

Communication 340/07 – Nixon Nyikadzino (represented by Zimbabwe Human Rights NGO Forum) v. Zimbabwe

Rapporteur:

Summary of the Complaint:

1. The Secretariat of the African Commission on Human and Peoples' Rights (the Secretariat) received a Complaint on 8 May 2007 from Zimbabwe Human Rights NGO Forum (the Complainant) on behalf of Mr. Nixon Nyikadzino (the Victim) against the Republic of Zimbabwe (the Respondent State)¹.
2. The Complainant submits that on 14 April 2006 on or about 19:00 hrs at Takunda Butchery in Glen Norah B (a residential suburb in Harare, Zimbabwe) the Victim was approached and forcibly pushed into a van by one Major Kembo (who is believed to be a member of the Military Intelligence in the Zimbabwe Defense Force), Mr. Makwande, and Ms Angie of Carrbritte Army Camp. The Complainant alleges that after the assailants forced him into the van, they drove away to an unknown destination.
3. The Complainant claims that while in the vehicle the Victim was interrogated on his involvement with the work of a non-governmental organization, the National Constitutional Assembly (NCA), and why he was drinking beer in the company of an army officer. The Complainant alleges that, according to the kidnappers the Victim was attempting to recruit one Mr Learnmore Kodzi, who is supposedly the Victim's cousin, into engaging in clandestine and illicit activities to unlawfully change the Government.
4. The Complainant further alleges that while the Victim was being interrogated, he was subjected to torture as he was assaulted with clenched fists, booted feet and empty bottles. The Complainant also alleges that Ms Angie kept on kissing the Victim while the men assaulted him and that she opened the zipper of his trousers and fondled his penis while the other men plucked his dreadlocks until all his locks were pulled-off his head.

¹ Zimbabwe ratified the African Charter on Human and Peoples' Rights on 30 May 1986.

5. The Complainant claims that the Victim was forced to eat a lit cigarette and was hit with an empty bottle and asked the whereabouts of the cigarette. The Complainant also alleges that the Victim was asked to kiss his own penis and was subjected to further assault when he told them that it was physically impossible. When the Victim soiled his pants as the result of the assault and torture, the Complainant claims, the assailants forced him to lick his own urine.
6. The Complainant claims that the Victim was thrown out of the vehicle and that the assailants followed him and urinated on him. The Complainant submits that the urine was stinking and itching the Victim's body. The Complainant alleges that the assailants advised the Victim that he would be thrown in Mazoe Dam and that he should say his last prayers, as he was about to die. According to the Complainant, the Victim was forced to say the prayers for his assailants, which the Complainant submits was dehumanizing and degrading.
7. The Complainant alleges that after the prayers, the Victim was directed to have sexual intercourse with the female assailant, and when he refused, he was subjected to further assaults. The Complainant avers that the Victim suffered excruciating pain, became dizzy and lost consciousness. The Complainant further avers that when the Victim regained consciousness, he realized that he was about 47 kilometers from Harare from where he had been kidnapped. The Complainant alleges that the assailants took away the Victim's three mobile phones and cash amounting to ZWD \$ 10 million.
8. The Complainant submits that before leaving, the assailants warned the Victim not to ever get involved in governance and human rights issues and in particular not to be involved with the business of NCA and that if he did, he would face unspecified action. The Complainant also submits that the assailants warned the Victim that they will keep surveillance on him, as they were now aware of his residential address after which they made a U-turn and sped-off.

9. The Complainant avers that the Victim had to walk for about 17 kilometers before getting to a police roadblock at about 12.00 midnight, who assisted him to get transport back home. According to the Complainant, the Victim told the police that he had been robbed for fear of further victimization as the police and the military work closely together. The Victim subsequently, the Complainant alleges, left the country for fear of further torture and victimization and now lives in exile.
10. The Complainant submits that the Victim complained of headache, pain in shoulders, pain in legs including feet, backache, chest pain, swollen and bloodshot eyes, and abdominal pains. The Complainant alleges that the Victim experienced and continues to experience trauma and hallucinations. The Complainant avers that on examination by a doctor it was confirmed that the Victim had: extensive removal of hair; bilateral subconjunctival hemorrhages; minor periorbital haematomas; and superficial bites on the left shoulder and thigh².

Articles alleged to have been violated

11. The Complainant alleges that the Respondent State has violated Articles 1, 2, 4, 5, 6 and 10 of the African Charter on Human and Peoples' Rights (the African Charter or the Charter).

Prayers

12. The Complainant seeks the following relief:
 - i. A declaration that the Government of Zimbabwe is in breach of Articles 1, 2, 4, 5, 6 and 10 of the African Charter;
 - ii. A recommendation to the Government of Zimbabwe to comply with its obligations under the Charter by investigating and prosecuting the perpetrators of torture complained of in this case;

² The Complainant has attached a copy of the medical affidavit as Annexure 1.

- iii. A recommendation to the Government of Zimbabwe to afford just satisfaction to the Victim in the sum of USD 50,000.³

Procedure

13. The present Complaint was received by the Secretariat on 8 May 2007, to which the latter acknowledged receipt and informed the Complainant that the Complaint will be considered for seizure by the African Commission at its 41st Ordinary Session that was scheduled to be held in Accra, Ghana, from 16 to 30 May 2007.
14. At its 41st Ordinary Session the African Commission was seized of the Communication and deferred consideration on Admissibility to its 42nd Ordinary Session pending the submission on Admissibility by both parties. The parties were accordingly notified by a letter and Note Verbale dated 20 July 2007.
15. At the 42nd, 43rd, and 44th Ordinary Sessions of the African Commission the consideration of the Communication was deferred pending the submission on Admissibility by both parties. The parties were accordingly notified and reminded to forward their submissions.
16. On 9 April 2009 the Secretariat received the submissions of the Complainant on Admissibility which the Secretariat acknowledged receipt and forwarded the submissions to the Respondent State.
17. On 17 May 2009 the Respondent State forwarded its submissions to the Secretariat, which acknowledged receipt and forwarded the submissions to the Complainant on the same day.

³ The Complainant has indicated in its submission that the figure, USD 50,000, is meant as a guidance for the benefit of the Commission and that the latter is at liberty to make its own assessment of the appropriate level of just satisfaction in accordance with established principles on compensatory remedies.

18. At its 45th, 46th, and 47th Ordinary Sessions the African Commission deferred the consideration of the Communication to give time for the Complainant to respond to the submissions of the Respondent State.
19. At its 48th, 49th, and 50th Ordinary Sessions the African Commission deferred the consideration of the Communication, to allow time for the preparation of the decision. The parties were accordingly notified.

The Law on Admissibility

The Complainant's Submission on Admissibility

20. The Complainant submits that each of the conditions under Article 56 of the Charter have been met and hence request the Commission to declare the Communication Admissible.
21. With regards to Article 56(1) the Complainant submits that the author of the Communication, Zimbabwe Human Rights NGO Forum, is named and its address and contact information clearly provided in the submission.
22. Concerning Article 56(2), the Complainant avers that a Communication is compatible with the African Charter if it alleges *prima facie* violations of the Charter⁴ and is directed against a State Party to the Charter⁵. Accordingly, the Complainant contends that the Communication is compatible with the African Charter as it details violations of Articles 1, 4, 5, 6, and 10 of the Charter and is directed against the Republic of Zimbabwe, a State Party to the Charter.

⁴ Communication 1/88 – *Frederick Korvah v Liberia* (1988) ACHPR para. 6.

⁵ Communication 14/88 – *Dr Abd Eldayem AE Sanussi v Ethiopia* (1988) ACHPR para. 3 and ACHPR Rules of Procedure Art 102(2).

23. In accordance with Article 56(3), the Complainant contends, the Communication is not written in disparaging or insulting language directed against Zimbabwe or its institutions or against the African Union and its institutions.
24. The Complainant submits that the facts of the Communication were compiled from the Victim's written statements to the Complainant, medical affidavits, records detailing the injuries the Victim sustained, and records from the counseling session that he received in the hospital. Therefore, the Complainant argues, in accordance with Article 56(4) of the Charter, the Communication and the Charter violations that it describes are not based on news disseminated through the mass media.
25. In relation to the requirement of exhaustion of local remedies under Article 56(5), the Complainant avers that the African Commission has recognized certain exceptions to the requirement, and that the case at hand falls within those exceptions as the African Commission has found that the requirement under Article 56(5) need not be met where domestic remedies are not available, effective or sufficient. In the case at hand, the Complainant argues, domestic remedies were not available, effective or sufficient because:
- i. The Victim was forced to flee Zimbabwe out of a generalized fear for his life, and note that he currently resides abroad and fears returning to Zimbabwe;
 - ii. The Zimbabwean court system lacks independence, and pressure from the executive branch would make any victory in court unlikely for the Victim;
 - iii. The Zimbabwean authorities have been unwilling to enforce court orders in cases seen to implicate political issues, and have generally treated human rights violators with impunity.

26. The Complainant further submits that in *Jawara v The Gambia*⁶ the African Commission found that:

Three major criteria can be deduced from the practice of the Commission in determining (the local remedies) rule, namely: the remedy must be available, effective, and sufficient....A remedy is considered available if the petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success, and it is found to be sufficient if it is capable of redressing the complaint.

27. The Complainant submits that the African Commission further held that "a remedy is considered available only if the applicant can make use of it in the circumstances of the case" and stated that "the existence of a remedy must be sufficiently certain, not only in theory but also in practice, failing which, it will lack the requisite accessibility and effectiveness."⁷ The Complainant argues that the existence of a remedy in the present case is neither certain in theory nor in practice and the Victim is patently unable to make use of local remedies in the circumstances of his case.
28. The Complainant contends that local remedies are considered unavailable when, *inter alia*, the Complainant cannot return to his country to pursue the remedies because of fear for his life. The Complainant cites the case of *Rights International v Nigeria*⁸ wherein:

Relying on its precedents... the Commission interpreted the standard for constructive exhaustion of domestic remedies to be satisfied where there is no adequate or effective remedy available to the individual. In this particular case, the Commission found that Mr. Wiwa was unable to pursue any domestic remedy following his flight for fear of his life to the Republic of Benin and the subsequent granting of refugee status to 'him by the United States of America'.

29. Continuing in this vein, the Complainant submits, in *Ouko v Kenya*⁹, the Commission stated:

⁶ Communication 147/95 and 149/96 - *Sir Dawda K. Jawara v The Gambia (The Jawara Case)* (2000) ACHPR para. 31 & 32.

⁷ Id, para 33 & 35.

⁸ Communication 215/98 - *Rights International v Nigeria* (2000) ACHPR para. 24.

⁹ Communication 232/99 - *John D. Ouko v Kenya* (2000) ACHPR para. 19.

Relying on case law... the Commission finds that the Complainant is unable to pursue any domestic remedy following his flight to the Republic of Congo for fear of his life... The Commission therefore declared the communication admissible based on the principle of constructive exhaustion of local remedies.

30. Similarly the Complainant avers that the Victim fled Zimbabwe in fear for his life after being tortured by the Zimbabwean military because of his affiliation with an organization lobbying for constitutional reform. The Victim according to the Complainant is now in South Africa, and remains fearful of further attacks should he return to Zimbabwe, particularly in light of the widely-reported and continuing attacks against opposition leaders and activists by members of the uniformed forces who do so with no punitive sanctions from the Zimbabwe Government.
31. In light of the above the Complainant submits that the Victim was forced to flee from Zimbabwe and remains outside the country due to a generalized fear for his life, and consistent with the Commission's jurisprudence above, local remedies are unavailable and constructively exhausted.
32. As stated above, the Complainant argues, a remedy is effective only when it offers a prospect of success.¹⁰ When remedies are formally available but courts are not independent or impartial, the remedies will be deemed ineffective.¹¹
33. The Complainant contends that because the Zimbabwean judiciary is no longer fully independent and is subject to political pressure, and because court orders in Zimbabwe are regularly ignored by Zimbabwean authorities, particularly in cases that involve politically-motivated violence, local remedies offer the Victim no reasonable prospect of success and are ineffective.

¹⁰ Jawara v The Gambia para. 32.

¹¹ Communication 60/91 - *Constitutional Rights Project v Nigeria* (1994) ACHPR para. 10.

34. The Complainant further contends that the decline in the integrity of the Zimbabwean judiciary is well-documented and refer to the 2002 fact finding mission report of the African Commission which states that it:

Was struck by the observation that the judiciary had been tainted and even under the new dispensation bears the distrust that comes from the prevailing political conditions....It appears that their conditions of service do not protect them from political pressure; appointments to the bench could be done in such a way that they could be insulated from the stigma of political patronage.¹²

35. In cases where the judges have tried to act independently and have issued court orders in cases perceived to be politically sensitive and/or contrary to government interests, the Complainant claims, Zimbabwean authorities have refused to enforce those orders, making remedies meaningless. This practice has been widespread and well-documented, but one case, *Chavhunduka v Commissioner of Police and Another (2001(1)ZLR 481(S))*, serves in particular to illustrate the ineffectiveness of seeking remedies for victims of torture by military authorities.
36. In that case, the Complainant submits, two journalists were abducted and tortured by military police from the Zimbabwe National Army, and that the evidence of torture was overwhelming and undisputed, and the petitioners obtained a court order enjoining the police to carry out a full investigation with a view to prosecuting the perpetrators. Notwithstanding this court order, no investigation or prosecution has been commenced. The Complainant avers that Chavhunduka experience is just one of many in which court orders have been ignored and the police and military authorities have been treated with impunity.
37. In another well-documented and published case, the Complainant claims that the Magistrate Court sitting at Harare Rotten Row similarly found that torture, including electrocution had been used on an opposition politician one Job Sikhala, and human

¹² ACHPR, Report of the Fact Finding Mission to Zimbabwe, 24 to 28 June 2002

rights lawyer, Gabriel Shumba and others when these were arrested on false charges of treason, trumped up by the police. While the court ordered an investigation and prosecution of the perpetrators, who in this case are known, to date nothing has been done.

38. The Complainant refers to the jurisprudence of the European Court of Human Rights (ECHR) which the Complainant contends supports looking at a government's response to human rights violations to determine whether domestic remedies may be ineffective for all practical purposes. The ECHR has found:

The (domestic exhaustion) rule is also inapplicable where an administrative practice consisting of a repetition of acts incompatible with the Convention and official tolerance by the State authorities has been shown to exist, and is of such a nature to make proceedings futile or ineffective.¹³

39. The ECHR subsequently confirmed that the local remedies rule is not applicable where "national authorities (have remained) totally passive in the face of serious allegations of misconduct or infliction of hard by State agents, for example where they have failed to undertake investigations or offer assistance"¹⁴.

40. The Complainant claims the Zimbabwean Government fails to enforce court orders, ignores widespread human rights abuses by failing to investigate and prosecute perpetrators even where they are known and its agents actually carry out many of these human rights abuses, including the attack on the Victim.¹⁵

41. The Complainant also claims that Human Rights Watch has reported that "violent human rights violations are being carried out by uniformed army and police personnel.

¹³ Application No. 21893/93 – *Akdivar and Others v Turkey* (1993) ECHR Rep.143 para. 67.

¹⁴ *Mentes and Others v Turkey* (1997) ECHR, 58/1996/677/867, Report of Judgements and Decisions 1997 – VIII para. 57.

¹⁵ Amnesty International, 2004 Report, Zimbabwe

Further, the government has taken no clear action to halt the rising incidence of torture and mistreatment of suspects while in custody of the police or intelligence services”¹⁶.

42. The Complainant further claims that Amnesty International has written that “the perpetrators of human rights violations continued to enjoy impunity, and allegations against state agents remained without investigation. The majority of abuses were committed by ruling party supporters and police, security and army officers against opposition supporters”¹⁷.
43. The Complainant argues that the pointlessness of any attempt by the Victim to pursue local remedies is obvious. The Victim’s torture, it is argued, was a result of his affiliation with the NCA, a group that advocates for a new constitution for Zimbabwe and a return to democratic governance. The Complainant submits because the attack was politically motivated, there is very little chance that he could receive a fair hearing by independent court in Zimbabwe, and that even if a brave judge resisted government pressure and ruled in favor of the Victim, such a judgment and any concomitant order would likely be ignored. In these circumstances, local remedies offer the Victim no reasonable prospect of success and are therefore ineffective.
44. The Complainant contends that the African Commission’s case law fully supports a finding that local remedies in the case at hand are not available, effective or sufficient, and that the Commission has recognized the impracticality of requiring the exhaustion of local remedies where a person has been forced into exile, as well as where judicial systems have become too vitiated, ineffective, and subject to outside influence that they offer no reasonable prospect of a fair, successful trial.
45. The Complainant submits that Article 56(6) requires that Communications be submitted within a reasonable period of time after local remedies have been exhausted. Where exhausting local remedies is not possible, as in the case at hand, the Complainant avers

¹⁶ Human Rights Watch, *Under a Shadow: Civil and Political Rights in Zimbabwe*, 6 June 2003.

¹⁷ n 15 above

that the Commission may wish to look to the practice of the Inter-American Commission on Human Rights in deciding what period of time is “reasonable”. The Complainant avers that as per its Rules of Procedure, the Inter-American Commission considers the date of the alleged violation and the circumstances of each case.¹⁸ The Complainant submits that the alleged violation occurred on 14 April 2006, and the Communication was submitted to the Commission on 3 May 2007. The Complainant contends that particularly in light of the Victim’s forced exile, this is a reasonable period of time.

46. The Complainant argues that in accordance with Article 56(7), the Communication does not deal with any case or cases that have been settled between the Complainant and the Government of Zimbabwe in accordance with the principles of the UN Charter, the Charter of the Organization of African Unity (now the Constitutive Act of the African Union), or the African Charter.
47. In conclusion, the Complainant submits that the Communication presents a *prima facie* case of violations of the Charter, and their submission demonstrates that the Communication meets the requirements of Article 56. Accordingly, the Complainant requests the African Commission to accept its arguments on Admissibility and to move forward to consider the merits of the case.

Respondent State’s Submission on Admissibility

48. The Respondent State submits that the Communication is not compatible with Articles 56(2), (5) and (6) of the Charter.
49. With regards to Article 56(2) the Respondent State submits that compatibility with the Charter or the Constitutive Act of the African Union entails that any communication so filed should prove a *prima facie* case of violation of specified Article, failing which there can be no communication before the African Commission.

¹⁸ Art. 32(2) of the Rules of Procedure of the Inter-American Commission on Human Rights

50. The Respondent State argues that the Complainant states that the “Communication details violations of Articles 1, 4, 5, 6 and 10 of the Charter”, without actually giving any details of how the articles were violated, adding that the facts raised in the Communication do not show *prima facie* violations of the provisions of the Charter alleged. This means, the Respondent State argues, that basically the facts and issues on the dispute do not fall within the *rationae materiae* jurisdiction of the Commission. The Respondent State submits that in Communication 307/2005, the Commission has defined *rationae materiae* jurisdiction.

51. On the requirement of exhaustion of local remedies under Article 56(5) of the Charter, the Respondent State contends that the Complainant should have attempted to access all available remedies at the domestic level, including judicial and administrative remedies without any success before he or she becomes eligible to approach the Commission for redress.

52. In response to the Complainant’s submission that because the Victim was forced to flee from the country, he was unable to pursue local remedies, the Respondent State avers that Section 24(1) of the Constitution of Zimbabwe provides that:

If any person alleges that the Declaration of Rights has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may, subject to the provisions of subsection (3), apply to the Supreme Court for redress.

53. The Respondent State submits that it is not a legal requirement for the Complainant to be physically present in the country in order to access local remedies. Both the High Court Act (Chapter 7:06) and the Supreme Court Act (Chapter 7:05), permit any person to make his application to either court through his or her legal practitioner. Section 50(1)

of the High Court Act provides that *every person shall be entitled to be present if he so wishes at the hearing of his trial, action or appeal.*

54. The Respondent State submits that Section 51 of the High Court Act specifically provides that:

Subject to Section fifty, rules of the court and any other law, in all proceedings before the High Court the parties may appear in person or be represented and appear by any legal practitioner registered in terms of the Legal Practitioners Act (Chapter 27:07).

55. The Respondent State contends that the Victim can, therefore seek local remedies from the authorities in Zimbabwe without being physically present in the jurisdiction. It further states that in Communication 307/2005, the Commission ruled that where the national laws so provided, it would not be necessary for an applicant to be present in the jurisdiction to personally make an application to the courts. This also shows, the Respondent State argues, the courts in Zimbabwe actually offer effective remedies to alleged violations of rights.
56. The Respondent State submits that the onus is on the state to prove that the remedies are not only available, but are effective, and that there are remedies available to the Victim if their rights were violated.
57. The Respondent State further argues that the Constitution of Zimbabwe guarantees the independence of the judiciary in the exercise of its interpretative function in accordance with the United Nations Principles on an Independent Judiciary. The Respondent State also agrees that it is also in conformity with the guidelines of the African Commission on the right of a fair trial.
58. The Respondent State states that the Commission had this to say in the *Jawara case*:

A remedy is considered available if the petitioner can pursue it without impediment; it is deemed effective if it offers a prospect of success and it is found sufficient if it is capable of redressing the complaint.

59. According to the Respondent State in Communication 307/05, the African Commission dealt with the burden of proving torture and the reasons why local remedies could not be exhausted, as resting with the Complainant. The Respondent State further submits that it is only when he or she discharges this burden that it shifts to the Respondent State to show what remedies are available and whether they are effective and sufficient.
60. The Respondent State contends that the Complainant has failed to satisfy the requirement of Article 56(5) of the Charter.
61. Concerning Article 56(6) of the Charter, the Respondent State avers that the Communication should have been lodged within a reasonable period from the time local remedies are exhausted, or from the time the Commission is seized with the matter. Where the Complainant realizes that local remedies would be unduly prolonged, he or she must submit the Complaint to the Commission *immediately*.
62. The Respondent State submits that the alleged violations took place on 14 April 2006 and yet the Communication was filed with the Commission on 3 May 2007, a year later. Although the Charter does not prescribe what constitutes a reasonable time, the Respondent State contends, other jurisdictions have clear indications to that effect. The Inter-American Commission has interpreted the period to be six months, while the Protocol merging the African Court of Justice and the African Court for Human Rights also prescribes six months as a reasonable period. Taking into consideration, the intended harmonization of the Rules of Procedure of the Commission with those of the African Court of Justice, the Respondent State urges the Commission to embrace the period stated therein.

63. The Respondent State submits that in the modern era of communication where various modes are available, it would not require a Complainant lengthy period of time, in this case, a year, to submit a Complaint or indeed communicate with his representatives, taking into account the gravity of the alleged violations.
64. In light of the above, the Respondent State submits that the period between 14 April 2006 and 3 May 2007, which is a year, cannot be considered reasonable in the circumstances.
65. In conclusion the Respondent State contends that this Communication should not be Admissible because it is not in full compliance with Article 56 of the Charter.

The Commission's Analysis on Admissibility

66. Article 56 of the Charter provides seven admissibility requirements which need to be cumulatively fulfilled before a Communication is declared Admissible. In the present Communication, while the Complainant argues that all the seven requirements have been met, the Respondent State contests the fulfillment of three of the seven requirements namely Article 56(2), (5) and (6) of the Charter.
67. With regards to the remaining four requirements, since the Respondent State has not expressly disputed them, the African Commission is of the view that the Respondent State agrees with the Complainant that they have been fulfilled. The African Commission, after looking into the submissions of the Complainant, also finds no ground to decide otherwise, and hence rules that Articles 56(1), (3), (4) and (7) of the Charter have been met. Accordingly, the African Commission analyzes the submissions of both parties against the contested Admissibility requirements.

68. Article 56(2) of the African Charter provides that a Communication should be compatible with the Charter or the Constitutive Act of the African Union. With regards to this requirement, the Complainant is of the view that the Communication reveals a *prima facie* violation as it alleges a violation of Articles 1, 4, 5, 6 and 10 of the Charter. The Respondent State, on the other hand, argues that the allegations are made without giving any details as to how the articles are violated, and that the facts as presented do not show *prima facie* violations. Based on this premise the Respondent State concludes that the facts and issues in dispute do not fall within the *rationae materiae* jurisdiction of the Commission.

69. As the well-established jurisprudence of the African Commission provides *prima facie* violation of the provisions of the Charter is said to have occurred “when the facts presented in the Complaint show that a human rights violation has *likely* occurred”¹⁹.

70. In line with the above requirement, the Complainant in part two (paragraphs 2.1 to 2.9) of its submissions succinctly narrates how the Victim allegedly suffered, among others, from acts of torture, inhumane and degrading treatment in the hands of suspected members of the military intelligence in the Zimbabwe Defense Force while he was in Zimbabwe. In Section four (paragraphs 4.1 to 4.6) of its submissions, the Complainant tries to show how the alleged acts of the Respondent State violate Articles 1, 4, 5, 6 and 10 of the Charter. Moreover, the Complainant has attached some documentary evidences to corroborate its allegations.²⁰

71. Therefore, the African Commission is convinced that the facts of the Complaint together with the evidences presented and the link made with the provisions of the African

¹⁹ Communication 306/05 – Samuel T. Muzerengwa and 110 Others (represented by Zimbabwe Lawyers for Human Rights) v Zimbabwe (2011) ACHPR para. 56.

²⁰ The facts of the case are summarized in this decision under ‘summary of the Complaint’

Charter, do lead to the conclusion that a human rights violation has likely occurred, and hence *prima facie* case proved.

72. Having proved the existence of *prima facie* violation of the Charter, it becomes obvious that the African Commission has the *rationae materiae* jurisdiction to entertain the case. However, the African Commission finds it necessary to pronounce itself on this issue particularly because this is an argument repeatedly raised by the Respondent State on decided cases and those that are pending before the Commission²¹.

73. As it is pointed out by the Respondent State itself, *rationae materiae* jurisdiction is defined in *Mr. Obert Chinhamo v Zimbabwe* as “by reason of the matter involved; in consequence of, or from the nature of, the subject matter”²². The issue involved in the present case is an alleged violation of the provisions of the African Charter by a State Party, which squarely fits into the *rationae materiae* jurisdiction of the African Commission. Thus, the argument raised by the Respondent State that the issue does not fall within the *rationae materiae* jurisdiction of the African Commission is not tenable.

74. In light of the above, the African Commission finds that the Communication complies with Article 56(2) of the Charter.

75. On the requirement of exhaustion of local remedies, the Complainant concedes that it has not exhausted or even attempted to exhaust local remedies, but pleads the African Commission to waive such requirement based on the principle of constructive interpretation of the exhaustion of local remedies rule for the following three reasons:

- i. The Victim was forced to flee Zimbabwe out of a generalized fear for his life, and liberty, and that he is still in exile;

²¹ For decided cases see *Mr. Obert Chinhamo v Zimbabwe* and *Michael Majuru v Zimbabwe*. The same argument is raised in Communication 351/2007- *Givemore Chari v Republic of Zimbabwe*, which by the time this decision was taken was also finalized.

²² *Mr. Obert Chinhamo v Zimbabwe*, para. 39.

- ii. The Zimbabwean court system lacks independence, and pressure from the executive branch would make any victory in court unlikely for the Victim; and
- iii. The Zimbabwe authorities have been unwilling to enforce court orders in cases seen to implicate political issues, and have generally treated human rights violators with impunity.

76. In support of its first argument, the Complainant argues by citing the *Jawara Case* that a remedy must be available, effective and sufficient, and for a remedy to be considered available the applicant should be able to make use of it in the circumstances of his case. Based on this, the Complainant concludes that the existence of a remedy in the case at hand is certain neither in theory nor in practice and the Victim is patently unable to make use of local remedies in the circumstances of his case, as he has fled the country for fear of his life.

77. The Complainant also makes reference to cases in which the African Commission used fear of persecution on the side of the Victim as a ground to waive the requirement of exhaustion of local remedies.

78. In response to the above argument of the Complainant, the Respondent State contends that Section 24(1) of the Constitution read together with Chapter 7:06 of the High Court Act and Chapter 7:05 of the Supreme Court Act allow a person to be represented by a legal practitioner to file his/her case and hence the Victim does not need to be physically present to exhaust local remedies.

79. In analyzing the response of the Respondent State it could easily be deduced that the latter does not dispute the fact that the Victim was not able to exhaust local remedies because he had fled the country for fear of his life. Rather the point the Respondent State is making is that the Victim could and should have been represented by a lawyer as he is entitled to do so in the Constitution and other legislations of the country with a view to exhaust local remedies.

80. The national laws of the Respondent State allow for someone to file a case on behalf of another person even if the Victim is not within the country. This fact is not contested by the Complainant and hence the Zimbabwe Human Rights NGO Forum, or anyone else could have taken the case before Zimbabwean courts. In the case of *J.E. Zitha and P.J.L Zitha v Mozambique*²³, the African Commission confirmed this position by stating that “having decided to act on behalf of the Victims, it is incumbent on the author of a Communication to take concrete steps to comply with the provisions of Article 56(5)”. In the same case, the African Commission went on to rule that “local remedies could have been exhausted by the Victim, the Complainant or any other person”. This same position was reiterated in *Article 19 v Eritrea*²⁴.

81. Similarly, in the present case even though the Victim was not able to exhaust local remedies, the Complainant could have taken the case before Zimbabwean courts or made arrangements for someone else to plead the Victim’s case on his behalf. This should have been done especially taking into consideration the fact that the Complainant is a Zimbabwe based NGO which has specialized in human rights litigation before domestic and regional courts.

82. However, the Complainant has not even attempted to approach domestic courts. Under such circumstances, the African Commission is of the view that fear of persecution is not a tenable ground to waive the requirement of exhaustion of local remedies when the Victim could have been represented by the Complainant or anyone else.

83. The second ground upon which the Complainant pleads for waiver of the exhaustion of local remedies requirement is that the Zimbabwean court system lacks independence, and pressure from the executive branch would make any victory in court unlikely for the Victim. In line with this submission, the Complainant contends that when remedies

²³ Communication 361/08 – *J.E. Zitha & P.J.L Zitha (represented by Prof. Dr. Liesbeth Zegveld) v Mozambique* (2011) ACHPR paras. 108 & 109.

²⁴ Communication 275/03 – *Article 19 v Eritrea* (2007) ACHPR para. 65.

are formally available but courts are not independent or impartial, the remedies are deemed ineffective. The Complainant corroborates this argument by making reference to the 2002 fact-finding mission of the African Commission to Zimbabwe wherein the Commission observed that:

the judiciary had been tainted and even under the new dispensation bears the distrust that comes from the prevailing political conditions....It appears that their conditions of service do not protect them from political pressure; appointments to the bench could be done in such a way that they could be insulated from the stigma of political patronage.²⁵

84. The African Commission through its jurisprudence made it clear that the whole purpose of asking Complainants to exhaust local remedies before approaching the Commission is to give the Respondent State a chance to redress the alleged human rights violations through its structures and organs. This is derived from the principle of complementarity which dictates that international or regional mechanisms do not and cannot substitute national courts; it is only when national courts or tribunals fail to deliver justice that international or regional organs will have jurisdiction to receive cases. This is why the African Commission has been stringently applying the exhaustion of local remedies rule and only in few justified circumstances has it waived such condition.

85. The question here is does the allegation that Zimbabwean courts are not independent or impartial and are subject to political pressure warrants the conclusion that victory before such courts is unlikely, and thus makes the remedies ineffective?

86. First it is important to note that the only evidence that the Complainant has furnished in support of this statement is an excerpt from the 2002 fact-finding mission report of the

²⁵ n 12 above.

African Commission to Zimbabwe, which investigated into the then general human rights situation in the country.

87. Although the report shades some light on the independence of the judiciary at the time, it should be stressed that even the report highlights the fact that the political pressure on the judiciary were *recent* occurrences of the time, which had a lot to do with the then political turmoil in the country fueled by the land policy.²⁶ These observations were made in 2002 and by the time this Communication was filed in 2007, the Complainant has not managed to prove if the situation still remains the same. Thus, it begs the question if the observation is still relevant in the present case.

88. In addition, in its submissions the Complainant itself has referred to two cases wherein Zimbabwean courts ruled in favor of torture victims though the decisions were never implemented. The issue of lack of implementation being another issue, which will be addressed later in this decision, but the fact that Zimbabwean courts, at least in two cases, did find violations of torture is a proof that domestic remedies could still be effective.

89. In *Anuak Justice Council v Ethiopia*²⁷ where the Complainant was apprehensive about the success of local remedies because of, among others, the lack of independence of the judiciary, the African Commission reasoned that “if a remedy has the slightest likelihood to be effective, the applicant must pursue it. Arguing that local remedies are not likely to be successful, without trying to avail oneself of them, will not simply sway the Commission”.

²⁶ n 12 above

²⁷ Communication 299/05 – *Anuak Justice Council v Ethiopia* (2006) para. 58.

90. Moreover, the African Commission in *Article 19 v Eritrea*²⁸ has found that “it is incumbent on the Complainant to take all necessary steps to exhaust, or at least attempt to exhaust local remedies. It is not enough for the complainant to cast aspersion on the ability of the domestic remedies of the State due to isolated incidences”.
91. The African Commission therefore is of the view that, as conceded by the Complainant, there is a chance that domestic courts could remedy the subject matter of the Complaint and hence the Complainant should have tried to pursue them instead of casting aspersion on the ability of the domestic remedies due to isolated or past incidences.
92. Non-implementation of decisions of courts by Zimbabwean authorities, as indicated above, is the third ground upon which the Complainant tries to justify why they have not attempted to exhaust local remedies. They argue that in cases where the judges have tried to act independently and have issued court orders in cases perceived to be politically sensitive and/or contrary to government interests, Zimbabwean authorities have refused to enforce those orders, making remedies meaningless.
93. The Complainant makes particular reference to two cases wherein Zimbabwean authorities refused to investigate and prosecute torture claims despite court orders. Moreover, the Complainant refers to reports by Amnesty International and Human Rights Watch on cases of torture and human rights abuse by security and military personnel and the reported failure of Zimbabwean authorities to investigate and prosecute those responsible.
94. The Complainant in the case of *Mr. Obert Chinhamo v Zimbabwe*²⁹ case argued that even if local remedies were available, they were not effective because the State has the tendency of ignoring court rulings taken against it. The Complainant cited among others the High Court of Zimbabwe’s decision in the *Commercial Farmers Union Case* and the

²⁸ Article 19 v Eritrea, para 65.

²⁹ Mr. Obert Chinhamo v Zimbabwe para 83.

Ray Choto and Mark Chavhunduka case as an example and further claimed that the Zimbabwe Lawyers for Human Rights had documented at least 12 instances where the State has ignored court rulings.

95. In the *Mr. Obert Chinhamo v Zimbabwe* in which the facts of the case and issues raised are similar with the case at hand, the African Commission ruled that “it is not enough for a Complainant to simply conclude that because the State failed to comply with a court decision in one instance, it will do the same in their own case. Each case must be treated on its own merits”³⁰.
96. In the same vein, in *Michael Majuru v Zimbabwe*³¹ wherein the Complainant argued on similar grounds of ignorance of court decisions by Zimbabwe, the African Commission re-affirmed its position that the Complainant instead of casting doubts, should have attempted to exhaust local remedies.
97. Similarly, in the present case the African Commission is of the view that the Complainant should have tried to pursue the local remedies available, rather than merely anticipating the outcomes of court proceedings.
98. Based on the above, the African Commission finds that the requirement of exhaustion of local remedies under Article 56(5) of the Charter has not been met.
99. The third issue of contention is the Admissibility requirement under Article 56(6) of the Charter, which provides that Communications should be “submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized with the matter”.

³⁰ Mr. Obert Chinhamo v Zimbabwe para 84.

³¹ Communication 308/07 – *Michael Majuru v Zimbabwe* (2008) ACHPR paras 101 - 103

100. This requirement is tied to the requirement of exhaustion of local remedies so much so that the point of departure of the reasonable time is from the date of exhaustion of local remedies. The African Commission having ruled that local remedies have not been exhausted, it automatically follows that the requirement under Article 56(6) of the Charter is not met.

Decision of the African Commission on Admissibility

101. In view of the above, the African Commission on Human and Peoples' Rights decides:

- i. To declare the Communication Inadmissible because it does not comply with the requirements under Article 56 (5) and (6) of the African Charter;
- ii. To give notice of this decision to the parties in accordance with Rule 107 (3) of its Rules of Procedure; and
- iii. To attach the decision to its 32nd Activity Report.

**Done in Banjul, The Gambia, at the 11th Extraordinary Session of the African Commission
held from 21 February to 1 March 2012**