

Criminalising a ‘way of life’: The human rights implications of the UK Government’s ban of khat (or miraa) on the farmers of Meru County, Kenya

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Abstract: This paper explores the human rights implications of the categorisation of khat (mira) as a Class C Drug under the *UK Misuse of Drugs Act 1977* on farmers in the Meru County of Kenya. The paper will argue that the criminalisation of khat is a contravention of the obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR), and other human rights instruments that provide for the right of people to enjoy adequate standards of living. As the UK is signatory to the ICESCR and has ratified it into its domestic law, its obligations as a State Party to the Convention extend not only to the UK residents, but also to the broader international community.

Keywords: ICESCR, khat, Nyambene Hills, Meru County, Kenya, UK

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1. Introduction

In January 2013, The British Minister Responsible for Drugs requested, on behalf of the Government, that the Advisory Council on the Misuse of Drugs (ACMD) review khat (mira), specifically on its societal harm. When the ACMD was requested to undertake this review, it was already aware of the concerns raised around the ‘social harms’ of khat and as a result, the ACMD ensured that they conducted extensive and elaborate evidence-based research, collated from different and reliable sources. The ACMD final report showed that khat had no causal links with adverse medical conditions, other than small number of reports of an association with significant liver toxicity.¹ Buttressing the ACMD’s report is an overwhelming consensus among the international health authorities that khat has a low abuse potential as well as significant evidence that it has little to no social consequences on its users.² Despite these findings, the British Government classified khat under the *Misuse of Drugs Act 1971* as a *Class C Drug*. This means that, when the law comes into effect, anyone caught trafficking or supplying the substance faces up to 14 years in prison and an unlimited fine. The ban will have direct consequences on migrant communities in the UK, especially the Somali Community which are the largest consumers of the substance. However, the biggest impact will be on the Meru farmers in Kenya, who are the

1 Advisory Council on Misuse of Drugs (ACMD) *Khat: A Review of its Potential Harms to the Individual and Communities in the UK*, (Jan 2013) p.3.

2 Fitzgerald, J., *Khat: A Review*, Centre for Culture, Ethnicity and Health, Louise Lawrence Research, 2009, p.2

biggest producers and exporters of the commodity to the UK. It is estimated that 54 per cent of the local population in Meru produce khat and majority of the population rely on the khat industry for their living.³

2. Research question and justification

This research question is a topic of interest because khat, otherwise, known as miraa in Kenya, is an important cash crop that is fundamental to the lives of the people in Kenya's Meru County. It is their primary source of employment, earnings, and the crux of their standards of living. Before the UK Government imposed the ban on khat, the commodity generated millions of dollars for the Kenyan economy, and most of all, to the impoverished farmers in Meru County of Kenya. In that regard, the ban of this cash crop by the UK has had direct economic consequences on the farmers in Meru County. Now, the farmers are struggling to provide basic necessities for their children: education, food, shelter, water, health services, and in general, they are struggling to maintain adequate standards of living in a county that is significantly rural and dependent on the exports of this crop. The issue provides a good case scenario for testing the utility of the ICESCR in the current international human rights climate.

2.1. Methodology

For the purpose of this paper, information from a variety of sources are canvassed: treaties, soft law and delegated soft law. The contents of this paper will be contextualised within the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Optional Protocol to the ICESCR. In addition to that, the paper will look at a number of international, regional and domestic instruments, from which to draw arguments and authority. Relevant case law from different human rights courts across the world will be consulted where relevant.

In terms of semantics, miraa and khat will be used interchangeably in this paper. The reason for this is that 'khat' is the name used in the UK's legislation that banned the substance, whereas 'miraa' is the name that is predominantly used in Kenya.

3. Khat as a 'way of life' for the farmers in Meru County, Kenya

3.1. Background – information on Khat (miraa)

Khat is one of many names used to refer to *Catha edulis* (Forskål), cultivated as a tree, the stems and leaves of which are chewed. Miraa is the name commonly used in Kenya, while other names are used in other countries such as Somalia (khat), Ethiopia (chat) and in Arab countries (qat). Miraa is grown and mainly consumed in parts of Eastern Africa and the Middle East. In Kenya, it is mainly grown in the Nyambene Hills by Tigania and Igembe (sub-groups of the Meru Tribe). The high altitude of 5000-8000 feet of the Nyambene Hills provides perfect conditions for planting and growing miraa. Once Miraa is planted and it becomes ready for harvest, its fresh succulent stems and leaves are harvested regularly from the trees and are highly valued for their stimulating properties. These properties are delivered from its pharmacological constituents including *cathine* and *cathinone*, the latter being approximately ten times more potent than the former. *Cathinone* is the more efficient of the two as it increases heart rate, locomotor activity and oxygen consumption.⁴ Khat is sold in different grades. The best tend to be succulent in texture and sweet in taste. The effects of its consumption are quite mild. As one author describes it:

Khat seems to have a pleasantly excitant effect upon the organism. People who take khat become cheerful, talkative, and wide awake. Some people also fall into pleasant dreams. The violent excitement caused by opium and sometimes by hashish does not seem to occur with khat. Khat more closely resembles coffee than those more violent excitants, although it is stronger than coffee.⁵

These effects of miraa are used for a number of purposes, including to boost stamina or overcome sleep when the need arises. It is also used at social occasions, where the effects aid in generating conviviality. Due to these effects, miraa has become a controversial substance which has been condemned by some and praised by others.⁶ For the Meru

³ Njiru, N., Muluvi, A., Owuor, G., and Langat, J., 'Effects of Khat production on Rural Households' Income in Gachoka Division Mbeere South District of Kenya', *Journal of Economics and Sustainable Development*, Vol. 4, No.2, 2013, pp.56-57.

⁴ Weir, S., *Qat in Yemen*, London: British Museum Press, 1985, p. 46

⁵ Bibra, E.Von, *Plant Intoxicants*, 1995 (Translated from German by Hedwig Schleiffer, foreword by Martin Haseneir, technical notes by Jonathan Ott), Vermont: Healing Arts Press, p.18-55.

⁶ The controversy is associated with health problems such as insomnia, lack of appetite leading to malnutrition, tooth decay, and social problems such as violence aggravated by the high stakes in the miraa trade, marital discord caused by wives being deprived of attention and

communities of the Nyambene Hills, miraa has a crucially distinct socio-economic and cultural importance, which is deeply ingrained in their identity, ancestry and upbringing.⁷

3.2. The economic importance of miraa to the Meru farmers in Kenya

Miraa is certainly the primary source of income for the Meru of the Nyambene Hills.⁸ The Nyambene-grown miraa feeds a burgeoning market, both national and international. The Tigania and Igembe tribes of Nyambene have a great pride in miraa, emphasising not just its economic role but its place in Nyambene traditions. Tigania and Igembe have a strong ancestral connection with miraa and its consumption is said to have traditionally been restricted to the elders alone. Today, miraa is largely consumed by all and sundry; it has become the epitome of the Meru culture and its livelihood.⁹ While other ethnic groups such as the Somalis are strongly linked with miraa, the substance is highly regarded as a Meru crop.

Over the years, the trade of the crop has evolved into a commercialised commodity, around the time when coffee was one of the main crops grown by Kenyan farmers.¹⁰ Miraa is cultivated on smallholder plots and offers farmers good returns per acre, compared to crops like coffee and tea. In a United Nations Office on Drugs and Crime (UNODC) report, one farmer proudly stated that, for every shilling invested in tea, there is a return of two shillings and for a shilling invested in miraa, there is a return of four shillings.¹¹ Farmers also appreciate the frequent harvests that miraa trees provide – every few weeks or so depending on the season – stating that income from crops like coffee is not only depressingly small, but also comes in just one yearly payment. As well as the benefits that the farmers get, miraa also offers young men and women the opportunity to earn money as agents supplying retailers or as retailers themselves.¹²

In terms of the commercialisation of the commodity, miraa is flown to the UK in cartons containing 40 retail bundles. It is imported in large quantities to meet demand among Ethiopian, Kenyan, Somali and immigrant communities. Before miraa was banned, it was freely imported, consumed, distributed and unrestricted in the UK. The Somali traders in the UK sold such cartons to retailers at £80, relaying £50-60 to the exporters in Nairobi.¹³ UK retailers make around £40 per box if they sell all bundles. As the Meru County Member of Parliament, Florence Kajuju, stated,

I have grown up in Meru, educated by money from miraa and I have benefitted from miraa proceeds and as a leader, I am championing for what helps my people. I am protecting the cultural heritage and economic mainstay of my people.¹⁴

This statement indicates how important miraa is to the daily lives of the Meru people. As one local politician Mr Kubai Kiringo stated in regard to the proceeds of miraa:

This is money that is used to build churches, take children to school, build infrastructure, and do everything. Basically, the livelihood of the people here depends on these trees. Exports to the UK account for around 15 per cent of the total production in Meru, worth an estimated \$7.5m (£4.9m) annually.¹⁵

3.3. The cultural significance

Apart from being a successful commodity, for Igembe and Tigania, miraa carries a tangible link to the ancestors who first cultivated it – a valued part of many traditional ceremonies and a source of great pride.¹⁶ The Meru have a strong cultural links with miraa – with the old miraa trees believed to have existed for more than 300 years. Tigania and Igembe discourse concerning their long-existing plantation of miraa stresses a profound connection with their

financial support by their miraa chewing husbands and young children harvesting miraa when they should be at school.

7 Carrier, N., *Bundles of Choice: Variety and the Creation and Manipulation of Kenyan Khat's Value*, St Anthony's College, Oxford, 2006, p.3.

8 Bernard, F.E., *East of Mount Kenya: Meru Agriculture in Transition*, Munich: Wetforum, Verlag, 1972.

9 Carrier, N., 'Miraa is Cool: The Cultural Importance of Miraa (Khat) for Tigania and Igembe Youth in Kenya', *Journal of African Cultural Studies*, Oxford, 2006, p.202.

10 Goldsmith, P., *Symbiosis and Transformation in Kenya's Meru District*, Unpublished PHD thesis, University of Florida, 1994, p.75.

11 United Nations Office on Drugs and Crime, *The Drugs Nexus in Africa*, accessed online at www.unodc.org on 11/11/2013.

12 Ibid

13 Klein, A., *Khat and the Informal Globalisation of a Psychoactive Commodity*, Kent Institute of Medicine and Health Sciences, University of Kent, 2008, pp. 4-6.

14 Kirimi Murithi, 'Miraa is a Matter of Life and Death for Meru Residents', An Interview with Florence Kajuju, www.thestar.co.ke, retrieved 19 August 2013.

15 BBC News, 12th July 2013, retrieved on the 7 October 2013.

16 Munjuri, K.J.S., *All Restrictions On Miraa/Khat/CatheElulis Should Be Removed*, A Petition to the World Health Organisation on behalf of Saikijo International, A Group of Miraa Traders.

traditions. McKeag, a British District Commissioner of Meru at the colonial period, noted that Meru are the ‘only people for whose tribal customs miraa has a place’.¹⁷ Due to the importance of miraa to the Meru people, a restriction on the sale of miraa has long been resisted. As evidenced by a letter written by three Meru men to the Hon. Chief of the Native Commissioner on the 25th of April 1947, the men eloquently complained of the injustice of an ordinance which was imposed by the British administration prohibiting the cultivation and sale of miraa.¹⁸ The three men vehemently stated the importance of miraa in times of circumcision when young boys were initiated into adulthood; the use of miraa to pay dowry and its vital role during rituals.

During initiations, when young men thought they were ready for circumcision, they would give miraa to the elders to request the circumciser and if the elders gave them a go-ahead, the next stage would be to take miraa to the elders who would then call for the time when event was to occur.¹⁹ As part of the initiation ceremony, called *kioro*, the initiate would be asked to make confessions and at this stage, miraa leaves would be used along other plants and thrown onto a fire. If there was a crackle, the initiate would be told that the crackle showed that he had not confessed.²⁰ After the initiation stage, young boys were allowed to marry. In order to secure a girl in marriage, the suitor must take a bundle of miraa called *ncoolo* to his prospective father-in-law, who would then signal his acceptance of the marriage proposal by taking or refusing the bundle. Once a young man was married, he had to pass through to the next stage of playing an active role in the traditional system of governance. This stage was called *njuri ncheke*. To go to this stage, the man was required to pay a goat, a bull and miraa for fees. This is just but a snapshot of the larger place of miraa for the people of Meru. Miraa is so special to Tigania and Igembe, to an extent that, if anyone felled a miraa tree without the permission of the Council of Elders, the offender would, believably, be fallen by a curse. These customs illustrate that miraa holds a special and distinct position in the traditions and cultures of the Meru people.

3.4. The ban of khat in the UK and its consequences for Meru farmers

In 2005, the Advisory Council on the Misuse of Drugs advised against classifying khat under the *Misuse of Drugs Act 1971*,²¹ instead recommending that educational and awareness-raising campaigns be instituted. Before the ban, the Value Added Tax (VAT) on khat imports was imposed, raising £2.9 million in 2010 when around 3,002 tonnes of khat entered the UK, a large increase since the late 1990s. Consumption in the UK was almost entirely limited to diaspora communities, primarily Ethiopians, Somalis, Yemenis and some Kenyans. Among Somalis, chewers tend to be older than non-chewers, while more men than women consume. The majority of consumers chew khat moderately, though there is evidence of heavy use by some. The Advisory Council undertook another review and recommended that there was no justification for criminalising khat.²² Despite this, the Government went ahead and imposed a criminal sanction on the sale and consumption of khat in the UK. The Government did not give any reasons to justify the ban other than claiming that khat had social impacts on minority communities in the UK.

4. Economic, social and cultural rights

4.1. Legal framework – The concept of economic, social and cultural rights

International human rights law is designed to protect the full range of human rights required for people to have a full, free, safe, secure and healthy life. The right to live a dignified life cannot be attained unless all the fundamental necessities of life-work, food, housing, health care, education and culture are adequately and equitably available to everyone.²³ Due to this primary principle of the global human rights regime, international human rights law has put in place individual and group rights relating to the civil, cultural, economic, political and social spheres. The United Nations promotes, protects and monitors the respect for human rights through the Bill of Rights: the Universal Declaration of Human Rights (1948), the International Covenant on Economic, Social and Cultural Rights (1966) and the International Covenant on Civil and Political Rights (1966) and their accompanying optional protocols.²⁴ These instruments are the primary source of human rights standards.

17 Kenya National Archives: BB.PC/EST/6/12 Miraa – general.

18 Kenya National Archives: loc.cit.

19 Nyaga, D., *Customs and Traditions of the Meru*, Nairobi: East African Educational Publishers, 1997.

20 Rimita, D.M., *The Njuri-Ncheke of Meru*, Meru: Kolbe Press, 1988.

21 Advisory Council on the Misuse of Drugs (ACMD), *Khat (Qat): Assessment of Risk to the Individual and Communities in the UK*, 2005, pp28-30.

22 Fitzgerald, J.G., *Khat: A Literature Review*, Louise, Lawrence Pty Ltd, 2009, pp.10-12.

23 The Committee on Economic, Social and Cultural Rights, Fact Sheet No.16 (Rev.1), p.1.

24 Human Rights: A Compilation of International Instruments, vol.1 (2 parts), Universal Instruments (United Nations) Publication, Sales No.

These instruments have shaped the international legal norms relating to a wide range of issues, including women's rights, and protection against racial discrimination, amongst others. When Member and non-Member States of the United Nations become 'State party' to the Covenants, they wilfully accept a series of legal obligations to uphold the rights and provisions enshrined in the texts. Equally, if a State ratifies one of the Covenants, it accepts a solemn responsibility to apply each of the obligations embodied therein and to ensure compatibility of their national laws to their international duties, in a spirit of good faith. Therefore, through ratification of human rights treaties, States become accountable to the international community, to other States which have ratified the same texts and to their own citizens and others resident in their territories.

It is from this perspective that it was clarified under the *Universal Declaration of Human Rights* (UNDHRs) that civil and political, economic, social and cultural rights are indivisible and interdependent; they are the principal tenets of international human rights law.²⁵ Economic, social and cultural rights (ESCRs) are designed to be malleable – that is, they can co-exist and be enjoyed at the same time with civil and political rights. In a world where 'a fifth of the developing world's population goes hungry every night, a quarter lacks access to even a basic necessity like safe drinking-water, and a third lives in a state of abject poverty-at such a margin of human existence that words simply fail to describe it', the significance of renewed focus and commitment to the full realisation of ESCRs is warranted.²⁶

ESCRs are often regarded as 'second generation' human rights after the civil and political rights – meaning, the realisation of ESCRs was meant to be programmatic, gradual and therefore, not a matter of rights.²⁷ Relatively, of all global human right standards, the ICESCR provides the most important international legal framework for protecting basic human rights. Therefore, ESCRs enjoy equal importance with the civil and political rights if not more.

4.2. The nature and scope of the State's obligations

Article 2(1) of ICESCR:

'To take steps (...) by all appropriate means, including particularly the adoption of legislation'.

Article 2 (1) of the ICESCR is the principal provision that requires all State parties to take immediate measures towards the full realisation of all the rights contained in the Covenant. States are required to take legislative, administrative and other structural measures to ensure the realisation of ESCRs.²⁸ States are obligated to move expeditiously and immediately to achieve the full realisation to fulfil their obligations under the Covenant.²⁹ States are obligated to use available resources to ensure that subsistence is provided to all.³⁰ All possible international co-operation and assistance must be gathered as provided under the United Nations Charter to ensure that there are resources available to be distributed evenly without discriminating against anyone based on race, colour, age, and gender, political and religious affiliation. In this regard, it is emphasised that obligations under the Covenant are not an optional choice that States can execute at will, but they are binding basic standards that must be realised immediately.

4.3. Minimum core obligations

In its General Comment No.3, the Committee on Economic, Social and Cultural Rights argues that that States have 'minimum core obligations' under the Covenant to ensure the satisfaction, of at least, minimum essential levels of each of the rights.³¹ This is to say that States are obligated, regardless of the level of economic development, to ensure respect for minimum subsistence rights for all.³² The minimum core concept maintains that there are some rights, especially in the ICESCR, that should be immediately attended to and implemented. These rights generate an immediate obligation for results instead of being subjected to progressive implementation and therefore should receive priority over other

E.94.XIV.1).

25 See the Universal Declaration of Human Rights and also the re-statement of the principle in General Assembly Resolution 32/130 of 16 December 1977.

26 United Nations Development Programme, *Human Development Report*, Oxford University Press, 1994, p.2.

27 Vierdag, E.W., *The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights*, vol. 9, 1978, p.103.

28 Principle 1, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, A/RES/60/147, Resolution adopted by the Sixtieth Session of the UN General Assembly.

29 Aba, E., and Hammer, M., *Options and Barriers to Broadening the Scope of the Responsibility to Protect to Include Cases of Economic, Social and Cultural Rights Abuse*, One World Trust, International Law Regulation, 2009, p.6

30 Jeff, K., *An Activist's manual on the International Covenant on Economic, Social and Cultural Rights*, Law and Society Trust, March, 2003, p.39.

31 Committee on Economic, Social and Cultural Rights, General Comment 3, para 3.

32 Second Progress Report (E/CCN.4/Sub.2/1991/17), para. 10.

rights.³³ Absolute minimum is needed, without which the right would be unrecognisable or meaningless. If a State claims to attribute its failure to meet its minimum core obligations to a lack of available resources, it must demonstrate that every effort was exerted to use all resources that are in its disposition in an effort to meet, as a matter of priority, those minimum core obligations.³⁴

4.4. Avoiding retrogressive measures

The Committee on Economic Social and Cultural Rights has sought to discourage what it calls ‘deliberately retrogressive measures’ taken by State parties to the Covenant. A ‘retrogressive measure’ is one that, directly or indirectly, leads to backward steps being taken with respect to the rights recognised in the covenant.³⁵ Any prohibition, taken consciously, which reduces the enjoyment of economic, social and cultural rights, whether or not the regression was intended, is taken to violate the enjoyment rights of subsistence.³⁶ The Committee stated that, if a regression is apparent, the State is obligated, under its general obligations under the Covenant, to take immediate steps to rectify the measure. The notion of progressive realisation of economic, social and cultural rights implies that there should be no regression by act or omission to a lower level of enjoyment of these rights.

5. The UK Government’s violations

5.1. Are the UK Government’s violations against the rights of Meru farmers justiciable and enforceable?

The first question that must be asked is whether the violations of the UK Government against the Meru farmers are justiciable and enforceable in any court in the UK and Europe. In the past two decades,³⁷ the concept of justiciability of ESCRs has gained a new momentum – taking on a real practical meaning in municipal legal systems across the world.³⁸ There was an argument that judicial enforcement of ESCRs encroached into the legislative platform – thereby culminating in the violation of the doctrine of separation of powers.³⁹ In the contemporary jurisprudence of ESCRs, this perception has changed markedly. In *Olga Tellis v Bombay Municipal Corporation*,⁴⁰ the Supreme Court of India forced the Commissioner not to evict slum dwellers without sufficient notice because doing so would amount to deprivation of a livelihood which is akin to deprivation of life under Article 2 of the European Convention on Human Rights (ECHR) and Article 2 of the *Human Rights Act 1998 UK*.

The Committee on ESCRs, in General Comment No. 9 also took an issue with justiciability, stating that, as reflected in *Article 27 of the Vienna Convention*, ‘A party may not invoke the provisions of its internal law as the justification for its failure to perform a treaty’. In other words, States should modify the domestic legal order as necessary in order to give effect to their treaty obligations. *Article 8 of the Universal Declaration of Human Rights* supplements this argument, postulating that ‘everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law’.

In light of the arguments raised in this discussion, there is substantial evidence to argue that the UK Government violated its State obligations under the ICESCR in regard to the Meru people’s rights to export miraa to the UK. The economic, social and cultural rights impose three obligations on States: the obligations to respect, protect and fulfil. Failure to perform any of these three obligations constitutes a violation of such rights.⁴¹ Although the UK may argue their sovereign right to enact laws suitable to their national environment, the justification given for the sanction is not sufficient to trump the UK’s State obligations under the ICESCR. In this regard, the Meru farmers are entitled to enforce their rights in any British courts or in the European Court of Human Rights under the European Convention on Human Rights and the ICESCR.

³³ Langford, M., *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, Cambridge University Press, 2008, p.22.

³⁴ General Comment No.3, para 10.

³⁵ Office of the United Nations High Commissioner for Human Rights, Economic, Social and Cultural Rights, Handbook for National Human Rights Institutions, Professional Training Series No. 12, New York and Geneva, 2005, p.28.

³⁶ Ibid.

³⁷ Yusuf, S., The Rise of Judicially Enforced Economic, Social & Cultural Rights – Refocusing Perspectives, *Seattle Journal of Social Justice*, Volume 10, Issue 2, Article, 2012, p.753.

³⁸ Solomonides, T., and Ramcharan, B.G., Judicial Protection of Economic, Social and Cultural Rights: Cases and Materials, 2005, p.255.

³⁹ Pieterse, M., Coming to Terms with Judicial Enforcement of Social Rights, 20 *South African Journal of Human Rights*, pp.383, 386-391, 2004.

⁴⁰ *Tellis v Bombay Municipal Corporation* (1986) A.I.R (India)

⁴¹ Seymour, D., and Pincus, J., ‘Human Rights and Economics: The Conceptual Basis for their Complementarity’, *Development Policy Review*, 2008, p.387.

5.2. Does the miraa ban imposed by the UK Government fall within the scope of one of the substantive articles of the ICESCR and ECHR?

The two main Conventions that are instrumental to this paper are: the ICESCR and the European Convention on Human Rights (ECHR). Article 2 (1) of the ICESCR obligates States to ensure that they undertake steps individually and through international assistance with the view to progressively achieve the full realisation of the rights enunciated under the Covenant. It is also stated under Article 2(2) of ICESCR that States must exercise their obligations without discrimination of any kind as to race, colour, sex, language national or social origin, birth or other status. Non-discrimination was also confirmed in Article 14 of the European Convention on Human Rights (ECHR) which is part of the British domestic law. Member States' obligations cover both nationals and non-nationals under Article 2(3) of the ICESCR. Therefore, the United Kingdom's State obligations under the ICESCR and the ECHR extend to the farmers of Meru County.

The UK Government's obligations also fall within Article 1 of the ECHR which states that everyone's right to life must be protected by law and no one shall be denied of his right to life intentionally save in the execution of a sentence. The European Court of Human Rights interpreted the right to life as the right of everyone to be protected if their life is at risk; it is not to be construed and interpreted in the narrow sense.⁴²

5.3. Was there an 'interference' with the right to adequate standard of living?

Principle 7 of the Limburg Principles provides that State Parties must at all-time act in good faith to fulfil the obligations they have assented to under the Covenant. Principle 10 adds that State Parties are accountable both to the international community and to their own people for their compliance with the obligations under the Covenant. Relatively, the UK Government, as a State Member to the ICESCR and ECHR has obligations to the Meru farmers. The interference with their rights amounts to violations under the Covenants.

The right to an adequate standard of living requires that, at minimum, everyone shall enjoy the necessary subsistence rights – that is: adequate food, and nutrition, housing and the necessary conditions of care required. The universal right to education, at elementary and fundamental stages, is also a right guaranteed to all and sundry irrespective of their racial, religious, political social affiliation. Articles 25(1) and 26(1) of the Universal Declaration of Human Rights provide that everyone is entitled to enjoy these rights as basic necessities to live a dignified life and to develop human personality and to strengthen the respect for human rights. This has also been strongly buttressed by Article 11 of the ICESCR stating that everyone has the right to an adequate standard of living for himself and his family. The Committee on Economic, Social and Cultural Rights has issued several comments elaborating on the criteria to be satisfied to fulfil the rights to adequate housing, food, water, social security and other necessities of the day-to-day living.

Article 14 of Convention on the Elimination of Discrimination Against Women (CEDAW) provides the right to adequate living conditions without any distinctions being made based on race, colour, national or ethnic origin or gender. Article 30 (a) and (b) of the European Social Charter also provide the right to protection against poverty and social exclusion. The Parties are obliged to promote the effective access of persons who live or risk living in a situation of social exclusion or poverty, as well as their families, in providing them with access to education, employment, housing, culture and social medical assistance. The right to adequate standards of living also resonates in case law with the Inter-American Commission on Human Rights opining that everyone is entitled to enjoy adequate standards of living.⁴³ The African Human Rights Commission also found that the right to housing and shelter is entrenched in the totality of the right to enjoy the best attainable standard of mental and physical health, the right to property and protection of the family.⁴⁴ These international instruments and case law indicate that economic, social and cultural rights are indeed justiciable.

Article 2 of the Optional Protocol to the ICESCR provides that violations may be communicated by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party, claiming to be the victims of violation. ESCRs have also been litigated at the UN level, with the Committee on CEDAW finding that retrogressive measures with regard to housing rights constituted violation under the ICESCR.⁴⁵ Article 34 of the ECHR states that any individual or groups, claiming to be victims of violations of a High Contracting Party, can apply to the Court for redress. The United Kingdom as a State Member to the ICESCR as well as the ECHR has the obligation to ensure that the primary source of livelihood for the Meru farmers is respected and protected.

42 *Pretty In R v United Kingdom* (1983) 33 DR 270

43 *Miranda Cortez et al v El Salvador* (case 11.670).

44 *The Social and Economic Rights Action Centre et al v Nigeria*, Communication 155/96

45 L.R et al v Slovakia Communication No. 31/2003, U.N. Doc. CERD/C/66/D/31/2003 (2005)

5.4. Legislation, necessity and proportionality in a democratic society

The violation in issue was done under the Misuse of Drugs Act 1977. Therefore, there was a legitimate basis for imposing the ban. However, the question is whether the ban was proportional to the problem in issue and whether it is necessary in a free and democratic society. Article 18 of the European Convention on Human Rights states that restrictions are not justified in any way except in circumstances provided under the Convention. Article G of the European Charter provides that the rights and principles of the Charter shall not be subject to any restrictions or limitations unless they are necessary in a democratic society for the protection of public interests based on national security, public health or morals.

Thus, a State cannot invoke just any aim to justify an interference with a Convention right. It needs to be shown that interference is necessary in a democratic society. An interference with a human right is considered 'necessary in a democratic society' if only it responds to a 'pressing social need' and, in particular, if it is proportionate to the legitimate aim pursued and if the reasons adduced by the national authorities to justify it are 'relevant and sufficient'.⁴⁶ Judging whether the interference is necessary in a democratic society is often decided at the initial stages by national authorities but courts have the prerogative to review the decision of national authorities to ensure that the proposed interference conforms with human rights instruments.⁴⁷ As far as the decision of the UK Government to categorise miraa as an illicit drug is concerned, it is argued that the prohibition is not reasonable, proportionate and it cannot be justified in a democratic society.

5.5. Economic and social rights are non-negotiable entitlements

The international instruments, as developed through case law, impose positive obligations on States to ensure that human rights are not violated.⁴⁸ In *Velasquez Rodriguez v Honduras*,⁴⁹ the Inter-American Court on Human Rights posited that States do have an obligation to prevent human rights violations and the responsibility to investigate and punish human rights violations when they occur. The European Court of Human Rights also adopted a similar trajectory, putting forward, in *Airey v Ireland*,⁵⁰ that the protection of human rights must not be theoretical and illusory but practical and effective and accordingly, requires States to take positive action to ensure the enjoyment of human rights. In *Z and Others v UK*,⁵¹ the Court asserted that State Parties to the European Convention on Human Rights were 'bound to ensure that individuals within their jurisdiction were not subjected to inhuman and degrading treatment, including such ill-treatment administered by private individuals'. Although the Court did not expand on the meaning of jurisdiction, it can be interpreted to refer to the meaning given under the Convention and other international instruments that a country is party to.

In this regard, the farmers in Meru County of Kenya, being part of the Commonwealth, fall within the jurisdiction of the UK Government and therefore are entitled to protection by the UK Government. The law also imposes negative obligations on States which is called the obligation to respect human rights. The principle postulates that, a State must not intrude in a way that interferes directly or indirectly with an individual's pursuit of their economic and social rights nor may it make matters worse – for instance, by prohibiting self-help measures without providing alternatives. When people have no means of securing basic economic and social provisions, they resort to their own self-help measures.⁵² If a State seeks to terminate these self-help measures, then, it must provide alternatives and ensure that people are not put in a position of greater deprivation.⁵³ As the leading Union in the Commonwealth of Nations, the UK has the obligation to respect the rights of the Meru farmers to self-help measures which they have done through the planting of khat or miraa – a mainstay of their local livelihood. Imposing a ban on the importation and consumption of the substance without providing any alternatives has had serious implications on the standards of living of the Meru people.

6. Remedies

Guides 22 and 23 of the Maastricht Guidelines provide that any person or group who is a victim of economic, social and cultural violation should have access to judicial or other suitable remedies, available, both nationally and

⁴⁶ *S. & Marper v The United Kingdom*, European Court of Human Rights, 4 December 2008, paras 101-104.

⁴⁷ *Coster v The United Kingdom* [GC] No. 2476/94, 104, 18, January 2001.

⁴⁸ Chinkin, C., The Protection of Economic, Social and Cultural Rights Post-Conflict, PAGE!

⁴⁹ 28 International Legal Materials (1989) 294.

⁵⁰ 32 ECHR (ser.A) 1979.

⁵¹ *Z and Others v UK*, ECHR (GC), 10 May 2001.

⁵² Above note 1, p.28

⁵³ Ibid

internationally. All victims of violations are entitled to adequate reparation which may take the form of restitution, compensation, rehabilitation and satisfaction or guarantees of non-repetition. As far as the farmers of Meru County are concerned, the appropriate redress for them would be to de-categorise miraa or khat as an illicit substance under the *Misuse of Drugs Act*. In addition, a just and appropriate compensation would be appropriate for the economic loss they suffered since the prohibition was imposed.

7. Conclusion

This paper has discussed the human rights implications of the categorisation of khat (mira) as a Class C Drug under the *Misuse of Drugs Act 1977* by the UK Government. It has been put forward that the proposed ban will have major economic consequences on the daily lives of the farmers in Meru County of Kenya. The UK, as a State Party to the ICESCR and other international instruments, has obligations to ensure that their policies are in tandem with the norms enumerated under the ICESCR, ECHR and other international laws to which they are party. The paper has illustrated that miraa is the mainstay of subsistence in Meru and as such, any interference with it, without providing alternative source of income, is likely to violate the rights of the people to adequate standards of living.