welfare”, or “public order”.²¹⁶

Where a legitimate purpose for a limitation has been established, one must assess whether the means suitably meet the intended objective of the limitation.²¹⁷ There must then be an assessment of whether the limitation is proportionate for the intended outcome.²¹⁸

Further, limitations of the law become unlawful if they “stray from the ‘purpose for which (they) have been established’”.²¹⁹ In sum, “lawful” is used to characterise: (1) conduct prescribed by domestic law and (2) conduct prescribed by domestic law that respects the principles of the international convention from which such law was inspired. It should be noted that regional practices at the time did allow for less protection against arbitrary violations of personal liberty, for example, giving the state exemption for “reasons and conditions laid down by law”.²²⁰

Arbitrary:

The meaning of ‘arbitrary’ was given clarification in the *Study of the Rights to be Free From Arbitrary Arrest, Detention and Exile*, suggesting that arbitrary was not synonymous with illegal, although illegal action would often be arbitrary. It set out the following definition:

1. On grounds or in accordance with procedures other than those established by law, or
2. Under the provisions of a law the purpose of which is incompatible with respect [to the rights protected].²²¹

Thus, “arbitrary” can be used to describe State activity that: (1) while authorized by domestic law, unnecessarily infringes upon certain rights otherwise guaranteed under international human rights; (2) while lawful, is applied in a discriminatory basis; and (3) while lawful, punishes constituents or fails to afford access to due process.

Note that these definitions are also applicable to the Second and Third Republics below.

²¹⁵ *Draft Articles*, *supra* note 10, art. 4.

²¹⁶ Universal Declaration of Human Rights [UDHR], art. 29(2), G.A. Res. 217 (III) A (Dec. 10, 1948).

²¹⁷ G. Huscross, B. Miller and G. Wenner (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press, 2014).

²¹⁸ *Id.*

²¹⁹ *See id.* at para. 18; *see also* Article 30 of the American Convention on Human Rights.

²²⁰ African Human Rights Charter, art. 6.

²²¹ *Study of the Right to Everyone to be Free From Arbitrary Arrest, Detention and Exile*, Commission on Human Rights, Sess. 18 E/Cn.4/826 (Jan. 5, 1962).

First Republic: 29 June 1976 – 4 June 1979

III. Unlawful Killing²²²

A. Elements:

1. The unlawful deprivation of life of one or more persons;
2. By a perpetrator.

B. Explanation:

The main inquiry for unlawful killing is the lawfulness of the killing and the State nexus of the killing. Therefore, in addition to the previously noted definitions of “unlawful” and “arbitrary”,²²³ two elements must be addressed with unlawful killing. It must be established on a balance of probabilities that (1) State officials were directly responsible for the death and (2) the killing does not fall within one of the lawful exceptions under the Constitution of 1976.

1. Unlawful deprivation of the life of one or more persons: “Unlawful” should be understood as per the General Provisions section above. Article 13 of the Seychelles 1976 Independence Order (“Constitution of 1976”) enshrines the protection of the right to life and carves out various exceptions for “lawful” killings.²²⁴ The International Covenant on Civil and Political Rights (ICCPR) states further: “[n]o one shall be arbitrarily deprived of his life”.²²⁵ The unlawfulness or arbitrariness of the killing is generally determined by the human rights-based principles of necessity, proportionality, and non-discrimination. The unlawfulness or arbitrariness of the killing is generally determined by the standard human rights-based approach of settling the principles of necessity, proportionality, and non-discrimination.

The TRNUC has made determinations in numerous cases regarding the violation of unlawful killing. While the Commission highlights that under the above elements, no *mens rea* is needed to find a violation of the right to life by the State, the Commission has considered a *mens rea* of intent or knowledge, determining in at

²²² TRNUC Act, sec. 2(8)(a).

²²³ See *supra* sec. E, F of the General Provisions section of this document for the general definitions of “unlawful” and “arbitrary”.

²²⁴ Constitution of 1976, art. 13 (2) (under the 1976 Constitution, killing was “lawful”: “(a) for the defence of any person from violence or the defence of property; (b) in order to effect a lawful arrest or prevent the escape of a person lawfully detained; (c) for the purpose of suppressing a riot, insurrection or mutiny; or (d) in order to prevent the commission by that person of a criminal offence, or if [the person] die as the result of a lawful act of war”) [hereinafter “1976 Constitution”].

²²⁵ International Covenant on Civil and Political Rights [ICCPR], 16 December 1966, 999 U.N.T.S. 171, art. 6.

least one case that the perpetrator deliberately intended to kill the victim,²²⁶ as additional evidence to support a finding of a violation.²²⁷

2. By a perpetrator: As with all human rights violations under the TRNUC Act, to be a violation, the unlawful killing must have been committed by a perpetrator with some link to the Government. However, even acts lacking on their face State nexus can still amount to a violation if there is a failure of the State to prevent or punish the conduct. For instance, the act of a person who relies upon their political connections to ensure they will not be held accountable for murder, or relies on systemic impunity afforded to persons supportive of the Government, and then is so protected, could still amount to a violation by the State. In particular, the Commission has found that in Seychelles, the police were often instructed not to pursue persons who committed crimes in a personal capacity because of their political support of the Government.

IV. Unlawful Imprisonment or Other Deprivation of Physical Liberty²²⁸

A. Elements:

1. An arrest, detention, imprisonment, or other deprivation of one's physical liberty;
2. Executed unlawfully, arbitrarily, or without due process;
3. By a perpetrator.

B. Explanation:

This violation stems from the right to personal liberty. The UDHR holds that "[e]veryone has the right to life, liberty and security of person".²²⁹

1. An arrest, detention, imprisonment, or other deprivation of one's personal liberty: The OHCHR's *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (OHCHR Body of Principles) defines arrest as an "act of apprehending a person for the alleged commission of an offence or by the action of an authority".²³⁰ While "detention" refers to being under police or State custody for any amount of time, "imprisonment" is specifically being detained as

²²⁶ Case Determination 001: Dorothy Chang-Him et al.

²²⁷ The Commission similarly notes that the concept of unprovoked murder, or in 'cold blood', is a universally accepted criminal offence under international human rights norms,²²⁷ which is also recognised by virtually all domestic legal systems, including the Seychelles Penal Code, as a criminal offence. Laws of Seychelles, Title V B, Cap. 73: PENAL CODE, sec. 192-196 (Feb. 1, 1955); *see also* Case Determination 001: Dorothy Chang-Him et al.

²²⁸ TRNUC Act, sec. 2(8)(b).

²²⁹ UDHR, at art. 3. Article 6 of the African Charter of Human and Peoples' Rights parallels, noting, "[e]very individual shall have the right to liberty and to the security of his person." Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, CAB/LEG/67/3 Rev. 5, 21 I.L.M. 58 (June 27, 1981); Additionally, the 1976 Constitution Art. 12(a) ensures "the right of the individual to life, liberty, security of the person and the protection of the law" which is expanded on in Art. 14.

²³⁰ *See* G.A. Res. 43/173 (Dec. 9, 1988) [hereinafter "OHCHR Body of Principles"]. It is noted that these definitions are consistent with earlier definitions set out in 1968, *supra* note 28.

the result of a conviction.²³¹ Other deprivation of liberty is used to capture any other sort of unlawful, or arbitrary custody situation that may exist beyond the scope of detention, arrest, or imprisonment.

In regard to domestic law, Article 14 of the 1976 Constitution protected the right to personal liberty. However, the 1976 Constitution also provided for standard exceptions to personal liberty, such as criminal charges, court orders, reasonable suspicion of a criminal offense, and reasonable suspicion of “being likely to commit a breach of the peace”.²³² Outside of these contexts, any deprivation of liberty is considered unlawful. The concern under domestic law centres around the justification, or lack thereof, of the initial arrest and whether the detention following the arrest followed the appropriate procedures.

The ICCPR also preserves the right to personal liberty, stating, in its Article 9(1), “[e]veryone has the right to liberty and security of person . . . [and] [n]o one shall be subjected to arbitrary arrest or detention”.²³³

2. Executed unlawfully, arbitrarily, or without due process: This involves consideration of the “arbitrariness” prong—commented upon in the General Provisions section above—when analysing this violation. Arbitrary arrests, detentions, and imprisonments are outlawed by various international conventions. Under the UDHR, “[n]o one shall be subjected to arbitrary arrest, detention or exile”.²³⁴ Article 9(1) of the ICCPR prohibits “arbitrary arrest[s] or detention[s]”.²³⁵

Even if the arrest is lawful and not arbitrary, due process must still be upheld to ensure there is no rights violation. Due process during arrest generally includes the rights to:

- (1) be notified of the charge;
- (2) be afforded details regarding arrest at the time thereof;
- (3) appeal detainment;
- (4) be received promptly before a judicial officer; and
- (5) be tried within a reasonable amount of time.²³⁶

Article 14 of the 1976 Constitution included due process protections such as the right of the detained to be promptly informed of the reasons for their arrest or

²³¹ *Id.*

²³² 1976 Constitution, art. 14(1).

²³³ ICCPR, art. 9.

²³⁴ Though not applicable during this time period, other international conventions have similar provisions. Article 9(1) of the ICCPR prohibits “arbitrary arrest[s] or detention[s]”. Likewise, Article 6 of the African Charter of Human and Peoples’ Rights prohibits unlawful arrests and detentions and Article 7 of the ACHR prohibits “arbitrary arrest or imprisonment”.

²³⁵ ICCPR art. 9(1).

²³⁶ ICCPR, art. 9 (outlining that those arrested have certain rights, including being “promptly informed of any charges against” them at “the time of arrest,” being “brought promptly before a judge or other officer authorized by law to exercise judicial power” and being “entitled to trial within a reasonable time or to release.”).

detention, the right to counsel, and the right to be brought before a court without undue delay.²³⁷

Further, the Criminal Procedure Code still in force at the time provided some basic due process protections including the right to appeal, right to a trial by jury, and writs of habeas corpus.²³⁸ Both the Criminal Procedure Code and the Penal Code included provisions on making arrests, as well.²³⁹

Lastly, the 1976 Constitution specifically addressed these due process rights when the person was detained under emergency laws, which is especially relevant for this era in Seychelles.²⁴⁰ Article 25, sets out that an individual must be “as soon as reasonably practicable and ... not more than seven days after” detention be given written notice of the grounds. While there is scope to debate “as soon as reasonably practicable” the protections set out in Article 25 give a clear timeline for due process steps to be taken.²⁴¹

3. By a perpetrator: See General Provisions, *supra*, for the definition of “perpetrator” and required State nexus.

V. Torture²⁴²

A. Elements:

1. The intentional infliction;
2. Of severe pain or suffering;
3. In a cruel, inhuman, or degrading manner;
4. By a perpetrator.

B. Explanation:

Article 16 of the 1976 Constitution outlines protection against torture: “[n]o person shall be subjected to torture or to inhuman or degrading punishment or other such treatment”.²⁴³ This is consistent with the UDHR, Article 5 of which has nearly identical language.²⁴⁴ The ICCPR also contains the prohibition of torture or cruel, inhuman or degrading treatment or punishment.²⁴⁵

1. Intentional infliction: In the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or

²³⁷ 1976 Constitution, arts. 14(2)-(3).

²³⁸ Laws of Seychelles, Title V A, Cap. 45: CRIMINAL PROCEDURE CODE, secs. 140, 274, 295, 230-273, 339 (Feb. 1, 1955).

²³⁹ *Id.* at sec. 10; *see also* Penal Code, *supra* note 32, sec. 70.

²⁴⁰ 1976 Constitution, at art. 25.

²⁴¹ *Id.*

²⁴² TRNUC Act, sec. 2(8)(c).

²⁴³ 1976 Constitution, at art. 16.

²⁴⁴ The Commission recalls that the prohibition of torture is a peremptory norm of international law, reflected in numerous human rights instruments, including the UDHR. *See* UDHR, art. 5.

²⁴⁵ *See* ICCPR, art. 7.

Punishment adopted by General Assembly resolution 3452 (XXX) of 9 December 1975, the definition contained in Article one requires the act in question to be “intentionally inflicted... for such purposes as obtaining from him or a third person information or confession”.²⁴⁶ The Commission notes an assessment of the purpose for the act(s) comprising torture necessarily implicates an analysis of the perpetrator’s state of mind to determine whether the act inflicted was done deliberately to elicit information, to punish, to intimidate or coerce, or for reasons of discrimination.

In particular, the Committee emphasises that the queries of intent and purpose do not involve a subjective inquiry into the motivations of the perpetrators, but rather must be objective determinations under the circumstances. It is essential to investigate and establish the responsibility of persons in the chain of command as well as that of the direct perpetrator(s).²⁴⁷

2. Severe pain or suffering: The language, “severe pain or suffering,” is understood to refer to sufficiently grave or serious physical or mental pain or suffering. As noted in the OHCHR’s Manual, “. . . severe pain and suffering is difficult to quantify given the absence of ‘an objective element’ used to distinguish torture from cruel and unusual punishment”.²⁴⁸ Nevertheless, factors to be considered include the duration, physical effects, and mental effects of the treatment, as well as the “sex, age and State of health of the victim”.²⁴⁹ Pain and suffering can include both physical and psychological suffering.
3. In a cruel, inhuman, or degrading manner: Generally, torture is considered a step beyond cruel, inhuman, or degrading²⁵⁰ treatment or punishment.²⁵¹ Circumstantial factors to be considered when assessing whether this threshold is met include age, sex and one’s State of health, as well as the “duration of the treatment, its physical or mental effects”.²⁵² Generally, acute physical injury is necessary for cruel, inhumane, or degrading treatment to transcend into torture.²⁵³

²⁴⁶ Declaration on the Protection of All Persons, art. 1, Dec. 9, 1975.

²⁴⁷ CAT, para. 9.

²⁴⁸ See *Interpretation of Torture in the Light of the Practice and Jurisprudence of International Bodies*, OHCHR 7 (2009), https://www.ohchr.org/Documents/Issues/Torture/UNVFVT/Interpretation_torture_2011_EN.pdf.

²⁴⁹ *Ireland v. United Kingdom*, App. No. 5310/71, 2 Eur. Ct. H.R. 25. ¶ 62 (1979-80). In this case prisoners were subjected to varying levels of wall-standing, subjection to noise, sleep deprivation, food and drink deprivation and hooding this did not meet the “special stigma to deliberate inhuman treatment causing very serious and cruel suffering.

²⁵⁰ See Article 7 of the International Covenant on Civil and Political Rights (ICCPR) (outlawing and juxtaposing “torture” and “cruel, inhuman or degrading treatment or punishment”). See Article VI of the Inter-American Convention to Prevent and Punish Torture (in defining torture as “cruel, inhuman, or degrading treatment”), the Convention Against Torture (in regularly distinguishing “Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment” throughout), as well as Article V of the UDHR (outlawing and juxtaposing “torture” and “cruel, inhuman or degrading treatment or punishment.” UDHR, at art. 5.

²⁵¹ See Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment”); and Article II of the UN General Assembly Resolution 3452/91 of 9 December, 1975.

²⁵² See *Ireland v. the United Kingdom*, Eur. Ct. of H.R. (Jan. 18, 1978).

²⁵³ See *id.* (whereby being subjected to noise, wall-standing, hooding, sleep deprivation, and deprivation of food and drink did not constitute torture).

However, acts that may not rise to the legal definition of torture but constitute cruel, inhuman, or degrading treatment or punishment may still be prohibited under international law and under the Act, particularly in the context of “other acts of a similar character causing suffering”.²⁵⁴

The Commission has affirmed in various cases that physical injuries inflicted on victims, for example during interrogation, generally constitute torture. Physical injuries such as severed hands, fingers, and heads amount to torture according to the Commission.²⁵⁵

4. By a perpetrator: See General Provisions, *supra*, for the definition of “perpetrator” and required State nexus.

VI. Rape²⁵⁶

A. Elements:

1. The perpetrator;
2. Has carnal knowledge of a woman or girl;
3. Without consent, or by force or by means of threats or intimidation, or by means of false representations as to the nature of the act or identity where impersonating her husband.

B. Explanation:

1. A perpetrator: See General Provisions, *supra*, for the definition of “perpetrator” and required State nexus.
2. Has carnal knowledge of a woman or girl: The 1955 Penal Code of Seychelles specifies that rape requires that a person has “carnal knowledge” of a woman or girl.²⁵⁷ While it has been widely accepted that at the time in this context the violation was committed by a male perpetrator with a female victim, ‘Carnal knowledge’ is an ambiguous term, and where not defined in the act/code, it has been suggested the trier of fact was to decide on community standards at the time(s) as to whether it is solely penile penetration of the vagina, or if it includes other sexual acts.²⁵⁸
3. Without consent or by force or by means of threats or intimidation, or by means of false representations as to the nature of the act or identity where impersonating her husband:

²⁵⁴ TRNUC Act, sec. 2(8)(m).

²⁵⁵ Case Determination 022: Olivia Vincent, para. 217.

²⁵⁶ TRNUC Act, sec. 2(8)(d).

²⁵⁷ Penal Code, *supra* note 32, sec. 130.

²⁵⁸ NSW *Crimes Act 1900* defined ‘Carnal knowledge’ as “proved upon penetration”; *Crimes Consolidation Act 1876* ‘proved upon penetration but it shall not be necessary to prove actual emission of seed.’ See further, Scott Long, *Before the Law: Criminalizing Sexual Conduct in Colonial and Post-Colonial Southern African Societies* (HRW Reports, 2003) (https://www.hrw.org/reports/2003/safrica/safriglrc0303-07.htm#P3216_662432).

- a. Without consent: means “non-consensual or non-voluntary on the part of the victim”. Without consent can also include misrepresentation as to the character of the act of the identity of the person doing the act where the perpetrator holds themselves out to be the husband of the victim.²⁵⁹
- b. By force: For example, “whether the person used or threatened to use violence in the course of or for the purpose or committing the offence”.²⁶⁰ At common law force has been given its ordinary meaning and the trier of fact is to decide on the facts before it whether contact amounts to a use of force.²⁶¹
- c. Or by means of threats or intimidation: Threat of force or coercion includes when victims fear violence and are: (a) under duress; (b) placed into or fearing detention; (c) oppressed psychologically or through abuse of power, against such person or another person; or, (d) taken advantage of within a coercive environment. The recognition of coercion as an essential element of the crime of rape and of other sexual crimes is a significant development because it recognises an inequality between perpetrators and victims. The South African Law Commission has aptly described this development:

Fear of violence differs from submission to sexual violence due to threatened violence. Fear of violence is a more subtle, but equally compelling, form of coercion as victims may silently and without complaint acquiesce in order to avoid further risk to their safety.

- d. Or by means of false representations as to the nature of the act or identity were impersonating her husband: This requires examination of what representations were made. Was the act held out to be of a medical nature or other nature to which the victim consented?

The latter part of this limb only applies to married women, and whether the perpetrator fraudulently held themselves out as the husband.

VII. Enforced Disappearance of Persons²⁶²

A. Elements:

1. Prolonged disappearance through the arrest, detention, abduction, or any other form of deprivation of liberty;
2. Followed either by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person;
Which places such a person outside the protection of the law;

²⁵⁹ Penal Code, *supra* note 32, sec. 130.

²⁶⁰ *Id.*

²⁶¹ *R v Dawson & James* (1976) 64 Crim App R 170. The case gives the term its ordinary meaning and says that it is for the trier of fact to decide whether force is made out based on the case before them.

²⁶² TRNUC Act, sec. 2(8)(e).

3. By a perpetrator.

B. Explanation:

An enforced disappearance is an international crime and a severe violation of human rights, the prohibition of which is a *ius cogens* or peremptory norm of international law.²⁶³ It is commonly understood to entail violations of the following customary rights: right to life, liberty, and security of person; freedom from torture or cruel, inhuman, or degrading treatment or punishment; freedom from arbitrary arrest, detention, or exile; right to a fair and public hearing; effective remedy; and presumption of innocence.²⁶⁴ The focus here is on both a prolonged disappearance and the State's intentional cover-up or denial of knowledge regarding the fate or whereabouts of the disappeared.²⁶⁵

1. Prolonged disappearance through the arrest, detention, abduction, or any other form of deprivation of liberty: The person must be disappeared, including by an arrest, detention, abduction, or any other form of deprivation of liberty. Regarding length of time, enforced disappearances are often ongoing²⁶⁶ and the whereabouts or fate remain unknown, though any length of time can meet the standard where the latter elements are made out.
2. A refusal to acknowledge the deprivation of liberty or concealment of the fate or whereabouts of the disappeared person: As part of the above disappearance, the disappeared person's family and friends must be without any knowledge of the person's whereabouts. The State's refusal to give information on the victim's fate is a crucial element of this.²⁶⁷
3. Which places such a person outside the protection of the law: Where the person has been detained without acknowledgement, it is impossible for the family or others to access a lawyer on their behalf, or to challenge the legality of the detention.²⁶⁸ In these circumstances there is no recourse to challenge the detention, and no means

²⁶³ See International Convention for the Protection of All Persons from Enforced Disappearance [ICPPED], 20 December 2006, 2716 U.N.T.S. 3, *ratified* 18 January 2017. Although this Convention entered into force in Seychelles in 2017, many years after most disappearances alleged before the Commission, the Commission recalls that the violation of enforced disappearance is a continuing violation under international law, which lasts from the moment of abduction until such time as the fate or whereabouts of the missing person are established. As there was almost always no disclosure by the State as to the fate of the disappeared person in question, the Commission considers that the principles of the ICPPED can be applicable to its case determinations.

²⁶⁴ See ICCPR, arts. 2(3), 6, 7, 9, 14; *see also* UDHR, arts. 3, 5, 8-11.

²⁶⁵ See the violation of unlawful imprisonment or other deprivation of liberty for further information on that element of this violation.

²⁶⁶ This is the classic example of the continuing violations doctrine in international human rights law. See Working Group on Enforced or Involuntary Disappearances, *General Comment on Enforced Disappearance as a Continuous Crime*, U.N. Doc A/HRC/16/48 (Jan. 26, 2011).

²⁶⁷ Disappeared persons G.A. Res. 33/173 at 158. Deep concern was expressed about this in General Assembly resolution on disappeared persons that the lack of information from competent authorities, and the impact this had on relatives.

²⁶⁸ 'Human Rights and the Phenomenon of Disappearances: Hearings Before the Subcommittee on International Organizations of the House 96th Congress 1st Session 79 (1979) (statement of Patricia Fagen, Exec. Director Amnesty International)' as in Naomi Roht-Arriaza 'State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law' *California Law Review* (1990) Vol 78, No. 2 pp 449-513, 456.

to hold the detainers to account for any other violation to the detainee's rights that may occur.

4. By a perpetrator: See General Provisions, *supra*, for the definition of "perpetrator" and required State nexus.

VIII. Kidnapping²⁶⁹

A. Elements

1. The taking of a person;
2. Through force or fraud;
3. By means of a deprivation of liberty;
4. Without consent;
5. For the purpose of;
 - a. Removing the person from Seychelles;
 - b. Removing the person from guardianship; or
 - c. Otherwise done with malicious intent;
6. By a perpetrator.

B. Explanation

The violations of kidnapping, unlawful/arbitrary deprivation of liberty, and enforced disappearance have significant overlap, as they all impact a victim's rights to liberty, security of person, and recognition before the law.²⁷⁰ Further, each may amount to an arbitrary arrest and/or detention, *i.e.*, Section 2(8)(b) of the TRNUC Act. There are distinct elements to each, however.

Chapter XXV – Offences Against Liberty of the Seychelles Penal Code (1955) lays out the offences that amount to a kidnapping and narrowly defines abduction as "[a]ny person, who by force compels, or by deceitful means induces, any person from any place, is said to abduct that person".²⁷¹ Kidnapping is set out across five provisions in the Penal Code, which has the effect of adding an additional element of purpose beyond those commonly seen in the common law.²⁷²

These additional considerations of purpose and taking will be necessary for unlawful/arbitrary deprivation of liberty to become kidnapping. One slight nuance is that unlawful/arbitrary deprivation is more likely (though not required) to be done pursuant to a

²⁶⁹ TRNUC Act, sec. 2(8)(f).

²⁷⁰ ICCPR, arts. 9, 10, 14; UDHR, arts. 3, 6, 7.

²⁷¹ Penal Code, *supra* note 32, sec. 241.

²⁷² *See id.*, sec. 239, 240, 243, 244, 245.

proclamation/decree.²⁷³ Later jurisprudence of kidnapping has suggested the distinction in domestic law is that kidnapping is an aggravated form of false imprisonment or a combination of abduction and false imprisonment.²⁷⁴ The distinction between enforced disappearance and a kidnapping is the requirement for there to be a refusal to acknowledge the deprivation of liberty or concealment of the fate or whereabouts of the disappeared person.²⁷⁵

1. The taking of a person: The penal code of Seychelles does not contain an express definition of kidnapping, though the common law sets out the following definition: In *R v Wellard* it was considered sufficient that the perpetrator remove the victim from the place the victim wished to be. In the same case, it was decided that there was no minimum distance, however the trier of fact was to consider the circumstances of the specific case.²⁷⁶ This requirement is largely similar to “abduction” as set out in Chapter XXV of the penal code.
2. Through force or fraud:
 - a. Force: Force is to be decided by taking into consideration whether particular contact or conduct amounts to a use of force or a threat of force.²⁷⁷ “Force” is to be given its ordinary meaning.
 - b. Fraud: To establish fraud, one looks to the information presented to the victim and whether the misrepresentations were sufficient to compel the individual to submit to the will of the perpetrator.²⁷⁸ Such misrepresentation vitiates the victim’s consent. Throughout the case law of fraud, in kidnapping the perpetrator has misrepresented their authority or where they were taking the victim. This will often look similar to a ‘but for’ test—but for the fraud, would the victim have agreed to be taken?
3. By means of a deprivation of liberty: See above discussion on deprivation of liberty.
4. Without Consent: It has been established through case law regarding kidnapping that consent is vitiated where the ensuing taking and deprivation of liberty are done against the victim’s will.²⁷⁹ Further, in *R v D* it was concluded that the consent need only relate to the fact of being taken.²⁸⁰ For instance, where the victim had agreed to go somewhere but was then detained against their will, the offence would simply be false imprisonment.
5. For the purpose of:

²⁷³ That is not to say that a kidnapping could not also be made out where a detainment is made pursuant to a proclamation/decree.

²⁷⁴ *Davis v R* [2006] NSWCCA 392. Noting that this is a much later judgement, it is only used to describe the nature of kidnapping and illustrate the difference of kidnaping and other offences.

²⁷⁵ See above section VI regarding enforced disappearance.

²⁷⁶ *Wellard* [1978] 1 WLR 921.

²⁷⁷ *R v Dawson & James* [1976] 64 Cr. App. R. 170.

²⁷⁸ *Wellard* [1978] 1 WLR 921

²⁷⁹ *R v D* [1984] AC 778.

²⁸⁰ *Id.*

a. Removing the person from the Seychelles: Section 239 of the Penal Code states that the kidnapping must take the victim “beyond the limits of the Seychelles”.²⁸¹

b. Removing the person from lawful guardianship: Section 240 of the Penal Code states:

Any person who takes or entices any minor under fourteen years of age if a male, or under sixteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.

c. Otherwise done with malicious intent: The *mens rea* requirement for offences falling under this limb includes with the intent to murder,²⁸² wrongly confine,²⁸³ with intent to do harm, slavery, etc.²⁸⁴

6. By a perpetrator: See General Provisions, *supra*, for the definition of “perpetrator” and required State nexus.

IX. Forceful Eviction from Legally Owned Building or Land²⁸⁵

A. Elements:

1. The removal of a person;
2. From the land the person owns or rents;
3. Against the person’s will or the will of those living on their land, including by involuntary coercion, physical force, illegitimate colour of authority, or other means for a temporary or permanent basis;
4. By a perpetrator.

B. Explanation:

Evictions entail the forcible removal of a person from a dwelling the person owns on a permanent or temporary basis, in violation of their right to property.²⁸⁶ This can be done through physical force or misuse of authority. The TRNUC considers that even when alternative accommodation is offered, one can still be subjected to forced eviction as the occupant had no intention of leaving. There have been cases before the TRNUC where occupants were re-housed from their owned homes to rental accommodations against their will.

²⁸¹ Penal Code, *supra* note 32, sec. 239.

²⁸² *Id.*, sec. 243.

²⁸³ *Id.*, sec. 244.

²⁸⁴ *Id.*, sec. 245.

²⁸⁵ TRNUC Act, sec. 2(8)(g).

²⁸⁶ See UDHR, art. 17. ‘Forced Evictions’ Commission of Human Rights Resolution 1993/77 E-CN 4 Res. 1993/77 (explaining that “[t]he practice of forced eviction involves the involuntary removal of persons, families and groups from their homes and communities, resulting in increased levels of homelessness and in inadequate housing and living conditions”).

These occupants were required to pay rent as the Government argued the land was needed for other purposes. These cases were nested within the constitutional protections contained under Article 17, ensuring that they would not be considered wrongful evictions. The Commission also notes that due to the inherent violation of the victim's right to property, as this violation requires that the victim actually legally owned the dwelling from which they were evicted, the Commission commonly conceptualises events that might constitute this violation as the broader violation of unjustified acquisition or loss of property, as the majority of cases before it were spurred by or resulted in a taking by the Government of the property in question.

1. The removal of a person: The removal must be real (rather than threatened), *i.e.*, the person no longer had physical access to or use, enjoyment, etc., of their property.
2. From the land the person owns or rents: In addition to land legally owned, IHRL permits the use of eviction in the circumstance of "persistent non-payment of rent or of damage to rented property without any reasonable cause," but, in doing so, IHRL reciprocally implies that wrongful eviction from rented land would constitute forced eviction.

This is further supported by article 17 of the 1976 Constitution, which provides situations in which the State can lawfully remove or enforce someone to be removed property.²⁸⁷

3. Against the person's will or the will of those living on their land, including by involuntary coercion, physical force, illegitimate colour of authority, or other means for a temporary or permanent basis: The taking lacked the consent of the owner/rented of the property, and had an element of force involved. Forced evictions include both physical and unlawful or arbitrary coercion by authority. The African Commission of Human and Peoples' Rights defines forced evictions to include "acts and/or omissions involving the coerced or involuntary displacement of individuals".²⁸⁸
4. By a perpetrator: See General Provisions, *supra*, for the definition of "perpetrator" and required State nexus.

X. Unjustified Acquisition or Loss of Property or Business²⁸⁹

A. Elements:

1. The unlawful or arbitrary taking or appropriation;
2. Of the physical, real, financial, intellectual, or other property or business of one or more persons;
3. That results in the deprivation or interference of use of the property or business by that person;
4. Without adequate, prompt, and effective compensation;

²⁸⁷ 1976 Constitution, art. 17.

²⁸⁸ See U.N. Resolution 1993/77.

²⁸⁹ TRNUC Act, sec. 2(8)(h).

5. By a perpetrator.

B. Explanation:

The fundamental right to property is recognised in the UDHR, which provides as follows: (1) “[e]veryone has the right to own property alone as well as in association with others,” and (2) “[n]o one shall be arbitrarily deprived of [their] property”.²⁹⁰ Other human rights authorities have similar provisions. For example, the European Convention of Human Rights recognises the right to peaceful enjoyment of one’s possessions,²⁹¹ and the Permanent Court of International Justice has held that expropriation is only “unlawful” if the State is expressly forbidden to do so or the acts of expropriation do not satisfy the requirements of form or substance stipulated in an international instrument.²⁹² Article 17 of Seychelles’ 1976 Constitution also protected against deprivation of property, as discussed below.²⁹³

It should be noted that this violation includes both the words “acquisition” and “loss”. The existence of both together implies a distinction between the two, and this the Commission has largely interpreted as a matter of perspective. “Acquisition” describes the (unjustified) conduct of the State actor vis-à-vis the act of acquiring the property, most frequently including takings done under the Lands Acquisition Act, 1977. On the other hand, “loss” puts the emphasis on the victim to describe their state of not having the benefit of the property, and is more frequently used in the context of a forced sale or other “*de facto* taking” by the Government.

1. The unlawful or arbitrary taking or appropriation:

There must be a loss of property, however temporary, or an attempt at a deprivation of property. The threat of the loss of property can cause distress and undue mental anguish for the person who is being threatened. This corresponds to an interference in their use of the property.

For example, the TRNUC has seen cases in which Seychellois citizens of old age or in ill health feel threatened by the State of acquisition of their property. Given the citizens’ age or health status, the fear of acquisition prompts acceptance of undervalued compensatory offers. The result is the loss of property, which oftentimes simultaneously accompanies the loss of property with deep sentimental value, as a result of distress and undue mental anguish on behalf of the victim.

The 1976 Constitution allowed for an exception to the property rights of an individual only when four conditions were met. First, the taking must be (1) “necessary or expedient in the interests of defence, public safety, public order, public morality, public health, nature conservation, town and country planning or the development or utilisation of any property in such a manner as to promote the public benefit”.²⁹⁴ Additionally, there must be (2) reasonable justification for the taking, (3) prompt payment for adequate compensation must be provided, and (4)

²⁹⁰ UDHR, art. 17.

²⁹¹ ECHR, art. 1 of Protocol 1.

²⁹² The Permanent Court, case concerning certain German interests in Polish Upper Silesia (1926 and 1928).

²⁹³ 1976 Constitution, at art. 17.

²⁹⁴ 1976 Constitution, at art. 17(1)(a).

the individual must have the opportunity to appeal or challenge the taking.²⁹⁵ An acquisition/loss would be unlawful if it is inconsistent with the domestic law of Seychelles. An acquisition/loss would be arbitrary according to the discussion of “arbitrary” above.

In addition to the 1976 Constitution, the Lands Acquisition Act of Seychelles (herein after ‘Lands Acquisition Act’) broadly set out that the State may acquire any land if it is in the public purpose to do so.²⁹⁶ That Land Acquisition Act also provided rules for compulsory acquisition including necessary proceedings, compensation, etc.²⁹⁷ The Lands Acquisition Act ran parallel to the Constitution and was often used in place of Article 17, so it should also be referenced in case determinations, particularly when the protections it did contains (due process, compensation) were not observed.

2. Of the physical, real, financial, intellectual, or other property or business of one or more persons:

Under Seychelles law, land includes “land covered with water, all things growing on land and buildings and other things permanently affixed to land and also an undivided share in land...”²⁹⁸ Personal property law covers other forms of property, such as cars, businesses, bank accounts, and personal items, inter alia.

The TRNUC has seen cases where the Government rented out property it acquired unlawfully to René supporters.²⁹⁹ According to the Penal Code, any person that receives or retains property while knowing or having reason to believe that property was unlawfully obtained commits a criminal act.³⁰⁰

3. That results in the deprivation or interference of the use of the property or business by that person:

“Use” means the ability to enjoy an object in accordance with its purpose.³⁰¹ Use also gives the owner an exclusive right to his property. Thus, State interference is not allowed without following the appropriate rules for the deprivation of the property.³⁰² “Deprivation” corresponds to the act of obtaining/expropriating property, and “interference” is merely an *attempt* to obtain/expropriate. However, “interference” can also entail trespass, nuisance, or other violations of property rights.

4. Without adequate, prompt, and effective compensation:

In regard to the adequate compensation required by the 1976 Constitution, the Lands Acquisition Act provides that land and buildings are valued based on the

²⁹⁵ 1976 Constitution, at art. 17.

²⁹⁶ Land Acquisition Act of Seychelles, 1978.

²⁹⁷ *Id.*

²⁹⁸ Land Registration Act, Cap. 107.

²⁹⁹ Case Determination 054: Marie Jessy Mona Souyave.

³⁰⁰ Penal Code, *supra* note 32, sec. 309.

³⁰¹ In the *Sporrong and Lönnroth* case, the ECHR Commission and Court recognized that prohibitions on construction interfered with the use of property.

³⁰² Eur. Comm. H.R., decision of 16 December 1974 (admissibility), *Müller v. Austria*, No. 5849/72, DR 1, p. 46, and Comm. Report of 1 October 1975, DR 3, p. 25.

use, exploitation, and letting of the land. The Act states that the numbers of these elements will be taken from the three years prior to the compulsory acquisition.³⁰³ Consequently, this means that land and buildings that are used in an incompatible way with the line set out in the Act would not qualify for compensation or would be valued below their actual worth. The TRNUC has seen in Case 054 that the Government offered more than 1,000,000 SG below the actual value of the land. This shows that victims were not offered an adequate or just price for their taken land.

The Seychelles courts have decided that for any land not being returned, the compensation is to be the fair market value of the property at the time the claim is made.³⁰⁴

5. By a perpetrator:

See General Provisions, *supra*, for the definition of “perpetrator” and required State nexus.

XI. Wrongful Denial of the Right to Employment³⁰⁵

A. Elements:

1. The repeated refusal to hire, promote, otherwise interfere with or refuse a person;
2. In pursuit of employment in that person’s chosen field;
3. For reasons other than business necessity or some other reasonable and articulable basis;
4. By a perpetrator.

B. Explanation:

The ICESCR recognises the right to work, “which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.”³⁰⁶ This fundamental right also includes the right of everyone to just and favourable conditions of work, including, *inter alia*, fair wages to provide a decent living, safe and healthy working conditions, equal opportunity for promotion, and reasonable rest and leisure,³⁰⁷ and is related to the rights to form trade unions and to social security.³⁰⁸ Article 23 of the UDHR reflects the customary international right “to work, [and] to free choice of employment”.³⁰⁹ The ILO Declaration of Philadelphia similarly recognises this right, guaranteeing individuals “the right to pursue both their material well-being and their

³⁰³ Land Acquisition Act of Seychelles, 1978, Second Schedule, Assessment of Compensation part 2 and 3.

³⁰⁴ *Poole v Government of the Seychelles & Ors* (CP 4 /2012) [2016] SCCC 9 (May 17, 2016), *available at* <https://seylit.org/sc/judgment/constitutional-court/2016/9/>.

³⁰⁵ TRNUC Act, sec. 2(8)(i).

³⁰⁶ ICESCR, art. 6(1).

³⁰⁷ *Id.*, art. 7.

³⁰⁸ *Id.*, arts. 8-9.

³⁰⁹ UDHR, art. 23.

spiritual development in conditions of freedom and dignity, of economic security and equal opportunity”.³¹⁰

This violation can be found in either the public or private sector, as the Commission has received evidence that not only were people denied security clearance, preventing them from working in the public sector, but their employees in the private sector were also sometimes contacted and directed to terminate their employment and have no further contact. The Commission also notes that the denial of security clearance had impacts in the private-sector employment of a person, as it served in many instances as a black-listing of that person and thus a public signal that they were branded an “undesirable” by the Government, thus rendering any association with that person fraught with political and physical dangers.

1. Repeated refusal to hire, promote, or otherwise interfere with or refuse a person: This violation goes beyond a single wrongful termination. Rather, the State must have continually or systematically interfered or blacklisted the person, usually by way of denial of security clearance to work in the public sector, so that they were consistently denied the ability to effectively pursue their career in their chosen field. This can include actions such as barring an individual from public service when their chosen career is non-existent in the private sector or contacting foreign organisations to prevent their hiring under a guise of diplomacy.³¹¹ Another example is refusing to grant appropriate licenses and necessary governmental authorisation for the individual to be able to pursue their career and/or harassment by local authorities when the individual tries to promote their career.³¹²
2. In pursuit of employment in that person’s chosen field: The ILO Employment Policy Convention guarantees “the fullest possible opportunity for each worker to qualify for, and to use [their] skills and endowments in a job for which [they] [are] well suited”.³¹³ This right extends beyond mere termination, as it also extends to State-imposed obstructions, whether blacklisting or promotion caps, designed to inhibit one’s ability to achieve promotion or full productivity.³¹⁴
3. For reasons other than business necessity or some other reasonable and articulable basis: This prong essentially follows a general discrimination analysis: when discrimination or retaliation is alleged, it falls on the State to disprove that claim or provide other reasonable justification for the (continued) termination or denial. Retaliation is heavily contextual and will be determined by a weighing of the evidence and proximate cause analysis (would the person have been fired/denied employment but for an action of theirs or state of being, such as party loyalty?). In Seychelles, during the period of time in question retaliation often happened on political grounds, including on real or perceived support, or lack thereof, of the ruling party.

Article 1 of the ILO’s Discrimination Convention defines discrimination to include “any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect

³¹⁰ Int’l Labour Conference, 26th, Declaration of Philadelphia, art. 2(a), May 10, 1944.

³¹¹ See, e.g., Case Determination No. 039: Luc Chang-Ko.

³¹² See, e.g., Case Determination No. 028: Alain Ernesta.

³¹³ Employment Policy Convention, 1964 (No. 122), art. I(ii)(c).

³¹⁴ See ILO C122 - Employment Policy Convention, art. I, 1964 (No. 122).

of nullifying or impairing equality of opportunity or treatment in employment or occupation”.³¹⁵ For purposes of the case determinations, the focus has mostly centred around discrimination based on real or perceived political opinion.

4. By a perpetrator: This violation is limited to either (1) jobs with the State from which the complainant was continuously denied employment, or (2) instances where the State systematically or continuously interfered with private employment, with “State” or “state actor” being the same State nexus as per the General Provisions above.

XII. Wrongful Termination of Employment³¹⁶

A. Elements:

1. The dismissal of a person from their position at work;
2. Whether by unlawful or arbitrary means, including but not limited to reasons of retaliation or discrimination;
3. By a perpetrator.

B. Explanation:

This violation implicates all the same rights as discussed in the foregoing section. As above, this violation can apply to either the public or private sector, should a State actor take some act or omission that results in the unlawful termination of a person.

1. The dismissal of one from his or her position at work: Unlike the previous violation, this violation applies to discrete events where the State made a direct termination, if the person was a State employee, or indirect termination, if the State interfered with private employment resulting in the person’s termination. For example, a wrongful termination occurs when the State forces a person into exile or arbitrary or unlawful detention and the person loses his or her job as a result of such absence. Another common example in the context of the Coup d’état involves the firing of well-qualified State personnel who have maintained an upward career trajectory for years and are inexplicably fired without cause. Terminations were thus examined against the backdrop of the political climate in the Seychelles in combination with a review of the individuals’ professional development, employment file, and any factors regarding how in demand the service at hand was.
2. Whether by unlawful or arbitrary means, including but not limited to reasons of retaliation or discrimination: As in the previous violation, this prong essentially follows a general discrimination analysis:³¹⁷ Article 1 of the ILO’s Discrimination

³¹⁵ Discrimination (Employment and Occupation) Convention, art. 1, 1958 (No. 111).

³¹⁶ TRNUC Act, sec. 2(8)(j).

³¹⁷ Article 1(ii)(c) of the ILO’s Employment Policy Convention, 1964 (No. 122); *see also* Article II of the ISESCR which slightly expands the protected classes, preventing considerations to be made in light of one’s “race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” Such

Convention defines discrimination to include “any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.”³¹⁸ The Commission notes that when discrimination or retaliation is alleged, it falls on the State to disprove that claim or provide other reasonable justification for the (continued) termination or denial. Retaliation is heavily contextual, and within the context of Seychelles, retaliation was more often than not motivated on political grounds, including on real or perceived support, or lack thereof, of the ruling party. Notably, this link of retaliation with politically discriminatory motivations was a necessary factor of bringing any such allegation within the mandate of the Commission.

3. By a perpetrator: This violation is limited to either (1) jobs with the State from which the complainant was terminated, or (2) instances where the State interfered with private employment, resulting in the person’s termination, with “State” or “state actor” being the same State nexus as per the General Provisions above.

XIII. Forced Exile³¹⁹

A. Elements:

1. The expulsion, deprivation of access to re-enter, or removal of a national from his or her country;
2. Unlawfully or arbitrarily through either direct deportation or expulsion or by making living conditions unbearable for the national to stay in the country due to ongoing or potential persecution, victimisation, violence, or other difficulties;
3. By a perpetrator.

B. Explanation:

The violation of forced exile is fundamentally a violation of the rights, at the level of customary international law, to freedom of movement and to re-enter one’s country.³²⁰

Forced exile may occur directly or indirectly. First, direct force exile occurs when a State actor expels, deports, or causes a national of that country to flee the country due to the State actor’s victimisation of, persecution of, or incitement of fear of violence or harm toward the person or their family. Second, forced exile can occur indirectly for individuals who lived or travelled abroad when alleged human rights violations occurred if such persons: (1) had a genuine fear that returning to their home country would put them in danger; and (2) due to such fear, did not return to their home country.

discrimination can also include dismissal on the “grounds of pregnancy or of maternity” or “marital status” as noted by Article 11 of the Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979.

³¹⁸ Discrimination (Employment and Occupation) Convention, art. 1, 1958 (No. 111).

³¹⁹ TRNUC Act, sec. 2(8)(k).

³²⁰ See ICCPR, art. 12; UDHR, arts. 9 (freedom from arbitrary exile), 13 (freedom of movement and right to return to one’s country).

1. The expulsion, deprivation of access to re-enter, or removal of a national from his or her country:

This prong essentially describes the acts of fleeing and State-refused re-entry. For the exile to occur, an individual or family must have physically left Seychelles for a sufficient period of time that they either do not intend to return or have the ability or expectation to live in the destination country. The period of time will depend on a weighing of evidence in each case. The 1976 Constitution provides immunity from expulsion from Seychelles.³²¹ The UDHR also protects against arbitrary exile.³²²

2. Unlawfully or arbitrarily through either direct deportation or expulsion or by making living conditions unbearable for the national to stay in the country due to ongoing or potential persecution, victimisation, violence, or other difficulties:

Under international law, those who fled Seychelles due to persecution, victimisation, or other forms of discrimination would be considered refugees.³²³ Under the 1951 Refugee Convention, a refugee is a person:

[O]wing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.³²⁴

In the context of the Commission's case determinations, the finding that a person was granted asylum or refugee status in another country was considered very persuasive evidence of persecution in Seychelles.

Essentially, ongoing discrimination in the employment sector and other actions that would prevent an individual from being able to provide for themselves and their families may amount to forced exile if the individual must leave the country in order to support his or herself.³²⁵ The deprivation of property such as a farm or other property that provided income or refusal to grant the licenses necessary to run a farm or business may also force an individual into exile in order to find a new means of support.

In general, the right of a citizen to re-enter their country of origin is well established in international law. The UDHR outlines citizens' rights to enter their country with some exceptions based on public safety, criminal offences, and lack of citizenship status.³²⁶ The UDHR further observes that "[e]veryone has the right to leave any

³²¹ 1976 Constitution, at art. 23.

³²² UDHR, art. 9.

³²³ Convention and Protocol Relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S. 137. Seychelles ratified both the Convention and Protocol on 23 April 1980.

³²⁴ *Id.*, art. 1(A)(2).

³²⁵ See, e.g., Case Determination No. 053: Mivonne Barallon.

³²⁶ UDHR, art. 23.

country, including his own, and to return to his country”.³²⁷ In Seychelles, this right to enter or return to one’s country was either directly or indirectly denied: having fled Seychelles, many were subsequently denied the renewal of their Seychelles passport, amounting to a restriction on the right of return and freedom of movement. Those to whom passports were not denied, but who still fled in response to unbearable living conditions, were nonetheless indirectly denied those same rights; the act of fleeing in the first place, along with the element of victimisation or persecution, is enough to constitute forced exile.

3. By a perpetrator:

See General Provisions, *supra*, for the definition of “perpetrator” and required State nexus.

XIV. Abuse of Office by a Government Official, Including the Executive, Judiciary or Legislature³²⁸

A. Elements:

1. The use of the capacity and powers of a public office;
2. To restrict the specific rights or freedoms of a person or persons;
3. In a manner that strayed from the proper purpose of the law or of the official’s position;
4. By a State official.

B. Explanation:

This violation commonly (though not exclusively) includes discrimination or victimisation based on real or perceived political opinion or that is otherwise legally baseless or arbitrary. The violation could take the form of, e.g., improper actions under the orders of President René, a Minister, or another government official; administrative abuses; denials of pensions; gross failures of the police to investigate certain acts; etc. The Commission notes that equality before the law, non-discrimination, and freedom from fear of Government abuse are basic principles of human rights law enshrined in the UDHR.³²⁹ Any State action that violates these principles may fall under this violation. Furthermore, this violation is often implicated in other violations, such as unlawful imprisonment, forced exile, and the employment violations, among others.

1. The use of the capacity and powers of a public office: The official in question must act under colour of law, acting as they would be expected to act by virtue of their office.
2. To restrict the specific rights or freedoms of a person or persons: Some damage must have been caused to an individual that allows them to recover as a victim. This may include lack of due process or equality before the law, discrimination,

³²⁷ UDHR, art. 13. Returning to a country may entail more than just being able to return to the country of one’s birth or citizenship.

³²⁸ TRNUC Act, sec. 2(8)(I).

³²⁹ UDHR, arts. 1, 2, 7, 12.

persecution or victimisation, violence or threat of violence, or many other factors, and it is via this element that other violations under the Act may be implicated.

3. In a manner that strayed from the proper purpose of the law or of the official's position: This element describes the wrongful nature of the action and impact. That is, even though the act was done under colour of law or office, it was baseless, without actual authority, lacked due process, or was otherwise unlawful or arbitrary. The restriction of the rights of a person could be legitimate and lawfully imposed, but restrictions should be prohibited if imposed for an improper purpose, *i.e.*, not for the purpose indicated in domestic or international law. Specific government acts could serve a double purpose—to restrict human rights on allegedly legitimate and lawful grounds and an “ulterior purpose” which is: (a) not prescribed by the relevant provisions of the 1976 Constitution and the UDHR; (b) is different from that proclaimed by the authorities; or, (c) is one which can be reasonably inferred from the context.
4. By a State official: Unlike the other violations, this one specifically requires that the perpetrator be a Government official employed by one of the three branches of the Government of Seychelles. This **does not** include the general or indirect State nexus that applies to other violations.

XV. Other Acts of a Similar Character Causing Suffering, or Injury to Body or to Mental or Physical Health³³⁰

A. Elements:

1. The infliction of suffering or injury to body or to mental or physical health;
2. By a perpetrator.

B. Explanation:

The Commission has considered this violation to be a catch-all provision meant to include any other conduct not otherwise defined in the other violations that is yet conducted by State actors or with a State nexus. It generally contemplates a human rights violation of sufficient significance, on par with the other violations under the TRNUC Act, as to warrant redress. The conduct must be sufficiently grave or severe, such as victimisation or harassment by the State that causes physical or mental damage (injury, pain, suffering). This violation may also be implicated in other violations, such as forced exile, *e.g.*, as this conduct can consequently force the victim to flee for their safety and livelihood. Among the rights violated in this regard are the customary international law-based rights to life, prohibition of slavery, freedom from torture, equal protection, and protection from arbitrary interference and attacks upon honour and reputation.³³¹

³³⁰ TRNUC Act, sec. 2(8)(m).

³³¹ UDHR, arts. 3, 4, 5, 7, 12.

1. The infliction of suffering or injury to body or to mental or physical health:

The Commission has generally interpreted this violation to comprise of suffering or injury of sufficient severity to merit its own category. The fundamental human rights being violated are therefore, generally, the rights to be free from torture or other cruel, inhuman, or degrading treatment; to not be deprived of life in an extrajudicial or arbitrary manner; to not be subject to slavery or serfdom; and to a set of fundamental fair trial guarantees.

In Seychelles, factors to be considered include being followed and harassed by army, militia, or other state security forces; general victimisation on political grounds; denial of the right to seek medical treatment overseas; or other such behaviour. The TRNUC has seen this in multiple cases.

The severity necessary may include either or both physical and mental trauma and suffering. The intentional infliction of physical pain which is substantial but below the torture threshold is likely to be sufficiently severe. Additionally, an incident that was harrowing, and/or made the victim fear for their life or bodily integrity, or the life or bodily integrity of another close to them, is also likely severe enough to meet this violation.³³²

2. By a perpetrator:

See General Provisions, *supra*, for the definition of “perpetrator” and required State nexus.

³³² See, e.g., Case Determination No. 013: Anthony Hunt; Case Determination No. 035: Jules Stravens.

Second Republic: 5 June 1979 – 23 June 1993

Applicable Law: For the period of the Second Republic, 1979-1993, the Commission considers that the applicable legal framework for purposes of case determinations includes but is not limited to the following: Preservation of Public Security Ordinance and related Regulations; Penal and Criminal Procedure Codes; Police Force Act 1959; Lands Acquisition Act, 1977; Defence Forces Act 1980; and the customary international law principles reflected in the Universal Declaration of Human Rights. The Commission also notes that it has considered that the ICCPR and ICESCR remained part of the applicable law in the Second Republic until 22 October 1980.

N.B.: Seychelles Constitution of 1979: The 1979 Constitution was passed by decree and lacked specific protection of human rights as it did not include an operative bill of rights. The human rights protections contained in the 1976 Constitution were removed and a newly drafted set of “rights” were inserted to the preamble of the 1979 decree as merely aspirational. Effectively, the rights set out in the 1979 constitutional preamble were not operative and were easily and often derogated from or limited through other legislative means or instruments. Consequently, this set of elements and the case determinations during this time period cannot rely directly on the 1979 Constitution as a source of human rights obligations in setting out the elements of violations that occurred between 1979 and 1993.

XVI. Unlawful Killing³³³

A. Elements

1. The unlawful deprivation of life of one or more persons;
2. By a perpetrator.

B. Explanation:

The main inquiry for unlawful killing is the lawfulness of the killing and the State nexus of the killing. Therefore, in addition to the previously noted definitions of “unlawful” and “arbitrary,”³³⁴ two elements must be addressed with unlawful killing: it must be established on a balance of probabilities that (1) State officials were responsible for the death and (2) the killing was unlawful or arbitrary.

1. Unlawful deprivation of the life of one or more persons: “Unlawful” should be understood as per the General Provisions section above. Article 3 of the Universal Declaration of Human Rights (UDHR) protects the right to life,³³⁵ and any murder or attempted murder would be a severe violation of this fundamental right. The unlawfulness or arbitrariness of the killing is generally determined by the standard

³³³ TRNUC Act, sec. 2(8)(a).

³³⁴ See *supra* sec. E, F of the General Provisions section of this document for the general definitions of “unlawful” and “arbitrary”.

³³⁵ Universal Declaration of Human Rights [UDHR], art. 3, G.A. Res. 217 (III) A (Dec. 10, 1948).

human rights-based approach of settling the principles of necessity, proportionality, and non-discrimination.

The TRNUC has made determinations in numerous cases regarding the violation of unlawful killing. While the Commission highlights that under the above elements, no *mens rea* is needed to find a violation of the right to life by the State, the Commission has considered a *mens rea* of intent or knowledge, determining in at least one case that the perpetrator deliberately intended to kill the victim,³³⁶ as additional evidence to support a finding of a violation.³³⁷

2. By a perpetrator: As with all human rights violations under the TRNUC Act, to be a violation, the unlawful killing must have been committed by a perpetrator with some link to the Government. However, even acts lacking on their face such a State nexus can still amount to a violation if there is a failure of the State to prevent or punish the conduct. For instance, the act of a person who relies upon their political connections to ensure they will not be held accountable for murder, or relies on systemic impunity afforded to persons supportive of the Government, and then is so protected, could still amount to a violation by the State. In particular, the Commission has found that in Seychelles, the police were often instructed not to pursue persons who committed crimes in a personal capacity because of their political support of the Government.

XVII. Unlawful Imprisonment or Other Deprivation of Physical Liberty³³⁸

A. Elements:

1. An arrest, detention, imprisonment, or other deprivation of one's physical liberty;
2. Executed unlawfully, arbitrarily, or without due process;
3. By a perpetrator.

B. Explanation:

This violation stems from the right to personal liberty. The UDHR provides that “[e]veryone has the right to life, liberty and security of person”.³³⁹ N.B.: While Seychelles’ Penal and Criminal Procedure Codes contained many provisions on applicable rights and (in)appropriate restrictions of the same, these codes are unfortunately of functionally lesser legal value during this time period, as most detentions at this time were made by Presidential

³³⁶ Case Determination 001: Dorothy Chang-Him et al.

³³⁷ The Commission similarly notes that the concept of unprovoked murder, or in ‘cold blood’, is a universally accepted criminal offence under international human rights norms,³³⁷ which is also recognised by virtually all domestic legal systems, including the Seychelles Penal Code, as a criminal offence. Laws of Seychelles, Title V B, Cap. 73: PENAL CODE, sec. 192-196 (Feb. 1, 1955); *see also* Case Determination 001: Dorothy Chang-Him et al.

³³⁸ TRNUC Act, sec. 2(8)(b).

³³⁹ UDHR, art. 3. Article 6 of the African Charter of Human and Peoples’ Rights parallels, noting, “[e]very individual shall have the right to liberty and to the security of his person.” Organization of African Unity (OAU), *African Charter on Human and Peoples’ Rights (“Banjul Charter”)*, CAB/LEG/67/3 Rev. 5, 21 I.L.M. 58 (June 27, 1981).

Decree. Decrees and Proclamations were made either pursuant to or as a basis for the various Emergency Powers Regulations, which were not necessarily subject to the protections contained in the codes. This resulted in detentions often being made in the interest of “national security” through Presidential Decrees.³⁴⁰

1. An arrest, detention, imprisonment, or other deprivation of one’s personal liberty: The Office for the High Commissioner of Human Rights’ *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (OHCHR Body of Principles) defines arrest as an “act of apprehending a person for the alleged commission of an offence or by the action of an authority”.³⁴¹ While “detention” refers to being under police or State custody for any amount of time, “imprisonment” is specifically being detained as the result of a conviction.³⁴² Other deprivation of liberty is used to capture any other sort of unlawful, or arbitrary custody situation that may exist beyond the scope of detention, arrest, or imprisonment.
2. Executed unlawfully, arbitrarily, or without due process: This involves consideration of the “arbitrariness” prong when analysing this violation. Arbitrary arrests, detentions, and imprisonments are forbidden by various international conventions.³⁴³ Under the UDHR, “[n]o one shall be subjected to arbitrary arrest, detention or exile”.³⁴⁴

An important aspect in assessing whether the arrest is lawful and not arbitrary is whether due process considerations is ensured. Due process must be upheld to ensure there are no violations of protected rights.

The Preservation of Public Security (Detention) Regulations of 1979 allowed the detention of a person deemed “prejudicial to the public” by the President.³⁴⁵ Additionally, the President could confer power upon police officers or other authorised personnel to arrest and detain named in a presidential order.³⁴⁶ This Regulation did not provide any explanation as to what “prejudicial to the public” specifically entailed resulting in the President having complete freedom in assigning this status to individuals.

Furthermore, in 1981, the Preservation of Public Security (Detention) Regulations were passed, and the 1979 Detention Regulations were revoked. The 1981 Regulations allowed the exercise of detaining. Similarly, to the 1979 Detention Regulations, the President could order for specific individuals to be detained if they committed acts that were “prejudicial to public safety” and for the maintenance of

³⁴⁰ *See id.*

³⁴¹ *See* G.A. Res. 43/173 (Dec. 9, 1988) [hereinafter “OHCHR Body of Principles”]. It is noted that these definitions are consistent with earlier definitions set out in 1968, *supra* note 29.

³⁴² *Id.*

³⁴³ Though not applicable during this time period, Article 9(1) of the ICCPR prohibits “arbitrary arrest[s] or detention[s].” Likewise, Article 6 of the African Charter of Human and Peoples’ Rights prohibits unlawful arrests and detentions and Article 7 of the ACHR prohibits “arbitrary arrest or imprisonment”.

³⁴⁴ *See* UDHR, art. 9.

³⁴⁵ Preservation of Public Security (Detention) Regulations 1979 (4 May), in “1979 Detention Orders” [hereinafter “Detention Regulations of 1979”].

³⁴⁶ *Id.*

public order. Moreover, “Detainees ... saw their rights to liberty, freedom of movement, and due process decrease substantially: they could be moved from one place to another in Seychelles at the direction of the President, and would be guilty of an offence if they attempted to escape or help another individual targeted for detention”. Additionally, orders for detention under the 1981 Detention Regulations were similar to arrest warrants as the police were able to use them to arrest and detained individuals named in the orders.³⁴⁷ The Commission also notes that under these provisions, the President was allowed to, as per the 1981 Detention Regulations, restrict individuals from entering or leaving areas in Seychelles.³⁴⁸

It should be kept in mind that while some of these detentions may have been “lawful” under the regulations at this specific time, such actions could still have been arbitrary and amounted to violations for present purposes due to the incompatibility with human rights principles.

When assessing unlawfulness as discussed in General Provisions, the query is whether there was a law in place at the time to then establish whether the detention was arbitrary or if it occurred without due process. Moreover, it must be considered what the cause for detention was and if the power or basis of the detention was legal.

In the Seychelles context, the TRNUC has seen several cases regarding unlawful imprisonment or other deprivation of liberty. The TRNUC has heard cases with months of pretrial detention, which it has deemed a severe violation, and determined a period of 30 days’ confinement is a violation. In contrast, the TRNUC has also noted that a period of detention of only one hour has also amounted to a violation in specific circumstances. For example, in Case Determination No. 013: Anthony Hunt, the TRNUC found that the complainant was detained for one hour following specific targeting of the complainant by pro-Government supporters during a SPPF demonstration, during which the complainant was dragged by a rope amongst thousands of SPPF supporters calling for him to be killed. The TRNUC reasoned that the entire ordeal suffered by the complainant, including his hour-long detention, was the result of the actions of SPPF demonstrators who had been organized by the Government, and found that under the circumstances the terrorization of the complainant amounted to both “other acts” and unlawful deprivation of liberty

3. By a perpetrator: See General Provisions, *supra*, for the definition of “perpetrator” and required State nexus.

XVIII. Torture³⁴⁹

A. Elements:

³⁴⁷ Preservation of Public Security (Detention) Regulations, 1981, S. I. 110/81 (Cap. 36), sec. 2(2)-(3), 4 December 1981 [hereinafter “Detention Regulations of 1981”].

³⁴⁸ *Id.*, sec. 5.

³⁴⁹ TRNUC Act, sec. 2(8)(c).

1. The intentional infliction;
2. Of severe pain or suffering;
3. In a cruel, inhuman, or degrading manner;
4. By a perpetrator.

B. Explanation:

The UDHR prohibits “torture or cruel, inhuman or degrading treatment or punishment”.³⁵⁰ The Preamble to the 1979 Constitution reaffirms the IHRL torture prohibition, affirming that all persons have “the right not to be subjected to torture or to cruel, inhuman or degrading treatment”.³⁵¹

1. Intentional infliction:

In the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted by General Assembly resolution 3452 (XXX) of 9 December 1975, the definition contained in Article one requires the act in question to be “intentionally inflicted... for such purposes as obtaining from him or a third person information or confession”.³⁵² The Commission notes an assessment of the purpose for the act(s) comprising torture necessarily implicates an analysis of the perpetrator’s state of mind to determine whether the act inflicted was done deliberately to elicit information, to punish, to intimidate or coerce, or for reasons of discrimination.

In particular, the Committee emphasizes that the queries of intent and purpose do not involve a subjective inquiry into the motivations of the perpetrators, but rather must be objective determinations under the circumstances. It is essential to investigate and establish the responsibility of persons in the chain of command as well as that of the direct perpetrator(s).³⁵³

2. Severe pain or suffering:

The language, “severe pain or suffering,” is understood to refer to sufficiently grave or serious physical or mental pain or suffering. As noted in the OHCHR’s Manual, “. . . severe pain and suffering is difficult to quantify given the absence of ‘an objective element’ used to distinguish torture from cruel and unusual punishment”.³⁵⁴ Nevertheless, factors to be considered include the duration,

³⁵⁰ UDHR, at art. 5.

³⁵¹ 1979 Constitution, at Preamble.

³⁵² Declaration on the Protection of All Persons, art. 1, Dec. 9, 1975.

³⁵³ CAT, para. 9.

³⁵⁴ See *Interpretation of Torture in the Light of the Practice and Jurisprudence of International Bodies*, OHCHR 7 (2009), https://www.ohchr.org/Documents/Issues/Torture/UNVFVT/Interpretation_torture_2011_EN.pdf.

physical effects, and mental effects of the treatment, as well as the “sex, age and State of health of the victim”.³⁵⁵

3. In a cruel, inhuman, or degrading manner:

The TRNUC has affirmed in various cases that physical injuries inflicted on victims, for example during interrogation, generally constitute torture. Physical injuries such as severed hands, fingers, and heads amount to torture according to the TRNUC.³⁵⁶

Generally, torture is considered a step beyond cruel, inhuman, or degrading³⁵⁷ treatment or punishment.³⁵⁸ Circumstantial factors to be considered when assessing whether this threshold is met include age, sex and one’s State of health, as well as the “duration of the treatment, its physical or mental effects”.³⁵⁹ Generally, acute physical injury is necessary for cruel, inhumane, or degrading treatment to transcend into torture.³⁶⁰

However, acts that may not rise to the legal definition of torture but constitute cruel, inhuman, or degrading treatment or punishment may still be prohibited under international law and under the Act, particularly in the context of “other acts of a similar character causing suffering”.³⁶¹

4. By a perpetrator:

See General Provisions, *supra*, for the definition of “perpetrator” and required State nexus.

XIX. Rape³⁶²

A. Elements:

³⁵⁵ *Ireland v United Kingdom*, App. No. 5310/71, 2 Eur. Ct. H.R. 25. ¶62 (1979-80). In this case prisoners were subjected to varying levels of wall-standing, subjection to noise, sleep deprivation, food and drink deprivation and hooding this did not meet the “special stigma to deliberate inhuman treatment causing very serious and cruel suffering.

³⁵⁶ Case Determination 022: Olivia Vincent ¶ 217.

³⁵⁷ See Article 7 of the International Covenant on Civil and Political Rights (ICCPR) (outlawing and juxtaposing “torture” and “cruel, inhuman or degrading treatment or punishment”). See Article VI of the Inter-American Convention to Prevent and Punish Torture (in defining torture as “cruel, inhuman, or degrading treatment”), the Convention Against Torture (in regularly distinguishing “Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment” throughout), as well as Article V of the UDHR (outlawing and juxtaposing “torture” and “cruel, inhuman or degrading treatment or punishment.” UDHR, art. 5.

³⁵⁸ See Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment”); and Article II of the UN General Assembly Resolution 3452/91 of 9 December, 1975.

³⁵⁹ See *Ireland v. the United Kingdom*, 1978, Eur. Ct. of H.R. (Jan. 18, 1978).

³⁶⁰ See *id.* (whereby being subjected to noise, wall-standing, hooding, sleep deprivation, and deprivation of food and drink did not constitute torture).

³⁶¹ TRNUC Act, sec. 2(8)(m).

³⁶² TRNUC Act, sec. 2(8)(d).

1. The perpetrator;
2. Has carnal knowledge of a woman or girl;
3. Without consent, or by force or by means of threats or intimidation, or by means of false representations as to the nature of the act or identity where impersonating her husband.

B. Explanation:

1. Perpetrator: See General Provisions, *supra*, for the definition of “perpetrator” and required State nexus.
2. Has carnal knowledge of a woman or girl: The 1955 Penal Code of Seychelles specifies that rape requires that a person has “carnal knowledge” of a woman or girl.³⁶³ While it has been widely accepted that at the time in this context the offence was committed by a male perpetrator with a female victim, ‘Carnal knowledge’ is an ambiguous term, and where not defined in the act/code, it has been suggested the trier of fact was to decide on community standards at the time(s) as to whether the term references solely penile penetration of the vagina, or if it includes sodomy.³⁶⁴
3. Without consent or by force or by means of threats or intimidation, or by means of false representations as to the nature of the act or identity where impersonating her husband:
 - a. Without consent: means “non-consensual or non-voluntary on the part of the victim”. Without consent can also include misrepresentation as to the character of the act of the identity of the person doing the act where the perpetrator holds themselves out to be the husband of the victim.³⁶⁵
 - b. By force: For example, “whether the person used or threatened to use violence in the course of or for the purpose or committing the offence”.³⁶⁶ At common law force has been given its ordinary meaning and the trier of fact is to decide on the facts before it whether contact amounts to a use of force.³⁶⁷
 - c. Or penetration under threat of force or coercion to the victim: Threat of force or coercion includes when victims fear violence are: (a) under duress; (b) placed into or fearing detention; (c) oppressed psychologically or through abuse of power, against such person or another person; or, (d) taken advantage of within a coercive environment. The recognition of coercion as an essential element of the

³⁶³ Penal Code, *supra* note 32, sec. 130.

³⁶⁴ NSW *Crimes Act 1900* defined ‘Carnal knowledge’ as “proved upon penetration”; *Crimes Consolidation Act 1876* ‘proved upon penetration but it shall not be necessary to prove actual emission of seed.’ See further, Scott Long, *Before the Law: Criminalizing Sexual Conduct in Colonial and Post-Colonial Southern African Societies* (HRW Reports, 2003) (https://www.hrw.org/reports/2003/safrica/safriglhr0303-07.htm#P3216_662432).

³⁶⁵ Penal Code, *supra* note 32, sec. 130.

³⁶⁶ *Ibid.*

³⁶⁷ *R v Dawson & James* (1976) 64 Crim App R 170. The case gives the term its ordinary meaning and says that it is for the trier of fact to decide whether force is made out based on the case before them.

crime of rape and of other sexual crimes is a significant development because it recognizes an inequality between perpetrators and victims. The South African Law Commission has aptly described this development:

- i. Fear of violence differs from submission to sexual violence due to threatened violence. Fear of violence is a more subtle, but equally compelling, form of coercion as victims may silently and without complaint acquiesce in order to avoid further risk to their safety.
- d. Or by means of false representations as to the nature of the act or identity where impersonating her husband: This requires examination of what representations were made. Was the act held out to be of a medical nature or other nature to which the victim consented?

The latter part of this limb only applies to married women, and whether the perpetrator fraudulently held themselves out as the husband.

XX. Enforced Disappearance of Persons³⁶⁸

A. Elements:

1. Prolonged disappearance through the arrest, detention, abduction, or any other form of deprivation of liberty;
2. Followed either by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person;
3. Which places such a person outside the protection of the law;
4. By a perpetrator.

B. Explanation:

An enforced disappearance is an international crime and a severe violation of human rights, the prohibition of which is a *jus cogens* or peremptory norm of international law.³⁶⁹ It is commonly understood to entail violations of the following customary rights: right to life, liberty, and security of person; freedom from torture or cruel, inhuman, or degrading treatment or punishment; freedom from arbitrary arrest, detention, or exile; right to a fair and public hearing; effective remedy; and presumption of innocence.³⁷⁰

³⁶⁸ TRNUC Act, sec. 2(8)(e).

³⁶⁹ See International Convention for the Protection of All Persons from Enforced Disappearance [ICPPED], 20 December 2006, 2716 U.N.T.S. 3, *ratified* 18 January 2017. Although this Convention entered into force in Seychelles in 2017, many years after most disappearances alleged before the Commission, the Commission recalls that the violation of enforced disappearance is a continuing violation under international law, which lasts from the moment of abduction until such time as the fate or whereabouts of the missing person are established. As there was almost always no disclosure by the State as to the fate of the disappeared person in question, the Commission considers that the principles of the ICPPED can be applicable to its case determinations.

³⁷⁰ See UDHR, arts. 3, 5, 8-11.

The focus here is on both a prolonged disappearance and the State's intentional cover-up or denial of knowledge regarding the fate or whereabouts of the disappeared person.³⁷¹

1. Prolonged disappearance through the arrest, detention, abduction, or any other form of deprivation of liberty: The person must be disappeared, including by an arrest, detention, abduction, or any other form of deprivation of liberty. See that violation for more information on the actual deprivation. Regarding length of time, enforced disappearances are often ongoing³⁷² and the whereabouts or fate of the individual remain unknown, though any length of time can meet this definition where the latter elements are made out.
2. A refusal to acknowledge the deprivation of liberty or concealment of the fate or whereabouts of the disappeared person: As part of the above disappearance, the disappeared person's family and friends must be without any knowledge of the person's whereabouts. The State's refusal to give information on the victim's fate is a crucial piece of this element.³⁷³
3. Which places such a person outside the protection of the law: Where the person has been detained without acknowledgement, it is impossible for the family or others to access a lawyer on their behalf, or to challenge the legality of the detention.³⁷⁴ In these circumstances there is no recourse to challenge the detention, and no means to hold the detainers to account for any other violation to the detainee's rights that may occur.
4. Perpetrator: See General Provisions, *supra*, for the definition of "perpetrator" and required State nexus.

XXI. Kidnapping³⁷⁵

A. Elements

1. The taking of a person;
2. Through force or fraud;
3. By means of a deprivation of liberty;
4. Without consent;

³⁷¹ See the violation of unlawful imprisonment or other deprivation of liberty for further information on that element of this violation and the list of general provisions for further information on what a state actor includes.

³⁷² This is the classic example of the continuing violations doctrine in international human rights law. See Working Group on Enforced or Involuntary Disappearances, *General Comment on Enforced Disappearance as a Continuous Crime*, U.N. Doc A/HRC/16/48 (Jan. 26, 2011).

³⁷³ Disappeared persons G.A. Res. 33/173 at 158. Deep concern was expressed about this in General Assembly resolution on disappeared persons that the lack of information from competent authorities, and the impact this had on relatives.

³⁷⁴ 'Human Rights and the Phenomenon of Disappearances: Hearings Before the Subcommittee on International Organizations of the House 96th Congress 1st Session 79 (1979) (statement of Patricia Fagen, Exec. Director Amnesty International)' as in Naomi Roht-Arriaza 'State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law' *California Law Review* (1990) Vol 78, No. 2 pp 449-513, 456..

³⁷⁵ TRNUC Act, sec. 2(8)(f).

5. For the purpose of;
 - a. Removing the person from Seychelles;
 - b. Removing the person from guardianship; or
 - c. Otherwise done with malicious intent;
6. By a perpetrator.

B. Explanation

The violations of kidnapping, unlawful/arbitrary deprivation of liberty, and enforced disappearance have significant overlap, as they all impact a victim's rights to liberty, security of person, and recognition before the law.³⁷⁶ Further, each may amount to an arbitrary arrest and/or detention, *i.e.*, Section 2(8)(b) of the TRNUC Act. There are distinct elements to each, however.

Chapter XXV – Offences Against Liberty of the Seychelles Penal Code (1955) lays out the offences that amount to a kidnapping and narrowly defining abduction as “Any person, who by force compels, or by deceitful means induces, any person from any place, is said to abduct that person.”³⁷⁷ Kidnapping is set out across five provisions in the Penal Code, which has the effect of adding an additional element of purpose beyond those commonly seen in the common law.³⁷⁸

These additional considerations of purpose and taking will be necessary for unlawful/arbitrary deprivation of liberty to become kidnapping. One slight nuance is that unlawful/arbitrary deprivation is more likely (though not required) to be done pursuant to a proclamation/decree.³⁷⁹ Later jurisprudence of kidnapping has suggested the distinction in domestic law is that kidnapping is an aggravated form of false imprisonment or a combination of abduction and false imprisonment.³⁸⁰ The distinction between enforced disappearance and a kidnapping is the requirement for there to be a refusal to acknowledge the deprivation of liberty or concealment of the fate or whereabouts of the disappeared person.³⁸¹

1. The taking of a person: The penal code of Seychelles does not contain an express definition of kidnapping, though the common law sets out the following definition: In *R v Wellard* it was considered sufficient that the perpetrator remove the victim from the place the victim wished to be. In the same case, it was decided that there was no minimum distance, however the trier of fact was to consider the circumstances of the specific case.³⁸² This requirement is largely similar to “abduction” as set out in Chapter XXV of the Penal code.

³⁷⁶ UDHR, arts. 3, 6, 7.

³⁷⁷ Penal Code, *supra* note 32, sec. 241.

³⁷⁸ *See id.*, sec. 239, 240, 243, 244, and 245.

³⁷⁹ That is not to say that a kidnapping could not also be made out where a detainment is made pursuant to a proclamation/decree.

³⁸⁰ *Davis v R* [2006] NSWCCA 392. Noting that this is a much later judgement, it is only used to describe the nature of kidnapping and illustrate the difference of kidnapping and other offences.

³⁸¹ *See above*, section regarding enforced disappearance.

³⁸² [1978] 1 WLR 921.

2. Through force or fraud:
 - a. Force: Force is to be decided by taking into consideration whether particular contact or conduct amounts to a use of force or a threat of force.³⁸³ “Force” is to be given its ordinary meaning.
 - b. Fraud: To establish fraud, one looks to the information presented to the victim and whether the misrepresentations were sufficient to compel the individual to submit to the will of the perpetrator.³⁸⁴ Such misrepresentation vitiates the victim’s consent. Throughout the case law of fraud, in kidnapping the perpetrator has misrepresented their authority or where they were taking the victim. This will often look similar to a ‘but for’ test—but for the fraud, would the victim have agreed to be taken?
3. By means of a deprivation of liberty: See above discussion on deprivation of liberty.
4. Without Consent: It has been established through case law regarding kidnapping that consent is vitiated where the ensuing taking and deprivation of liberty are done against the victim’s will.³⁸⁵ Further, in *R v D* it was concluded that the consent need only relate to the fact of being taken.³⁸⁶ For instance, where the victim had agreed to go somewhere but was then detained against their will, the offence would simply be false imprisonment.
5. For the purpose of:
 - a. Removing the person from the Seychelles: Section 239 of the Penal Code states that the kidnapping must take the victim “beyond the limits of the Seychelles.
 - b. Removing the person from lawful guardianship: Section 240 of the Penal Code states:

Any person who takes or entices any minor under fourteen years of age if a male, or under sixteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.
 - c. Otherwise done with malicious intent: The *mens rea* requirement for offences falling under this limb includes with the intent to murder,³⁸⁷ wrongly confine;³⁸⁸ with intent to do harm, slavery, etc.³⁸⁹
6. By a perpetrator: See General Provisions, *supra*, for the definition of “perpetrator” and required State nexus.

³⁸³ *R v Dawson & James* [1976] 64 Cr App R 170.

³⁸⁴ *Wellard* [1978] 1 WLR 921

³⁸⁵ *R v D* [1984] AC 778.

³⁸⁶ *Id.*

³⁸⁷ Penal Code, *supra* note 32, sec. 243.

³⁸⁸ *Id.*, sec. 244.

³⁸⁹ *Id.*, sec. 245.

XXII. Forceful Eviction from Legally Owned Building or Land³⁹⁰

A. Elements:

1. The removal of a person;
2. From the land the person owns or rents;
3. Against the person's will or the will of those living on their land, including by involuntary coercion, physical force, illegitimate colour of authority, or other means for a temporary or permanent basis;
4. By a perpetrator.

B. Explanation:

Evictions entail the forcible removal of a person from a dwelling the person owns on a permanent or temporary basis, in violation of their right to property.³⁹¹ This can be done through physical force or misuse of authority. The TRNUC considers that even when alternative accommodation is offered, one can still be subjected to forced eviction as the occupant had no intention of leaving. There have been cases before the TRNUC where occupants were re-housed from their owned homes to rental accommodations against their will. These occupants were required to pay rent as the Government argued the land was needed for other purposes. These cases were nested within the constitutional protections contained under Article 17, ensuring that they would not be considered wrongful evictions. The Commission also notes that due to the inherent violation of the victim's right to property, as this violation requires that the victim actually legally owned the dwelling from which they were evicted, the Commission commonly conceptualises events that might constitute this violation as the broader violation of unjustified acquisition or loss of property, as the majority of cases before it were spurred by or resulted in a taking by the Government of the property in question.

1. The removal of a person: The removal must be real (rather than threatened), i.e., the person no longer had physical access to or use, enjoyment, etc., of their property.
2. From the land the person owns or rents: In addition to legally owned land, IHRL permits the use of eviction in the circumstance of "persistent non-payment of rent or of damage to rented property without any reasonable cause," but, in doing so, IHRL reciprocally implies that wrongful eviction from rented land would constitute forced eviction.
3. Against the person's will or the will of those living on their land, including by involuntary coercion, physical force, illegitimate colour of authority, or other means for a temporary or permanent basis: The taking lacked the consent of the owner/rented of the property, and had an element of force involved. Forced evictions include both physical and unlawful or arbitrary coercion by authority. The African Commission of Human and Peoples' Rights defines forced evictions to

³⁹⁰ TRNUC Act, sec. 2(8)(g).

³⁹¹ See UDHR, art. 17. 'Forced Evictions' Commission of Human Rights Resolution 1993/77 E-CN 4 Res. 1993/77 (explaining that "[t]he practice of forced eviction involves the involuntary removal of persons, families and groups from their homes and communities, resulting in increased levels of homelessness and in inadequate housing and living conditions").

include “acts and/or omissions involving the coerced or involuntary displacement of individuals”.³⁹²

The Commission notes, however, that even when alternative accommodation is offered, one can still be subjected to forced eviction as the occupant had no intention of leaving. There have been cases before the TRNUC where occupants were rehoused from their owned homes to rental accommodations against their will. These occupants were required to pay rent as the Government argued the land was needed for other purposes.

4. By a perpetrator: See General Provisions, *supra*, for the definition of “perpetrator” and required State nexus.

XXIII. Unjustified Acquisition or Loss of Property or Business³⁹³

A. Elements:

1. The unlawful or arbitrary taking or appropriation;
2. Of the physical, real, financial, intellectual, or other property or business of one or more persons;
3. That results in the deprivation or interference of use of the property or business by that person;
4. Without adequate, prompt, and effective compensation;
5. By a perpetrator.

B. Explanation:

The fundamental right to property is recognised in the UDHR, which provides as follows: “(1) [e]veryone has the right to own property alone as well as in association with others, and (2) [n]o one shall be arbitrarily deprived of [their] property”.³⁹⁴ Other regional human rights authorities have similar provisions. For example, the European Convention of Human Rights recognises the right to peaceful enjoyment of one’s possessions,³⁹⁵ and the Permanent Court of International Justice held that expropriation is only “unlawful” if the State is expressly forbidden to do so or the acts of expropriation do not satisfy the requirements of form or substance stipulated in an international instrument.³⁹⁶

It should be noted that this violation includes both the words “acquisition” and “loss”. The existence of both together implies a distinction between the two, and this the Commission has largely interpreted as a matter of perspective. “Acquisition” describes the (unjustified) conduct of the State actor vis-à-vis the act of acquiring the property, most frequently including takings done under the Lands Acquisition Act, 1977. On the other hand, “loss” puts the emphasis on the victim to describe their state of not having the benefit of the property, and is

³⁹² See U.N. Resolution 1993/77.

³⁹³ TRNUC Act, sec. 2(8)(h).

³⁹⁴ UDHR, art. 17.

³⁹⁵ ECHR, art. 1 of Protocol 1.

³⁹⁶ The Permanent Court, case concerning certain German interests in Polish Upper Silesia (1926 and 1928).

more frequently used in the context of a forced sale or other “*de facto* taking” by the Government.

1. The unlawful or arbitrary taking or appropriation:

There must be a loss of property, however temporary, or an attempt at a deprivation of property. The threat of the loss of property can cause distress and undue mental anguish for the person who is being threatened. This corresponds to an interference in their use of the property.

For example, the TRNUC has seen cases in which Seychellois citizens of old age or in ill health feel threatened by State acquisition of their property. Given the citizens’ age or health status, the fear of acquisition—which, under the circumstances, is already unreasonable—often then prompts acceptance of undervalued compensatory offers, the result of which is the loss of property. This frequently simultaneously accompanies the loss of property (often with deep sentimental value), as a result of distress and undue mental anguish on behalf of the State.

The Lands Acquisition Act, 1977, broadly set out that the State may acquire any land if it is in the national interest to do so.³⁹⁷ However, this was only in effect in 1983, when the Lands Acquisition Act was modified. This modification changed the “public purpose” element to “national interest”, the latter being broader and more elusive. Moreover, the modification resulted in the complete removal of the right to challenge acquisitions. That section now provided “No person shall challenge the validity or legality of any acquisition of land under this Act on any ground whatsoever and no court shall, in any proceedings and on any ground whatsoever, have jurisdiction to pronounce upon the validity or legality of such acquisition.”³⁹⁸

2. Of the physical, real, financial, intellectual, or other property or business of one or more persons:

Under Seychelles law, land includes “land covered with water, all things growing on land and buildings and other things permanently affixed to land and also an undivided share in land...”³⁹⁹ Personal property law covers other forms of property, such as cars, businesses, bank accounts, and personal items, *inter alia*.

The TRNUC has seen cases where the Government rented out property it acquired unlawfully to René supporters.⁴⁰⁰ According to the Penal Code, any person that receives or retains property while knowing or having reason to believe that property was unlawfully obtained commits a criminal act.⁴⁰¹

3. That results in the deprivation or interference of the use of the property or business by that person:

³⁹⁷ Lands Acquisition Act, 1977, Act 10 of 1977, *repealed* by Act 9 of 1996.

³⁹⁸ Lands Acquisition Act, *supra* note 89, sec. 7(1).

³⁹⁹ Land Registration Act, Cap. 107.

⁴⁰⁰ Case Determination 054: Marie Jessy Mona Souyave.

⁴⁰¹ Penal Code, *supra* note 32, sec. 309.

“Use” means the ability to enjoy an object in accordance with its purpose.⁴⁰² Use also gives the owner an exclusive right to his property. Thus, State interference is not allowed without following the appropriate rules for the deprivation of the property.⁴⁰³ “Deprivation” corresponds to the act of obtaining/expropriating property, and “interference” is merely an *attempt* to obtain/expropriate. However, “interference” can also entail trespass, nuisance, or other violations of property rights.

4. Without adequate, prompt, and effective compensation:

The Lands Acquisition Act provided that land and buildings are valued based on the use, exploitation and letting of the land. The Act stated that the numbers of these elements will be taken from the three years prior to the compulsory acquisition.⁴⁰⁴ Consequently, this meant that land and buildings used in an incompatible way with the line set out in the Act would not qualify for compensation or would be valued below their actual worth. In 1978, the Land Acquisitions Act was drastically amended, specifically the method of assessing compensation for land acquired by the Government. The new method valued land not containing buildings based on the average income derived from the land. This enabled the Government to acquire properties for a significant lesser amount than the land was actually worth. The market value was ignored and therefore the prime land on, for example, acquire Beau Vallon beach was valued at nil.

The TRNUC has seen in Case 054, for instance, that the Government offered more than SR 1,000,000 below the actual value of the land. This shows that victims were not offered adequate or just price for their compulsorily acquired land.

The courts of Seychelles have since determined that for any land not being returned, the compensation is to be the fair market value of the property at the time the claim is made.⁴⁰⁵

5. By a perpetrator:

See General Provisions, *supra*, for the definition of “perpetrator” and required State nexus.

XXIV. Wrongful Denial of the Right to Employment⁴⁰⁶

A. Elements:

1. The repeated refusal to hire, promote, otherwise interfere with or refuse a person;
2. In pursuit of employment in that person’s chosen field;

⁴⁰² In the *Sporrong and Lönnroth* case, the ECHR Commission and Court recognized that prohibitions on construction interfered with the use of property.

⁴⁰³ Eur. Comm. H.R., decision of 16 December 1974 (admissibility), *Müller v. Austria*, No. 5849/72, DR 1, p. 46, and Comm. Report of 1 October 1975, DR 3, p. 25.

⁴⁰⁴ Land Acquisition Act of Seychelles, 1978, Second Schedule, Assessment of Compensation part 2 and 3.

⁴⁰⁵ *Poole v Government of the Seychelles & Ors* (CP 4 /2012) [2016] SCCC 9 (17 May 2016), available at <https://seylia.org/sc/judgment/constitutional-court/2016/9/>.

⁴⁰⁶ TRNUC Act, sec. 2(8)(i).

3. For reasons other than business necessity or some other reasonable and articulable basis;
4. By a perpetrator.

B. Explanation:

Article 23 of the UDHR reflects the customary international law-based right “to work, [and] to free choice of employment”.⁴⁰⁷ The ILO Declaration of Philadelphia reinforces this right, guaranteeing individuals “the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity”.⁴⁰⁸

This violation can be found in either the public or private sector, as the Commission has received evidence that not only were people denied security clearance, preventing them from working in the public sector, but their employees in the private sector were also sometimes contacted and directed to terminate their employment and have no further contact. The Commission also notes that the denial of security clearance had impacts in the private-sector employment of a person, as it served in many instances as a black-listing of that person and thus a public signal that they were branded an “undesirable” by the Government, thus rendering any association with that person fraught with political and physical dangers.

1. Repeated refusal to hire, promote, or otherwise interfere with or refuse a person: This violation goes beyond a single wrongful termination. Rather, the State must have continually or systematically interfered or blacklisted the person, usually by way of denial of security clearance to work in the public sector, so that they were consistently denied the ability to effectively pursue their career in their chosen field. This can include actions such as barring an individual from public service when their chosen career is non-existent in the private sector or contacting foreign organisations to prevent their hiring under a guise of diplomacy.⁴⁰⁹ Another example is refusing to grant appropriate licenses and necessary governmental authorisation for the individual to be able to pursue their career and/or harassment by local authorities when the individual tries to promote their career.⁴¹⁰
2. In pursuit of employment in that person’s chosen field: The ILO Employment Policy Convention guarantees “the fullest possible opportunity for each worker to qualify for, and to use [their] skills and endowments in a job for which [they] [are] well suited”.⁴¹¹ This right extends beyond mere termination, as it also extends to State-imposed obstructions, whether blacklisting or promotion caps, designed to inhibit one’s ability to achieve promotion or full productivity.⁴¹²
3. For reasons other than business necessity or some other reasonable and articulable basis: This prong essentially follows a general discrimination analysis: when discrimination or retaliation is alleged, it falls on the state to disprove that claim or

⁴⁰⁷ UDHR, art. 23.

⁴⁰⁸ Int’l Labour Conference, 26th, Declaration of Philadelphia, art. 2(a), May 10, 1944.

⁴⁰⁹ See, e.g., Case Determination No. 039: Luc Chang-Ko.

⁴¹⁰ See, e.g., Case Determination No. 028: Alain Ernesta.

⁴¹¹ Employment Policy Convention, 1964 (No. 122), art. 1(ii)(c).

⁴¹² See Article I of ILO C122 - Employment Policy Convention, 1964 (No. 122).

provide other reasonable justification for the (continued) termination or denial. Retaliation is heavily contextual and will be determined by a weighing of the evidence and proximate cause analysis (would the person have been fired/denied employment but for their action or state of being, such as party loyalty). In the Seychelles, during the period of time in question retaliation often happened on political grounds, including on real or perceived support, or lack thereof, of the ruling party.

Article 1 of the ILO's Discrimination Convention defines discrimination to include "any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation".⁴¹³ For purposes of the case determinations, the focus has mostly centred around discrimination based on real or perceived political opinion.

4. By a perpetrator: This violation is limited to either (1) jobs with the State from which the complainant was continuously denied employment, or (2) instances where the State systematically or continuously interfered with private employment, with "State" or "state actor" being the same State nexus as per the General Provisions above.

XXV. Wrongful Termination of Employment⁴¹⁴

A. Elements:

1. The dismissal of a person from their position at work;
2. Whether by unlawful or arbitrary means, including but not limited to reasons of retaliation or discrimination;
3. By a perpetrator.

B. Explanation:

This violation implicates all the same rights as discussed in the foregoing section. As above, this violation can apply to either the public or private sector, should a State actor take some act or omission that results in the unlawful termination of a person.

1. The dismissal of a person from their position at work: Unlike the previous violation, this violation applies to discrete events where the State made a direct termination, if the person was a State employee, or indirect termination, if the State interfered with private employment resulting in the person's termination. For example, a wrongful termination occurs when the State forces a person into exile or arbitrary or unlawful detention and the person loses his or her job as a result of such absence. Another common example in the context of the Coup d'état involves the firing of well-qualified State personnel who have maintained an upward career trajectory for years and are inexplicably fired without cause. Terminations should thus be

⁴¹³ Discrimination (Employment and Occupation) Convention, art. 1, 1958 (No. 111).

⁴¹⁴ TRNUC Act, sec. 2(8)(j).

examined against the backdrop of the political climate in the Seychelles in combination with a review of the individuals' professional development, employment file, and any factors regarding how in demand the service at hand was. When analysing terminations, it is important to identify the following factors: (a) the State provided reasonable justifications for termination; (b) the terminated employee was notified of any deficiencies in their work performance; (c) the terminated employee had a sufficient opportunity to correct any identified professional deficiencies; and (d) whether there was a degree of "foul play" insofar as the State had reason to know of the terminated employee's political beliefs and may have acted against that interest.

2. Whether by unlawful or arbitrary means, including but not limited to reasons of retaliation or discrimination: As in the previous violation, this prong essentially follows a general discrimination analysis:⁴¹⁵ Article 1 of the ILO's Discrimination Convention defines discrimination to include "any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation."⁴¹⁶ The Commission notes that when discrimination or retaliation is alleged, it falls on the State to disprove that claim or provide other reasonable justification for the (continued) termination or denial. Retaliation is heavily contextual, and within the context of Seychelles, retaliation was more often than not motivated on political grounds, including on real or perceived support, or lack thereof, of the ruling party. Notably, this link of retaliation with politically discriminatory motivations was a necessary factor of bringing any such allegation within the mandate of the Commission.
3. By a perpetrator: This violation is limited to either (1) jobs with the State from which the complainant was terminated, or (2) instances where the State interfered with private employment, resulting in the person's termination, with "State" or "state actor" being the same State nexus as per the General Provisions above.

XXVI. Forced Exile⁴¹⁷

A. Elements:

1. The expulsion, deprivation of access to re-enter, or removal of a national from his or her country;
2. Unlawfully or arbitrarily through either direct deportation or expulsion or by making living conditions unbearable for the national to stay in the country due to ongoing or potential persecution, victimisation, violence, or other difficulties;
3. By a perpetrator.

⁴¹⁵ Article 1(ii)(c) of the ILO's Employment Policy Convention, 1964 (No. 122).

⁴¹⁶ Discrimination (Employment and Occupation) Convention, art. 1, 1958 (No. 111).

⁴¹⁷ TRNUC Act, sec. 2(8)(k).

B. Explanation:

The violation of forced exile is fundamentally a violation of the rights, at the level of customary international law, to freedom of movement and to re-enter one's country.⁴¹⁸

Forced exile may occur directly or indirectly. First, direct force exile occurs when a State actor expels, deports, or causes a national of that country to flee the country due to the State actor's victimisation of, persecution of, or incitement of fear of violence or harm toward the person or their family. Second, forced exile can occur indirectly for individuals who lived or travelled abroad when alleged human rights violations occurred if such persons: (1) had a genuine fear that returning to their home country would put them in danger; and (2) due to such fear, did not return to their home country.

1. The expulsion, deprivation of access to re-enter, or removal of a national from his or her country: This prong essentially describes the acts of fleeing and State-refused re-entry. As few other legal bases were available at the time, the UDHR is the most relevant in protecting against arbitrary exile.⁴¹⁹ For the exile to occur, an individual or family must have physically left Seychelles for a sufficient period of time that they either do not intend to return or have the ability or expectation to live in the destination country. The period of time will depend on a weighing of evidence in each case.
2. Unlawfully or arbitrarily through either direct deportation or expulsion or by making living conditions unbearable for the national to stay in the country due to ongoing or potential persecution, victimisation, violence, or other difficulties: Under international law, those who fled the Seychelles due to persecution, victimisation, or other forms of discrimination would be considered refugees.⁴²⁰ Under the 1951 Refugee Convention, a refugee is a person:

[O]wing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.⁴²¹

In the context of the Commission's case determinations, the finding that a person was granted asylum or refugee status in another country was considered very persuasive evidence of persecution in Seychelles.

Essentially, ongoing discrimination in the employment sector and other actions that would prevent an individual from being able to provide for themselves and their families may amount to forced exile if the individual felt they must leave the country in order to support his or herself, and then actually left.⁴²² The deprivation of property such as a farm or other property that provided income

⁴¹⁸ See UDHR, arts. 9 (freedom from arbitrary exile), 13 (freedom of movement and right to return to one's country).

⁴¹⁹ UDHR, art. 9.

⁴²⁰ Convention and Protocol Relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S. 137. Seychelles ratified both the Convention and Protocol on 23 April 1980.

⁴²¹ *Id.*, art. 1(A)(2).

⁴²² See, e.g., Case Determination No. 053: Mivonne Barallon.

or refusal to grant the licenses necessary to run a farm or business may also force an individual into exile in order to find a new means of support.

In general, the right of a citizen to re-enter their country of origin is well established in international law. The UDHR outlines citizens' rights to enter their country with some exceptions based on public safety, criminal offences, and lack of citizenship status.⁴²³ The UDHR further observes that "[e]veryone has the right to leave any country, including his own, and to return to his country."⁴²⁴ In addition to the UDHR, the African Charter on Human and Peoples' Rights likewise recognises the right of return, qualifying that "[t]his right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality"⁴²⁵ In Seychelles, this right to enter or return to one's country was either directly or indirectly denied: having fled Seychelles, many were subsequently denied the renewal of their Seychelles passport, amounting to a restriction on the right of return and freedom of movement. Those to whom passports were not denied, but who still fled in response to unbearable living conditions, were nonetheless indirectly denied those same rights; the act of fleeing in the first place, along with the element of victimisation or persecution, is enough to constitute forced exile.

3. By a perpetrator: See General Provisions, *supra*, for the definition of "perpetrator" and required State nexus.

XXVII. Abuse of Office by a Government Official, Including the Executive, Judiciary or Legislature⁴²⁶

A. Elements:

1. The use of the capacity and powers of a public office;
2. To restrict the specific rights or freedoms of a person or persons;
3. In a manner that strayed from the proper purpose of the law or of the official's position;
4. By a State official.

B. Explanation:

This violation commonly (though not exclusively) includes discrimination or victimisation based on real or perceived political opinion or that is otherwise legally baseless

⁴²³ UDHR, art. 23.

⁴²⁴ UDHR, art. 13. Returning to a country may entail more than just being able to return to the country of one's birth or citizenship.

⁴²⁵ African Charter on Human and Peoples' Rights, art. 12(2). State obligation to permit citizens' access to their country deepens when considering the Convention on the Status of Aliens (1928) and its Article VI, which maintains that "States are required to receive their nationals expelled from foreign soil who seek to enter their territory. Convention on the Status of Aliens, art. VI (1928).

⁴²⁶ TRNUC Act, sec. 2(8)(1).

or arbitrary. It often but not always belies a sense of public corruption or unjust enrichment on the part of Government actors, to the detriment of the victim. The violation could take the form of, e.g., improper actions under the orders of President René, a Minister, or another government official; administrative abuses; denials of pensions; gross failures of the police to investigate certain acts; etc. The Commission notes that equality before the law, non-discrimination, and freedom from fear of Government abuse are basic principles of human rights law enshrined in the UDHR.⁴²⁷ Any State action that violates these principles may fall under this violation. Furthermore, this violation is often implicated in other violations, such as unlawful imprisonment, forced exile, and the employment violations, among others.

The 1979 Constitution did not provide any guidelines on the actual power of the President beyond vesting executive (and some legislative) authority in the President.⁴²⁸ The Constitution did provide that the President was allowed to make appointments to judicial organs. For example, René was able to appoint temporary judges to the Supreme Court⁴²⁹ and permanent judges to the Court of Appeals.⁴³⁰ As mentioned earlier, the 1979 Constitution lacked in providing basic human rights to Seychellois citizens allowing government officials to rather easily disregard such rights and abuse the power conferred upon them by their Governmental position.

1. The use of the capacity and powers of a public office: The official in question must act under colour of law, acting as they would be expected to act by virtue of their office.
2. To restrict the specific rights or freedoms of a person or persons: Some damage must have been caused to an individual that allows them to recover as a victim. This may include lack of due process or equality before the law, discrimination, persecution or victimisation, violence or threat of violence, or many other factors, and it is via this element that other violations under the Act may be implicated.
3. In a manner that strayed from the proper purpose of the law or of the official's position: This element describes the wrongful nature of the action and impact. That is, even though the act was done under colour of law or office, it was baseless, without actual authority, lacked due process, or was otherwise unlawful or arbitrary. The restriction of the rights of a person could be legitimate and lawfully imposed, but restrictions should be prohibited if imposed for an improper purpose, *i.e.*, not for the purpose indicated in domestic or international law. Specific government acts could serve a double purpose—to restrict human rights on allegedly legitimate and lawful grounds and an “ulterior purpose” which is: (a) not prescribed by the relevant provisions of the UDHR; (b) is different from that proclaimed by the authorities; or (c) is one which can be reasonably inferred from the context.

⁴²⁷ UDHR, arts. 1, 2, 7, 12.

⁴²⁸ 1979 Constitution, art. 18.

⁴²⁹ *Id.*, art. 68(2).

⁴³⁰ *Id.*, art. 74(1).

Therefore, case determinations should consider this violation in a holistic manner by assessing both the action and the impact, as well as the other violations through which it might be implicated. In Seychelles, many government officials, including but not limited to ministers and judges, may have understood the underlying ‘expectations’ of the René regime and acted in accord with these, as ministers in particular were granted broad discretion to act even without direct orders. In doing so unlawfully or arbitrarily, they would have strayed from their appropriate role and the State would face liability for this violation. There is no requirement that the executive must have given direct orders for this violation to have been committed.

4. **By a State official:** Unlike the other violations, this one specifically requires that the perpetrator be a Government official employed by one of the three branches of the Government of Seychelles. This **does not** include the general or indirect State nexus that applies to other violations.

XXVIII. Other Acts of a Similar Character Causing Suffering, or Injury to Body or to Mental or Physical Health⁴³¹

A. Elements

1. The infliction of suffering or injury to body or to mental or physical health;
2. By a perpetrator.

B. Explanation:

The Commission has considered this violation to be a catch-all provision meant to include any other conduct not otherwise defined in the other violations that is yet conducted by State actors or with a State nexus. It generally contemplates a human rights violation of sufficient significance, on par with the other violations under the TRNUC Act, as to warrant redress. The conduct must be sufficiently grave or severe, such as victimisation or harassment by the State that causes physical or mental damage (injury, pain, suffering). This violation may also be implicated in other violations, such as forced exile, e.g., as this conduct can consequently force the victim to flee for their safety and livelihood. Among the rights violated in this regard are the customary international law-based rights to life, prohibition of slavery, freedom from torture, equal protection, and protection from arbitrary interference and attacks upon honour and reputation.⁴³²

1. **The infliction of suffering or injury to body or to mental or physical health:** The Commission has generally interpreted this violation to comprise of suffering or injury of sufficient severity to merit its own category. The fundamental human rights being violated are therefore the basic rights to life, to freedom from torture

⁴³¹ TRNUC Act, sec. 2(8)(m).

⁴³² UDHR, arts. 3, 4, 5, 7, 12.

to bodily integrity, to freedom from slavery, and to due process and fair trial standards.

In Seychelles, factors to be considered include being followed and harassed by army, militia, or other state security forces; general victimisation on political grounds; denial of the right to seek medical treatment overseas; or other such behaviour. The TRNUC has seen this in multiple cases.

The severity necessary may include either or both physical and mental trauma and suffering. The intentional infliction of physical pain which is substantial but below the torture threshold is likely to be sufficiently severe. Additionally, an incident that was harrowing, and/or made the victim fear for their life or bodily integrity, or the life or bodily integrity of another close to them, is also likely severe enough to meet this violation.⁴³³

2. By a perpetrator: See General Provisions, *supra*, for the definition of “perpetrator” and required State nexus.

⁴³³ See, e.g., Case Determination No. 013: Anthony Hunt; Case Determination No. 035: Jules Stravens.

Third Republic: 24 June 1993 – Present

Applicable Law: For the period of the Third Republic, 1993-present, the Commission considers that the applicable legal framework for purposes of case determinations includes but is not limited to the following: Constitution of 1993; Penal and Criminal Procedure Codes; Police Force Act 1959 as amended; Defence Forces Act 1980; International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; and the customary international law principles reflected in the Universal Declaration of Human Rights.

XXIX. Unlawful Killing⁴³⁴

A. Elements:

1. The unlawful deprivation of life of one or more persons;
2. By a perpetrator.

B. Explanation:

The main inquiry for unlawful killing is the lawfulness of the killing and the State nexus of the killing. Therefore, in addition to the previously noted definitions of “unlawful” and “arbitrary,”⁴³⁵ two elements must be addressed with unlawful killing: it must be established on a balance of probabilities that (1) State officials were directly responsible for the death and (2) the killing does not fall within one of the lawful exceptions under the Constitution of 1993.

1. Unlawful deprivation of the life of one or more persons: “Unlawful” should be understood as per the General Provisions section above. Article 13 of the Seychelles 1976 Independence Order (“Constitution of 1976”) enshrines the protection of the right to life and carves out various exceptions for “lawful” killings.⁴³⁶ The International Covenant on Civil and Political Rights (ICCPR) states further: “[n]o one shall be arbitrarily deprived of his life”.⁴³⁷ The unlawfulness or arbitrariness of the killing is generally determined by the human rights-based principles of necessity, proportionality, and non-discrimination. The unlawfulness or arbitrariness of the killing is generally determined by the standard human rights-based approach of settling the principles of necessity, proportionality, and non-discrimination.

The TRNUC has made determinations in numerous cases regarding the violation of unlawful killing. While the Commission highlights that under the above elements,

⁴³⁴ TRNUC Act, sec. 2(8)(a).

⁴³⁵ See above the general definitions of “unlawful” and “arbitrary”.

⁴³⁶ Constitution of 1976, art. 13 (2) (under the 1976 Constitution, killing was “lawful”: “(a) for the defence of any person from violence or the defence of property; (b) in order to effect a lawful arrest or prevent the escape of a person lawfully detained; (c) for the purpose of suppressing a riot, insurrection or mutiny; or (d) in order to prevent the commission by that person of a criminal offence, or if [the person] die as the result of a lawful act of war”) [hereinafter “1976 Constitution”].

⁴³⁷ International Covenant on Civil and Political Rights [ICCPR], 16 December 1966, 999 U.N.T.S. 171, art. 6.

no *mens rea* is needed to find a violation of the right to life by the State, the Commission has considered a *mens rea* of intent or knowledge, determining in at least one case that the perpetrator deliberately intended to kill the victim,⁴³⁸ as additional evidence to support a finding of a violation.⁴³⁹

2. By a perpetrator: As with all human rights violations under the TRNUC Act, to be a violation, the unlawful killing must have been committed by a perpetrator with some link to the Government. However, even acts lacking on their face such a State nexus can still amount to a violation if there is a failure of the State to prevent or punish the conduct. For instance, the act of a person who relies upon their political connections to ensure they will not be held accountable for murder, or relies on systemic impunity afforded to persons supportive of the Government, and then is so protected, could still amount to a violation by the State. In particular, the Commission has found that in Seychelles, the police were often instructed not to pursue persons who committed crimes in a personal capacity because of their political support of the Government.

XXX. Unlawful Imprisonment or Other Deprivation of Physical Liberty⁴⁴⁰

A. Elements:

1. An arrest, detention, imprisonment, or other deprivation of one's physical liberty;
2. Executed unlawfully, arbitrarily, or without due process;
3. By a perpetrator.

B. Explanation:

This violation stems from the right to personal liberty. Article 3 of the Universal Declaration of Human Rights (UDHR) provides that “[e]veryone has the right to life, liberty and security of person”.⁴⁴¹

1. An arrest, detention, imprisonment, or other deprivation of one's personal liberty: The OHCHR's *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (OHCHR Body of Principles) defines arrest as an “act of apprehending a person for the alleged commission of an offence or by the

⁴³⁸ Case Determination 001: Dorothy Chang-Him et al.

⁴³⁹ The Commission similarly notes that the concept of unprovoked murder, or in ‘cold blood’, is a universally accepted criminal offence under international human rights norms,⁴³⁹ which is also recognised by virtually all domestic legal systems, including the Seychelles Penal Code, as a criminal offence. Laws of Seychelles, Title V B, Cap. 73: PENAL CODE, sec. 192-196 (Feb. 1, 1955); *see also* Case Determination 001: Dorothy Chang-Him et al.

⁴⁴⁰ TRNUC Act, sec. 2(8)(b).

⁴⁴¹ UDHR, art. 3. Article 6 of the African Charter of Human and Peoples' Rights parallels, noting, “Every individual shall have the right to liberty and to the security of his person.” Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights* (“Banjul Charter”), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982). Additionally, Article 7 of the American Convention on Human Rights follows suit, guaranteeing the “right to personal liberty and security,” and one’s “physical liberty.” “Arbitrary arrest[s] and imprisonment[s]” thus fall within the confines of prohibited behavior by the American Convention on Human Rights.

action of an authority”⁴⁴² While “detention” refers to being under police or State custody for any amount of time, “imprisonment” is specifically being detained as the result of a conviction.⁴⁴³ “Other deprivation of liberty” is used to capture all other unlawful or arbitrary custody situations that may exist beyond the scope of detention, arrest, or imprisonment.

The 1993 Constitution protects the right to personal liberty and security.⁴⁴⁴ However, the 1993 Constitution also provides for standard exceptions to personal liberty, such as in the case(s) of criminal charges, court orders, rehabilitation for those using illicit substances, reasonable suspicion of a criminal offense, public health concerns, immigration violations, and protection of minors.⁴⁴⁵ Outside of these exceptions, any deprivation of liberty is generally considered unlawful. The concern under domestic law centres around the justification, or lack thereof, of the initial arrest and whether the detention following the arrest followed the appropriate procedures.

Various IHRL treaties also address arrest, detention, imprisonment, and personal liberty. First, the ICCPR preserves the right to personal liberty, stating, in its Article 9(1): “[e]veryone has the right to liberty and security of person . . . [and] [n]o one shall be subjected to arbitrary arrest or detention”.⁴⁴⁶ Second, the African Charter of Human and Peoples’ Rights parallels this, noting, “[e]very individual shall have the right to liberty and to the security of his person”.⁴⁴⁷ Lastly, Article 7 of the American Convention on Human Rights follows suit, guaranteeing the “right to personal liberty and security,” and one’s “physical liberty.”⁴⁴⁸ “Arbitrary arrest[s] and imprisonment[s]” thus fall within the confines of all international and regional human rights frameworks.

2. Executed unlawfully, arbitrarily, or without due process: This involves consideration of the “arbitrariness” prong when analysing this violation. Arbitrary arrests, detentions, and imprisonments are outlawed by various international conventions. Under Article 9 of the UDHR, “[n]o one shall be subjected to arbitrary arrest, detention or exile”.⁴⁴⁹ The ICCPR Article 9 notes, “[n]o one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law”⁴⁵⁰ Article 9(1) of the ICCPR prohibits “arbitrary arrest[s] or

⁴⁴² G.A. RES. 43/173, Dec. 9, 1988 (hereinafter “OHCHR Body of Principles”).

⁴⁴³ *Id.*

⁴⁴⁴ Constitution of 1993, art. 18(1) (“Every person has a right to liberty and security of the person”).

⁴⁴⁵ Constitution of 1993, art. 18(2). For more information regarding arbitrary detentions, see also UGAD, *About arbitrary detention*, Supra note 7.

⁴⁴⁶ Article 9 of the ICCPR. U.N General Assembly, *International Covenant on Civil and Political Rights*, Dec. 16, 1966, S. Exec. Rep. 102-23, 999 U.N.T.S. 171.

⁴⁴⁷ Organization of African Unity (OAU), *African Charter on Human and Peoples’ Rights (“Banjul Charter”)*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

⁴⁴⁸ American Convention on Human Rights “Pact of San José, Costa Rica” [ACHR], art. 7, Nov. 22, 1969, 1144 U.N.T.S. 123.

⁴⁴⁹ Though not applicable during this time period, other international conventions have similar provisions. Article 9(1) of the ICCPR prohibits “arbitrary arrest[s] or detention[s].” Likewise, Article 6 of the African Charter of Human and Peoples’ Rights prohibits unlawful arrests and detentions and Article 7 of the ACHR prohibits “arbitrary arrest or imprisonment”.

⁴⁵⁰ ICCPR, art. 9. For more information regarding arbitrary detentions, see also UGAD, *About arbitrary detention*.

detention[s]”⁴⁵¹ Likewise, the ACHR, prohibits unlawful arrests and detentions and “arbitrary arrest or imprisonment”.⁴⁵²

Even if the arrest is lawful and not arbitrary, due process must still be upheld to ensure there is no violation of rights. Due process during arrest generally includes the rights to:

- (1) be notified of the charge;
- (2) be afforded details regarding arrest at the time thereof;
- (3) appeal detainment;
- (4) be received promptly before a judicial officer; and
- (5) be tried within a reasonable amount of time.⁴⁵³

Under relevant domestic law, Article 18 of the 1993 Constitution includes due process protections such as the right of the detained to be promptly informed of the reasons for their arrest or detention, the right to counsel, the right of detainees to be informed of their rights, and the right to be brought before a court without undue delay.⁴⁵⁴

What constitutes “reasonable” time between detention and trial is not clear-cut under IHRL. Reasonableness generally “depend[s] upon all the circumstances”.⁴⁵⁵ International courts and treaty bodies have established that being brought before a judicial body within four days of detention is reasonable,⁴⁵⁶ while allowing a week to pass without being brought before a judge or relevant judicial authority, even in murder cases, is not necessarily reasonable.⁴⁵⁷ On the other hand, the Inter-American Court permits detainment for only 24 hours, with the only exception being the allotment of 15 days for terrorism charges.⁴⁵⁸ The 1993 Constitution aligns with such international practices: “A person who is arrested or detained, if not released, shall be produced before a court within twenty-four hours of the arrest or detention or, having regard to the distance from the place of arrest or detention to the nearest court or the non-availability of a judge or magistrate, or force majeure, as soon as is reasonably practicable after the arrest or detention.”⁴⁵⁹

⁴⁵¹ ICCPR art. 9(1).

⁴⁵² ACHR, arts. 6, 7.

⁴⁵³ ICCPR, art. 9 (outlining that those arrested have certain rights, including being “promptly informed of any charges against” them at “the time of arrest,” being “brought promptly before a judge or other officer authorized by law to exercise judicial power” and being “entitled to trial within a reasonable time or to release.”); U.N. General Assembly, *International Covenant on Civil and Political Rights*, Dec. 16, 1966, S. Exec. Rep. 102-23, 999 U.N.T.S. 171.

⁴⁵⁴ Constitution of 1976, arts. 18(3), 18(4) and 18(5).

⁴⁵⁵ See *Case of Fox, Campbell and Hartley v. the United Kingdom*, 1990, Eur. Ct. Hum. Rts.

⁴⁵⁶ See CCPR, Communication No. 90/1981, *L. Magana ex-Philibert v. Zaire*, 1990, U.N. Doc. CCPR/C/OP/2, at 124.

⁴⁵⁷ See CCPR, Communication No. 702/1996, *C. McLawrence v. Jamaica*, 1996, CCPR/C/60/D/702/1996, 26 April 1996.

⁴⁵⁸ See Inter-Am. Court HR, *Castillo Páez Case v. Peru*, judgment of November 3, 1997.

⁴⁵⁹ Constitution of 1993, art.18(5).

3. By a perpetrator: See General Provisions, *supra*, for the definition of “perpetrator” and required State nexus.

XXXI. Torture⁴⁶⁰

A. Elements:

1. The intentional infliction;
2. Of severe pain or suffering;
3. In a cruel, inhuman, or degrading manner;
4. By a perpetrator.

B. Explanation:

Article 16 of the 1993 Constitution prohibits torture: it provides that “[e]very person has a right to be treated with dignity worthy of a human being and not to be subjected to torture, cruel, inhuman or degrading treatment or punishment”.⁴⁶¹ Article 5 of the African Charter prohibits “torture, cruel, inhuman or degrading punishment and treatment” and although it does not define the term, it borrows heavily from the Convention against Torture (CAT) and other international instruments. This is thus consistent with the UDHR and with CAT, the latter of which defines torture as follows:

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.⁴⁶²

1. Intentional infliction: The language of “intentionally inflicted” used in CAT (Article I) is a common feature in international definitions of torture, further endorsed by, *inter alia*, the African Commission on Human Rights and Peoples’ Rights⁴⁶³. As such, there is a requirement that the act in question is deliberate, and mind must be turned to the intention of the perpetrator.

The Commission notes that the consensus definition of torture requires the act of torture to be “intentionally inflicted”; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment defines “torture” as follows:

⁴⁶⁰ TRNUC Act, sec. 2(8)(c).

⁴⁶¹ Constitution of 1993, art. 16.

⁴⁶² Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [CAT], art. 1(1), 1465 U.N.T.S. 85 (1984), *ratified by Seychelles* on 5 May 1992.

⁴⁶³ *See, e.g., The Robben Island Guidelines*, African Commission on Human and Peoples’ Rights, 2003, adopted 14 Feb 2002.

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.⁴⁶⁴

The Commission notes an assessment of the purpose for the act(s) comprising torture necessarily implicates an analysis of the perpetrator's state of mind to determine whether the act inflicted was done deliberately to elicit information, to punish, to intimidate or coerce, or for reasons of discrimination.

In particular, the Committee emphasises that elements of intent and purpose in article 1 do not involve a subjective inquiry into the motivations of the perpetrators, but rather must be objective determinations under the circumstances. It is essential to investigate and establish the responsibility of persons in the chain of command as well as that of the direct perpetrator(s).⁴⁶⁵

2. Severe pain or suffering: The language "severe pain or suffering" is understood to refer to sufficiently grave or serious physical or mental pain or suffering. Similar language can be found throughout CAT.⁴⁶⁶ As noted in the OHCHR's Manual, "severe pain and suffering is difficult to quantify given the absence of 'an objective element' used to distinguish torture from cruel and unusual punishment".⁴⁶⁷ Nevertheless, factors to consider include the duration, physical effects, and mental effects of the treatment, as well as the "sex, age and State of health of the victim".⁴⁶⁸

Pain and suffering, as described by the Convention Against Torture, can include physical or mental pain, an interpretation supported by the Inter-American Convention to Prevent and Punish Torture ("physical or mental capacities"). The Committee Against Torture likewise recognizes victimhood for not only those who suffered "physical or mental injury" and "emotional suffering," but also for those who suffered "economic loss or substantial impairment of their fundamental rights".⁴⁶⁹

⁴⁶⁴ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [CAT], art. 1(1), 1465 U.N.T.S. 85 (1984) (ratified by Seychelles on 5 May 1992).

⁴⁶⁵ CAT, para. 9.

⁴⁶⁶ CAT, *supra* note 5.

⁴⁶⁷ See *Interpretation of Torture in the Light of the Practice and Jurisprudence of International Bodies*, OHCHR 7 (2009), https://www.ohchr.org/Documents/Issues/Torture/UNVFVT/Interpretation_torture_2011_EN.pdf.

⁴⁶⁸ See *id.*; see also *Ireland v. United Kingdom*, App. No. 5310/71, 2 Eur. Ct. H.R. 25. ¶62 (1979-80). Examples on page 7 of the manual gives of severe pain and suffering include rape and Palestinian hooding (covering the head with a hood) as well as the following cited cases. European Court of Human Rights, Communication 21987/93, *Aksoy v. Turkey*, 1996, 18 December 1996, para 64; European Court of Human Rights, Communication 23178/94, *R Aydin v. Turkey*, 1995, 25 September 1995 para 86.

⁴⁶⁹ Committee Against Torture, *General Comment No. 3 (2012), Implementation of Article 14 by States Parties*, art. III.

3. In a cruel, inhuman or degrading manner: Generally, torture is considered a step beyond cruel, inhuman, or degrading⁴⁷⁰ treatment or punishment.⁴⁷¹ Circumstantial factors to be considered when assessing whether this threshold is met include age, sex, and one's State of health, as well as the "duration of the treatment, its physical or mental effects."⁴⁷² As such, torture is viewed as "an aggravated and deliberate form of cruel, inhuman, or degrading treatment".⁴⁷³ Generally (but not always), acute physical injury is necessary for cruel, inhumane or degrading treatment to transcend into torture.⁴⁷⁴

However, acts that may not rise to the legal definition of torture but still constitute cruel, inhuman, or degrading treatment or punishment may still be prohibited under international law, specifically under Article 16 of CAT and as a violation under the TRNUC Act in the context of "other acts of a similar character causing suffering".⁴⁷⁵

The Commission has affirmed in various cases that physical injuries inflicted on victims, for example during interrogation, generally constitute torture. Physical injuries such as severed hands, fingers, and heads amount to torture according to the Commission.⁴⁷⁶

4. By a perpetrator: See General Provisions, *supra*, for the definition of "perpetrator" and required State nexus.

XXXII. Rape⁴⁷⁷

A. Elements:

1. The perpetrator;
2. Penetrates a body orifice of another;
3. For a sexual purpose;

⁴⁷⁰ See ICCPR, art. 7 (outlawing and juxtaposing "torture" and "cruel, inhuman or degrading treatment or punishment"). See also Inter-American Convention to Prevent and Punish Torture, art. VI (in defining torture as "cruel, inhuman, or degrading treatment"); CAT, *passim* (in regularly distinguishing "Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment" throughout); UDHR, art. 5 (outlawing and juxtaposing "torture" and "cruel, inhuman or degrading treatment or punishment").

⁴⁷¹ See OHCHR, Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by G.A. Res. 3452 (XXX) of 9 December 1975, art. 1(2) ("Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment").

⁴⁷² See *Ireland v. the United Kingdom*, 1978, Eur. Ct. of H.R. (18 January 1978).

⁴⁷³ *Istanbul Protocol*, Office of the United Nations High Commissioner For Human Rights, HR/P/PT/8/Rev.1 (2004) In which its stated "[Tortures] purpose is to destroy deliberately not only the physical and emotional well-being of individuals but also. In some instances, the dignity and will of entire communities", 1

⁴⁷⁴ See, European Court on Human Rights, *Ireland v. the UK*, *Supra*, n. 64 (whereby being subjected to noise, wall-standing, hooding, sleep deprivation, and deprivation of food and drink did not constitute torture); See further, *Istanbul Protocol*, 1.

⁴⁷⁵ TRNUC Act, sec. 2(8)(m).

⁴⁷⁶ Case Determination 022: Olivia Vincent, para. 217.

⁴⁷⁷ TRNUC Act, sec. 2(8)(d).

4. Without consent.

B. Explanation:

N.B.: Taking note of the legislative history of Rape, these elements apply for complaints occurring after 12 August 1996. If the complaint arises prior to this please refer to the Violation Elements for rape as they appear in the 1979-1993.

1. The Perpetrator: See General Provisions, *supra*, for the definition of “perpetrator” and required State nexus.

2. Penetrates a body orifice of another: This element requires the perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body. In *S v Pierre* it was found that this

includes any such penetration made by using any other part of one’s body or by using any other external object or material whether solid, liquid or gas, which entity may even include radiations such as laser beams etc. What is important here is the act of penetration using any tangible entity and the purpose for which such penetration is made.

3. For a sexual Purpose: The Seychelles Penal code requires that the penetration has been for a sexual purpose. This is further supported by the decision in *S v Pierre*, which held as follows:

What is important here is the act of penetration using any tangible entity and the purpose for which such penetration is made. If it is made for a sexual purpose, then it complete and constitutes the act of sexual assault as defined in section 130 (2) (d) of the Penal Code. It does not matter, what is being used for the penetration and, which orifice in the body is penetrated.⁴⁷⁸

4. Without consent: Section 130 (3) of the Penal Code states that an act is done without consent where:

The person’s consent was obtained by misrepresentation as to the character of the act or the identity of the person doing the act;

The person is below the age of fifteen years; or

The person’s understanding and knowledge are such that the person was incapable of giving consent.⁴⁷⁹

In the judgement of *Julie v R*, the Seychelles Court of Appeal noted that the Penal Code is derived from the Criminal Code of Queensland, and draws on authority from that jurisdiction.⁴⁸⁰ The Criminal Code of Queensland suggests that consent is vitiated by force, threat or intimidation, fear of bodily harm, exercise of authority, and misrepresentations. In *R v Malone* (1998), Cr.L.R 834 suggests

⁴⁷⁸ (71 of 2003) [2007] SCSC 12 (07 October 2007).

⁴⁷⁹ Penal Code 130(3)

⁴⁸⁰ *Nicholas Julie v The Republic* Criminal Appeal SCA 21/2017 (Dissent) It must be noted that in *Julie v R* Twomey J.A was in dissent, however, the majority disagreed on evidentiary points and not the definition of consent put forward by Twomey J.A.

that lack of consent could be deduced from any evidence and need not be demonstrated through specific words or acts.

Where a person is below the age of 15, there is a strong line of precedent that consent was vitiated.⁴⁸¹ Further, it is express that consideration may be turned to the victim's level of understanding of what they are consenting to in section 130(3)(c).

XXXIII. Enforced Disappearance of Persons⁴⁸²

A. Elements:

1. Prolonged disappearance through the arrest, detention, abduction, or any other form of deprivation of liberty;
2. Followed either by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person;
3. Which places such a person outside the protection of the law;
4. By a perpetrator.

B. Explanation:

An enforced disappearance is an international crime and a severe violation of human rights, the prohibition of which is a *jus cogens* or peremptory norm of international law.⁴⁸³ It is commonly understood to entail violations of the following customary rights: right to life, liberty, and security of person; freedom from torture or cruel, inhuman, or degrading treatment or punishment; freedom from arbitrary arrest, detention, or exile; right to a fair and public hearing; effective remedy; and presumption of innocence.⁴⁸⁴

The focus in this violation is on both a prolonged disappearance and the State's intentional cover-up or denial of knowledge regarding the fate or whereabouts of the disappeared. In 1993, the General Assembly passed the Declaration on the Protection of All Persons from Enforced Disappearance, in which it similarly defined the act of enforced disappearance:

⁴⁸¹ *R v Auguste* (2 of 2005) (2 of 2005) [2007] SCSC 7 (05 August 2007); *Republic v Madeleine* (56 of 2003) [2005] SCSC 6 (07 July 2005).

⁴⁸² TRNUC Act, sec. 2(8)(e).

⁴⁸³ "No State shall practice, permit or tolerate enforced disappearances." UN Comm. on Human Rights, *Declaration on the Protection of All Persons from Enforced Disappearance*, 28 February 1992, E/CN.4/RES/1992/29 ("Declaration on Disappearances"). See also International Convention for the Protection of All Persons from Enforced Disappearance [ICPPED], 20 December 2006, 2716 U.N.T.S. 3, ratified 18 January 2017. Although this Convention entered into force in Seychelles in 2017, many years after most disappearances alleged before the Commission, the Commission recalls that the violation of enforced disappearance is a continuing violation under international law, which lasts from the moment of abduction until such time as the fate or whereabouts of the missing person are established. As there was almost always no disclosure by the State as to the fate of the disappeared person in question, the Commission considers that the principles of the ICPPED can be applicable to its case determinations.

⁴⁸⁴ See ICCPR, arts. 2(3), 6, 7, 9, 14; see also UDHR, arts. 3, 5, 8-11.

[P]ersons are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of Government, or by organi[s]ed groups or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government, followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty, which places such persons outside the protection of the law.⁴⁸⁵

The International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED) drew on this encapsulation, codifying the definition of enforced disappearance as follows:

The arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.⁴⁸⁶

1. Prolonged disappearance through the arrest, detention, abduction, or any other form of deprivation of liberty: The person must be disappeared, including by an arrest, detention, abduction, or any other form of deprivation of liberty.⁴⁸⁷ Regarding length of time, enforced disappearances are often ongoing⁴⁸⁸ and the whereabouts or fate remain unknown, though any length of time can meet the standard.
2. Followed either by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person: As part of the above disappearance, the disappeared person's family and friends must be without any knowledge of the person's whereabouts. The State's refusal to give information on the victim's fate is a crucial element of this. The Committee on enforced disappearances affirmed "the right of any victim to know the truth about the circumstances of an enforced disappearance and the fate of the disappeared person".⁴⁸⁹

There are only four situations when States parties may restrict the right to information about persons deprived of liberty:

- i. When the transmission of the information would adversely affect the privacy of the person;⁴⁹⁰

⁴⁸⁵ Declaration on the Protection of All Persons from Enforced Disappearance, G.A. Res. A/Res/47/133 (adopted 12 Feb 1993).

⁴⁸⁶ ICPPED, art. 2.

⁴⁸⁷ See the violation of unlawful imprisonment or other deprivation of physical liberty above for more information on the actual deprivation.

⁴⁸⁸ This is the classic example of the continuing violations doctrine in international human rights law. See Working Group on Enforced or Involuntary Disappearances, *General Comment on Enforced Disappearance as a Continuous Crime*, 26 January 2011, U.N. Doc A/HRC/16/48.

⁴⁸⁹ Declaration on the Protection of All Persons from Enforced Disappearance, *supra* note 74.

⁴⁹⁰ Given the pressing need of the person for the outside world to know of his or her fate as a safeguard for that person's safety, there should be a presumption that would prevail over any supposed privacy concerns, absent a compelling reason to the contrary; See also relevant discussion during the drafting of the Convention, reported at

- ii. When the transmission of the information would adversely affect the safety of the person who has been deprived of liberty;⁴⁹¹
 - iii. When the transmission of the information would hinder a criminal investigation;
 - iv. Or for other equivalent reasons in accordance with the law.
3. Which places such a person outside the protection of the law: Where the person has been detained without acknowledgement, it is impossible for the family or others to access a lawyer on their behalf, or to challenge the legality of the detention.⁴⁹² In these circumstances there is no recourse to challenge the detention, and no means to hold the detainers to account for any other violation to the detainees' rights that may occur.
4. By a perpetrator: See General Provisions, *supra*, for the definition of "perpetrator" and required State nexus.

XXXIV. Kidnapping⁴⁹³

A. Elements:

- 1. The taking of a person;
- 2. Through force or fraud;
- 3. By means of a deprivation of liberty; and
- 4. Without consent;
- 5. For the purpose of;
 - a. Removing the person from Seychelles;
 - b. Removing the person from guardianship; or
 - c. Otherwise done with malicious intent;
- 6. By a perpetrator.

B. Explanation

The violations of kidnapping, unlawful/arbitrary deprivation of liberty, and enforced disappearance have significant overlap, as they all impact a victim's rights to liberty, security

U.N. Doc. E/CN.4/2005/66, para. 92; UN Doc E/CN.4/2006/57, paras. 17 and 136; and Pollard, "A lighter shade of black? 'Secret detention' and the UN Disappearances Convention" in Gilbert, Hampson, Sandoval (eds), *The Delivery of Human Rights* (Abingdon: Routledge, 2011), pp. 153-154 (emphasising that concern for privacy of the detainee should not be invoked to restrict information against the will of the detainee him- or herself).

⁴⁹¹ Given that in most instances the provision of information immediately after the deprivation of liberty about the person is the most effective way to protect his or her safety, the number of instances when publicity would adversely affect the person's safety is likely to be very low. Again, concern for the safety of the detainee should not be invoked as a ground for restricting information against the detainee's own wishes.

⁴⁹² *Boucherf v Algeria* (27 April 2006) Human Rights Committee, 9.5-9.7.

⁴⁹³ TRNUC Act, sec. 2(8)(f).

of person, and recognition before the law.⁴⁹⁴ Further, each may amount to an arbitrary arrest and/or detention, *i.e.*, Section 2(8)(b) of the TRNUC Act. There are distinct elements to each, however, which does not prevent there being significant overlap, though care should be paid to ensure that the violation found truly encapsulates the conduct and multiple violations are not found for the same act(s).

Chapter XXV – Offences Against Liberty of the Seychelles Penal Code (1955) lays out the offences that amount to a kidnapping and narrowly defining abduction as “Any person, who by force compels, or by deceitful means induces, any person from any place, is said to abduct that person.”⁴⁹⁵ Kidnapping is set out across five provisions in the Penal Code, which has the effect of adding an additional element of purpose beyond those commonly seen in the common law.⁴⁹⁶

These additional considerations of purpose and taking will be necessary for unlawful/arbitrary deprivation of liberty to become kidnapping. One slight nuance is that unlawful/arbitrary deprivation is more likely (though not required) to be done pursuant to a proclamation/decreed.⁴⁹⁷ Later jurisprudence of kidnapping has suggested the distinction in domestic law is that kidnapping is an aggravated form of false imprisonment or a combination of abduction and false imprisonment.⁴⁹⁸ The distinction between enforced disappearance and a kidnapping is the requirement for there to be a refusal to acknowledge the deprivation of liberty or concealment of the fate or whereabouts of the disappeared person.⁴⁹⁹

1. The taking of a person: The Penal Code of Seychelles does not contain an express definition of kidnapping, though the common law sets out the following definition: In *R v Wellard* it was considered sufficient that the perpetrator remove the victim from the place the victim wished to be. In the same case, it was decided that there was no minimum distance, however the trier of fact was to consider the circumstances of the specific case.⁵⁰⁰ This requirement is largely similar to “abduction” as set out in Chapter XXV of the Penal code.
2. Through force or fraud:
 - a. Force: Force is to be decided by the trier of fact, taking into consideration whether particular contact or conduct amounts to a use of force or a threat of force.⁵⁰¹ “Force” is to be given its ordinary meaning.
 - b. Fraud: To establish fraud, one looks to the information presented to the victim and whether the misrepresentations were sufficient to compel the

⁴⁹⁴ ICCPR, arts. 9, 10, 14; UDHR, arts. 3, 6, 7.

⁴⁹⁵ Penal Code, *supra* note 33, sec. 241.

⁴⁹⁶ *See id.*, sec. 239, 240, 243, 244, 245.

⁴⁹⁷ That is not to say that a kidnapping could not also be made out where a detainment is made pursuant to a proclamation/decreed.

⁴⁹⁸ *Davis v R* [2006] NSWCCA 392. This judgement is used to describe the nature of kidnapping and illustrate the differences of kidnaping to other violations.

⁴⁹⁹ See discussion on the violation of enforced disappearance.

⁵⁰⁰ [1978] 1 WLR 921.

⁵⁰¹ *R v Dawson & James* [1976] 64 Cr App R 170.

individual to submit to the will of the perpetrator.⁵⁰² Such misrepresentation vitiates the victim's consent. Throughout the case law of fraud, in kidnapping the perpetrator has misrepresented their authority or where they were taking the victim. This will often look similar to a 'but for' test—but for the fraud, would the victim have agreed to be taken?

3. By means of a deprivation of liberty: See above discussion on deprivation of liberty.
4. Without Consent: It has been established through case law regarding kidnapping that consent is vitiated where the ensuing taking and deprivation of liberty are done against the victim's will.⁵⁰³ Further, in *R v D* it was concluded that the consent need only relate to the fact of being taken.⁵⁰⁴ For instance, where the victim had agreed to go somewhere but was then detained against their will, the offence would simply be false imprisonment.
5. For the purpose of:
 - a. Removing the person from the Seychelles: Section 239 of the Penal Code states that the kidnapping must take the victim "beyond the limits of the Seychelles.
 - b. Removing the person from lawful guardianship: Section 240 of the Penal Code states:

Any person who takes or entices any minor under fourteen years of age if a male, or under sixteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.
 - c. Otherwise done with malicious intent: The *mens rea* requirement for offences falling under this limb includes with the intent to murder,⁵⁰⁵ wrongly confine;⁵⁰⁶ with intent to do harm, slavery, etc.⁵⁰⁷
6. By a perpetrator: See General Provisions, *supra*, for the definition of "perpetrator" and required State nexus.

XXXV. Forceful Eviction from Legally Owned Building or Land⁵⁰⁸

A. Elements:

1. The removal of a person;

⁵⁰² *Wellard* [1978] 1 WLR 921

⁵⁰³ *R v D* [1984] AC 778.

⁵⁰⁴ *Id.*

⁵⁰⁵ Penal Code, *supra* note 33, sec. 243.

⁵⁰⁶ *Id.*, s. 244.

⁵⁰⁷ *Id.*, s. 245.

⁵⁰⁸ TRNUC Act, sec. 2(8)(g).

2. From the land the person owns or rents;
3. Against the person's will or the will of those living on their land, including by involuntary coercion, physical force, illegitimate colour of authority, or other means for a temporary or permanent basis;
4. By a perpetrator.

B. Explanation:

Evictions entail the forcible removal of a person from a dwelling on a permanent or temporary basis, in violation of their right to property.⁵⁰⁹ This can be done through physical force or misuse of authority. The prohibition of forced evictions stems from Article 11(1) of the International Convention on Economic, Social, and Cultural Rights (ICESCR), which guarantees "an adequate standard of living . . . and housing."⁵¹⁰ As noted by General Comment No. 4 of the Committee on Economic, Social and Cultural Rights (CESCR), as part of the guarantee of the right to adequate housing, the ICESCR guarantees the right to the "Legal Security of Tenure".⁵¹¹ It is this sub-right that "guarantees legal protection against forced eviction".⁵¹² In its General Comment No. 7 on the right to adequate housing, CESCR defines forced eviction as the "permanent or temporary removal against [the] will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection".⁵¹³

The TRNUC considers that even when alternative accommodation is offered, one can still be subjected to forced eviction as the occupant had no intention of leaving. There have been cases before the TRNUC where occupants were re-housed from their owned homes to rental accommodations against their will. These occupants were required to pay rent as the Government argued the land was needed for other purposes. These cases were nested within the constitutional protections contained under Article 17, ensuring that they would not be considered wrongful evictions. The Commission also notes that due to the inherent violation of the victim's right to property, as this violation requires that the victim actually legally owned the dwelling from which they were evicted, the Commission commonly conceptualises events that might constitute this violation as the broader violation of unjustified acquisition or loss of property, as the majority of cases before it were spurred by or resulted in a taking by the Government of the property in question.

1. The removal of a person: For more explanation on "perpetrator" and the required State nexus, see the General Provisions section above. The removal must be real (rather than threatened), *i.e.*, the person no longer had physical access to or use, enjoyment, etc., of their property.

⁵⁰⁹ The OHCHR's website defines "forced evictions" as "the permanent or temporary removal against [the] will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection."

⁵¹⁰ International Covenant on Economic, Social and Cultural Rights [ICESCR], art. 11(1), Dec. 19, 1966, 993 U.N.T.S. 3. The ICESCR was ratified by Seychelles on 5 May 1992.

⁵¹¹ See ICESCR, *General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)*, 13 December 1991, para. 8(a).

⁵¹² See *ibid.*

⁵¹³ See ICESCR, *General Comment No. 7: The right to adequate housing (Art.11.1): forced evictions*, 20 May 1997, para. 3.

2. From the land the person owns or rents: In addition to land legally owned, IHRL permits the use of eviction in the circumstance of “persistent non-payment of rent or of damage to rented property without any reasonable cause,” but, in doing so, IHRL reciprocally implies that wrongful eviction from rented land would constitute forced eviction.⁵¹⁴
3. Against the person’s will or the will of those living on the person’s land, including by involuntary coercion, physical force, illegitimate colour of authority, or other means for a temporary or permanent basis: The taking lacked the consent of the owner/rented of the property, and had an element of force involved. Forced evictions include both physical and unlawful or arbitrary coercion by authority. The African Commission of Human & Peoples’ Rights defines forced evictions to include “acts and/or omissions involving the coerced or involuntary displacement of individuals”.⁵¹⁵

The TRNUC considers that even when alternative accommodation is offered, one can still be subjected to forced eviction as the occupant had no intention of leaving or the circumstances were otherwise unjust. There have been cases before the TRNUC where occupants were re-housed from their owned homes to rental accommodations against their will. These occupants were generally required to pay rent as the Government argued the land was needed for other purposes. Moreover, the wrongful transfer of one’s title, under government authority, for instance, can be considered a means of wrongful eviction.⁵¹⁶
4. By a perpetrator: See General Provisions, *supra*, for the definition of “perpetrator” and required State nexus.

XXXVI. Unjustified Acquisition or Loss of Property or Business⁵¹⁷

A. Elements:

1. The unlawful or arbitrary taking or appropriation;
2. Of the physical, real, financial, intellectual, or other property or business of one or more persons;
3. That results in the deprivation or interference of use of the property or business by that person;
4. Without adequate, prompt, and effective compensation;
5. By a perpetrator.

⁵¹⁴ See Guideline no. 6 in the OHCHR’s Guidelines for the Implementation of the Right to Adequate Housing.

⁵¹⁵ See Principles and Guidelines on the Implementation of Economic, Social, and Cultural Rights in the African Charter on Human and Peoples’ Rights, Part I, Paragraph 1(A), 2011. Further, UN Resolution 2004/28, when discussing the consequences of forced evictions, characterized the practice as “[t]he often violent practice of forced eviction,” thus inferring that it can be practiced through non-violent means.

⁵¹⁶ See *Cyprus v. Turkey*, 2001, Eur. Ct. of H.R.

⁵¹⁷ TRNUC Act, sec. 2(8)(h).

B. Explanation:

The fundamental right to property is recognised in the UDHR, which provides as follows: (1) “[e]veryone has the right to own property alone as well as in association with others,” and (2) “[n]o one shall be arbitrarily deprived of [their] property”.⁵¹⁸ Other regional human rights authorities have similar provisions. For example, the European Convention of Human Rights recognises the right to peaceful enjoyment of one’s possessions,⁵¹⁹ and the Permanent Court of International Justice has held that expropriation is only “unlawful” if the State is expressly forbidden to do so or the acts of expropriation do not satisfy the requirements of form or substance stipulated in an international instrument.⁵²⁰ Article 26 of Seychelles’ 1993 Constitution also protected against deprivation of property, as discussed below.⁵²¹

It should be noted that this violation includes both the words “acquisition” and “loss”. The existence of both together implies a distinction between the two, and this the Commission has largely interpreted as a matter of perspective. “Acquisition” describes the (unjustified) conduct of the State actor vis-à-vis the act of acquiring the property, most frequently including takings done under the Lands Acquisition Act, 1977. On the other hand, “loss” puts the emphasis on the victim to describe their state of not having the benefit of the property, and is more frequently used in the context of a forced sale or other “*de facto* taking” by the Government.

1. The unlawful or arbitrary taking or appropriation: There must be a loss of property, however temporary, or an attempt to deprive of property. The threat of the loss of property can cause distress and undue mental anguish for the person who is being threatened. This corresponds to an interference in their use of the property.

For example, the TRNUC has seen cases in which Seychellois citizens of old age or ill health feel threatened by State acquisition of their property. Given the citizens’ age or health status, the fear of acquisition—which, under the circumstances, is already unreasonable—often then prompts acceptance of undervalued compensatory offers, the result of which is the loss of property.

The 1993 Constitution, in Article 26, provides that every person has a right to property, subject to certain limitations such as enforcing a court order or judgement, in satisfaction of a penalty or tax, or in the public interest, among others.⁵²² That provision also contains four conditions that must be met for the State to be able to compulsorily acquire private property, as follows:

- (1) reasonable notice of the State’s intention and purpose of acquiring the property must be provided to persons with an interest in the property;
- (2) the taking must not only be necessary in the public interest, but more specifically must be “for the development or utilization of the property to

⁵¹⁸ UDHR, art. 17.

⁵¹⁹ ECHR, art. 1 of protocol 1.

⁵²⁰ The Permanent Court, case concerning certain German interests in Polish Upper Silesia (1926 and 1928).

⁵²¹ Constitution of 1993, art. 26.

⁵²² *Id.*

promote public welfare or benefit or for public defense, safety, order, morality or health or for town and country planning”;

(3) reasonable justification must be given for any hardships resulting to persons with a property interest; and

(4) the State must pay prompt and adequate compensation.

Further, persons with interests in property previously acquired by the State (including by the René regime) also now had a constitutional right under the 1993 Constitution, specifically in Part III of Schedule 7 (“Compensation for Past Land Acquisitions, under Schedule 7 on “Transitional” matters), to file suit in the Supreme Court either directly or in appeal from other administrative decisions and thereby challenge the legality of the acquisition(s).⁵²³ An acquisition might be unlawful if it is inconsistent with the domestic law of Seychelles.

2. Of the physical, real, financial, intellectual, or other property or business of one or more persons: Under Seychelles law, land includes “land covered with water, all things growing on land and buildings and other things permanently affixed to land and also an undivided share in land...”⁵²⁴ Personal property law covers other forms of property, such as cars, businesses, bank accounts, and personal items, inter alia.
3. That results in the deprivation or interference of the use of the property or business by that person: “Use” means the ability to enjoy an object in accordance with its purpose.⁵²⁵ Use also gives the owner an exclusive right to their property. Thus, State interference is not allowed without following the appropriate rules for the deprivation of the property.⁵²⁶ “Deprivation” corresponds to the act of obtaining/expropriating property, and “interference” is merely an *attempt* to obtain/expropriate. However, “interference” can also entail trespass, nuisance, or other violations of property rights.
4. Without adequate, prompt, and effective compensation: In response to violations that occurred under the Lands Acquisition Act (repealed in 1996), the 1993 Constitution carved out a special procedure for individuals to file applications to the government to either re-obtain their land or receive appropriate compensation for a compulsory acquisition under the Lands Acquisition Act.⁵²⁷ This constitutional procedure sets the value of the land to be “the market value of the land at the time of coming into force of this Constitution or such other value as may be agreed to between the Government and the person whose land has been acquired”.⁵²⁸ In *Moulinie v Government of Seychelles & Or* it was held that:

⁵²³ Constitution of 1993, Ch. XVI, Schedule 7, Part III.

⁵²⁴ Land Registration Act Chapter 107.

⁵²⁵ In the *Sporrong and Lönnroth* case, the ECHR Commission and Court recognized that prohibitions on construction interfered with the use of property.

⁵²⁶ Eur. Comm. H.R., decision of 16 December 1974 (admissibility), *Müller v. Austria*, No. 5849/72, DR 1, p. 46, and Comm. Report of 1 October 1975, DR 3, p. 25.

⁵²⁷ Constitution of 1993, schedule 7, part III, art. 14.

⁵²⁸ *Id.*, art. 14(2).

The drafters of the Constitution cannot have been amnesic of Article 20 when it came to Part III of Schedule 7 regarding the application of past acquisitions. In fact, they showed due regard to it when they not only created an action but also provided that the compensation for those pre-1993 injustices should be as per the market value as at 1993. A special regime meant to correct past injustice cannot be used to become a Charter for future injustices...⁵²⁹

In taking this approach the Seychelles Court of Appeal took into consideration the detriment of the victim having been denied due compensation and found that full compensation was to be at a current rate, and that an applicant would have recourse to further cause of action if denied.⁵³⁰

Additionally, this violation applies in the context of personal property or businesses if the State fails to obtain a fair appraisal, or if there is specific value lost to the person and the State fails to compensate accordingly or with(out) due process.

5. By a perpetrator: See General Provisions, *supra*, for the definition of “perpetrator” and required State nexus.

XXXVII. Wrongful Denial of the Right to Employment⁵³¹

A. Elements:

1. The repeated refusal to hire, promote, otherwise interfere with or refuse a person;
2. In pursuit of employment in that person’s chosen field;
3. For reasons other than business necessity or some other reasonable and articulable basis;
4. By a perpetrator.

B. Explanation:

The ICESCR recognises the right to work, “which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.”⁵³² This fundamental right also includes the right of everyone to just and favourable conditions of work, including, *inter alia*, fair wages to provide a decent living, safe and healthy working conditions, equal opportunity for promotion, and reasonable rest and leisure;⁵³³ and is related to the rights to form trade unions and to social security.⁵³⁴ Article 23 of the UDHR reflects the customary international right “to work, [and] to free choice of employment”.⁵³⁵ The ILO Declaration of Philadelphia similarly recognises this right, guaranteeing individuals “the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity”.⁵³⁶

⁵²⁹ [2016] SCCA 10 [16].

⁵³⁰ *Id.*, [13].

⁵³¹ TRNUC Act, sec. 2(8)(i).

⁵³² ICESCR, art. 6(1).

⁵³³ *Id.*, art. 7.

⁵³⁴ *Id.*, arts. 8-9.

⁵³⁵ UDHR, art. 23.

⁵³⁶ Int’l Labour Conference, 26th, Declaration of Philadelphia, art. 2(a), May 10, 1944.

This violation can be found in either the public or private sector, as the Commission has received evidence that not only were people denied security clearance, preventing them from working in the public sector, but their employees in the private sector were also sometimes contacted and directed to terminate their employment and have no further contact. The Commission also notes that the denial of security clearance had impacts in the private-sector employment of a person, as it served in many instances as a black-listing of that person and thus a public signal that they were branded an “undesirable” by the Government, thus rendering any association with that person fraught with political and physical dangers.

1. Repeated refusal to hire, promote, or otherwise interfere with or refuse a person: This violation goes beyond a single wrongful termination. Rather, the State must have continually or systematically interfered or blacklisted the person, usually by way of denial of security clearance to work in the public sector, so that they were consistently denied the ability to effectively pursue their career in their chosen field. This can include actions such as barring an individual from public service when their chosen career is non-existent in the private sector or contacting foreign organisations to prevent their hiring under a guise of diplomacy.⁵³⁷ Another example is refusing to grant appropriate licenses and necessary governmental authorisation for the individual to be able to pursue their career and/or harassment by local authorities when the individual tries to promote their career.⁵³⁸
2. In pursuit of employment in that person’s chosen field: The 1993 Constitution protects the right to choose one’s occupation and to earn their living off of their chosen job.⁵³⁹ In addition, the ILO Employment Policy Convention guarantees “the fullest possible opportunity for each worker to qualify for, and to use [their] skills and endowments in a job for which [they] [are] well suited”.⁵⁴⁰ This right extends beyond mere termination to State-imposed obstructions, whether blacklisting or promotion caps, designed to inhibit one’s ability to achieve promotion or full productivity.⁵⁴¹ While Seychelles has not yet ratified the ILO Employment Policy Convention, similar guarantees are also referenced by the CESCR in General Comment No. 18, where the Committee highlights that “respect for the individual and his dignity is expressed through the freedom of the individual regarding the choice to work...” and this is part of the State’s obligations under the ICESCR.⁵⁴²
3. For reasons other than business necessity or some other reasonable and articulable basis: This prong essentially follows a general discrimination analysis: when discrimination or retaliation is alleged, it falls on the state to disprove that claim or provide other reasonable justification for the (continued) termination or denial. Retaliation is heavily contextual and will be determined by a weighing of the evidence and proximate cause analysis (would the person have been fired/denied employment but for their action or state of being, such as party loyalty). In Seychelles, during the period of time in question retaliation often happened on

⁵³⁷ See, e.g., Case Determination No. 039: Luc Chang-Ko.

⁵³⁸ See, e.g., Case Determination No. 028: Alain Ernesta.

⁵³⁹ Constitution of 1993, art. 35(b).

⁵⁴⁰ Employment Policy Convention, 1964 (No. 122), art. 1(ii)(c).

⁵⁴¹ See ILO C122 - Employment Policy Convention, art. I, 1964 (No. 122).

⁵⁴² CESCR, *General Comment No. 18: The Right to Work (Art. 6 of the Covenant)*, 6 February 2006, para. 4.

political grounds, including real or perceived support, or lack thereof, of the ruling party.

Article 1 of the ILO's Discrimination Convention, which Seychelles ratified in 1999, defines discrimination to include "any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation."⁵⁴³ For purposes of the case determinations, the focus has mostly centred around discrimination based on real or perceived political opinion.

4. By a perpetrator: This violation is limited to either (1) jobs with the State from which the complainant was continuously denied employment, or (2) instances where the State systematically or continuously interfered with private employment, with "State" or "state actor" being the same State nexus as per the General Provisions above.

XXXVIII. Wrongful Termination of Employment⁵⁴⁴

A. Elements:

1. The dismissal of a person from their position at work;
2. Whether by unlawful or arbitrary means, including but not limited to reasons of retaliation or discrimination;
3. By a perpetrator.

B. Explanation:

This violation implicates all the same rights as discussed in the foregoing section. As above, this violation can apply to either the public or private sector, should a State actor take some act or omission that results in the unlawful termination of a person.

1. The dismissal of one from his or her position at work: Unlike the previous violation, this violation applies to discrete events where the State made a direct termination, if the person was a State employee, or indirect termination, if the State interfered with private employment resulting in the person's termination. For example, a wrongful termination occurs when the State forces a person into exile or arbitrary or unlawful detention and the person loses his or her job as a result of such absence. Another common example in the context of the Coup d'état involves the firing of well-qualified State personnel who have maintained an upward career trajectory for years and are inexplicably fired without cause. Terminations should thus be examined against the backdrop of the political climate in the Seychelles in combination with a review of the individuals' professional development, employment file, and any factors regarding how in demand the service at hand was.

⁵⁴³ Discrimination (Employment and Occupation) Convention, art. 1, 1958 (No. 111), ratified by the Seychelles on 23 November 1999.

⁵⁴⁴ TRNUC Act, sec. 2(8)(j).

When analysing terminations, it is important to identify the following factors: (a) the State provided reasonable justifications for termination; (b) the terminated employee was notified of any deficiencies in their work performance; (c) the terminated employee had a sufficient opportunity to correct any identified professional deficiencies; and (d) whether there was a degree of “foul play” insofar as the State had reason to know of the terminated employee’s political beliefs and may have acted against that interest.

2. Whether by unlawful or arbitrary means, including but not limited to reasons of retaliation or discrimination:⁵⁴⁵ Article 1 of the ILO’s Discrimination Convention defines discrimination to include “any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.”⁵⁴⁶ The Commission notes that when discrimination or retaliation is alleged, it falls on the State to disprove that claim or provide other reasonable justification for the (continued) termination or denial. Retaliation is heavily contextual, and within the context of Seychelles, retaliation was more often than not motivated on political grounds, including on real or perceived support, or lack thereof, of the ruling party. Notably, this link of retaliation with politically discriminatory motivations was a necessary factor of bringing any such allegation within the mandate of the Commission.
3. By a perpetrator: This violation is limited to either (1) jobs with the State from which the complainant was terminated, or (2) instances where the State interfered with private employment, resulting in the person’s termination, with “State” or “state actor” being the same State nexus as per the General Provisions above.

XXXIX. Forced Exile⁵⁴⁷

A. Elements:

1. The expulsion, deprivation of access to re-enter, or removal of a national from his or her country;
2. Unlawfully or arbitrarily through either direct deportation or expulsion or by making living conditions unbearable for the national to stay in the country due to ongoing or potential persecution, victimisation, violence, or other difficulties;
3. By a perpetrator.

B. Explanation:

⁵⁴⁵ Article 1(ii)(c) of the ILO’s Employment Policy Convention, 1964 (No. 122); *see also* Article II of the ISESCR which slightly expands the protected classes, preventing considerations to be made in light of one’s “race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” Such discrimination can also include dismissal on the “grounds of pregnancy or of maternity” or “marital status” as noted by Article 11 of the Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979.

⁵⁴⁶ Discrimination (Employment and Occupation) Convention, art. 1, 1958 (No. 111).

⁵⁴⁷ TRNUC Act, sec. 2(8)(k).

The violation of forced exile is fundamentally a violation of the rights, at the level of customary international law, to freedom of movement and to re-enter one's country.⁵⁴⁸

Forced exile may occur directly or indirectly. First, direct force exile occurs when a State actor expels, deports, or causes a national of that country to flee the country due to the State actor's victimisation of, persecution of, or incitement of fear of violence or harm toward the person or their family. Second, forced exile can occur indirectly for individuals who lived or travelled abroad when alleged human rights violations occurred if such persons: (1) had a genuine fear that returning to their home country would put them in danger; and (2) due to such fear, did not return to their home country.

1. The expulsion, deprivation of access to re-enter, or removal of a national from his or her country: This prong essentially describes the acts of fleeing and State-refused re-entry. The 1993 Constitution provides immunity from expulsion from the Seychelles and citizens' right to enter the Seychelles.⁵⁴⁹ The UDHR also protects against arbitrary exile.⁵⁵⁰ For the exile to occur, an individual or family must have physically left Seychelles for a sufficient period of time that they either do not intend to return or do not have the ability or expectation to live in the destination country. The period of time will depend on a weighing of evidence in each case.
2. Unlawfully or arbitrarily through either direct deportation or expulsion or by making living conditions unbearable for the national to stay in the country due to ongoing or potential persecution, victimisation, violence, or other difficulties: Under international law, those who fled the Seychelles due to persecution, victimisation, or other forms of discrimination would be considered refugees.⁵⁵¹ Under the 1951 Refugee Convention, a refugee is a person:

[O]wing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.⁵⁵²

In the context of the Commission's case determinations, the finding that a person was granted asylum or refugee status in another country was considered very persuasive evidence of persecution in Seychelles.

Essentially, ongoing discrimination in the employment sector and other actions that would prevent an individual from being able to provide for them and their families may amount to forced exile if the individual felt that they must leave the country in order to be safe or in order to make a livelihood, e.g., and then actually

⁵⁴⁸ See ICCPR, art. 12; UDHR, arts. 9 (freedom from arbitrary exile), 13 (freedom of movement and right to return to one's country).

⁵⁴⁹ Constitution of 1993, art. 25.

⁵⁵⁰ UDHR, art. 9.

⁵⁵¹ Convention and Protocol Relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S. 137. Seychelles ratified both the Convention and Protocol on 23 April 1980.

⁵⁵² *Id.*, art. 1(A)(2).

left.⁵⁵³ The deprivation of property such as a farm or other property that provided income or refusal to grant the licenses necessary to run a farm or business may also force an individual into exile in order to find a new means of support.

In general, the right of a citizen to re-enter their country of origin is well established in international law. The UDHR outlines citizens' rights to enter their country with some exceptions based on public safety, criminal offences, and lack of citizenship status.⁵⁵⁴ The UDHR further observes that "[e]veryone has the right to leave any country, including his own, and to return to his country".⁵⁵⁵ This obligation is reiterated by the ICCPR, which similarly mandates, "[n]o one shall be arbitrarily deprived of the right to enter his own country".⁵⁵⁶ The ACHPR likewise recognises the right of return, qualifying that "[t]his right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality".⁵⁵⁷ In Seychelles, this right to enter or return to one's country was either directly or indirectly denied: having fled Seychelles, many were subsequently denied the renewal of their Seychelles passport, amounting to a restriction on their right of return and freedom of movement. Those to whom passports were not denied, but who still fled in response to unbearable living conditions, were nonetheless indirectly denied those same rights; the act of fleeing in the first place, along with the element of victimisation or persecution, is enough to constitute forced exile.

3. By a perpetrator: See General Provisions, *supra*, for the definition of "perpetrator" and required State nexus.

XL. Abuse of Office by a Government Official, Including the Executive, Judiciary or Legislature⁵⁵⁸

A. Elements:

1. The use of the capacity and powers of a public office;
2. To restrict the specific rights or freedoms of a person or persons;
3. In a manner that strayed from the proper purpose of the law or of the official's position;
4. By a State official.

⁵⁵³ See, e.g., Case Determination No. 053: Mivonne Barallon.

⁵⁵⁴ UDHR, art. 23.

⁵⁵⁵ UDHR, art. 13. Returning to a country may entail more than just being able to return to the country of one's birth or citizenship.

⁵⁵⁶ ICCPR, art. 9.

⁵⁵⁷ African Charter on Human and Peoples' Rights, art. 12(2). State obligation to permit citizens' access to their country deepens when considering the Convention on the Status of Aliens (1928) and its Article VI, which maintains that "States are required to receive their nationals expelled from foreign soil who seek to enter their territory. Convention on the Status of Aliens, art. VI (1928).

⁵⁵⁸ TRNUC Act, sec. 2(8)(1).

B. Explanation:

This violation commonly (though not exclusively) includes discrimination or victimisation based on real or perceived political opinion or that is otherwise legally baseless or arbitrary. It often but not always belies a sense of public corruption or unjust enrichment on the part of Government actors, to the detriment of the victim. The violation could take the form of, e.g., improper actions under the orders of President René, a Minister, or another government official; administrative abuses; denials of pensions; gross failures of the police to investigate certain acts; etc. The Commission notes that equality before the law, non-discrimination, and freedom from fear of Government abuse are basic principles of human rights law enshrined in the UDHR.⁵⁵⁹ Any State action that violates these principles may fall under this violation. Furthermore, this violation is often implicated in other violations, such as unlawful imprisonment, forced exile, and the employment violations, among others.

1. The use of the capacity and powers of a public office: The official in question must act under colour of law, acting as they would be expected to act by virtue of their office.
2. To restrict the specific rights or freedoms of a person or persons: Some damage must have been caused to an individual that allows them to recover as a victim. This may include lack of due process or equality before the law, discrimination, persecution or victimisation, violence or threat of violence, or many other factors, and it is via this element that other violations under the Act may be implicated.
3. In a manner that strayed from the proper purpose of the law or of the official's position: This element describes the wrongful nature of the action and impact. That is, even though the act was done under colour of law or office, it was baseless, without actual authority, lacked due process, or was otherwise unlawful or arbitrary. The restriction of the rights of a person could be legitimate and lawfully imposed, but restrictions should be prohibited if imposed for an improper purpose, *i.e.*, not for the purpose indicated in domestic or international law. Specific government acts could serve a double purpose—to restrict human rights on allegedly legitimate and lawful grounds and an “ulterior purpose” which is: (a) not prescribed by the relevant provisions of the 1993 Constitution and the UDHR; (b) is different from that proclaimed by the authorities; or (c) is one which can be reasonably inferred from the context.

Therefore, case determinations should consider this violation in a holistic manner by assessing both the action and the impact, as well as the other violations through which it might be implicated. In Seychelles, many government officials, including but not limited to Ministers and judges, may have understood the underlying ‘expectations’ of the René regime and acted in accord with these, as Ministers in particular were granted broad discretion to act even without direct orders. In doing so unlawfully or arbitrarily, they would have strayed from their appropriate role and face liability for this violation. There is no requirement that the executive must have given direct orders for this violation to have been committed.

⁵⁵⁹ UDHR, arts. 1, 2, 7, 12.

4. By a State official: Unlike the other violations, this one specifically requires that the perpetrator be a Government official employed by one of the three branches of the Government of Seychelles. This **does not** include the general or indirect State nexus that applies to other violations.

XLI. Other Acts of a Similar Character Causing Suffering, or Injury to Body or to Mental or Physical Health⁵⁶⁰

A. Elements:

1. The infliction of suffering or injury to body or to mental or physical health;
2. By a perpetrator.

B. Explanation:

The Commission has considered this violation to be a catch-all provision meant to include any other conduct not otherwise defined in the other violations that is yet conducted by State actors or with a State nexus. It generally contemplates a human rights violation of sufficient significance, on par with the other violations under the TRNUC Act, as to warrant redress. The conduct must be sufficiently grave or severe, such as victimisation or harassment by the State that causes physical or mental damage (injury, pain, suffering). This violation may also be implicated in other violations, such as forced exile, e.g., as this conduct can consequently force the victim to flee for their safety and livelihood. Among the rights violated in this regard are the customary international law-based rights to life, prohibition of slavery, freedom from torture, equal protection, and protection from arbitrary interference and attacks upon honour and reputation.⁵⁶¹

1. The infliction of suffering or injury to body or to mental or physical health: The Commission has generally interpreted this violation to comprise of suffering or injury of sufficient severity to merit its own category. The fundamental human rights being violated are therefore, generally, the rights to be free from torture or other cruel, inhuman, or degrading treatment; to not be deprived of life; to not be subject to slavery or serfdom; and to a set of fundamental fair trial guarantees. In Seychelles, factors to be considered for this violation include being followed and harassed by army, militia, or other state security forces; general victimisation by the State on political grounds; denial of the right to seek medical treatment overseas; or other such behaviour.

The TRNUC has seen this in multiple cases but notably in Case 054, where the individual in question was followed and harassed throughout his time in the Seychelles, including being followed by State security forces, suffering damage to his career and educational opportunities, receiving threatening letters, and losing family land through coercion.⁵⁶²

⁵⁶⁰ TRNUC Act, sec. 2(8)(m).

⁵⁶¹ UDHR, arts. 3, 4, 5, 7, 12.

⁵⁶² See, e.g., Case Determination No: 054: Marie Jessy Mona Souyave.

The required level of severity may include either or both physical and mental trauma and suffering. The intentional infliction of physical pain which is substantial, but below the torture threshold, is likely to be sufficiently severe for this violation. Additionally, an incident that could be described as harrowing, and/or made the victim fear for their life or bodily integrity, or the life or bodily integrity of another close to them, is also likely severe enough to amount to “other acts”.⁵⁶³

2. Perpetrator: See General Provisions, *supra*, for the definition of “perpetrator” and required State nexus.

⁵⁶³ See, e.g., Case Determination No. 013: Anthony Hunt; Case Determination No. 035: Jules Stravens.





VOLUME III

ANNEX I



Seychelles and the Declaration of the Rights of Man and of the Citizen

Conrad Lablache¹

The Declaration of the Rights of Man and the Citizen (*DRMC*)² was adopted by the French National Assembly on 26 August 1789. Inspired by the philosophers of the enlightenment, it is one of the enduring legacies of the French Revolution and impacted the development of human rights and democracy in Europe and the world.³

The DRMC was drafted and presented to the Constituent Assembly by Marquis de Lafayette, who fought on the side of the colonists in the American War of Independence and witnessed the actualisation of the ideas French Enlightenment philosophers such as Montesquieu and Rousseau in the American Declaration of Independence.

The DRMC's central principle is that "all men are born free and remain equal in rights" – which are enumerated as liberty, private property, the inviolability of the person, and resistance to oppression. The DRMC contains comprehensive provisions for the protection of those basic human rights. It asserts the requirement of due process and principles of transparent, accountable and democratic government. It is also aspirational and casts programmatic obligations on the State. It was a seminal document in the history of civil liberties. Little wonder, revolutionary France unsettled monarchical Europe! The original version and an English translation of the DRMC is set out in the annexure to this note.

The DRMC was adopted by the Colonial Assembly of Mauritius in 1794 and immediately became law in Mauritius as well as Seychelles, which was then a French colonial dependency of Mauritius.

The continuation of French law in Mauritius and its dependencies after these islands surrendered to British forces in 1810 was based on the British undertaking in the Capitulation to preserve the 'religion, laws and customs' of the inhabitants.⁴ This undertaking was, however, not ratified by the Treaty of Paris of 1814, under which Mauritius and dependencies were ceded to Britain in 'full right and sovereignty', but it was, all the same, honoured by the British administration.⁵ It was on this basis that the various French codes and other laws enacted by the colonial legislature in Mauritius remained in force in those islands.

In 1903 Seychelles became a separate crown colony and its administration moved from Port Louis to Victoria. Laws that had hitherto been enacted and in force in Mauritius and

¹ The author is an attorney-at-law of the Supreme Court of Seychelles and a partner at the firm Rivard Nariman. Research for this note was prompted by an article of Marc Hein SC of the Mauritian Bar, titled 'Déclaration des Droits de l'Homme de 1789 et Droit Mauricien', published in Week- End of 26 December 2021.

² Fr: Déclaration des Droits de l'Homme et du Citoyen.

³ The DRMC is referred to in the preamble to the constitution of the Fourth Republic (1946) and Fifth Republic (1958) and inspired the elaboration of the Universal Declaration of Human Rights.

⁴ Art 8 of the Capitulation of Mauritius.

⁵ There is scepticism as to whether that undertaking was binding on Britain in international law. See: John W Bridge, 'Judicial Review in Mauritius and the Continuing Influence of English Law' [1997] ICLQ Vol 46, 784; and the Foreword to the Mauritius Report 1961 by Neerunjun CJ – who attributes the British honouring of the undertaking 'to the misconception of the legal implication of the Treaty of Capitulation and, in a greater measure, to British liberality'.

dependencies continued to apply in Seychelles. However, none of the several authorised printed versions of the laws of Seychelles⁶ reproduced or adverted to the DRMC. Nor is there record of any abrogation of the DRMC.

The Seychelles Independence Order 1976, which promulgated the Independence Constitution, saved the laws in existence at the time.⁷ Importantly, the Independence Constitution contained a bill of rights⁸ whose opening article read thus:

It is hereby recognised and declared that in Seychelles there have existed and shall continue to exist without discrimination by reason of race, place or origin, political opinions, colour, creed of sex [...] each and all of the following human rights and fundamental freedoms, namely [...] (*emphasis added*)

The opening article of the bill of rights of the Mauritian Constitution, promulgated in 1968 at independence from Britain, is similarly worded.⁹ The courts of Mauritius, including the Judicial Committee of the Privy Council,¹⁰ are settled in the view that the provisions of DRMC are pre-existing human rights referred to in the bill of rights, and have affirmed that those provisions continue to be part of laws of Mauritius.¹¹

This interpretation would apply equally to the Seychelles Independent Constitution and the DRMC. However, it does not appear the government that came to power consequent to the Coup d'Etat of 1977 was of the view that DRMC remained part of Seychelles law. So, the DRMC was spared the axe that fell on much of the Independence Constitution (including its bill of rights) immediately after the Coup.¹² The Constitution of the Republic of Seychelles Decree 1979, which promulgated the Constitution of the Second Republic, saved all laws that were in existence immediately before it was brought into operation.¹³ The Constitution the Third Republic (1992) had similar provisions.¹⁴

In those ways, the DRMC survived - inconspicuously, if not completely unnoticed - the cataclysms of Seychelles constitutional history.

The practical value of the DRMC might not obvious in the present context of Mauritius.¹⁵ Given the uninterrupted existence of a modern bill of rights since independence in 1968, it may be argued the DRMC is now largely redundant in the Mauritian legal system.

However, in Seychelles, the DMRC may be of greater significance, considering the country's recent checkered experience with human rights and constitutionalism. In particular, the DRMC should be of interest to the Truth, Reconciliation and National Unity Commission¹⁶ in the

⁶ Previous editions of Seychelles laws were published in 1904 (Sir Alfred Herchenroder), 1907 (W L Rind), 1952 (Sir Charlton Lane), 1971 (Sir Campbell Wylie), and 1994 (GGD de Silva).

⁷ Seychelles Independence Order, s 4.

⁸ Constitution of the Republic of Seychelles 1976, ch III, art 12.

⁹ Constitution of Mauritius 1968, s 3.

¹⁰ *Pointu and Anor v Matadeen and Ors* [1998] Judicial Committee of the Privy Council, Appeal no. 147 of 1997.

¹¹ *ibid.*

¹² Seychelles Constitutional Proclamation 1977 (No. 3 of 1977)

¹³ Constitution of the Republic of Seychelles Decree 1979, s 15.

¹⁴ Constitution of the Republic of Seychelles 1992, sch 7, para 2(1).

¹⁵ Marc Hein's article (see n1) is indicative of this.

¹⁶ The Truth, Reconciliation and National Unity Commission Act (9 of 2018)

discharge of its mandate of investigating and determining human rights violation that occurred during the Second Republic when there was no other domestic law instrument protecting human rights in Seychelles.¹⁷ The DRMC might not offer the sophistication of a modern bill of rights, such as Chapter III of the Constitution 1993, but it enjoins the State to protect a comprehensive array of fundamental human rights.

August 2022

¹⁷ See: Constitution of the Republic of Seychelles, Sch 3, s (2); and *R v Passport Officer – Ex parte Kathleen Pillay* [1990] SLR 250

ANNEXURE

Déclaration des Droits de l'Homme et du Citoyen de 1789 / Declaration of the Rights of Man and of the Citizen of 1789

Les Représentants du Peuple Français, constitués en Assemblée Nationale, considérant que l'ignorance, l'oubli ou le mépris des droits de l'Homme sont les seules causes des malheurs publics et de la corruption des Gouvernements, ont résolu d'exposer, dans une Déclaration solennelle, les droits naturels, inaliénables et sacrés de l'Homme, afin que cette Déclaration, constamment présente à tous les Membres du corps social, leur rappelle sans cesse leurs droits et leurs devoirs; afin que les actes du pouvoir législatif, et ceux du pouvoir exécutif, pouvant être à chaque instant comparés avec le but de toute institution politique, en soient plus respectés; afin que les réclamations des citoyens, fondées désormais sur des principes simples et incontestables, tournent toujours au maintien de la Constitution et au bonheur de tous. En conséquence, l'Assemblée Nationale reconnaît et déclare, en présence et sous les auspices de l'Être suprême, les droits suivants de l'Homme et du Citoyen:

The representatives of the French people, organized as a National Assembly, believing that the ignorance, neglect, or contempt of the rights of man are the sole cause of public calamities and of the corruption of governments, have determined to set forth in a solemn declaration the natural, unalienable, and sacred rights of man, in order that this declaration, being constantly before all the members of the Social body, shall remind them continually of their rights and duties; in order that the acts of the legislative power, as well as those of the executive power, may be compared at any moment with the objects and purposes of all political institutions and may thus be more respected, and, lastly, in order that the grievances of the citizens, based hereafter upon simple and incontestable principles, shall tend to the maintenance of the constitution and redound to the happiness of all. Therefore the National Assembly recognizes and proclaims, in the presence and under the auspices of the Supreme Being, the following rights of man and of the citizen:

Art. 1er. Les hommes naissent et demeurent libres et égaux en droits. Les distinctions sociales ne peuvent être fondées que sur l'utilité commune. / Men are born and remain free and equal in rights. Social distinctions may be founded only upon the general good.

Art. 2. Le but de toute association politique est la conservation des droits naturels et imprescriptibles de l'Homme. Ces droits sont la liberté, la propriété, la sûreté, et la résistance à l'oppression. / The aim of all political association is the preservation of the natural and

imprescriptible rights of man. These rights are liberty, property, security, and resistance to oppression.

Art. 3. Le principe de toute Souveraineté réside essentiellement dans la Nation. Nul corps, nul individu ne peut exercer d'autorité qui n'en émane expressément. / The principle of all sovereignty resides essentially in the Nation. No body nor individual may exercise any authority which does not proceed directly from the nation.

Art. 4. La liberté consiste à pouvoir faire tout ce qui ne nuit pas à autrui : ainsi, l'exercice des droits naturels de chaque homme n'a de bornes que celles qui assurent aux autres Membres de la Société la jouissance de ces mêmes droits. Ces bornes ne peuvent être déterminées que par la Loi. / Liberty consists in the freedom to do everything which injures no one else; hence the exercise of the natural rights of each man has no limits except those which assure to the other members of the society the enjoyment of the same rights. These limits can only be determined by law.

Art. 5. La Loi n'a le droit de défendre que les actions nuisibles à la Société. Tout ce qui n'est pas défendu par la Loi ne peut être empêché, et nul ne peut être contraint à faire ce qu'elle n'ordonne pas. / Law can only prohibit such actions as are hurtful to society. Nothing may be prevented which is not forbidden by law, and no one may be forced to do anything not provided for by law.

Art. 6. La Loi est l'expression de la volonté générale. Tous les Citoyens ont droit de concourir personnellement, ou par leurs Représentants, à sa formation. Elle doit être la même pour tous, soit qu'elle protège, soit qu'elle punisse. Tous les Citoyens étant égaux à ses yeux sont également admissibles à toutes dignités, places et emplois publics, selon leur capacité, et sans autre distinction que celle de leurs vertus et de leurs talents. / Law is the expression of the general will. Every citizen has a right to participate personally, or through his representative, in its foundation. It must be the same for all, whether it protects or punishes. All citizens, being equal in the eyes of the law, are equally eligible to all dignities and to all public positions and occupations, according to their abilities, and without distinction except that of their virtues and talents.

Art. 7. Nul homme ne peut être accusé, arrêté ni détenu que dans les cas déterminés par la Loi, et selon les formes qu'elle a prescrites. Ceux qui sollicitent, expédient, exécutent ou font exécuter des ordres arbitraires, doivent être punis ; mais tout citoyen appelé ou saisi en vertu de la Loi doit obéir à l'instant : il se rend coupable par la résistance. / No person shall be accused, arrested, or imprisoned except in the cases and according to the forms prescribed by law. Any one soliciting, transmitting, executing, or causing to be executed, any arbitrary order, shall be punished. But any citizen summoned or arrested in virtue of the law shall submit without delay, as resistance constitutes an offense.

Art. 8. La Loi ne doit établir que des peines strictement et évidemment nécessaires, et nul ne peut être puni qu'en vertu d'une Loi établie et promulguée antérieurement au délit, et légalement appliquée. / The law shall provide for such punishments only as are strictly and obviously necessary, and no one shall suffer punishment except it be legally inflicted in virtue of a law passed and promulgated before the commission of the offense.

Art. 9. Tout homme étant présumé innocent jusqu'à ce qu'il ait été déclaré coupable, s'il est jugé indispensable de l'arrêter, toute rigueur qui ne serait pas nécessaire pour s'assurer de sa personne doit être sévèrement réprimée par la loi. / As all persons are held innocent until they shall have been declared guilty, if arrest shall be deemed indispensable, all harshness not essential to the securing of the prisoner's person shall be severely repressed by law.

Art. 10. Nul ne doit être inquiété pour ses opinions, même religieuses, pourvu que leur manifestation ne trouble pas l'ordre public établi par la Loi. / No one shall be disquieted on account of his opinions, including his religious views, provided their manifestation does not disturb the public order established by law.

Art. 11. La libre communication des pensées et des opinions est un des droits les plus précieux de l'Homme : tout Citoyen peut donc parler, écrire, imprimer librement, sauf à répondre de l'abus de cette liberté dans les cas déterminés par la Loi. / The free communication of ideas and opinions is one of the most precious of the rights of man. Every citizen may, accordingly, speak, write, and print with freedom, but shall be responsible for such abuses of this freedom as shall be defined by law.

Art. 12. La garantie des droits de l'Homme et du Citoyen nécessite une force publique : cette force est donc instituée pour l'avantage de tous, et non pour l'utilité particulière de ceux auxquels elle est confiée. / The security of the rights of man and of the citizen requires public military forces. These forces are, therefore, established for the good of all and not for the personal advantage of those to whom they shall be intrusted.

Art. 13. Pour l'entretien de la force publique, et pour les dépenses d'administration, une contribution commune est indispensable : elle doit être également répartie entre tous les citoyens, en raison de leurs facultés. / A common contribution is essential for the maintenance of the public forces and for the cost of administration. This should be equitably distributed among all the citizens in proportion to their means.

Art. 14. Tous les Citoyens ont le droit de constater, par eux-mêmes ou par leurs représentants, la nécessité de la contribution publique, de la consentir librement, d'en suivre l'emploi, et d'en déterminer la quotité, l'assiette, le recouvrement et la durée. / All the citizens have a right to decide, either personally or by their representatives, as to the necessity of the public contribution; to grant this freely; to know to what uses it is put; and to fix the proportion, the mode of assessment and of collection and the duration of the taxes.

Art. 15. La Société a le droit de demander compte à tout Agent public de son administration. / Society has the right to require of every public agent an account of his administration.

Art. 16. Toute Société dans laquelle la garantie des Droits n'est pas assurée, ni la séparation des Pouvoirs déterminée, n'a point de Constitution. / A society in which the observance of the law is not assured, nor the separation of powers defined, has no constitution at all.

Art. 17. La propriété étant un droit inviolable et sacré, nul ne peut en être privé, si ce n'est lorsque la nécessité publique, légalement constatée, l'exige évidemment, et sous la condition d'une juste et préalable indemnité. / Since property is an inviolable and sacred right, no one shall be deprived thereof except where public necessity, legally determined, shall clearly

demand it, and then only on condition that the owner shall have been previously and equitably indemnified.





VOLUME III

ANNEX II



1

LAND ACQUISITION BY GOVERNMENT IN SEYCHELLES - 1977 TO THE PRESENT

Some Notes :

1. Evolution of the Law

1.1 In keeping with similar provisions in practically all countries, Seychelles has legislation enabling the government to acquire land against the wishes or plans of the owner. Traditionally that right is exercisable only where the land is required for a public purpose. This was the case in Seychelles from 1968 until 1983. In 1983, these principles were radically changed by legislation.

1.2 Following is a brief synopsis of the various legal provisions which have existed in the field of compulsory purchase from 1968 :

1.2.1 1968 : Enactment of Acquisition of Land for Public Purposes Ordinance, Cap 227. This gave the Governor in Council the power to acquire land on behalf of the Government by service of a notice on the landowner.

The acquisition had to be for a public purpose and compensation was offered in the notice of acquisition itself. Provision was made for a landowner aggrieved with the offer of compensation to request a board of arbitrators to assess the compensation. No appeal lay against that assessment. The method of valuing was essentially based on an open market valuation.

1.2.2 1976 : The Independence constitution enacted a Bill of Rights for Seychelles in Chapter III thereof. Article 17 protected the person from being deprived of his property save in specific circumstances (generally for public purposes) and against payment of prompt and adequate compensation.

In the same year, the Civil Code of Seychelles was enacted. Art 545 of the Code provides, as in the French Civil Code, that no person shall be forced to part with his property save for a public purpose and against payment of prompt and adequate compensation.

1.2.3 1977: In May 1977 the Lands Acquisition Act (the "Act") was enacted. In accordance with the restriction set out in the Constitution, the Act empowered the Minister to acquire on behalf of the State any land for a public purpose.

10 October 2019

Mrs. Gabrielle McIntyre
Chairperson
Truth, Reconciliation and National Unity Commission
P O Box 5013
Beau Vallon

Dear Mrs McIntyre

At my last appearance before the Commission, you expressed the wish to have copies of the documents I had referred to in connection with compulsory acquisitions. I am pleased to attach copies of these herewith.

In addition to the exchange of correspondence with the Lands Ministry, I have taken the liberty of attaching from my files a short paper on the history of compulsory acquisitions and the changes to the law up to 1992. I cannot remember the reason this paper but it may have been an information paper to assist those engaged in seeking a better way forward on the issue. I hope you find this useful.

Yours sincerely,



B GEORGES

Generally speaking, the Act contained the following safeguards against arbitrary administrative exercise of the power :

- acquisition was by notice and in cases where speed was not of the essence the notice was one offering to enter into negotiations only (notice to treat)
- the landowner was specifically given the right to contest the legality and validity of the acquisition
- the landowner could challenge the compensation by agreement, by arbitration or in the Supreme Court.
- payment of compensation could be expected to be made promptly
- compensation was to be assessed on the basis of the open market value of the land acquired.

1.2.4 **1978** : An amendment to the Act in August 1978 radically modified the method of assessing compensation. This remained based on the market value in respect of buildings but for land not containing buildings the land was to be separately valued based on the average income derived therefrom. Such a move would have contravened the 1976 constitution, but that had been modified after the 1977 Coup d'Etat.

The obvious intention of this amendment was to enable the State to acquire large properties (which were in most cases running at a loss or at a small profit) for cheap and redistribute the land. The "development" or "market" value of the land was ignored, hence prime land on Beau Vallon beach could be, and was, valued at nil value. Another main anomaly which this artificial separation of land from buildings brought about was the separate valuation of buildings from the land on which they stood ! The notion of the site was thus eliminated and in practice an acre of land in a low-cost housing area was worth the same as an acre of land in a high-cost residential area with fine views !

1.2.5 **1983**: Major modifications to the Act were made in 1983 which, again would have contravened the 1976 Constitution. By now, however, the 1979 Constitution, a Bills of Rights less, was in force. The main changes were :

- the notion of public purpose excusing acquisitions was done away with and replaced by the nebulous concept of "national interest". This alone meant that Seychelles had departed from norms in the matter applicable in common-law and civil-law jurisdictions.

- the right to challenge the legality of the acquisition was removed
- the President was empowered to pay compensation by bond instead of cash
- the Curator of Vacant Estates was given wide powers of dealing with absentee owners' rights.

The combination of these powers enabled the government to speed up radically its compulsory purchase programme while reducing its accountability in the matter vis-a-vis the public at large.

The national interest and bond payment concepts allowed the government to use acquisitions as a political tool and made the Act one of the most unfair, unjust and repressive laws on the Statute Book.

1.2.6. 1987: The final amendments to the Act were made in May and June 1987.

- For the avoidance of doubt the right was removed from the Court to hear any challenge to the validity or legality of acquisitions.
- The automatic right to 4% interest on delayed compensation payments was removed. Henceforth the Minister would determine the rate of interest applicable.

2. Attitude of the Courts: With few exceptions, the Supreme Court and Court of Appeal have taken the view in compulsory acquisitions that the matter was not one for judicial interpretation. Accordingly, the government's programme in the matter generally prevailed with the minimum of judicial interference as the following brief and selective summary shows.

2.1 Summary of judicial Decisions:

2.1.1 No case sought to challenge the legality of the acquisition.

2.1.2 Value of Land: In the cases of Robert Poole v/s Government of Seychelles (G.O.S) and Chamery Chetty & Or v/s G.O.S the Supreme Court categorically accepted the principle of valuing land separately from buildings thereon and did not shrink from awarding NIL compensation in each case in respect of the land element. (In recent cases of agreed compensation, however, ex-gratia sums corresponding to the lower end of the market value have been awarded, and paid, for bare land which technically is worthless under the provisions of the Act, as amended in 1978)

In Chamery Chetty & or G.O.S the notion of the site value was accepted by the Court of Appeal, not per se, but only in that it increased the value of the building on the site.

- 2.1.3 **Compensation:** All cases filed against government revolved around the assessment of compensation. In most cases this resulted in an increase of the compensation. Examples vary from Daisy Nageon v/s G.O.S where the increase in respect of a town property was from R70,000 to R220,000, to The Shell Company of the Islands PLC v/s G.O.S where the increase was from R11 million to R35 million (reduced by the Court of Appeal to R16 million).

In view, however, of the provision giving the President a discretion in the method of payment of the compensation, it is fair to say that a number of landowners preferred to accept a lower than fair figure of compensation payable in cash than risk obtaining an increase by a referral to Court and being paid the increased sum by means of a 20-year bond. 20-year bond payments have been applied in the cases of Marzocchi (the Victoria Slipway), Alix Cauvin (Felicite Island) and Daisy Nageon (the Tartaruga Felice Restaurant at Mont Fleuri).

An attempt to obtain a Court pronouncement on the issue of the method of payment in the Shell and Chamery Chetty cases failed. It was argued that the Court could not assess compensation without reference to the manner in which the compensation was to be paid. (In other words Rupees X might have been fair if paid in cash, but would not be adequate if payable over 20 years at little or no interest.) The Supreme Court and the Court of Appeal both refused to accede to the argument and were content to state that the President had an absolute discretion in the matter with which the Courts could not interfere.

- 2.1.4 **Bank Interest:** In a number of cases of compulsory acquisitions, the landowner had loans with financial institutions which, as a result of the acquisition, could no longer be serviced. Such was the case in respect of Vacoa Village in the case of Bernard Pool v/s Banque Francaise Commerciale, in the case of Marzocchi abovenamed and in that of Allan Ernestine v/s G.O.S in the matter of the Lobster Pot restaurant. The Supreme Court and the Court of Appeal both refused (the Court of Appeal by a majority) to give to a provision of the Act its logical interpretation that interest payable to a bank stops at acquisition (Section 31 (5)). The consequences are especially severe where the landowner has no other sources of income to service the debt. In both Marzocchi and Ernestine, the extreme slowness of payment of any compensation has resulted in substantial losses to the landowners and in substantial gains to the banks.

- 2.1.5 **Speed of Payments:** The prompt payment of compensation is one of the conditions under which compulsory acquisitions are allowed in a society. In most cases of compulsory acquisition in this country compensation has been slow to come for a variety of reasons. Amongst these are :

- the provision allowing 20-year bond payments itself. The worse case of this nature is that of Daisy Nageon, a lady in her 70's who is being paid R220,000 over 20 years !
- the fact that offers of compensation are sometimes not made for years. The examples are numerous, but two of them are Daisy Nageon again and Belle Vue Estates. Claims for compensation in these cases were filed in 1988 and 1989 respectively and no offers have been received in either despite repeated requests.
- government has always refused offers to refer the determination of compensation to arbitration. Accordingly, agreement being impossible to reach, the Court was the only recourse. With a full calendar cases, especially if they went or appeal, take years to be resolved. In the Shell case, an acquisition in mid-1985 resulted in the first instalment being made in 1990.

3. Use of acquired land: Whatever the reasons behind the acquisition of land, in numerous cases the land has been put to no, or no satisfactory, use. It is an accepted principle of compulsory acquisitions that these are resorted to otherwise than by agreement only in cases where the relevant public purpose needs to be accomplished speedily.

Acquisitions of homes are thus especially distastful. Danny Bonte Marie-Therese Abbott, Mrs Guitard (Pomeroy), Stapleton, Von Oswald, Keiller (Soleil d'Or) and Eric Bossy have all had their homes acquired at some time or other. All these acquisitions have been reversed save for the case of Danny Bonte.

Other acquired properties remain unused many years after acquisition thus raising the question why they were acquired in the first place. Glacis - Sur Mer, the Tartruga Felice, the Voss property at Bel Air and Hotel des Seychelles have never been developed. Others, long acquired are only now being developed, e.g. Alexandre Deltel, acquired 1984, development started 1991. In hardly any of the cases of land acquisition in the last 15 years was it necessary to proceed in the manner in which Government proceeded. Government could have achieved its purpose of acquiring land through negotiation and upon making reasonable offers. In acting as it did government was responsible for creating a fair degree of dissatisfaction among an important section of the population, in alienating others and in stifling development and investment. The acute shortage of residential property, for instance, is partly attributable to the acquisitions policy which resulted in local investors not building for fear of arbitrary acquisition.

B GEORGES
12 September 1992

(2)

Georges & Georges
Attorneys-at-Law

11 February, 1994

Principal Secretary
Ministry of Community Development
LANDS AND INFRASTRUCTURE DIVISION
P.O. Box 199, Independence House,
Victoria, Republic of Seychelles

Attention: Director of Lands

Dear Pragassen,

Review of Compulsory Acquisition

I am following up our discussion of 14 January 1994.

Herewith please find enclosed three lists, each set out in order of priority, containing the cases with which I am dealing and their respective status as at the date hereof.

List 1 sets out the cases where I have written to you and am awaiting a response from you.

List 2 contains the matters which are currently under negotiation between ourselves.

List 3 sets out further applications for review which I shall be making shortly.

I look forward to further meetings with you with a view to settling these matters amicably and speedily.

Yours sincerely,


BERNARD GEORGES

