Essays

Imprisonment or Detention for Inability to Fulfil a Contractual Obligation or Pay a Debt(s)

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Abstract

Art 11 of the International Covenant on Civil and Political Rights (ICCPR) provides that '[n]o one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation'. The drafting history of Art 11 shows that state delegates were divided on whether the prohibition should apply to any contractual obligation(s) between private individuals or should also extend to contractual obligations between private individuals and the state. The delegates, especially from Spanish and French speaking countries, argued that Art 11 should only be limited to civil obligations and should not cover contractual obligations between individuals and the state. Some delegates also argued that Art 11 should only be limited to prohibiting imprisonment for inability to pay debts and should not extend to all contractual obligations. However, most of the delegates rejected the proposal that Art 11 should only be limited to contractual obligations between individuals. They also rejected the view that it should be limited to inability to pay debts. In this article, the author analyses the jurisprudence and practice of the international (United Nations) and regional (inter-American, European, Arab and African) human rights bodies to demonstrate how this right is protected. The author also analyses the constitutions of over 190 countries and case law from many countries to show how this right is protected. A combined reading of the international, regional and national practice shows that most countries have prohibited imprisonment for inability to pay a debt. Very few countries have prohibited imprisonment for inability to fulfil a contractual obligation. This implies that the prohibition on imprisonment for inability to pay a debt has attained the status of customary international law.

I. Introduction

Art 11 of the International Covenant on Civil and Political Rights (ICCPR) provides that '[n]o one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation'. During the drafting of Art 11, state delegates were divided on whether the prohibition should apply to any contractual obligation (between private individuals and the state) or should only be limited to contractual obligations between individuals. The delegates, especially from Spanish and French speaking countries, argued that Art 11 should only be limited to civil obligations and should not cover contractual obligations between individuals and the state. Some delegates also argued that Art 11 should only be limited to prohibiting imprisonment for inability to pay debts and should not extend to all contractual

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obligations. However, these proposals were opposed by the majority of the delegates (especially from English-speaking countries) and Art 11 was adopted in its current form – applicable to all contractual obligations. One of the delegates (from Sweden) also argued that Art 11 was vague because it was not clear whether it prohibited imprisonment as a sentence or any form of deprivation of liberty. His concern was not addressed by the other delegates. Subsequent developments at regional (American, European, Arab and African) and national levels show that countries have limited the scope of Art 11 in two different ways. First, at the regional human rights level, the American Convention on Human Rights and the Arab Charter on Human Rights only prohibit imprisonment for inability to pay debt. In other words, they don't prohibit imprisonment for inability to fulfil all contractual obligations. A survey of the constitutions of 193 countries (173 of which have ratified or acceded to the ICCPR) shows that the same approach has been followed by the majority of the countries. Second, unlike Art 11 which prohibits 'imprisonment', the European Convention on Human Rights and Arab Charter on Human Rights prohibit 'detention'. A similar approach is followed in the constitutions of many countries. The drafting history of the Protocol no 4 to the European Convention on Human Rights and of the American Convention of Human Rights shows that 'detention' is broader than imprisonment.[1] Only three countries – Seychelles, Rwanda and Zimbabwe have directly 'transplanted' Art 11 of the ICCPR in their constitutions. Jurisprudence from international human rights bodies such as the Human Rights Committee and the Working Group on Arbitrary Detention shows, inter alia, the measures that state parties are required implement to give effect to Art 11 of the ICCPR. The Working Group on Arbitrary Detention has argued, without explanation, that the prohibition of imprisonment for inability to pay a debt under Art 11 of the ICCPR has attained the status of jus cogens. In this article, it is argued, amongst other things, that although every prohibition under Art 11 of the ICCPR has not acquired the status of *jus cogens*, the prohibition of imprisonment for inability to pay a debt has acquired the status of customary international law. This is for two reasons. First, Art 11 is not transplanted in any of the three regional human rights instruments. Second, Art 11 has been transplanted in the constitutions of only three countries. Even in these three countries, legislation does not prohibit imprisonment for inability to fulfil a contractual obligation generally. It only prohibits imprisonment for inability to pay a debt (in Seychelles and Zimbabwe) or is silent on this issue in Rwanda. Thus, although the prohibition for inability to fulfil a contractual obligation is absolute (as per Art 4 of the ICCPR), it has not

[1] For the purpose of this article, 'imprisonment' means confining a person in facility (prison or correctional centre) for the purpose of serving a sentence imposed by a court or a quasi-judicial body. 'Detention' means confining a person in a facility (for example, a police cell, a hospital, a prison or correctional centre) whether or not pursuant to a court order before or without the imposition of a sentence of imprisonment. 'Arrest' means apprehending or seizing a person who is suspected of committing an offence for the purpose of taking him/her in custody before they are produced before court.

yet attained the status of customary international law. However, although the prohibition against imprisonment for inability to pay a debt has attained the status of customary international law, it has not yet become *jus cogens*. This is so because, since the ICCPR and all regional human rights treaties and the pieces of legislation in countries prohibit imprisonment for inability to pay a debt, this prohibition has attained near universal acceptance and could be classified as customary international law. The article will start by demonstrating the drafting history of Art 11 before dealing with the reservations which countries made to this provision. After that, the author demonstrates case law and practice on Art 11 from international human rights bodies before illustrating how this issue has been dealt with in regional human rights instruments. The author will finally illustrate how different countries have dealt with the prohibition of imprisonment for inability to fulfil a contractual obligation in the constitutions, legislation and case law.

II. Drafting History of Art 11 of the ICCPR

In 1946, the UN Economic and Social Council established the Commission on Human Rights, the Commission, with the mandate 'to submit proposals, recommendations, regarding, inter alia, an international bill of human rights'.[2] The Commission was also asked to suggest ways in which human rights and freedoms would be protected effectively.[3] The Commission, after studying different 'draft bills on human rights and proposals' and after several meetings, prepared the draft ICCPR.[4] In the UN Secretary General's Report to the UN General Assembly to which the draft ICCPR was attached, it was reported that the Commission suggested that Art 11 should be included in the draft ICCPR. The draft Art 11 provided that '[n]o one shall be imprisoned merely on the grounds of inability to fulfil a contractual obligation'.[5] The Secretary General's Report also highlights, not only reasons why the Commission included Art 11 in the ICCPR, but also the circumstances in which it was applicable or inapplicable. The report and the proposed ICCPR provisions were debated by state delegates to adopt the ICCPR. I will start by highlighting the Commission's views on Art 11 before dealing with the state delegates' debates.

1. The Commission's Views

The Commission was of the view that Art 11 should be understood literally and that it was only meant to protect a person who was unable to fulfil a contractual obligation. It explained that Art 11 was not applicable to 'crimes committed through

[2] UN Secretary-General, Draft International Covenants on Human Rights: annotation prepared by the Secretary-General, A/2929 (1 July 1955), 5.

[3] ibid 5.

[4] ibid 5.

[5] ibid 106.

the non-fulfilment of obligations of public interest, which were imposed by statute or court order'.[6] For example, it was not applicable in cases of failure to pay 'maintenance allowances'.[7] The Commission did not agree with the proposal that Art 11 should only be applicable in case of 'inability to pay a contractual debt'.[8] It was agreed that it should have wider application and should 'cover any contractual obligations, namely, the payment of debts, performance of services or the delivery of goods'.[9] An opinion was expressed that inability to fulfil some contractual obligations between the individuals and states which were 'so vital in nature' should justify imprisonment. For example, if the individual had failed to deliver essential food stuffs to the population.[10] However, the Commission did not take a position on that opinion. It just highlighted it. This implies that the Commission did not consider that to be one of the exceptions under Art 11. It was 'pointed out' that in many countries there were laws to the effect that 'persons who were able but unwilling to fulfil contractual obligations might be punished by imprisonment'.[11] This implies that Art 11 was aimed at codifying the principle that a person who is unwilling to fulfil a contractual obligation is liable to punishment. There was a proposal that the words 'unless he is guilty of fraud' should be added at the end of Art 11. However, the Commission did not accept this proposal because it was agreed that the words 'merely on the grounds of inability' made it clear that Art 11 was not applicable to cases of fraud.[12] In other words, a person whose inability to fulfil a contractual obligation is attributable to fraud is not protected under Art 11. His/her involvement in fraudulent activities implies that he/she is unwilling to fulfil a contractual obligation. The report also shows that the Commission rejected the inclusion of a new paragraph to the effect that 'no one shall be subjected to excessive fines'.[13]

2. The State Delegates' Debates on Art 11

The draft Art 11 was debated by state delegates in November 1958. As the discussion below illustrates, the majority of the state delegates were prepared to vote in favour of the text that was proposed by the Commission. However, some of them were of the view that the text could be improved upon to make it clearer. The Colombian delegate was the first to propose an amendment to the draft Art 11. He argued that he supported the inclusion of Art 11 in the ICCPR because it strengthened the protection of human rights and complied with the Columbian constitution 'which prohibited imprisonment for purely civil debts or obligations'.[14]

[6] ibid 106.
[7] ibid 106.
[8] ibid 106.
[9] ibid 106.
[10] ibid 106.
[11] ibid 106.
[12] ibid 106.
[13] ibid 106.
[14] General Assembly, 13th session, official records, 3rd committee, 883rd meeting, Monday,

He added that the Commission's report had indicated that Art 11 covered all contractual obligations.[15] He argued that:

> '[H]e had certain doubts regarding the wording of the article. Assuming that its object was to prohibit any person from being deprived of his liberty merely for inability to comply with a private legal obligation, that is, one not related to public law, it should be noted that such obligations did not always arise out of contracts, and, in addition, that private persons entered into contracts with the State which were contracts not under civil law but under administrative law, and failure to fulfil which might properly, in view of the serious consequences to society that could ensue, be punishable with imprisonment. That was the case with contracts to supply the armed forces in time of war'.[16]

Against that background, he proposed that the word 'contractual' should be replaced with the 'civil' or alternatively, the phrase 'contractual obligation' should be replaced by 'obligation under private law'. He also explained why those amendments were necessary. Since the Committee spent several hours discussing the Colombian proposal, it is important to reproduce extensively the rationale behind the amendment that the delegate had proposed.

He explained that:

> 'Civil obligations could have their origin not only in contracts, but also in the law, as was the case, for example, in so-called quasi-contracts or quasi-delicts. In other words, there were many purely civil obligations not originating in freedom of contract – for example, the obligation of the employer to make good damage which might have been caused through negligence or lack of foresight on the part of his employee. It would be wrong if imprisonment could be imposed in cases such as that and many similar ones. In such cases…there were no contractual obligations. He therefore thought that the word "contractual" might usefully be replaced by "civil", a word which was at once broader and more precise. All civil obligations, regardless of their origin, would then be covered by the prohibition, while all obligations which related to the State, whether contractual or not, would be left out. However, he was afraid that the word "civil" might cause certain difficulties of interpretation in some countries, or that it might be understood in others as excluding certain branches of private law, such as commercial and labour law. Accordingly, he thought that it might be possible to replace the expression "contractual obligation" by "obligation under private law". That formula would establish a sufficiently clear distinction between that type of obligation and obligations under public

17 November 1958 (A/C.3/SR.883), para 12.

[15] ibid para 13.

[16] ibid para 14.

> law, which would be those originating in criminal law, administrative law, constitutional law, and so forth'.[17]

He added that Art 11 was clearly inapplicable to criminal law cases.[18] The Venezuelan delegate recommended that Art 11 should be amended to expressly state that it was not applicable to cases of fraud.[19] However, the Colombian delegate argued that this was not necessary because the Commission's report made it clear that Art 11 was not applicable to cases of fraud.[20] The Venezuelan delegate was convinced that indeed Art 11 did not cover cases of fraud.[21] This view was also endorsed by the Spanish delegate.[22] The Spanish delegate also emphasised that the rationale behind Art 11 'was to ensure that no one should be imprisoned merely for non-compliance with a civil obligation'.[23] He added that this was evident from the use of the

> 'two words in the text: the word "merely", which ensured that no other aspect of the offence should be taken into consideration, and the word "inability", which meant that the person concerned should be unable, not unwilling, to fulfil his contractual obligation'.[24]

He supported Colombia's suggestion that replacing the word 'contractual' with 'civil' would have 'improved' the quality of Art 11.[25] He added that in Spanish law, a person who failed to fulfil government contracts was not imprisoned but rather was disqualified from doing business with government.[26] The Colombian delegate, in response to the Spanish delegate's submission, clarified that although in his country failure to fulfil government contracts was not punishable by imprisonment, there should be cases where such failure could be punished by imprisonment. For example, 'failure to supply foodstuff in war time'.[27] The Pakistan delegate said that he was going to abstain from voting on Art 11 because it was contrary to Pakistan law which provided for the circumstances in which a judgement debtor could be arrested and brought before court which was empowered to order his detention in 'a civil prison or elsewhere' if there was evidence that his refusal to pay the debt was 'in bad faith'.[28] The submissions which expressly objected to the Colombian proposal can be categorised into two groups. The first group includes those

[17] ibid para 15.
[18] ibid para 17.
[19] ibid para 18.
[20] ibid para 23.
[21] ibid para 27.
[22] ibid para 20.
[23] ibid para 19.
[24] ibid para 19.
[25] ibid para 21.
[26] ibid para 21.
[27] ibid para 24.
[28] ibid para 22.

delegates who did not give reasons for their objection to the proposal. The second group includes delegates who explained why they opposed the amendment. Within this second group, there are two sub-groups. The first sub-group just gave reasons for their objection to the proposal. The second sub-group not only gave reasons for their objections, but also proposed alternative amendments. I will start with the discussion of the first sub-group in the second category. The United Kingdom's delegate first explained his understanding of the scope of Art 11.

He stated that:

> '[H]is delegation regarded the article as intended to prevent two things: first, imprisonment for debt without the order of a court at the mere discretion of the creditor and, secondly, imprisonment, even by order of a court, on the ground of mere inability to pay; the words "merely" and "inability", as the Spanish representative had pointed out, were crucial. Many civil and quasi-civil suits were brought before the courts in the United Kingdom every day-for example, by wives seeking the enforcement of maintenance orders. In each case, the court carefully considered whether the defendant was in a position to pay and was willfully neglecting to do so before it made its order. In the case of a judgement debt, referred to by the representative of Pakistan, judgement for the debt was given only if the court was satisfied that the defendant had, or had had at the material time, the means to pay. It was only if the person concerned refused to comply with the order made by the Court that he laid himself open to a sentence of imprisonment; he was therefore sentenced, not for inability to pay, but for willful refusal to obey the court. Such cases were obviously outside the scope of article 11'.[29]

He objected to the Colombian delegate's suggested amendment to Art 11 on the grounds that

> '[t]he term "civil obligation" was much wider than "contractual obligation", and might cover tax cases or even cases of non-compliance with a court order, which would be most undesirable'.[30]

Other countries also opposed the Colombian suggested amendment on grounds that it would broaden Art 11 to cover cases which were beyond its scope;[31] the Commission had, after a lengthy debate, adopted the provision unanimously and it was 'not meant to apply to non-fulfilment of obligations imposed in the public

[29] ibid para 25.

[30] ibid para 26.

[31] General Assembly, 13th session, official records, 3rdcommittee, 883rd meeting, Monday, 17 November 1958 (A/C.3/SR.883), para 28 (Saudi Arabia); General Assembly, 13th session, official records, 3rd committee, 884th meeting, Monday, 17 November 1958 (A/C.3/SR.884), para 2 (India); General Assembly, 13th session, official records, 3rd committee, 884th meeting, Monday, 17 November 1958 (A/C.3/SR.884), para 34 (Saudi Arabia).

interest';[32] the amendment was unacceptable as it 'might give rise to misunderstandings' in different fields of law such as criminal law, civil law, the law of contract and the law of delict;[33] the meaning of Art 11 had been explained by the Commission and there were 'considerable' differences between civil and contractual obligations;[34] and the amendment contradicted the domestic legislation in many countries.[35] The Dutch delegate objected to the proposed amendment because the words suggested were open to various interpretations in different languages.[36] The Chinese delegation argued that he would abstain from voting for the Colombian proposal because it 'had no strong feelings' about it. However, it was prepared to vote for Art 11 as drafted by the Commission 'on the understanding that it did not cover obligations of the individual towards the State'.[37] Some countries opposed the Colombian proposal without detailed explanation. For example, the Japanese delegate pointed out that he was 'unable' to vote for it[38] and the Irish delegate argued that Art 11 as drafted by the Commission was satisfactory.[39] The Swedish delegate argued that he was prepared to vote for Art 11 as drafted by the Commission although he

> 'had some doubts about the meaning of the word "imprisoned", on which the... [Commission on Human Rights' Report] threw no light. It was not clear, for instance, whether it meant "sentenced by a court to a term of imprisonment", or merely "deprived of liberty" '.[40]

Some countries that opposed the Colombian proposal argued that if the delegates did not adopt Art 11 in the format proposed by the Commission on Human Rights, the Article had to be amended further. For example, the United States delegate argued that his delegation was opposed to the Colombian amendment and added that 'the meaning [sic] might be made more explicit by inserting the

[32] General Assembly, 13th session, official records, 3rd committee, 884th meeting, Monday, 17 November 1958 (A/C.3/SR.884), para 1 (India).

[33] General Assembly, 13th session, official records, 3rd committee, 884th meeting, Monday, 17 November 1958 (A/C.3/SR.884) para 4 (Belgium). See also para 23 where the United Kingdom delegate argued that 'Whatever the meaning of the term for the French speaking and Latin American countries, "civil obligations" would in English have the meaning of obligations other than military obligations. It would thus clearly include any such obligations of the individual towards the State. A contractual obligation belonged in an entirely different category'.

[34] General Assembly, 13th session, official records, 3rd committee, 884th meeting, Monday, 17 November 1958 (A/C.3/SR.884) para 31 (USSR).

[35] ibid paras 35 (United States) and 36 (Morocco).

[36] General Assembly, 13th session, official records, 3rd committee, 885th meeting, Tuesday, 18 November 1958 (A/C.3/SR.885) paras 2 (Sweden); 4 (the Netherlands).

[37] ibid para 8 (China).

[38] General Assembly, 13th session, official records, 3rd committee, 884th meeting, Monday, 17 November 1958 (A/C.3/SR.884), para 5 (Japan).

[39] ibid para 47 (Ireland).

[40] General Assembly, 13th session, official records, 3rd committee, 885th meeting, Tuesday, 18 November 1958 (A/C.3/SR.885), para 1 (Sweden).

words "*bona fide*" after the words "to fulfil a" '.[41] In other words, had this proposal been followed, Art 11 would have provided that '[n]o one shall be imprisoned merely on the ground of inability to fulfil a *bona fide* contractual obligation'. The Israel delegate suggested that Art 11 should be amended to provide that '[n]o one shall be deprived of his liberty because of his inability to pay a civil debt'.[42] In support of this proposal, he explained that:

> 'The text prepared by the Commission on Human Rights forbade imprisonment for debts, meaning contractual debts and not civil obligations in general. Thus, in common law countries, it did not apply to obligations arising out of a "tort". The reason for that exception was undoubtedly the fact that 'tort' implied an intention to injure, or at least negligence, on the part of its author and could therefore be regarded as to some extent comparable to a criminal offence. It was obvious that a breach of contract was not necessarily the result of malice or negligence, for the debtor under a contract might simply be unable to discharge his obligations. However, there were also instances of wilful and malicious breach of contract, which were then of a grave nature, but that point was not taken into consideration in article 11. On the other hand, a civil offender might commit only a minor misdemeanour yet be convicted and ordered to pay enormous sums in damages. In short, it was difficult to see why the imprisonment of a debtor under contract should be regarded as a violation of human rights, without any distinction being made, if in other circumstances it was permissible to imprison an involuntary offender who was unable to discharge the obligations incurred in connexion with his offence. That argument applied particularly to cases where no offence had actually been committed but a person was held liable for damage caused by others or by some object in his charge'.[43]

He argued that his suggested amendment was necessary because in some cases it might be difficult to determine whether or not the obligation was contractual.[44] However, both the American and Israeli proposals were not discussed by the delegates. The Spanish delegate supported the Colombian proposal but also noted that many delegates were opposed to it.[45] He suggested that another amendment to Art 11 that might strike a balance between the Commission's text and the Colombian proposal. It explained that:

> '[I]n Spanish-speaking countries the phrase "civil obligation" had only

[41] General Assembly, 13th session, official records, 3rd committee, 884th meeting, Monday, 17 November 1958 (A/C.3/SR.884), para 35 (United States).

[42] ibid para 41 (Israel).

[43] ibid para 39 (Israel).

[44] ibid para 40 (Israel).

[45] General Assembly, 13th session, official records, 3rd committee, 885th meeting, Tuesday, 18 November 1958 (A/C.3/SR.885), para 6.

> one meaning, namely...an obligation of a private nature, in contrast to... an obligation as between the individual and the State. He wondered whether the difficulty might not be met by replacing the phrase "civil obligation" by the words "an obligation of a private nature" ...Such a wording would cover both contractual obligations and non-contractual obligations of the kind he had described, while excluding the cases referred to by the United Kingdom representative at the 883rd meeting. Moreover, it would broaden the protection provided by article 11 which was much to be desired, as people had many more non-contractual obligations than contractual ones'.[46]

However, the above proposal was not debated by the delegates. This meant that there were only two texts for the delegates to debate and adopt one of them: the initial one which had been proposed by the Commission and the one suggested by Colombia (amending the initial one).

It is evident that many delegates, for various reasons, opposed the Colombian proposed amendment. However, some of the delegates supported it. For example, the Spanish delegate argued that the amendment would have 'improved' the quality of the provision.[47] It was also argued that it complied with France's domestic law which prohibited 'imprisonment for debt in commercial and civil cases' and that the amendment 'would make it clear that no penal proceedings were involved' in any failure to meet contractual obligations'[48] and would be in line with domestic penal law.[49] The Colombian delegate argued that Spanish-speaking countries and France supported his proposal because it would have made Art 11 clearer.[50] The Spanish delegate argued that although the Commission's text was 'generally acceptable' the Colombian proposal raised an important issue to the effect that:

> 'The word "contractual", although correct, did not go far enough. For instance, it did not cover obligations which, although not contractual, were nevertheless binding upon the person concerned. Under the article as it stood, a person who contracted for a loan in writing could not be imprisoned for default, whereas a person liable for damage caused by him or by members of his household for whom he was responsible could be sent to prison for default, no contract being involved. Thus, the word "contractual" only partly covered the obligations to which the article was intended to apply'.[51]

[46] ibid para 6 (Spain).

[47] General Assembly, 13th session, official records, 3rd committee, 883rd meeting, Monday, 17 November 1958 (A/C.3/SR.883) para 21 (Spain).

[48] ibid para 29 (France).

[49] General Assembly, 13th session, official records, 3rd committee, 884th meeting, Monday, 17 November 1958 (A/C.3/SR.884) paras 25 and 45 (France).

[50] General Assembly, 13th session, official records, 3rd committee, 884th meeting, Monday, 17 November 1958 (A/C.3/SR.884) para 8 (Colombia).

[51] General Assembly, 13th session, official records, 3rd committee, 885th meeting, Tuesday,

A few delegates were 'neutral' and argued that they were prepared to vote for Art 11 whether or not it was amended as suggested by Colombia.[52] This is because, for example, there was 'very little difference' between the words 'contractual' and 'civil'.[53] Since the delegates were divided on the issue of whether to adopt the Colombian proposed amendment, the chairperson put the Colombian amendment to vote. The results show that '[t]he amendment was rejected by 39 votes to 15, with 8 abstentions'.[54] Since the Colombian amendment had been rejected by the majority of the delegates, the Chairperson put Art 11 to vote, as had been drafted by the Commission. It was adopted unanimously.[55]

After casting their votes, four countries explained why they had voted in favour of the text proposed by the Commission. Colombia explained that its proposal had been meant to 'improve Article 11' but this did not mean that it was opposed to the Commission's text.[56] The Iranian delegate explained that it voted in favour of the Commission's text because, unlike the Colombian proposal, 'it was simple, precise and well-worded'.[57] He added that Art 11 should be interpreted in the light of 'reservations' in the Commission's report.[58] The Yugoslav and Philippine delegations explained that they voted in favour of the text because it was in conformity with their domestic legislation.[59] They opposed the Colombian proposed amendment because the word 'civil' was susceptible 'to too many interpretations'[60] and 'would have given rise to many unnecessary problems'.[61]

The following issues should be noted about the drafting history of Art 11. First, there was consensus that the provision applies to all contractual obligations. In other words, it is not limited to failure to pay debts (or loans) only. Implied in this is that the contract giving rise to the obligation should be valid. This is because as a general rule in the law of contract, an invalid contract is enforceable. Second, Art 11 is applicable to a person who is unable, as opposed to one who is unwilling, to fulfil a contractual obligation. Put differently, the Commission and the delegates were of view that Art 11 does not protect persons who are able but unwilling to fulfil their contractual obligations.[62] This means that before a person is sentenced

18 November 1958 (A/C.3/SR.885) para 5 (Spain).

[52] General Assembly, 13th session, official records, 3rd committee, 884th meeting, Monday, 17 November 1958 (A/C.3/SR.884) para 43 (Mexico).

[53] General Assembly, 13th session, official records, 3rd committee, 885th meeting, Tuesday, 18 November 1958 (A/C.3/SR.885) para 7 (Greece).

[54] ibid para 9.

[55] ibid para 10.

[56] ibid para 11.

[57] ibid para 12.

[58] ibid para 12.

[59] ibid paras 13 (Yugoslavia) and 14 (Philippines).

[60] ibid para 13 (Iran).

[61] ibid para 14 (Philippines).

[62] General Assembly, 13th session, official records, 3rdcommittee, 884th meeting, Monday, 17 November 1958 (A/C.3/SR.884) paras 3 (India); 5 (Japan); 30 (Pakistan); General Assembly, 13th session, official records, 3rd committee, 885th meeting, Tuesday, 18 November 1958 (A/C.3/

to prison, the court must be satisfied that he/she is unwilling to pay the debt. Third, there was no consensus amongst the delegates on the issue of whether Art 11 was applicable to all contractual obligations between private individuals and the states. Whereas the majority of the delegates did not object to the argument that it is applicable to any contractual obligation between private individuals (horizontal application) and between private individuals and states (vertical application), a few of them (especially China and those that supported the Columbian proposal) were of the view that it was not applicable to all contractual obligations between private individuals and the state. There was also a general understanding (with the exception of Israel) that Art 11 is not applicable to situations where the obligations had been imposed by statute or 'public law' (for example, maintenance cases). In the two cases above where the delegates disagreed on the scope of Art 11, it is argued that when interpreting the provision, the position of the majority should take precedence. This is because following the minorities' views, would defeat the purpose of the provision. This view is also supported by the fact that after the rejection of Columbia's proposed amendment, delegates voted unanimously in favour of the Commission's proposal. This implies that they agreed with the majority's understanding of Art 11. Otherwise, some would have voted against it or abstained. Therefore, the correct way of understating Art 11 is that it has both horizontal and vertical applications. It is applicable to all to all contractual obligations and not just to debts between private individuals.

An issue that was neither addressed in the Commission's report nor in the majority of delegates' submissions relates to the meaning of 'imprisonment' in the context of Art 11. Whereas there was consensus that Art 11 barred imprisonment for inability to fulfil a contractual obligation, neither the Commission's report nor the majority of delegates' submissions clarified the meaning of 'imprisonment'. This explains why the Swedish delegate argued that he

> 'had some doubts about the meaning of the word "imprisoned", on which the... [Commission on Human Rights' Report] threw no light. It was not clear, for instance, whether it meant "sentenced by a court to a term of imprisonment", or merely "deprived of liberty"'.[63]

As illustrated above, the United Kingdom delegate's view was that Art 11 was intended

> 'to prevent two things: first, imprisonment for debt without the order of a court at the mere discretion of the creditor and, secondly, imprisonment, even by order of a court, on the ground of mere inability to pay'.

SR.885) para 4 (Netherlands).

[63] General Assembly, 13th session, official records, 3rd committee, 885th meeting, Tuesday, 18 November 1958 (A/C.3/SR.885), para 1 (Sweden).

The first scenario above deals with cases, for example, where a creditor asks/pays the police or any other law enforcement officer to arrest and detain a debtor for the purpose of forcing him/her to pay the debt. There is no judicial oversight in such a situation. It is an extrajudicial mechanism. The debtor's ability or inability to pay the debt is irrelevant for the purposes of imprisonment in this context. The second scenario deals with a case where a court orders the imprisonment of a person simply because he/she or she is unable to pay a debt. In simple terms, he/she is being imprisoned for being poor. None of the delegates questioned or objected to the United Kingdom's understanding of the dual purposes of Art 11. This implies that the view that Art 11 was meant to prevent imprisonment in those two situations should not be dismissed lightly.[64] It is more accurate to refer to the first scenario as detention and to the second one as imprisonment. It is against that background that the author's view is different from that adopted by some scholars that 'Article 11 protects against imprisonment as a punishment'.[65] It is worth noting that in some instances, the Human Rights Committee has used the words 'detention' and 'imprisonment' interchangeably without explaining the difference(s) between the two.[66]

The drafting history of Art 11 shows that there are two possible ways in which to deal with a judgement debtor who, although able to pay, refuses to do so. The first 'way' can be inferred from the United Kingdom delegate's submission. In the process of explaining the circumstances in which Art 11 was not applicable to a judgement debtor, the United Kingdom delegate added that if such a debtor had the means to pay and the court ordered him/her to pay but they refused to do so, they had to be imprisoned 'not for inability to pay, but for willful refusal to obey the court'.[67] In other words, the person is being imprisoned for what could be referred to as contempt of court. This means that before the sentence of imprisonment is imposed, it has to be preceded by a court order to pay the debt. If one obeys the court order (fulfils a contractual obligation), he or she is not sentenced to prison. However,

[64] However, the Human Rights Committee uses the words 'detention' and 'imprisonment' interchangeably. For example, *Parkanyi* v *Hungary* (Communication 410/1990, U.N. Doc. CCPR/C/41/D/410/1990) (HRC 1991) para 5.2 the Human Rights Committee held that the application was inadmissible because, inter alia, 'that the author has failed to substantiate sufficiently, for purposes of admissibility, that he was subjected to detention on account of his inability to fulfil a contractual obligation.' The use of the word 'detention' as opposed to 'imprisonment' implies that the Committee considered Art 11 to be broad.

[65] S. Joseph and M. Castan, *The International Covenant on Civil and Political Rights Cases, Materials, and Commentary* (Oxford: Oxford University Press, 3rd ed, 2013, 335.

[66] For example, *Parkanyi* v *Hungary*n 64 above the Human Rights Committee held that the application was inadmissible because, inter alia, 'that the author has failed to substantiate sufficiently, for purposes of admissibility, that he was subjected to detention on account of his inability to fulfil a contractual obligation.' However, in *HS* v *Australia* (CCPR/C/113/D/2015/2010) (HRC, 30 March 2015) para 8.3, the Committee dismissed the author's argument allegating a violation of Art 11 because, inter alia, 'the author has never been imprisoned as a result of her failure to fulfil any kind of contractual obligation'.

[67] General Assembly, 13th session, official records, 3rd committee, 883rd meeting, Monday, 17 November 1958 (A/C.3/SR.883), para 25.

the opposite is true. Since he/she is sentenced to prison for contempt of court, even if he/she fulfils the contractual obligation after the sentence has been imposed, he/she may have to serve the sentence. He/she also gets a criminal record. In other words, imprisonment was a form of punishment. Legally, a person can only be punished/sentenced after a conviction. This means that he/she must have committed an offence. As the discussion below illustrates, the practice of the Human Rights Committee and of the Working Group on Arbitrary Detention shows that in some countries this approach has been followed in cases where people have refused to pay debts pursuant to court orders.

The second way is inferred from the submission of the Pakistan delegate. He argued, and his submission was endorsed by the United Kingdom delegate, that Art 11 did not prohibit the detention of a person in a 'civil prison or elsewhere' pursuant to a court order if there was evidence that his refusal to pay the debt was 'in bad faith'.[68] This means that the imprisonment is meant to force him to fulfil his/her contractual obligation. If he/she fulfils the contractual obligation, they are released from prison immediately and they don't get a criminal record. This amounts to deprivation of liberty for the purpose of forcing that person to fulfil a contractual obligation. However, the deprivation of liberty must be ordered by the court after being satisfied that the person is able but unwilling to meet his/her contractual obligation. This is perhaps the situation that the Commission of Human Rights had in mind when it stated that it was 'pointed out' during the Commissioners' deliberations on Art 11 that in many countries there were pieces of legislation to the effect that 'persons who were able but unwilling to fulfil contractual obligations might be punished by imprisonment'.[69] In this context, 'punishment' does not necessarily mean that a person has committed an offence. It is used to imply a coercive tool in the hands of a court to force judgment debtor to obey a court order. The above discussion shows that this is what the delegates had in mind when they discussed Art 11. This explains why they made it clear that Art 11 was not applicable to obligations imposed by statute. As the discussion below illustrates, many countries have adopted the 'Pakistan' approach. Therefore, it can be argued that the purpose of imprisonment under Art 11 is meant to compel the person to fulfil a contractual obligation. Otherwise, Art 11 would have provided that 'no one shall be punished merely on the ground of inability to fulfil a contractual obligation'. Once he/she fulfilled the contractual obligation, he/she must be released from detention or prison. Otherwise, he/she will remain in detention for the whole duration imposed by the court. After release, he/she is not absolved from fulfilling the contractual obligation if he/she has the means to do so.

Since there were disagreements during the drafting of Art 11, it is important to highlight how countries dealt with those disagreements at the time of ratifying

[68] ibid para 22.

[69] UN Secretary-General, Draft International Covenants on Human Rights: annotation prepared by the Secretary-General, A/2929 (1 July 1955), 106.

or acceding to the ICCPR and also in practice at the regional and domestic human rights levels. In the next part of the article, the author illustrates how Art 11 has been implemented or otherwise in practice at international, regional and national levels. At the international level, the author shows the reservations states parties have made on Art 11 and their legal implications and also the approaches that UN human rights mechanisms have taken in ensuring that states parties implement Art 11. At the regional and national levels, the author also demonstrates the approaches regional human rights bodies and states parties have taken to give effect to Art 11. The discussion will start with the international human rights system.

III. Art 11 in Practice: The International Level

At the international level, the author will examine the reservations that some states parties made on Art 11. This part of the article will also illustrate how the UN human rights mechanisms have understood and applied Art 11.

1. Reservations to Article ICCPR

Although many delegates had supported the Colombian amendment and some had suggested further amendments, these disagreements are not reflected in the reservations which the states made when ratifying or acceding to the ICCPR. For example, Colombia and other countries such as Spain and France which supported its proposed amendment, did not make any reservation on Art 11. Likewise, Israel and United States which had suggested amendments to Art 11 also did not make any reservation on the provision. The lack of many reservations could be attributable to the fact that Art 11 was adopted unanimously. However, two countries that did not participate in the debates on Art 11 – Bangladesh and Congo, made reservations on Art 11. In its reservation, Bangladesh stated that:

> 'Article 11 providing that…is generally in conformity with the Constitutional and legal provisions in Bangladesh, except in some very exceptional circumstances, where the law provides for civil imprisonment in case of willful default in complying with a decree. The Government of People's Republic of Bangladesh will apply this article in accordance with its existing municipal law'.[70]

Congo also made a reservation on Art 11 to the effect that:

> 'Article 11 (…) is quite incompatible with articles 386 et seq of the Congolese Code of Civil, Commercial, Administrative and Financial Procedure, derived from Act 51/83 of 21 April 1983. Under those provisions, in matters of private law, decisions or orders emanating from conciliation proceedings may be

[70] See http://tinyurl.com/2w6pdr3y (last visited 30 September 2024).

> enforced through imprisonment for debt when other means of enforcement have failed, when the amount due exceeds 20,000 CFA francs and when the debtor, between 18 and 60 years of age, makes himself insolvent in bad faith'.[71]

In its response to Congo's reservation, Belgium referred to the drafting history of Art 11 and argued that the reservation was unnecessary because 'there is no contradiction between the Congolese legislation and the letter and the spirit of article 11 of the Covenant'.[72] This is because, its understanding of the drafting history of Art 11 shows that

> '[i]mprisonment is not incompatible with article 11 when there are other reasons for imposing this penalty, for example when the debtor, by acting in bad faith or through fraudulent manoeuvres, has placed himself in the position of being unable to fulfil his obligations'.[73]

Belgium added that since Art 11 is non-derogable, states are not permitted to make any reservations on it. If one closely examines the Bangladesh reservation in the light of its domestic law, it is evident that the reservation was not necessary. This is because the circumstances in which the Code of Civil Procedure[74] empowers a court to order the imprisonment of a person for failure to fulfil a contractual obligation are permissible under Art 11.[75] It can thus be argued that both reservations do not affect the full implementation of Art 11 in the respective countries. It is now important to illustrate how the UN human rights bodies have dealt with Art 11.

2. The UN Human Rights Bodies and Art 11

Different UN human rights bodies or mechanisms have expressed their views on what is required of states parties to the ICCPR to give effect to their obligations under Art 11. The author will start with the views expressed by the Human Rights Committee, the enforcement body of the ICCPR. There are two main ways in which the Human Rights Committee has expressed its views on Art 11: through its concluding observations on the periodic reports of states parties to the ICCPR and through individual communications. We will start with concluding observations. Through its concluding observations on state party reports, the Human Rights Committee has recommended ways in which countries can give effect to Art 11. For example, in its Concluding Observation on Morocco's report, the Human Rights Committee was concerned about a circular issued by the Ministry of Justice providing

> 'for enforcement by committal of debtors who do not fulfil their contractual

[71] ibid.
[72] ibid.
[73] ibid.
[74] Code of Civil Procedure, 1908 (Act no V of 1908).
[75] Section 51, 55, 58, 74.

> obligations if they have not provided a certificate of indigence or a document that certifies that they are not liable to pay taxes'.[76]

Against that background, it recommended that Morocco 'should revise its laws in such a way as to ensure that committal may not be used as a method of enforcing contractual obligations'.[77] In its concluding observation on the Republic of Ireland's report, the Human Rights Committee observed that it is a violation of Art 11 for people to be 'imprisoned for failure to pay fines in connection with their inability to fulfil contractual obligations'.[78] Against that background, the Committee recommended that Ireland should implement its domestic law to

> 'provide for a community service order as an alternative to imprisonment for failure to pay court-ordered fines or civil debt, and ensure that in no case is imprisonment used as a method of enforcing contractual obligations'.[79]

The Human Rights Committee also requires states parties to ensure that their domestic legislation clearly prohibits the imprisonment of a person for failure to fulfil their contractual obligation and also that this right is non-derogable.[80] It considers imprisonment for inability to fulfil a contractual obligation as a form of arbitrary detention.[81] The above concluding observations shows, inter alia, that in some countries a person who is able but refuses to meet a contractual obligation after being ordered by a court to do so commits an offence. This means that he/she is punished for that offence and must also fulfil the contractual obligation. Apart from concluding observations, the Human Rights Committee has also handed down decisions in which it has explained the circumstances in which Art 11 is

[76] CCPR/C/MAR/CO/6 (CCPR 2016), para 31.

[77] ibid para 32.

[78] CCPR/C/IRL/CO/4 (CCPR 2014), para 16.

[79] ibid

[80] See CCPR/C/IDN/CO/1 (CCPR 2013) (Indonesia) para 9 where the Committee stated that it was 'concerned at the lack of a clear provision in article 28I of the Constitution of 1945 and Regulation in lieu of Law no 23 of 1959 (regulating the rights that are non-derogable in a state of emergency) to dispel any doubts that certain rights, including the right not to be imprisoned merely on the ground of inability to fulfil a contractual obligation protected under article 11 of the Covenant, cannot be derogated from during a state of emergency.' In its Concluding Observation on Grenada's report CCPR/C/GRD/CO/1 (2009) para 18, the Committee stated that the state party 'giving due consideration to article 11 of the Covenant…should provide the Committee with information clarifying the meaning of this term ["civil prisoners"]. It should ensure the full implementation of article 11 of the Covenant.' See also CCPR/C/NIC/CO/3 (CCPR 2008) (Nicaragua) para 18; CCPR/C/IRL/CO/3 (CCPR 2008) (Ireland) para 18; CCPR/C/GRC/CO/2 (CCPR 2015) (Greece) para 36; CCPR/C/TCD/CO/1 (CCPR 2009)(Chad) para 25; CCPR/C/TZA/CO/4 (CCPR 2009) (Tanzania) para 20; CCPR/C/DZA/CO/3 (CCPR 2007)(Algeria) para 6 (where the Committee recommends to states parties to ensure that their laws to do permit the imprisonment of persons for failure to fulfil contractual obligations).

[81] UN Human Rights Committee (HRC), General comment no 35, Art 9 (Liberty and security of person) (CCPR/C/GC/35)(16 December 2014) para 14. See also CCPR/C/QAT/CO/1 (CCPR 2022) (Qatar) para 31.

applicable. These communications will be highlighted below in the order in which they were decided.

In *Calvet* v *Spain*,[82] the applicant and his wife divorced and the court ordered him to pay his former wife and children's maintenance.[83] The applicant failed to pay the maintenance and he was convicted of the 'offence of abandonment of the family (…) and sentenced him to eight weekends' imprisonment and reimbursement of the sums owed to his ex-wife'.[84] He argued that his imprisonment was contrary to Art 11 because it was imposed as a result of failure to fulfil a contractual obligation.[85] The state argued that the applicant had been convicted of 'failure to fulfil his legal obligation to keep and feed his family'.[86] The Committee held that the State had not violated Art 11 because the applicant had been imprisoned for failure to meet his legal as opposed to contractual obligation.[87] The Committee reached similar conclusions where the applicant was imprisoned for failure to pay alimony to his former wife[88] and where the applicant risked 'being imprisoned for failure to pay costs following criminal proceedings'.[89] In a case where the applicant was imprisoned for allegedly committing fraud in the context of contracts he had entered into with his clients, the Committee held that Art 11 was not violated where imprisonment was imposed 'under the scope of the criminal law'.[90] In *Maksim Gavrilin* v *Belarus*[91] the Human Rights Committee held that

> 'the prohibition of detention for debt does not apply to criminal offences related to civil law debts. When a person commits fraud, negligent or fraudulent bankruptcy, etc., he or she may be punished with imprisonment even when he or she no longer is able to pay the debts'.[92]

The Committee came to the same conclusion in a subsequent communication.[93] In *José Luis de León Castro* v *Spain*[94] the author, a lawyer, over-billed his clients and was convicted of fraud and sentenced to three years' imprisonment. Although he qualified for parole, the prison authorities refused to release him on the ground that he had not 'paid the compensation corresponding to the civil liabilities arising

[82] *Calvet* v *Spain* (Communication no 1333/2004)(25 July 2005).
[83] ibid para 2.1.
[84] ibid para 2.2.
[85] ibid para 2.3.
[86] ibid para 4.1.
[87] ibid para 6.4.
[88] Seto Martínez v. Spain (Communication no 1624/2007) (19 March 2010), para 4.3.
[89] Christophe Désiré Bengono v Cameroon (CCPR/C/132/D/2609/2015) (29 December 2021), para 6.8.
[90] *Latifulin* v *Kyrgyzstan* (Communication no 1312/2004) (10 March 2010), para 7.2 (he had promised to secure study visas abroad for some of his clients but failed to do so).
[91] *Maksim Gavrilin* v *Belarus* (CCPR/C/89/D/1342/2005) (3 April 2007).
[92] ibid para 7.3.
[93] *Cyrille Gervais Moutono Zogo* v *Cameroon* (CCPR/C/121/D/2764/2016) (19 December 2017) para 6.11.
[94] *José Luis de León Castro* v *Spain* (CCPR/C/95/D/1388/2005) (25 May 2009).

from the offence'.[95] He was 'not financially solvent' and therefore could not pay that money to be released on parole.[96] Although he did not argue that his imprisonment violated Art 11, one of the Committee Members held that 'the measures used in criminal cases to coerce the payment of restitution may, at some future date, be worthy of examination in light of the language of' Art 11.[97] It is argued that continued imprisonment in such a case is not contrary to Art 11. The person is not being imprisoned for inability to fulfil a contractual obligation. He is being imprisoned for inability to meet his statutory duty of compensating his victims. For the Committee to decide whether or not Art 11 was violated, the applicant has a duty to explain how the state party indeed violated that provision. Otherwise, the Committee will not consider the allegation on merit.[98]

The above jurisprudence shows that although the Human Rights Committee does not refer to the drafting history of Art 11, its conclusions in the above communications are in line with the drafting history of Art 11. As at the time of writing, there was no case in which the Human Rights Committee had held that a state had violated Art 11. It is important to highlight how other human rights bodies have dealt with Art 11.

3. The Working Group on Arbitrary Detention

As is the case with the Human Rights Committee, the Working Group on Arbitrary Detention[99] has also followed different approaches in its effort to ensure that states comply with their obligation under Art 11. For example, it has stated that using contempt of court proceedings as a disguise to imprison people for inability to pay debts is a violation of Art 11.[100] The Working Group also added that 'the prohibition of imprisonment for debt under article 11 of the International Covenant on Civil and Political Rights is absolute and forms part of customary international

[95] ibid para 2.8.

[96] ibid para 3.2.

[97] *José Luis de León Castro* v *Spain* (CCPR/C/95/D/1388/2005) (25 May 2009) (Dissenting Opinion of Committee Member Ruth Wedgwood), 17.

[98] *Lukpan Akhmedyarov* v *Kazakhstan* (CCPR/C/129/D/2535/2015) (27 November 2020) para 8.4.

[99] According to the *Report of the Working Group on Arbitrary Detention* (A/HRC/54/51) (31 July 2023) para 1, '[t]he Working Group on Arbitrary Detention was established by the Commission on Human Rights in its resolution 1991/42. It was entrusted with the investigation of cases of alleged arbitrary deprivation of liberty according to the standards set forth in the Universal Declaration of Human Rights and the relevant international instruments accepted by the States concerned. The mandate of the Working Group was clarified and extended by the Commission in its resolution 1997/50 to cover the issue of administrative custody of asylum seekers and immigrants. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The mandate of the Working Group was most recently extended for a three-year period in Council resolution 51/8 of 6 October 2022'. See also paras 2 and 3 of the same report which deal with the past and current membership of the Working Group.

[100] A/HRC/51/29/ADD.1 (WG Arbitrary detention 2022) (Maldives), para 46.

law'.[101] It added that 'detention due to inability to repay a debt in itself amounts to arbitrary deprivation of liberty. It is also arbitrary as it discriminates against individuals on the basis of their economic status'.[102] It called upon Maldives to

> Ensure the immediate end to deprivation of liberty for contempt of court on the grounds of a failure to comply with a court order to repay a debt or contractual obligation, in compliance with article 11 of the International Covenant on Civil and Political Rights.[103]

The Working Group uses the words 'imprisonment' and 'detention' in the context of Art 11 interchangeably. Case law from the Working Group also demonstrates its understanding of Art 11. For example, in *Buzurgmehr Yorov* v *Tajikistan*,[104] the applicant, a lawyer, was convicted of fraud and sentenced to imprisonment because he had failed 'to represent his clients properly'.[105] The evidence before the Working Group showed that these were trumped-up charges. It was argued on behalf of the applicant, that this was a violation of Art 11 because the charges against him 'related to an alleged failure to meet his contractual obligations' and that 'these should have been tried as a civil suit, not a criminal case'.[106] The Working Group highlighted the fact that Art 11 is non-derogable and that imprisonment for failure to meet a contractual obligation 'will always be arbitrary'.[107] It emphasised that 'the charges of alleged failure to represent clients indeed stemmed from private contracts rather than any statutory obligation'.[108] Against that background, the Working Group held that:

> 'If indeed Mr. Yorov failed to represent his clients properly, the matter should have been addressed through the professional misconduct proceedings of the bar association or a similar body, or pursued through civil litigation for breach of contract. The Working Group also observes that…the Government made no attempt to explain why the alleged breaches of private contracts would be considered criminal offences. The Working Group therefore finds that there has been a violation of article 11 of the Covenant'.[109]

It is not clear whether the Working Group's conclusion would have been different if the Government has explained the rationale behind the criminalisation of breaches of private contracts. In *Muhammad Iqbal* v *Qatar*[110] the applicant

[101] ibid para 47.
[102] ibid para 47.
[103] ibid para 110(h).
[104] *Buzurgmehr Yorov* v *Tajikistan* (A/HRC/WGAD/2019/17) (12 June 2019).
[105] ibid para 72.
[106] ibid para 72.
[107] ibid para 73.
[108] ibid para 73.
[109] ibid para 74.
[110] *Muhammad Iqbal* v *Qatar* (A/HRC/WGAD/2020/75) (29 January 2021).

was 'charged and detained for issuing bad cheques'.[111] He was sentenced to three months' imprisonment or to a fine (bail). He paid the fine and was released.[112] However, the Working Group observed that the applicant's detention and prosecution violated Art 11 of the ICCPR because 'detention for the inability to pay a debt is prohibited in international law'.[113] Against that background, the Working Group held that the applicant:

> '[W]as imprisoned on charges of issuing bad cheques, in other words because of his economic status. The Working Group recalls that international human rights law prohibits the deprivation of liberty for the inability to fulfil a contractual obligation, as stipulated in article 11 of the Covenant. This prohibition is non-derogable and is in fact part of customary international law. It is arbitrary as it discriminates against individuals on the basis of their economic status'.[114]

It should be remembered that imprisonment for issuing a bad cheque is an offence under section 357 of the Qatar Penal Code.[115] It is not clear why the Working Group did not refer to this section. In many countries, issuing a bad cheque is also an offence.[116] This implies that the Working Group's reasoning that imprisonment for issuing a bad cheque violates Art 11 is not only contrary to the drafting history and literal meaning of Art 11 but also to the jurisprudence of the Human Rights Committee. As discussed above, Art 11 does not apply to conduct of a criminal nature. Issuing a bad cheque is such conduct. In *Sheikh Talal bin Abdulaziz bin Ahmed bin Ali Al Thani* v *Qatar*[117] the applicant was detained on the 'trumped-up charge of defaulting on his debts'.[118] The Working Group referred to Art 11 of the ICCPR and held that it:

> 'That prohibition protects against imprisonment as a punishment for the inability to pay a private debt or to fulfil another type of contractual condition owed to another person or corporation. It follows that any imprisonment, pre- or post-trial, premised on the failure to discharge a debt obligation is without legal basis under international human rights law. The Working Group thus reiterates its jurisprudence holding that imprisoning a person for debt violates

[111] ibid para 41.
[112] ibid para 41.
[113] ibid para 61.
[114] ibid para 72.
[115] The Penal Code, Law no 11 of 2004.
[116] For example, in Austria, *Toth* v *Austria* [1991] ECHR 72 (12 December 1991); Poland, *Migon* v *Poland* [2002] ECHR 523 (25 June 2002).
[117] *Sheikh Talal bin Abdulaziz bin Ahmed bin Ali Al Thani* v *Qatar* (A/HRC/WGAD/2021/47) (18 March 2022).
[118] ibid para 9. See also para 42.

jus cogens and customary international law, regardless of domestic law'.[119]

Against that background, the Working Group concluded that Qatar had violated Art 11 of the ICCPR because the evidence before it showed that the applicable 'unable to pay his debts, as opposed to being unwilling to do so'.[120] The following observations should be made about the above holding. First, although the drafting history of Art 11 is silent on whether it prohibited imprisonment as a punishment or mere detention for inability to pay a debt, the Working Group suggests that the provision prohibits imprisonment as a form of punishment. Second, the drafting history of Art 11 shows that the majority of the delegates did not object to the argument that it bars imprisonment for inability to pay a debt whether it is owed to the state or to a private individual. Therefore, it has both vertical and horizontal applications. However, in this decision, the Working Group creates the impression that Art 11 is of horizontal application only (between private individuals). This approach is contrary to the literal interpretation of Art 11. Lastly, the Working Group, without motivation, held that the 'imprisoning a person for debt violates *jus cogens*'. Although the Working Group had previously expressed the view that the right against arbitrary deprivation of liberty had attained the status of *jus cogens*,[121] this was the first time in which it held specifically that imprisonment for failure to pay a debt, as a form of arbitrary deprivation of liberty, had attained the status of *jus cogens*. Whether or not the prohibition of imprisonment for inability to pay a debt under Art 11 amounts to *jus cogens* requires a closer examination. The International Law Commission defines *just cogens* to mean:

> 'A peremptory norm of general international law (jus cogens) is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'.[122]

The International Law Commission stated further that:

1. Customary international law is the most common basis for peremptory norms of general international law (*jus cogens*).

2. Treaty provisions and general principles of law may also serve as bases for peremptory norms of general international law (*jus cogens*).[123]

[119] ibid para 46.

[120] ibid para 48.

[121] See *Report of the Working Group on Arbitrary Detention* (24 December 2012) (A/HRC/22/44) para 51, where it is stated that 'the prohibition of arbitrary deprivation of liberty is part of treaty law, customary international law and constitutes a *jus cogens* norm'.

[122] Conclusion 3[2] of the International Law Commission, Draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), A/CN.4/L.967 (11 May 2022).

[123] Conclusion 5 of the International Law Commission, Draft conclusions on identification

The International Law Commission added that:

1. Evidence of acceptance and recognition that a norm of general international law is a peremptory norm (*jus cogens*) may take a wide range of forms.

2. Forms of evidence include, but are not limited to: public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; constitutional provisions; legislative and administrative acts; decisions of national courts; treaty provisions; resolutions adopted by an international organization or at an intergovernmental conference; and other conduct of States.[124]

There is no doubt that Art 11 is non-derogable. Practice from regional human rights treaties and from many countries (as discussed below) shows that imprisonment for inability to fulfil a contractual obligation generally has not been prohibited. However, most countries prohibit imprisonment for inability to pay a debt. This means that the prohibition of imprisonment for inability to fulfil a contractual obligation generally has not attained the status of customary international law. However, prohibition for imprisonment to pay a debt could have attained the status of customary international law (as explained below in the concluding part of this article). Therefore, the author does not subscribe to the Working Group's view that imprisonment for inability to pay a debt has attained the status of *jus cogens*. In *Robert Pether and Khalid Radwan* v *Iraq*,[125] the applicants did not allege, and the evidence did not show, that the applicants were being detained for their inability to fulfil their contractual obligation. The evidence showed that the applicant had been detained allegedly because of a contractual dispute between their employer and the Central Bank of the respondent state. The Working Group referred to Art 11 of the ICCPR and held that the applicant's 'detention' was 'being used to exercise leverage in a commercial transaction, in violation of international law'.[126] Against that background, it concluded that the respondent state had violated Art 11.[127] It is argued that in this case Art 11 was not applicable. Although their detention was arbitrary and their trial was unfair, as the Working Group found, there was no evidence that they had been detained because of inability to fulfil a contractual obligation. Therefore, the Working Group stretched Art 11 beyond its scope. Apart from the Human Rights Committee and the Working Group, other UN Human Rights bodies have also invoked Art 11 in their practice. For example, the Committee against Torture has stated that detaining persons in hospitals for failure to pay hospital bills is contrary to Art 11 of

and legal consequences of peremptory norms of general international law (*jus cogens*), A/CN.4/L.967 (11 May 2022).

[124] Conclusion 8 of the International Law Commission, Draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), A/CN.4/L.967 (11 May 2022).

[125] *Robert Pether and Khalid Radwan* v *Iraq* (A/HRC/WGAD/2021/70)(16 March 2022).

[126] ibid para 88.

[127] ibid para 124.

ICCPR.[128] This implies that Art 11 is not limited to imprisonment/detention pursuant to a court order. It is also applicable in cases where detention is ordered by a government or private entity. The Committee on Migrant Workers was also concerned that migrant workers from some countries 'have been jailed in the Gulf States for…failing to fulfil contractual obligations'.[129] It is now important to take a look at how the issue of imprisonment for inability to fulfil a contractual obligation has been dealt with in the regional human rights systems.

IV. Regional Human Rights System

The right not to imprisoned for inability to fulfil a contractual obligation is also provided for in some regional human rights instruments. However, the relevant provisions in these instruments are worded differently from Art 11 of the ICCPR and this has different legal implications on the nature of the right. There are four regional human rights instruments which will be referred to in this part of the article: Inter-American, European, Arab and Africa. I will start with the American Convention. Art 7, para 7, of the American Convention on Human Rights[130] provides that '[n]o one shall be detained for debt. This principle shall not limit the orders of a competent judicial authority issued for nonfulfillment of duties of support'. The American Convention on Human Rights has been ratified or acceded to by 22 countries.[131] Of these, only Argentina made a declarative interpretation on Art 7, para 7.[132] Before discussing Art 11 in detail, it is important to take a look at its drafting history.

Art 6, para 6, of the Draft Inter-American Convention on Protection of Human Rights (which would later become Art 7, para 7) provided that:

> 'No person shall suffer deprivation of or limitation upon his physical liberty by reason of debt. Exceptions to this principle shall be admitted only when based on failure to fulfil pecuniary obligations imposed by law and when such failure is not due to the involuntary lack of economic capacity on the part of the oblige'.

The Inter-American Commission on Human Rights, in its 1955 annotations on the Draft Inter-American Convention on Protection of Human Rights, stated that:

[128] CAT/C/BDI/CO/1 (CAT 2007) (Burundi) para 26.

[129] CMW/C/LKA/CO/2 (CMW 2016) para 34(c); CMW/C/IDN/CO/1 (CMW 2017), para 34, lett c.

[130] American Convention on Human Rights (1969).

[131] See https://tinyurl.com/mss4w38s (last visited 30 September 2024).

[132] The Declarative Interpretation is to the effect that 'Article 7, paragraph 7, shall be interpreted to mean that the prohibition against "detention for debt" does not involve prohibiting the state from basing punishment on default of certain debts, when the punishment is not imposed for default itself but rather for a prior independent, illegal, punishable act.' See https://tinyurl.com/3n52425x (last visited 30 September 2024).

> 'Paragraph 6 [of Article 6] establishes the prohibition of deprivation of liberty by reason of debt. This paragraph correspondents with Article 11 of the United Nations International Covenant on Civil and Political Rights. However, it should be pointed out that this provision of the Covenant, which states, "No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation," is broader than that suggested by the IACHR, since, when the text of the Covenant was adopted, it was agreed that "the article should cover any contractual obligations, namely the payment of debts, performance of services or the delivery of good"'.[133]

During the fifth session of the committee (on 12 November 1969) that was responsible for drafting the Convention, the delegates from Ecuador suggested that Art 6, para 6 (as drafted by the Inter-American Commission on Human Rights), should be replaced by the following provision: '[n]o one shall be deprived or limited in their physical liberty or death [for debts], except in the case of child support'.[134] He argued that the reason why he introduced that proposal was that he did not 'agree with accepting' the ICCPR and that 'all of the cases would be determined by the laws of each country'.[135] The delegate of Costa Rica supported the proposal amendment by the Ecuadorian delegate but suggested that it could be improved by revising it to read as follows:

> No one shall be deprived or limited in their physical liberty for debts. The only exceptions to this principle that shall be admitted are those dealing with the nonfulfillment of pecuniary obligations derived from the laws to protect the family.[136]

However, the Ecuadorian delegate did not explain why that amendment was necessary and that difference it would make. The Mexican delegate suggested that Art 6, para 6, should be amended to provide that '[n]o one shall be deprived or limited in their physical ability for debt'.[137] However, he did not explain why the rest of the content had to be deleted. The Nicaragua delegate opposed the Mexican delegate's proposal and argued that it should be replaced with the following '[n]o one shall be deprived or limited in his physical liberty or obligations of purely civil nature, except in the case of punishment ordered in accordance with the law'.[138] At the voting state, all the above amendments, including the 'original text' suggested by the Inter-American Commission, were defeated. However, no reasons were given

[133] T. Buergenthall and R.E. Morris, *Human Rights: The Inter-American System* (New York: Ocean Publications, 1986), 41.
[134] ibid 54.
[135] ibid 54.
[136] ibid 55.
[137] ibid 57.
[138] ibid 57.

for these defeats.[139] Against that background, the Colombian delegate's suggestion that a working group should be established to reconcile all the defeated proposal was adopted. This group was established and was composed of delegates from Colombia, Costa Rica, Chile, Ecuador, Guatemala, Mexico, Nicaragua, Panama and Paraguay.[140]

At the sixth session of the Committee (16 November 1969), the Chairperson of the Committee informed delegates that Art 6, para 6, had changed to Art 6, para 7. He informed the delegates that the Working Group had considered all the proposals that had been defeated at the fifth session and suggested that Art 6, para 7, should provide as follows: '[n]o one shall be deprived of their physical liberty for debts'.[141] The United States delegate supported that proposal but wanted the Working Group to clarify

> 'if the concept includes the deprivation of liberty for reason such as not contributing to the support of children or when support payments are not made to a wife following a divorce'.[142]

In response, the Rapporteur of the Working Group stated that those debts 'are not included in the article' because 'they have another meaning'.[143] The Brazilian delegate argued that he disagreed with the Rapporteur's interpretation of the word 'debt' and will vote against the Working Group's proposed amendment because he 'believe[d] that the juridical concept of debts in the Roman world is the broadest possible'.[144] His view was endorsed by the Guatemalan delegate although he was open to voting in support of the proposal.[145] The delegate of Trinidad and Tobago argued that he supported the amendment on condition that the article will permit the imprisonment of a person for refusal to pay debts.[146] The Colombian delegate argued that he was prepared to vote for Art 6(7) on the understanding that it 'prohibits the deprivation of liberty for debts or purely civil obligations'.[147] The Costa Rican delegate argued that he was prepared to vote for the Working Group's amendment because it complied with the constitution of his country 'which does not define debt'.[148] Since some delegates supported the Working Group's proposal with reservations (country-specific interpretations of understandings of the word 'debt'), the Uruguay delegate, in an attempt to get consensus from other delegates, submitted that:

[139] ibid 59.
[140] ibid 59.
[141] ibid 62.
[142] ibid 62.
[143] ibid 62.
[144] ibid 62.
[145] ibid 63.
[146] ibid 63.
[147] ibid 63.
[148] ibid 63.

> The solution could be a sanction imposed upon the individual who fails to fulfil his social obligations, which in many cases would be another type of nonfulfillment, of assistance to the family, of support obligations, without detriment to the precept proposed by the Working Group.[149]

It was clear that at this stage, there were three positions on the amendment. The first position was that of the countries whose delegates had been members of the Working Group. This group was prepared to vote for the proposal they had introduced. The second group was made up of countries which were prepared to vote for the Working Group's proposal on condition that the word 'debt' had the same meaning in Art 6, para 7, as it did in their national constitutions. In other words, in principle, they did not oppose the Working Group's proposal. The third position was held Brazil. It was prepared to vote against the Working Group's proposal. The Brazilian delegate went to the extent of informing other delegates that

> 'although the text under study is a collective amendment, that does no prevent offering an alternative at the time of voting and indicates that his alternative is the text of the Draft'.[150]

He added that he was 'going to vote for the original test of paragraph 6'.[151] Brazil's opposition to the Working Group's amendment meant that it had in effect reintroduced the Inter-American Commission's proposal. This implied that at the time of voting, delegates were to choose between these two proposals. Against that background, the Uruguayan delegate requested 'a short recess in order' for the delegates to 'reach consensus'.[152] The President of the Session allowed the request and granted the recess.[153] After the recess, the Uruguayan delegate reported that consensus had been reached and thanked the Panama delegate's 'ability' in the process.[154] Against that background, the Panama delegate read out the proposed amendment that had been reached my consensus. It was to the effect that: '[n]o one shall be detained for debt. This principle shall not limit the orders of a competent judicial authority issued for nonfulfillment of duties of support'.[155] After the consensus proposal was read out, the Brazilian delegated informed the session that he had accepted 'the formula' and withdrew his amendment.[156] Thus, when the President submitted the text to vote, it was approved.[157] The above drafting history of Art 7, para 7, is important in understanding how it has

[149] ibid 63.
[150] ibid 63.
[151] ibid 63.
[152] ibid 63.
[153] ibid 63.
[154] ibid 63.
[155] ibid 63.
[156] ibid 63.
[157] ibid 64.

been understood or likely to be understood by states parties. The next discussion illustrates these issues.

The drafting history of Art 7, para 7, shows that there are differences between Art 11 of ICCPR and Art 7, para 7, of the American Convention on Human Rights. First, the ICCPR prohibits 'imprisonment' whereas the American Convention on Human Rights prohibits 'detention'. This implies that 'detention' can be imposed without a court order whereas imprisonment is a form of punishment which has to be preceded by a court order. Second, Art 11 of the ICCPR prohibits imprisonment for 'inability' to fulfil a contractual obligation. Which, as we have seen above, does not protect a person who is able but unwilling to fulfil a contractual obligation. Art 7, para 7, of the American Convention on Human Rights is silent on whether detention is prohibited in both cases of inability and unwillingness to pay a debt. It prohibits detention 'for a debt'. This is an issue that was also not discussed during the drafting of Art 7, para 7. However, as indicated above, the delegate of Trinidad and Tobago argued that he understood Art 7, para 7, as inapplicable to people who had refused to pay debts. This means that Art 7, para 7, was meant to protect people who are unable to pay debts. None of the delegates opposed the Trinidad and Tobago delegate's interpretation of the prohibition under Art 7, para 7. This implies that there is room for the argument that Art 7, para 7, does not protect people who refuse to pay debts. It only protects those who are unable to pay debts. Third, Art 11 of the ICCPR only prohibits imprisonment for inability to fulfil a contractual obligation and is silent on the grounds in which a person may be imprisoned. This means that imprisonment on any other ground, such as fraud, negligence and failure to fulfil any statutory duty does not violate Art 11. However, Art 7, para 7, of the American Convention on Human Rights provides for one ground upon which a person may be detained – 'nonfulfillment of duties of support'. Forth, Art 11 of the ICCPR prohibits imprisonment for inability to fulfil a 'contractual obligation'. On the other hand, Art 7, para 7, of the American Convention on Human Rights prohibits detention for 'a debt'. The drafting history of Art 7, para 7, shows that the Colombian delegate argued that he understood Art 7, para 7, as prohibiting 'the deprivation of liberty for debts or purely civil obligations'.[158] However, the delegates did not include the words 'civil obligations' in Art 7, para 7. This creates room for the argument that Art 7, para 7, is applicable to debts only. This was also the view of the Inter-American Commission which, as mentioned above, stated that Art 11 of the ICCPR was broader than Art 7, para 7, of the Inter-American Convention.

As at the time of writing, there were two cases from the Inter-American Commission on Human Rights in which parties had alleged a violation of Art 7, para 7.[159] Both these cases were at the admissibility stage. The first case was that

[158] ibid 63.

[159] The author could not find a case in which the Inter-American Court on Human Rights had dealt with Art 7, para 7.

of *Alejandro Peñafiel Salgado* v *Ecuador*.[160] In this case, the petitioner was convicted of embezzlement. While he was still serving the custodial sentence for that offence, civil proceedings were instituted against him to force him to pay the money he had allegedly embezzled.[161] He argued that:

> '[I]nstituting proceedings for a civil matter and later imposing a custodial sentence constitutes a violation of the provision that no one shall be detained for debt contained in Article 7 of the American Convention, since "nonfulfillment of a sales contract causes a civil debt" '.[162]

However, since the Commission was only required to determine whether the petition was admissible, it did not express its view on the issue of whether the State had violated Art7, para 7.[163] A few months later, in *Demétrios Nicolaos Nikolaidis* v *Brazil*,[164] the alleged violation of Art 7, para 7, was raised once again. The petitioner's company had been appointed by the government to auction off property of another company which had evaded tax. The proceeds of the auction were to 'satisfy the debt' the tax evading company owed to the state.[165] However, the goods which the petitioner's company was supposed to auction off 'disappeared'.[166] As a result, the Court for Tax Affairs found that the petitioner was an 'unfaithful receiver' within the meaning of Art 5, para 67, of the Constitution of Brazil (1988) and ordered his imprisonment. Art 5, para 67, of the Constitution provides that

> 'there shall be no civil imprisonment for indebtedness except in the case of a person responsible for voluntary and inexcusable default of alimony obligation and in the case of an unfaithful trustee'.

However, the evidence before the Commission showed that the petitioner was not arrested based on the order of the Court for Tax Affairs although he had been detained previously, in another part of the country, for breach of his fiduciary duties as a receiver.[167] Notwithstanding the fact that the petitioner was not arrested pursuant to the order of Court for Tax Affairs, he argued that

> 'the Brazilian constitutional norm allowing "civil imprisonment for debt"

[160] Alejandro Peñafiel Salgado v Ecuador (Petition 1671-02) (Report No. 65/12) (29 March 2012) (Admissibility).

[161] ibid para 13.

[162] ibid para 13, fn 9.

[163] All attempts by the author to find the English or Spanish version of the Commission's decision on merits were futile. The search for these decisions was conducted on the Commission's website https://tinyurl.com/mv433jpb (last visited 30 September 2024).

[164] *Demétrios Nicolaos Nikolaidis* v *Brazil* (Petition 86-07) (Report No. 117/12) (13 November 2012) (Inadmissibility).

[165] ibid para 6.

[166] ibid para 6.

[167] ibid para 6.

> not only for nonfulfillment of duties of support, but also for the case of an unfaithful receiver is incompatible with Art 7.7 of the American Convention'.[168]

The petitioner added that when he was detained for breach of his fiduciary duties, he applied for *habeas corpus* and the Superior Court of Justice ordered his release on, amongst other grounds, that his civil imprisonment was unlawful regardless 'of the deposit'.[169] On the other hand, the state argued that the petitioner's conduct in failing to remit the proceeds of the action was fraudulent.[170] It added that the order of the Court for Tax Affairs for the detention of the petitioner was not executed because the Superior Court of Justice had held that civil imprisonment of unfaithful receivers was unlawful and contrary to, inter alia, Art 7, para 7, of the Convention. Against that background, the state argued that the petitioner's rights had not been violated.[171] The Commission observed that the parties' arguments showed that '[t]he central topic of this petition…is the right to personal liberty, specifically regarding the provisions of Art 7.7 of the American Convention'.[172] The Commission held that the evidence showed that although the Court for Tax Affairs had ordered the petitioner's civil imprisonment, this order was reversed by the Superior Court of Justice which held that civil imprisonment in those circumstances was contrary to Art 7, para 7, of the Convention.[173] The Commission concluded that the Brazilian courts:

> '[E]nsured that the alleged victim's right to personal freedom was an effective right, particularly regarding Article 7.7 of the American Convention. Indeed, the IACHR [Commission] particularly underscores that the alleged victim was always able to petition the appropriate judicial authorities for a decision on the lawfulness of his arrest or, as the case could be, of the legal foundation to order his imprisonment for being an unlawful receiver. It is also noteworthy that he was successful both in obtaining his release within 24 hours…and in obtaining a declaration regarding the unconstitutional nature of civil imprisonment of an unfaithful receiver, as a result of the application of Article 7.7 of the American Convention…'.[174]

Against that background, the Commission concluded that the petition was inadmissible because it did 'not state facts that *prima facie* tend to establish a violation of the American Convention'.[175] Since the Commission found that the petition was inadmissible, it did not express its view on whether the petitioner's

[168] ibid para 5.
[169] ibid para 7.
[170] ibid para 8.
[171] ibid paras 9-10.
[172] ibid para 15.
[173] ibid para 26.
[174] ibid para 29.
[175] ibid para 29.

imprisonment violated Art 7, para 7, of the Convention. However, the decision shows that the Brazilian court invoked Art 7, para 7, of the Convention to interpret Art 5, para 67, of the Constitution strictly.[176] In other words, the court interpreted Art 5, para 67, as applicable to money a person owes to the government.

Since neither the Commission nor the Inter-American Court of Human Rights has dealt on merits with a case dealing with an alleged violation of Art 7, para 7, this raises two questions. First, whether Art 7, para 7, is applicable to debts only or it is also applicable to any contractual obligation. The second question is whether the word 'debt' under Art 7, para 7, is limited to a debt owed to an individual (horizontal application) or it also applies to a debt an individual owes to a state (vertical application). In the author's view, based on the drafting history of Art 7, para 7, the word 'debt' in Art 7, para 7, should be given its literal interpretation. This means that it excludes other contractual obligations. This is because, as discussed above, the Inter-American Commission stated clearly that Art 11 of the ICCPR was broader than Art 7, para 7, of the Inter-American Convention on Human Rights. Secondly, the drafting history of Art 11 of the ICCPR showed that many Latin-American countries made submissions on the draft Art 11 of the ICCPR and some of them expressed their reservations on the way it was phrased. Had they wanted to 'transplant' Art 11 of the ICCPR into the American Convention on Human Rights, nothing would have prevented them from doing so. The decision to include the word 'debt' as opposed to 'contractual obligation' shows a deliberate attempt to limit the application of Art 7, para 7, to debts only. As shown above, during the drafting of Art 11, some Latin-American countries were of the view that the word 'contractual obligation' had to be replaced by the word 'civil' to, amongst other things, reflect the position in their domestic legislation. What they could not achieve under ICCPR, they achieved under Art 7, para 7, of the American Convention on Human Rights. With regards to the second question above, Art 7, para 7, is applicable to debts owed to both private individuals (horizontal application) and the state (vertical application). Otherwise, the drafters of Art 7, para 7, would have stated expressly that it was not applicable to debts or some debts owed to the state as some had argued during the drafting of Art 11 of the ICCPR. Whichever interpretation one adopts, sight should not be lost of the fact that the purpose of Art 7, para 7, is to protect the right to personal liberty.[177]It should be recalled that many states parties to the ICCPR are also states parties to the American Convention on Human Rights. This means that the citizens in the countries which have ratified both the ICCPR and the American Convention on Human Rights are protected by Art 11 of the ICCPR or Art7, para 7, of the American Convention on Human Rights and, depending on the circumstances of the case, they can choose which human rights body to approach for the enforcement of their right.

Art 18 of the Arab Charter on Human Rights provides that '[n]o one who is

[176] Meaning of 'trustee' in Brazilian law.
[177] Chaparro Álvarez and Lapo Íñiguez [2007] IACHR 3, para 51.

shown by a court to be unable to pay a debt arising from a contractual obligation shall be imprisoned'. There are differences between Art 18 of the Arab Charter and Art 11 of the ICCPR. First, under Art 11 of the ICCPR, imprisonment is prohibited for inability to fulfil any contractual obligation. However, Art 18 of the Arab Charter on Human Rights only prohibits imprisonment for inability to pay a debt. The debt must arise from a contractual obligation. In other words, Art 18 Arab Charter on Human Rights does not prohibit imprisonment for failure to fulfil other contractual obligations. Second, a person can only be imprisoned for failure to pay a debt after a court order. This means that the court has to be satisfied that he/she is unable to pay the debt. Otherwise, he/she will be imprisoned. This is an issue on which Art 11 of the ICCPR is silent about. However, as seen above, case law from the Human Rights Committee shows that imprisonment for unwillingness to fulfil a contractual obligation has to be sanctioned by the court.

Art 1 of Protocol 4 to the European Convention of Human Rights provides that '[n]o one shall be deprived of his liberty merely on the ground of inability to fulfil a contractual obligation'. It is evident that unlike Art 11 of the ICCPR which prohibits imprisonment, Art 1 of Protocol 4 to the European Convention of Human Rights prohibits 'deprivation of liberty'. This choice of words is explained in the Explanatory Report to Protocol 4. Initially, the draft Art 1 provided that '[n]o-one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation'.[178] This provision had been influenced by the draft Art 11 of the ICCPR.[179] However, the Committee of Experts recommended that the word 'imprisoned' should be replaced by the words 'deprived of liberty'.[180] The Committee of Experts explained the rationale behind that recommendation:

> 'The wording "deprived of his liberty" is designed to cover loss of liberty for any length of time, whether by detention or by arrest. The arguments which led to the adoption of this proposal were as follows: [1] On the one hand, the proposed wording was designed to reinforce the terms of Article 5 of the [European] Convention [on Human Rights] which guarantees the right of every person to liberty and security. In Article 5, paragraph (1), the expression "no-one shall be deprived of his liberty..." is used; [2] Furthermore, in the case it was designed to cover, this provision prohibits not only detention but also arrest…The notion of "depriving an individual of his liberty" covered both cases more precisely than the term "imprisonment". Article 5, paragraph (4), of the Convention speaks moreover of a "person deprived of his liberty by arrest

[178] Explanatory Report to Protocol No 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto (1963), para 3.

[179] ibid 3.

[180] ibid 3.

or detention" '.[181]

Reading Art 1 in the light of the Explanatory Report means, inter alia, that it protects a person against three things: (1) arrest for inability to fulfil a contractual obligation; (2) detention for inability to fulfil a contractual obligation; and (3) imprisonment for inability to fulfil a contractual obligation. The Committee of Experts also explained that as it is the case with Art 11 of the ICCPR, Art 1 of Protocol 4 is applicable to all contractual obligations such as money debts, 'non-delivery, non-performance or non-forbearance'.[182] The Committee also made it clear that for Art 1 to be applicable, the obligation in question 'must (...) arise out of contract'.[183] In other words, the provision 'does not apply to obligations arising from legislation in public or private law'.[184] The Committee also explained that the words 'merely on the ground of inability' prohibit 'any deprivation of liberty for the sole reason that the individual had not the material means to fulfil his contractual obligations'.[185] The Committee gave some of examples in which deprivation of liberty is permissible even if the person is unable to fulfil his/her contractual obligations.

These include cases:

> '[I]f any other factor is present in addition to the inability to fulfil a contractual obligation, for example: [i] if a debtor acts with malicious or fraudulent intent; [ii] if a person deliberately refuses to fulfil an obligation, irrespective of his reasons therefore, [ii] if inability to meet a commitment is due to negligence'.[186]

The Committee gave a few more examples in which Art 1 is not applicable.[187] The Committee's explanation shows that the inability to fulfil a contractual obligation should be genuine and not attributable to the person's fault. The intention of the person at the time of entering into a contractual obligation is also important in determining whether or not he/she should be protected under Art 1. For example, if the circumstances of the case show that any reasonable person would have concluded that the person in question entered into a contractual obligation with the intention not to fulfil it, such a person is not protected by Art 1. Therefore, for

[181] ibid 3.
[182] ibid 3.
[183] ibid 3.
[184] ibid 3.
[185] ibid 3.
[186] ibid 3.
[187] ibid 4, where it stated that 'the law of a Contracting Party would thus not be in conflict with this article if it permitted the deprivation of liberty of an individual who: [i] knowing that he is unable to pay, orders food and drink in a cafe or restaurant and leaves without paying for them; [ii] through negligence, fails to supply goods to the army when he is under contract to do so; [iii] is preparing to leave the country to avoid meeting his commitments'. For a summary of the views of the Committee of Experts, also see W.A. Schabas, *The European Convention on Human Rights: A Commentary* (Oxford: Oxford University Press, 2015), 1049.

one to determine whether Art 1 is applicable, it is important to examine that person's conduct before, during and after entering into a contractual obligation. If this conduct shows that he/she is to blame for the inability to meet his/her contractual obligation, Art 1 doesn't protect him/her. Art 1 is only meant to protect people with 'clean hands'. The same observations apply with equal force under Art 11 of the ICCPR. There is limited case law from the European Court of Human Rights on Art 1. In these few cases, the Court has held that Art 1 is applicable 'solely when the debt arises under a contractual obligation';[188] is not applicable where the applicant was convicted of fraud and imprisoned;[189] and is not applicable to a country which has not ratified the Protocol.[190] The African Charter on Human and Peoples' Rights,[191] unlike the above mentioned regional human rights instruments, does not prohibit imprisonment for inability to fulfil a contractual obligation. However, this prohibition could be inferred from Art 6 of the African Charter which protects the right to liberty and prohibits arbitrary detention.[192] It is against that background that the African Commission on Human and Peoples' Rights (the African Commission) has called upon state parties to the African Charter on Human and Peoples' Rights to decriminalize some offences including 'failure to pay debts'.[193] The African Commission considers 'failure to pay debts' as one of the 'minor offences'.[194] The African Commission also requires states parties to the African Charter on Human and Peoples' Rights, in their periodic reports,[195] to report on the measures that have taken to protect, amongst other rights, the right not to be imprisoned for 'breach of mere contractual obligation'.[196] Indeed, in their periodic reports, some states have informed the African Commission of the measures they have taken to deal with imprisonment for debt.[197] Three

[188] *Gatt* v *Malta* (Application No 28221/08) (27/07/2010), para 39. See also *Goktan* v *France* (33402/96) (02/07/2002), para 51.

[189] *Norkunas* v *Lithuania* (Application 302/05) (20/01/2009), para 43.

[190] *Yeğer* v *Turkey* (4099/12) (07/06/2022), para 49.

[191] African Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force October 21, 1986.

[192] Art 6 of the African Charter provides that 'Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained'.

[193] Ouagadougou Declaration and Plan of Action on Accelerating Prisons and Penal Reforms in Africa (20 September 2002) para 5 (under Plan of Action). Available at https://tinyurl.com/txdfwjuw (last visited 30 September 2024).

[194] See Preamble to Resolution on the Need to Develop Principles on the Declassification and Decriminalization of Petty Offences in Africa (ACHPR/Res. 366 (EXT.OS/XX1) 2017) (4 March 2017).

[195] These reports are submitted under Art 62 of the African Charter on Human and Peoples' Rights which provides that 'Each state party shall undertake to submit every two years, from the date the present Charter comes into force, a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognized and guaranteed by the present Charter'.

[196] Guidelines for National Periodic Reports (14 April 1989), 2. Available at https://tinyurl.com/yf2xe933 (last visited 30 September 2024).

[197] For example, in Algeria's 5th & 6th Periodic Reports 2010-2014 (2014) para 138, it is stated that '[i]mprisonment for debt in contractual relations has been removed from the new Code of Civil

observations should be made about this procedure. First, in their periodic reports, very few African countries have dealt with the issue of imprisonment for inability to pay debt. As at the time of writing, 72 periodic reports (in English) were available on the African Commission's website.[198] The existence of few reports on the Commission's website can be explained by two factors. One, some countries had submitted several reports but the Commission had not uploaded all of them,[199] or any of them.[200] Second, some countries had not submitted any reports.[201]The issue of imprisonment for inability to pay debts was mentioned in four reports. Second and related to the above, none of these four reports mentions the issue of imprisonment or detention for inability to fulfil a contractual obligation. They only deal with the issue of imprisonment or detention for inability to pay debts. This

and Administrative Procedure.' In Mali's 2nd, 3rd, 4th, 5th, 6th & 7th Combined Periodic Reports, 2001-2011 (2021) para 111, it is stated that the prison law was amended to cater for a special group of those imprisoned 'for debts'). In Togo's 3rd, 4th and 5th Combined Periodic Reports, 2003-2010 (2011) para 71, it is stated that in Togolese law, 'The arresting of an individual for a civil or commercial debt is formally prohibited. Despite this imperative nature of Article 92 of the Criminal Procedure Code, there are persons detained in the detention centres for offences which relate to civil or commercial debts.' It is added (para 72) that '[i]n effect it should be recalled that most of the time offences such as breach of trust or fraud are also presented by the detainees as debts.' In Uganda's 2nd Periodic Report, 2000-2006 (2006) para 59.1, it is reported that 'all debtors' are classified as 'un convicted prisoners' and are detained separately from convicted prisoners 'to minimise the danger of contamination'.

[198] There were more than 72 reports but the author only searched those that were in English. A few of the reports were in French. The author did not include these few reports in the study. All the reports were available at https://tinyurl.com/228rnw5s (last visited 30 September 2024).

[199] The period reports of the following countries were available on the African Commission's website. The number of reports submitted by each country is indicated in the brackets. In some cases, all the submitted reports were not available. This is also mentioned in the brackets. Where all the submitted reports were available in English, the author just mentions the number of the reports. Where the report was in another language other than English, this fact is also mentioned. Algeria (four reports submitted, 1 not available and 3 available); Angola (4 reports submitted, one not available); Benin (4 reports submitted, two in French); Botswana (two reports); Burkina Faso (four reports submitted, one not available); Burundi (two reports submitted, one in French); Cape Verde (one report submitted and in French); Cameroon (five reports); Cote d'Ivoire (three reports); Djibouti (one report); Democratic Republic of the Congo (three reports); Egypt (three reports); Ghana (two reports submitted but only one available); Kenya (three reports); Eretria (two reports); Eswatini (two reports); Ethiopia (two reports); Gabon (one report); Mali (one of the two reports available); Namibia (of the four reports, only one was available); Nigeria (only one of the six reports available); Sahrawi (two reports); Senegal (only one of the five reports available); South Africa (three reports); Sudan (four reports); Tanzania (two reports); Togo (submitted four reports: one in French; one was not available on the website and two were available in English); Tunisia (submitted three reports: two in French one in English); Uganda (submitted five reports: one was unavailable and four available); Zambia (two reports); Zimbabwe (5 reports but one unavailable).

[200] The following countries submitted the indicated number of reports. However, all the reports were not available on the African Commission's website: Gambia (three reports); Guinea (one report); Lesotho (two reports); Liberia (one report); Libya (five reports); Madagascar (one report); Malawi (two reports); Mauritania (three reports); Mauritius (four reports); Mozambique (three reports); Niger (four reports); Republic of Congo (one report); Rwanda (six reports); Seychelles (two reports); Sierra Leone (one report).

[201] The following countries had not submitted any reports: Guinea Bissau; Morocco; Sao Tome and Principe; Somalia; South Sudan.

implies that legislation in these countries is silent on the issue of imprisonment or detention for inability to fulfil contractual obligations. Three, in its Concluding Observations on state party reports in which imprisonment or detention for inability to pay debts, the African Commission does not express any opinion on the measures these states are required to ensure that this right is effectively promoted and protected.[202] This creates room for the argument that the African Commission does not consider imprisonment for inability to pay a debt as a pressing issue. It is now necessary to take a look at how the right against imprisonment for inability to fulfil a contractual obligation has been protected in the constitutions and legislation of different countries.

V. The Prohibition of Imprisonment for Inability to Meet a Contractual Obligation at Domestic Level

Countries have adopted different approaches to dealing with the issue of imprisonment or deprivation of liberty on the ground of inability to fulfil a contractual obligation or debt. As at the time of writing, 173 countries had ratified or acceded to the ICCPR. A study of 193 constitutions[203] shows that of the 173 countries that had ratified the ICCPR, only fifteen countries had included the prohibition of imprisonment for inability to fulfil a contractual obligation in the constitutions.[204] In other words, it is an enforceable constitutional right in less than 10% of the state parties to the ICCPR. The fifteen countries have taken different approaches on this issue. In some countries, the constitutions prohibit deprivation of liberty[205] or freedom[206] whereas in others they prohibit imprisonment.[207] As the discussion above has illustrated, deprivation of liberty is broader than imprisonment. It

[202] See Concluding Observations and Recommendations on Togo's 3rd, 4th and 5th Periodic Reports, 2003-2010 (2 May 2012) available at https://tinyurl.com/42x68nk9 (last visited 30 September 2024). See also Concluding Observations and Recommendations on Uganda's 2nd Periodic Report, 2000-2006 (29 November 2006). Available at https://tinyurl.com/3d85rfme (last visited 30 September 2024). The Concluding Observations on the Algerian and Malian reports were not available at the time of writing.

[203] The constitutions were accessed from: https://tinyurl.com/2hpwe732 (last visited 30 September 2024).

[204] These constitutions were: Albania 1998 (rev 2016); Colombia 1991 (rev 2015); Czech Republic 1993 (rev 2013); Estonia 1992 (rev 2015); Kyrgyzstan 2010 (rev 2016); Malawi 1994 (rev 2017); Maldives 2008; Panama 1972 (rev 2004); Papua New Guinea 1975 (rev 2016); Paraguay 1992 (rev 2011); Rwanda 2003 (rev 2015); Seychelles 1993 (rev 2017); Slovakia 1992 (rev 2017); Turkey 1982 (rev 2017); Zimbabwe 2013 (rev 2017).

[205] Art 27, para 3, of the Constitution of Albania (1998); Art 8, para 2, of the Constitution of Czech Republic (1993); Art 20, para 3, of the Constitution of Estonia (1992); Art 42, para 1, lett c), of the Constitution of Papua New Guinea (1975); Art 38, para 8, of the Constitution of Turkey (1982).

[206] Art 17(2) of the Constitution of Slovakia (1992); Art 20, para2, of the Constitution of Kyrgyzstan (2010).

[207] Art 19, para 6, lett c), of the Constitution of Malawi (1994); Art 55 of the Constitution of Maldives (2008); Art 29, para 7, of the Constitution of Rwanda (2003); Art 18 para 15, of the Constitution of Seychelles (1993); Art 49, para 2, of the Constitution of Zimbabwe (2013).

includes arrest and detention without a court order. In some countries, the constitutions expressly prohibit detention, imprisonment and arrest. For example, Art 28, para 3, of the Constitution of Colombia provides that '[i]n no case may there be detention, a prison term, or arrest for debts, nor sanctions or security measures that are not prescribed'. A similar approach is followed in the constitution of Panama.[208] Whereas many constitutions prohibit imprisonment or deprivation of liberty for inability to fulfil a contractual obligation, others do not qualify the prohibition of imprisonment with the person's inability to fulfil a contractual obligation. For example, Art 55 of the Constitution of Maldives provides that '[n]o person shall be imprisoned on the ground of non-fulfillment of a contractual obligation'. This creates the impression that whether or not that person is unable to fulfil his/her contractual obligation is immaterial. Imprisonment on the ground of non-fulfilment of a contractual obligation is prohibited. However, a reading of the constitution as whole shows that what is prohibited is imprisonment for inability to fulfil a contractual obligation. This is because Art 68 of the Constitution provides that:

> 'When interpreting and applying the rights and freedoms contained within this Chapter, a court or tribunal shall promote the values that underlie an open and democratic society based on human dignity, equality and freedom, and shall consider international treaties to which the Maldives is a party'.

Art 55 is one of the provisions under the Charter of Fundamental Rights and Freedoms and the ICCPR is one of the treaties ratified by Maldives. Courts and tribunals have to give effect to Maldives' obligation under Art 11 of the ICCPR. There are also cases where the constitution(s) prohibit(s) imprisonment for any civil obligation. For example, Art 55 of the Constitution of Panama provides that '[t]hereshall not be imprisonment, detention or arrest for debts or strictly civil obligations'. This implies that a person's unwillingness to pay is not a ground for deprivation of liberty. The constitution of Paraguay prohibits imprisonment for refusal to pay a debt unless in three specific circumstances. Art 13 of the Constitution of Paraguay provides that:

> 'The deprivation of freedom for debts is not admitted, unless by [a] mandate of the competent judicial authority dictated for non-compliance [incumplimiento] of food supply duties or as a substitution of [payment of] fines [multas] or judicial bails [fianzas]'.

As is the case with human rights treaties discussed above, countries have followed different approaches on the issue of the exact prohibition. Many prohibit deprivation of liberty or imprisonment for failure to meet a contractual obligation

[208] Art 21, para 4, of the Constitution of Panama (1972) provides that '[t]here shall not be imprisonment, detention or arrest for debts or strictly civil obligations'.

whereas others prohibit deprivation of liberty for inability to pay debts. Only three countries have directly 'transplanted' Art 11 of the ICCPR into their constitutions.[209] Other countries have also indirectly transplanted Art 11 into their domestic law by virtue of the fact that the constitutions provide that international treaties ratified by these countries, such as the ICCPR, form part of domestic law[210] or that these countries will adhere to the principles established in these treaties.[211] The constitutions of nineteen countries prohibit deprivation of liberty or imprisonment for debt generally[212] or inability to pay a debt[213] or civil law obligation.[214] The majority of these constitutions prohibit imprisonment for a debt. They are silent on the word 'inability'. This creates room for the argument that imprisonment is prohibited irrespective of the reason(s) why a person has not paid a debt. Only in one country, Fiji, is inability to pay a prerequisite for a person to not be imprisoned for a failure to pay a debt.[215] In some countries, imprisonment for any 'civil' obligation is prohibited. This includes any debt and other contractual obligation. As mentioned above, Art 11 of the ICCPR prohibits imprisonment for inability to fulfil any contractual obligation. It is not limited to the prohibition of imprisonment for inability to pay a debt. Thus, constitutional provisions which prohibit imprisonment only for 'debt' but are silent on imprisonment for other contractual obligations fall short of what is required under Art 11 of the ICCPR. Likewise, constitutional provisions that prohibit imprisonment for failure to pay a debt or fulfil a contractual obligation, irrespective of the circumstances, also fall short of

[209] These are Rwanda, Seychelles and Zimbabwe.

[210] See for example, Constitutions of Bosnia and Herzegovina 1995 (Annex 1); Art 154A of the Constitution of Guyana (1980); Art 22 of the Constitution of Kosovo (2008); Art 46 of the Constitution of Nicaragua (1987).

[211] See for example, preambles to the Constitutions of Angola (2010), Central African Republic (2016) and New Zealand (1852); Niger (2010).

[212] Art 32 of the Constitution of Afghanistan (2004); Art 117 (III) of the Constitution of Bolivia (2009); Art LXVII of the Constitution of Brazil (1998); Art 61, para 6, of the Constitution of the Democratic of Congo (2005); Art 38 of the Constitution of Costa Rica (1949); Art 40, para10, of the Constitution of Dominican Republic (2015); Art 29(c) of the Constitution of Ecuador (2008); Art 27, para 2, of the Constitution of El Salvador (1983); Art 17, para 2, of the Constitution of Guatemala (1985); Art 17, para 8, of the Constitution of Mexico (1917); Art 13 of the Constitution of Micronesia (1978); Art 41 of the Constitution of Nicaragua (1987); Art 24, lett c), of the Constitution of Peru (1993); section 20 of the Constitution of Philippines (1987); Article 52(2) of the Constitution of Uruguay (1966).

[213] Art 9, para 2, of the Constitution of Fiji (2013).

[214] Art 27, para 6, of the Constitution of Armenia (1995); Art 98 of the Constitution of Honduras (1982); Art 21, para 4, of the Constitution of Panama (1972).

[215] In *Pacific Coatings Ltd* v *Prasad* [2018] FJHC 167; HBC142.2014 (13 March 2018) para 8, the High Court of Fiji referred to, inter alia, Art 9, para 2, of the Constitution and held that a court 'cannot make a committal order, where a debtor does not have means and has not wilfully refused to pay a sum ordered by Court'. The High Court held that section 9, para 2, prohibits the deprivation of liberty generally and not just imprisonment. See *Pacific Energy South West Pacific Ltd* v *Corporate Developers (Fiji) Ltd* [2015] FJHC 469; HBC97.2015 (24 June 2015) (the court refused to issue an *ex-parte* absconding warrant or stop departure order against the defendant before he could be heard).

what is required under Art 11 of the ICCPR. The above discussion shows that only three countries – Rwanda, Seychelles and Zimbabwe have 'transplanted' Art 11 of the ICCPR in their constitutions.[216] This implies that the majority of the countries have 'modified' Art 11 before including it in their constitutions. A similar approach has been followed in the regional human rights instruments discussed above. None of them 'cuts and pastes' Art 11 of the ICCPR. In other words, there is no consensus in human rights treaties on the scope of the prohibition. Whereas Art 11 of the ICCPR prohibits imprisonment for inability to fulfil a contractual obligation, the American Convention on Human Rights and the Arab Charter only bar imprisonment for inability to pay a debt. As mentioned above, three countries have transplanted Art 11 of the ICCPR into their constitutions. It is important to take a look at case law from some of these countries and from other countries for the purpose of highlighting how courts have given effect to this right. This case law shows, for example, that courts have held that before imprisoning a person for allegedly refusing to meet a contractual obligation, courts must first confirm that such a person is indeed unwilling as opposed to being unable to meet that contractual obligation. For example, in *Zimbabwe Leaf Tobacco* v *Cooke*,[217] the High Court of Zimbabwe referred to, inter alia, section 49, para 2, of the Constitution and held that:

> '[A]n indigent person will not be imprisoned for a debt simply because she owes…[I]t must be shown that the debtor has the means to pay, earn the amount due and that his failure or refusal to pay the amount due is willful. The fact that a debtor owes a contractual obligation does not necessarily call for his civil imprisonment. Civil imprisonment is a drastic measure which should be resorted to only as a last resort and only in instances where a debtor is able to service the debt but has shown an unwillingness to discharge the obligation. It is for this reason that the court is enjoined to carry out an enquiry to establish the financial position of the debtor and attitude to payment of the debt. The manner in which the debt will be cleared is considered in a case where the debtor is able to service the debt and shows a willingness to settle it'.[218]

The Seychelles Court of Appeal reached a similar conclusion when it held that before a judgement debtor is sentenced to civil prison for failure to pay a debt, a court has to conduct a means-test to determine whether this failure is attributable to inability. If he/she is unable to pay the debt, he cannot be sentenced to a civil prison because the aim of the constitutional provision prohibiting the imprisonment of a person for inability to fulfil a contractual obligation is to prevent 'sending

[216] Hong Kong also transplanted Article 11 into its Bill of Rights (as Art 7). For the circumstances in which Art 11 is applicable or inapplicable in Hong Kong, see BT and CBY (formerly known as YHK and also known as YCB) [2020] HKCFA 35; (2020) 23 HKCFAR 447; FAMV 121/2020.

[217] *Zimbabwe Leaf Tobacco* v *Cooke* (412 of 2021) [2021] ZWHHC 412 (6 August 2021).

[218] ibid para 7.

someone to prison for impecuniousness which preventing him from fulfilling his contractual debt'.[219] Put differently, 'poverty and the lack of financial means cannot justify putting a person in jail'.[220] Although the constitutions of these countries prohibit imprisonment for inability to fulfil contractual obligations, the pieces of legislation in Seychelles[221] and Zimbabwe[222] only provide for imprisonment for failure to pay a debt. In Rwandan, there is no legislation on imprisonment for failure or refusal to meet a contractual obligation generally or debt in particular.

Even in some countries which do not have constitutional provisions barring courts from imprisoning a person for inability to fulfil a contractual obligation, a judgement debtor can only be imprisoned if he/she is able but unwilling to pay the debt.[223] Courts in some of these countries have invoked Art 11 of the ICCPR to motivate why a judgement debtor should not be imprisoned for inability to pay a debt.[224] For example, in *KCB Bank Limited* v *Gichohi and 2 Others*[225] the High Court of Uganda referred to Art 11 of the ICCPR and held that:

> 'An order for imprisonment can only be made after a creditor has satisfied the Court that a debtor's failure to make repayments is due not to his inability to pay but rather due to his willful refusal or culpable neglect. To commit a debtor to prison who through poverty is unable to satisfy the judgment debt is contrary to the purpose of civil imprisonment which is to coerce payment. Its only real effect on an impoverished debtor is that of punishment. It is a punishment that can be avoided by a debtor who is able but unwilling to pay, for satisfaction of the judgment remains within his power. But it becomes mandatory against one without the means to pay. It discriminates between the one and the other. Poverty-stricken judgment debtors should not be consigned to jail.[226]

The Court also suggests, albeit indirectly, that a person can be imprisoned for failure to meet his contractual obligations generally (not just for failure to pay a

[219] *Chow* v *Bossy* (SCA 11 of 2014) [2016] SCCA 20 (12 August 2016), para 27.

[220] D. Ravindran, *Human Rights in Theory and Practice: An Overview of Concepts and Treaties* (Thousand Oaks: Sage Publications, 2022), 165.

[221] Imprisonment for Debt Act (Chapter 96) (Seychelles).

[222] See Rule 73 of the High Court Rules, Statutory Instrument No 202 of 2021.

[223] See for example, Debtors Act, 1938 (Zambia); sections 15-17 of the Courts Act (1958) (Malawi); *Esther Crescence Mashoko* v *Norbert Furaha Lyimo* (Misc Land Application 90 of 2016) [2020] TZHCLandD 2249 (23 September 2020), *James Christian* v *Mary Emmanuel Mmari* (Execution Application 30 of 2022) [2022] TZHCLandD 12419 (30 September 2022) (Tanzania); *Mwalimu Donald Mati* v *Chief Magistrates Court*, Milimani & another [2019] eKLR (Kenya).

[224] See for example, *Jolly George Verghese & Anr* v *The Bank of Cochin* [1980] INSC 19; AIR 1980 SC 470; 1980 (2) SCR 913; 1980 (2) SCC 360 (Supreme Court of India); *Jagjit Singh Saund* v *Jesvir Singh Rehal* [2021] eKLR (High Court of Kenya).

[225] *KCB Bank Limited* v *Gichohi and 2 Others* (Civil Appeal 323 of 2023) [2023] UGCommC 35 (20 March 2023).

[226] ibid 14.

debt).[227] Likewise, in *Toolsy Kamla* v *H.H. The District Magistrate of Pamplemousses*,[228] the Supreme Court of Mauritius held that:

> 'Mauritius is a party to the International Covenant on Civil & Political Rights [ICCPR] which provides in its article 11 that…This text was borrowed from article 1 to the Fourth Protocol of the European Convention for the Protection of Human Rights & Fundamental Freedoms… Any available jurisprudence on the interpretation of that article is therefore highly relevant. The prevailing opinion is that whilst article 1 extends to a failure to fulfil a contractual obligation of any kind, including non-payment of debts, it is limited in its application by the words "merely on the ground of inability to fulfil" an obligation. Deprivation of liberty is not forbidden if there is some other factor present as where the detention is because the debtor acts fraudulently or negligently or for some other reason refuses to honour an obligation that he is able to comply with'.[229]

There are cases in which the Supreme Court of Mauritius has held, inter alia, that Art 11 of the ICCPR is only applicable when the debtor is unwilling to pay the debt.[230] In South Africa[231] and in the Republic of Ireland,[232] courts held that legislation which permits the imprisonment of a judgement debtor for unwillingness to pay a debt is unconstitutional if it does not guarantee his/her constitutional rights to a fair procedure and liberty. Likewise, the Supreme Court of Mauritius held that a debtor has a right to a fair hearing before he/she can be imprisoned for unwillingness to pay a debt.[233] This implies that such legislation complies with the constitution if it the limitations it imposes on the constitutional rights are justifiable under the constitution. Since imprisonment for inability to pay a debt is outlawed in Ireland, a creditor is prohibited from threating a debtor with such

[227] ibid 15. However, there are allegations that in the magistrates' court in Uganda, some people are imprisoned in circumstances which show that they are unable to pay their debts. See https://tinyurl.com/2s368fwf (last visited 30 September 2024). Sometimes imprisonment forces some people to pay debts. See for example, https://tinyurl.com/yu9dzpbp (last visited 30 September 2024).

[228] *Toolsy Kamla* v *H.H. The District Magistrate of Pamplemousses* 2002 SCJ 16; 2002 MR 9.

[229] ibid 5.

[230] See for example, *Pelladoah* v *Development Bank of Mauritius* 1992 MR 5, 1992 SCJ 26; *Ramkorun Chabeelall* v *Ajay Shanto* 1998 SCJ 175.

[231] *Coetzee* v *Government of the Republic of South Africa, Matiso and Others* v *Commanding Officer Port Elizabeth Prison and Others* 1995 (10) BCLR 1382; 1995 (4) SA 631. However, a civil debtor can still be sentenced to prison if the conditions for 'coercive imprisonment' have been met. See, for example, *Antwerpen obo Scholtz Another* v *Road Accident Fund and Another* (41371/2021) [2024] ZAGPPHC 703.

[232] *McCann* v *Judges of Monahan District Court & Ors* [2009] IEHC 276. See also *Fulham* v *Chadwicks Ltd & Others* [2021] IECA 72 (12 March 2021).

[233] *Clelie Jean Pierre* v *Mahendar Sawon* 1998 SCJ 493. In this case, the Court (3), held that 'imprisonment for debt is a quasi-criminal sanction and the judgment debtor is submitted to a compulsory examination which forces him to answer self-incriminating questions'.

imprisonment in an effort to compel him to pay the debt.[234] Although in some countries, there is no legislation empowering courts to imprison judgement debtors,[235] there are many countries in which legislation provides for circumstances in which a person can be imprisoned for failure to pay a debt.[236] The possibility of imprisonment for failure to pay a debt is also recognised by the United Nations. Thus, rules 11, lett c)[237] and 121[238] of the United Nations Standard Minimum Rules for the Treatment of Prisoners (2015) contemplate circumstances in which a person may be imprisoned for debt. In South African the Supreme Court held that the criminalisation of breach of a fiduciary duty arising out of a contract is not contrary to Art 11 of the ICCPR.[239]

The above discussion raises an important question of whether the prohibition against imprisonment for inability to fulfil a contractual obligation has attained the status of customary law. In 2019, the United Nations General Assembly, pursuant to a recommendation by the International Law Commission, adopted a Resolution on Identification of Customary International Law.[240] This Resolution states that '[t]o determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law (*opinio juris*)'.[241] The Resolution adds that:

[234] *National Bank of Ras Al-Khaimah Trading as Rakbank* v *F.K.* [2021] IEHC 541 (23 September 2021) paras 25-27.

[235] *Naylor* v *Foundas* [2004] VUCA 26 (Court of Appeal of Vanuatu) (the court observed that Vanuatu although had not yet ratified the ICCPR, Art 11 of this treaty prohibited the imprisonment of a judgement debtor for inability to pay a debt).

[236] Sections 2 and 28 of the Prisons and Corrections Act 2013 (Samoa); Hauma v Tekeeu [2019] KIHC 119 (High Court of Kiribati) para 15; sections 2 and 24 Prisons and Corrections Act 2006 (Fiji); Rule 14, para 4, of the Magistrates' Court (Execution Proceedings) Rules, S 5/92 (2001) (Brunei); section 69, para 3, of the Eswatini Correctional Services Act (Act No. 13 of 2017); sections 75, para 3, 76, para 1, 87 and 89 of the Prisons Act, 1965 (Zambia).

[237] Rule 7, lett c), provides that 'Persons imprisoned for debt and other civil prisoners shall be kept separate from persons imprisoned by reason of a criminal offence'.

[238] Rule 121 provides that 'In countries where the law permits imprisonment for debt, or by order of a court under any other non-criminal process, persons so imprisoned shall not be subjected to any greater restriction or severity than is necessary to ensure safe custody and good order. Their treatment shall be not less favourable than that of untried prisoners, with the reservation, however, that they may possibly be required to work'.

[239] *Defendant* v *Prosecutor* 2018 WL 10456665 (SC), [2018] 15 KORSCD 429, 2017Do4027 [2018] 15 KORSCD 429, 405, the Court held that 'Punishing an act which caused non-performance of contract by means of willful betrayal should not be deemed as the 'imprisonment merely on the ground of inability to fulfill a contractual obligation'. The use of penal authority in the private sector must be restricted, but it should not be hastily concluded that a case falling under non-performance of contract under civil law is unpunishable under criminal law, or that punishment of such case goes against the principle of no punishment without law or constitutes the abuse of the State's penal authority'. See also *Defendant* v *Prosecutor* 2011 WL 11955558 (SC), [2011] 8 KORSCD 285, 2008Do10479; [2011] 8 KORSCD 285, 297.

[240] Resolution on Identification of Customary International Law (A/RES/73/203) (11 January 2019).

[241] ibid 2.

'1. In assessing evidence for the purpose of ascertaining whether there is a general practice and whether that practice is accepted as law (*opinio juris*), regard must be had to the overall context, the nature of the rule, and the particular circumstances in which the evidence in question is to be found.

2. Each of the two constituent elements is to be separately ascertained. This requires an assessment of evidence for each element'.

The Resolution explains the requirements of practice[242] and adds that:

'1. Practice may take a wide range of forms. It includes both physical and verbal acts. It may, under certain circumstances, include inaction.

2. Forms of State practice include, but are not limited to: diplomatic acts and correspondence; conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference; conduct in connection with treaties; executive conduct, including operational conduct "on the ground"; legislative and administrative acts; and decisions of national courts.

3. There is no predetermined hierarchy among the various forms of practice'.

The above discussion shows that three forms of state practice are relevant to this article: conduct in connection with treaties; legislative acts; and decisions of national courts. For the practice to meet the criteria above, 'it must be sufficiently widespread and representative, as well as consistent'.[243] The first form relates to the issue of treaties. The Resolution states that for a treaty norm to be recognised as customary international law, one of the following conditions has to exist:

'1. A rule set forth in a treaty may reflect a rule of customary international law if it is established that the treaty rule: (a) codified a rule of customary international law existing at the time when the treaty was concluded; (b) has led to the crystallization of a rule of customary international law that had started to emerge prior to the conclusion of the treaty; or (c) has given rise to a general practice that is accepted as law (*opinio juris*), thus generating a new rule of customary international law.

2. The fact that a rule is set forth in a number of treaties may, but does not necessarily, indicate that the treaty rule reflects a rule of customary

[242] ibid 3, where it is stated that '1. The requirement of a general practice, as a constituent element of customary international law, refers primarily to the practice of States that contributes to the formation, or expression, of rules of customary international law.

2. In certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law.

3. Conduct of other actors is not practice that contributes to the formation, or expression, of rules of customary international law, but may be relevant when assessing the practice referred to in paragraphs 1 and 2'.

[243] ibid 3.

international law'.

A close look at the above criteria in the light of Art 11 of the ICCPR shows the following. First, at the time Art 11 was included in the ICCPR, there was no rule of customary law prohibiting imprisonment for inability to fulfil a contractual obligation. However, it has been demonstrated in the discussion on the drafting history of Art 11, that many countries had legislation prohibiting imprisonment for inability to pay a debt. This prohibition did not extend to other contractual obligations. This also shows that the prohibition of imprisonment for inability to fulfil a contractual obligation had not 'led to the crystallization of a rule of customary international law that had started to emerge prior to the conclusion of the treaty'. Second, the discussion above shows that since the adoption of the ICCPR, two regional treaties (the Arab Human Rights Charter and American Convention on Human Rights) were adopted and they prohibit detention or imprisonment for inability to pay a debt. The European treaty prohibits detention for inability to fulfil a contractual obligation. The constitutions of most countries do not prohibit imprisonment for inability to fulfil a contractual obligation. Many constitutions prohibit imprisonment or detention for inability to pay a debt. Likewise, legislation in many countries prohibit imprisonment or detention for inability to pay debts. Case law from many countries discussed above shows that courts have held that national legislation and/or Art 11 of the ICCPR prohibit imprisonment or detention for inability to pay a debt. This implies that since the adoption of the ICCPR, there is no evidence giving 'rise to a general practice that is accepted as law (*opinio juris*), thus generating a new rule of customary international law' prohibiting imprisonment for inability to fulfil a contractual obligation. Thus, imprisonment for inability to fulfil a contractual obligation has not yet attained the status of customary international law on the basis of a treaty. This raises the question of whether there are other forms in which the prohibition of imprisonment for failure to fulfil a contractual obligation could have become customary international law. This takes us to the other two forms mentioned above: legislative acts; and decisions of national courts.

The discussion above has indicated that legislative acts and decisions of national courts have substantially prohibited imprisonment or detention for inability to pay debt as opposed to inability to fulfil contractual obligations generally. This implies that even on these two grounds, the prohibition of imprisonment for inability to fulfil a contractual obligation has not yet attained the status of customary international law. The Resolution also provides that

> '[d]ecisions of international courts and tribunals, in particular of the International Court of Justice, concerning the existence and content of rules of customary international law are a subsidiary means for the determination of such rules'.

Although there are instances in which the International Court of Justice has held

that some states have violated some rights in the ICCPR,[244] it has not yet dealt with Art 11. However, as illustrated above, international and regional quasi-judicial bodies have dealt with cases dealing the prohibition against imprisonment for inability to pay debts. Of all these bodies, only the Working Group on Arbitrary Detention held that the prohibition of imprisonment to pay a debt has attained the status of jus cogens. However, the author has disagreed with this conclusion. The above discussion shows that the prohibition of imprisonment for inability to fulfil a contractual obligation has not yet attained the status of customary law. However, the prohibition of imprisonment or detention for inability to pay a debt, which is a sub-category of the prohibition of imprisonment for inability to fulfil a contractual obligation, has attained the status of customary international. This is evidenced by the fact that this prohibition is provided for in the ICCPR; the three regional treaties discussed above; the practice of the African Commission on Human and Peoples' Rights; the constitutions and legislation of many countries; and the decisions of national courts and international and regional quasi-judicial bodies.

VI. Conclusion

In this article, the author has discussed the drafting history of Art 11 of the ICCPR. It has been demonstrated that the draft Art 11 that was proposed by the Commission was adopted by the delegates after a lengthy debate. The debate was mainly on the issue of whether the words 'contractual obligation' should be replaced with the words 'civil obligations' or 'private' obligations. The author has also demonstrated that although Art 11 prohibits imprisonment for inability to fulfil a contractual obligation, very few countries have transplanted it into their constitutions or other pieces of legislation. However, legislation in many countries prohibits imprisonment for inability to pay a debt. This creates room for the argument that this prohibition has become part of customary international law.

[244] Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Qatar* v *United Arab Emirates*), Preliminary Objections, Judgment, I.C.J. Reports 2021, 71, para 101; Jadhav (*India* v *Pakistan*), Judgment, I.C.J. Reports 2019, p 418 (dealing with the right to a fair trial); Questions relating to the Obligation to Prosecute or Extradite (*Belgium* v *Senegal*), Judgment, I.C.J. Reports 2012, 422 (dealing with the right to freedom from torture); Ahmadou Sadio Diallo (*Republic of Guinea* v *Democratic Republic of the Congo*), Merits, Judgment, I.C.J. Reports 2010, 639, para 160 (the Court held that the DRC violated Arts 9 and 13 of the International Covenant on Civil and Political Rights); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina* v *Serbia and Montenegro*), Judgment, I.C.J. Reports 2007, 43 para 220 (providing that Art 14 of the ICCPR provides for the minimum guarantees for the right to a fair trial); Armed Activities on the Territory of the Congo (*Democratic Republic of the Congo* v *Uganda*), Judgment, I.C.J. Reports 2005, 168, para 219 (the court held that Uganda violated Arts 6, para 1, and 7 of the ICCPR).