

Communication 351/2007- Givemore Chari (represented by Gabriel Shumba) v Republic of Zimbabwe

Summary of the Complaint:

1. The Secretariat of the African Commission on Human and Peoples' Rights, (the Secretariat) received this Complaint on 5 November 2007. It is submitted by Gabriel Shumba (the Complainant), representing Givemore Chari (hereinafter referred to as the Victim), against the Republic of Zimbabwe (the Respondent State).¹
2. The Complainant states that the Victim is an unemployed male citizen of Zimbabwe who was 27 years old at the time the Complaint was submitted. He states further that in 2005, the Victim was the President of the Student Representative Council (SRC) of the Bindura University in the Mashonaland Province of Zimbabwe, which was highly critical of Government policies on higher education.
3. The Complainant alleges that in October 2005, the Victim was suspended from his studies by the University authorities after leading a peaceful march of students which demanded timely and adequate payouts, as well as their general welfare. According to the Complainant, the Respondent State was involved in the Victim's suspension because of the harassment he suffered from the State police responsible for throwing him out of the

¹ The Republic of Zimbabwe ratified the African Charter on 30 May 1986, and is consequently a State party to the African Charter.

University campus. He alleges that the police is frequently used to suppress opposition in the Respondent State.

4. The Complainant avers that after the suspension, the Victim later returned to the University, but suffered constant harassment by way of victimisation and death threats from the University authorities and the police respectively.
5. The Complainant alleges that in May 2006, there was high tension at Bindura University caused by the increase of tuition for students. He alleges further that students were tortured and about 200 were arrested from the National University of Science and Technology, while student leaders were expelled from the University of Zimbabwe, for unjustified reasons.
6. The Complainant states that in mid-May 2006, the Victim and other student leaders staged a peaceful march in their various universities. He alleges that the peaceful march led to the arrest of the Victim, along with forty-seven (47) other students who were taken to Rhodesville Police Station.
7. The Complainant alleges that the Victim and other students were detained overnight in a crowded cell, which was wet, dirty, smelly, infested with vermin, and with a small opening for a window. He alleges that the students were brutally assaulted by the police while in the cell. The Complainant purports that the Victim was punched with clenched fists, kicked, and beaten on the soles of his feet. He alleges that the Victim was also denied food, visits from his relatives and access to a lawyer during the two days detention period. The Complainant avers that, the Victim

- and the other students were released after two days without any procedures of being charged.
8. The Complainant claims that after the first arrest, the Victim was again arrested and released after being assaulted by the police. He submits that on the night of the same day the Victim was released, he was abducted by members of the Government Security Agency-Central Intelligence Organisation (CIO), who bundled him into a vehicle and drove him to an unknown destination. The Complainant alleges that while in the vehicle, the Victim was continually assaulted and later overheard his abductors making plans to kill him and dump his body because he is critical of the Government.
 9. The Complainant states that after overhearing plots to be killed by his abductors, the Victim became terrified and jumped out of the moving vehicle to escape. As a result of this, he sustained severe body injuries and was fortunately rescued by passers-by.
 10. The Complainant submits that after this ordeal, which the Victim narrowly escaped from, he fled from Zimbabwe to South Africa.

Articles alleged to have been violated

11. The Complainant alleges that, the Victim's rights under **Articles 4, 5, 6, 7(b) and 14** of the African Charter on Human and Peoples' Rights (the African Charter) have been violated by the Respondent State.

Prayers

12. The Complainant prays that the African Commission on Human and Peoples' Rights (the African Commission or the Commission) should:
 - i. Find that the Respondent State has violated the Victim's right to physical integrity, protection against torture, protection against arbitrary arrest, fair trial, freedom of association, right to property and to work;
 - ii. Carry out an inquiry and investigation to bring the perpetrators of these human rights violations to justice; and
 - iii. Ask the Respondent State to pay compensation for the physical pain, psychological trauma, loss of job and access to family suffered by the Victim.

Procedure

13. The present Complaint was received by the Secretariat on 5 November 2007. Attached therein, were the Complainant's submissions on Admissibility.
14. By letter dated 7 November 2007, the Secretariat acknowledged receipt of the Complaint and informed the Complainant that it has been registered as a Communication and would be considered for Seizure during the 42nd Ordinary Session of the African Commission scheduled to take place in Brazzaville, Republic of Congo.

15. At its 42nd Ordinary Session, the African Commission considered the Communication and decided not to be seized of it, because it was not signed and did not include the annexes mentioned in the Complaint.
16. By letter dated 19 December 2007, the Secretariat informed the Complainant of the Commission's decision and requested the latter to forward a signed copy of the Complaint, as well as the annexes to be considered during the 43rd Ordinary Session of the Commission scheduled to take place in Ezulwini, Swaziland from 7 to 22 May 2008.
17. By letters dated 19 March 2008, 17 June 2008, 22 October 2008, 11 December 2008, and 27 April 2009 the Secretariat reminded the Complainant to forward a signed copy of the Complaint, as well as the annexes so that it can be seized, or else the matter will be deferred *sine die*.
18. On 11 May 2009, the Secretariat received a signed copy of the Complaint from the Complainant, after which the Commission was seized of it during its 45th Ordinary Session which took place from 13 to 27 May 2009, in Banjul, The Gambia.
19. The Respondent State's submissions on Admissibility were received by the Secretariat on 26 November 2009, and forwarded to the Complainant by a letter dated 3 December 2009.
20. By letters dated 3 December 2009, 3 June 2010, 30 September 2010, 7 December 2010, 26 May 2011, and 14 November 2011, the Secretariat forwarded several reminders to the Complainant requesting for additional information on Admissibility, if any and the annexes mentioned in the Complaint, which were not attached.

21. During its 46th, 47th, 48th, 49th and 50th Ordinary Sessions, the African Commission deferred the consideration of the Communication, and the parties were accordingly informed.

22. During its 11th Extra-Ordinary Session, the African Commission considered the Admissibility of the Communication and the Parties were accordingly informed.

The Law on Admissibility

Submissions of the Complainant

23. With respect to Article 56(1) of the African Charter, the Complainant submits that this requirement is fulfilled because the author of the Communication has been disclosed.

24. Regarding Article 56(2), the Complainant states that the Respondent State has violated the Victim's right to physical integrity, fair trial, freedom of association, property, work, protection against torture and arbitrary detention, in compliance with Article 56(2).

25. In fulfilment of Article 56(4) of the African Charter, the Complainant contends that the Complaint is not based on news from the mass media because the facts as presented are from the Victim's personal account.

26. With regards to the exhaustion of local remedies provided in Article 56(5) of the African Charter, the Complainant submits that due to the circumstances of the Complaint, it is impossible for the Victim to exhaust

local remedies. He states that the Victim was forced to flee from Zimbabwe to South Africa for fear of his life after being tortured by authorities from the Respondent State. According to the Complainant, the fact that the Victim did not collect his belongings is indicative of the urgency with which he left the country.

27. The Complainant avers that the Victim who was also a Human Rights Lawyer representing members of the MDC Party in legal matters is still living in a state of fear for his security and life as the threats did not stop even after he left the Respondent State. According to the Complainant, due to the nature of the Complaint, it would be impractical for the Victim to go back to Zimbabwe and seek remedy from the national courts.
28. The Complainant submits that since the Victim fled the country against his will and is now in another country, domestic remedies cannot be pursued without impediment and hence, not available.²
29. The Complainant further submits that domestic remedies are not effective because there is no prospect of success. He avers that due to the situation of the judicial system in Zimbabwe, the availability of local remedies is not sufficiently certain, and this is aggravated by the prevailing trend of non-compliance with court orders in Zimbabwe.
30. The Complainant states that in a number of decisions rendered by the judiciary, particularly those concerning the treatment of members of the opposition party, and matters affecting the Executive, there has been a deliberate practice of non-enforcement. He makes reference to *Commercial Farmers Union v The Minister of Lands and Agriculture, land*

² Communication 232/99-*John D. Ouko v Kenya* (2000) ACHPR.

Resettlement and others,³ where he submits that no attempt has been made to act upon orders of the High Court against the Commissioner of Police.

31. The Complainant states further that, Zimbabwe Lawyers for Human Rights has documented at least 12 cases since 2000 in which the State has ignored court rulings. He submits that some of the most egregious examples of non-enforcement of judicial rulings include the case of Journalists Mark Chavunduka and Ray Choto who were abducted and tortured by the army.⁴
32. The Complainant states that a Supreme Court-ordered police investigation in 2000 on the above case, but failed to proceed. Hence, it is the Complainant's submission that the Victim has no prospect of success in pursuing local remedies in Zimbabwe. It is also the Complainant's contention that the uncertainty of the factual existence of a remedy for the Victim is indubitable, and therefore lacks the requisite effectiveness.
33. Concerning Article 56(6) of the African Charter, the Complainant submits that the Communication complies with the requirement under this Article. He substantiates this argument by stating that where a Complainant is unable to obtain redress locally, and is not required to exhaust local remedies as in the instant case, reasonable time could be determined by having regard to the date of violation and date of submission as practiced in the Inter-American Human Rights System. The Complainant states that it has only been less than four months since the violations occurred,

³ Supreme Court Ruling, (132-2000).

⁴ Justice system eroded by state non-compliance available at www.allafrica.com.

starting from 14 January 2003. According to the Complainant therefore, the Communication is submitted within a reasonable time.

34. With regards to Article 56(7) of the African Charter, the Complainant states that the matter has not been brought before any international organ, and therefore the Communication fulfils Article 56(7) of the African Charter.

Respondent State's submissions on Admissibility

35. According to the Respondent State, the Communication does not comply with Articles 56(2), 56(5) and 56(6) of the African Charter and should be declared inadmissible.

36. With respect to Article 56(2) of the African Charter, the Respondent State argues that the facts raised in the Communication are vague and not adequate to prove a *prima facie* case. The Respondent State submits that according to the Complainant, the Victim was allegedly arrested and detained by the police on several occasions, without supplying evidence of the dates and place of such detention.

37. The Respondent State also submits that, according to the Complainant, the Victim was allegedly punched with clenched fists, kicked, and beaten. Further, that the Victim allegedly jumped out of a moving vehicle and sustained serious injuries. However, it is the Respondent State's contention that no medical reports were submitted in support of these allegations by the Complainant.

38. Furthermore, still substantiating on the vagueness of the Complaint, the Respondent State submits that the Complainant describes the Victim as a student leader who was involved in peaceful marches to the general welfare of students in the country, and at the same time describes him as a Human Right Lawyer who was representing members of the MDC Party in legal matters.

39. According to the Respondent State, the facts in the Communication lack clarity and consistency and do not fall within the *rationae materiae* of the African Commission.

40. As far as Article 56(5) is concerned, the Respondent State refers to the Complainant's submissions that the Victim could not exhaust local remedies because he was forced to flee the country. While quoting *Section 24(1) of the Constitution of Zimbabwe*, the Respondent State submits that this Section is clear to the effect that anyone who believes that his or her rights are being violated can approach the Supreme Court for redress. *Section 24(1) of the 2009 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 a 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.

41. The Respondent State submits that it is not a legal requirement for a Complainant to be physically present in the country in order to access

local remedies. It notes that *Chapter 7.06 of the High Court Act*, and *Chapter 7.05 of the Supreme Court Act* permits any person to make his application to either Court through his or her legal representative. Furthermore, the Respondent State notes *Section 50(1) of the High Court Act* which provides that “*Every person shall be entitled to be present if he so wishes at the hearing of his trial, action or appeal.*” According to the Respondent State therefore, the Victim,⁵ could have sought local remedies from the authorities in Zimbabwe without being physically present in the jurisdiction, instead of opting to approach the African Commission directly.

42. The Respondent State cites the African Commission’s decision in *Mr. Obert Chingamo v Zimbabwe*⁶, where the Commission ruled that where national laws so provide, it would not be necessary for an applicant to be present in the jurisdiction to personally make an application to the courts. The Respondent State therefore argues that the Victim’s absence from the country did not inhibit his freedom to make an application to the Constitutional Court for redress.

43. The Respondent State further submits that, contrary to the Complainant’s submissions that local remedies are not available and effective, it has discharged its *onus* to prove that remedies are not only available, but also effective. According to the Respondent State, there is no indication in the Complaint that the conduct of State Officials was such that it impeded the Complainant from exhausting local remedies, adding that the Complainant never even made an attempt to exhaust them.

⁵ Who is referred to as the Complainant by the Respondent State in this Communication.

⁶ Communication 307/07- *Mr. Obert Chingamo v Zimbabwe* (2007) ACHPR.

44. In its contention of the Communication's non-compliance with Article 56(6), the Respondent State avows that according to the Complainant's submissions, the alleged violations took place between October 2005 and May 2006, while the Communication was received by the Commission on 5 November 2007, which add up to seventeen (17) months after the alleged violations. The Respondent State notes that, the Complainant also refers to 14 January 2003 as the date on which the alleged violations took place, making the period even longer than the time period in contention.
45. The Respondent State submits that although the African Charter does not prescribe what constitutes a reasonable time, other jurisdictions have clear indications to that effect. The Respondent State mentions the interpretation of reasonable time given by the Inter-American Commission and the Protocol merging the African Court of Justice and the African Court for Human Rights which both prescribe a period of six (6) months. It is the State's submission that given the modern era of communication where various modes are available, it would not require the Complainant seventeen (17) months or more to submit the Communication, taking into account the gravity of the alleged violations.
46. In light of the above, the Respondent State submits that if calculation is made from 14 January 2003, when the alleged violations are supposed to have taken place, the delay is clearly unreasonable. The Respondent State adds that, where calculation is made with effect from 2005, seventeen (17) months cannot also be considered reasonable under the circumstances.

The African Commission's Analysis on Admissibility

47. The Admissibility of Communications within the African Commission is governed by the requirements of Article 56 of the African Charter. These requirements are cumulative and must all be satisfied for a Communication to be Admissible. If one of the requirements is not met, the African Commission will declare the Communication inadmissible, unless the Complainant provides sufficient reasons why any of the requirements could not be met.
48. In the Communication before the African Commission, the Complainant avers that apart from Article 56(5) of the African Charter, all the other requirements under Article 56 have been complied with. The Respondent State however argues that the Complainant has not complied with Articles 56(2), 56(5) and 56(6) of the African Charter.
49. Since the Respondent State does not dispute compliance with the other sub-articles under Article 56 of the African Charter, the African Commission will proceed to analyze only the contentious Articles, so as to establish whether the Communication complies with these Articles or not.
50. 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.*" In substantiating compliance with Article 56(2) of the African Charter, the Complainant alleges that the Respondent State has violated the Victim's right to physical integrity, fair trial, freedom of association, property, work, protection against torture and arbitrary detention, guaranteed by Articles 4, 5, 6, 7(b) and 14 of the African Charter.

51. The Respondent State on the other hand, submits that the facts raised in the Communication are vague and not adequate to establish a *prima facie* case. It is also the Respondent State's contention that '*The facts in the Communication lack clarity and consistency and do not fall within the rationae materiae of the Commission.*'
52. Before establishing whether there has been compliance with Article 56(2) of the African Charter by the Complainant, the African Commission finds it necessary to explain the concept of its *rationae materiae* jurisdiction mentioned by the Respondent State.
53. *Rationae materiae* is one of the four aspects of compatibility with the African Charter under Article 56(2). It is a substantive requirement which validates a Complaint when a right set out in the African Charter has been violated. Hence, a Communication will be inadmissible if it does not fall within the framework of the *rationae materiae* of the African Commission. In other words, if it does not provide *prima facie* violation of the African Charter.
54. In *Michael Majuru v Zimbabwe*, the African Commission relied on Black's law dictionary to define *rationae materiae*, stating its meaning to be, "*By reason of the matter involved; in consequence of, or from the nature of, the subject-matter.*"⁷
55. In the present Communication, the Respondent State argues that the facts do not present a *prima facie* case because the Complainant submits that the Victim was allegedly arrested and detained by the police on several occasions, without supplying evidence of the dates and place of such

⁷ Communication 308/2005- *Michael Majuru v Zimbabwe* (2008) ACHPR para 63.

detention, as well as medical reports in support of the injuries allegedly sustained.

56. Contrary to the Respondent State's contention, the Complainant explains the violations committed against the Victim in **paragraphs 2 to 10** of his allegations above, which lead to the conclusion that the Victim's rights under Articles 4, 5, 6, 7(b) and 14 of the African Charter have been violated by the Respondent State.

57. The African Commission noted in *Southern Africa Human Rights NGO Network and Others v Tanzania*, that, "*The primary consideration of the Commission under Article 56(2) is whether there has been prima facie violation of rights provided by the African Charter.*"⁸ Thus, looking at the submissions of both parties, albeit the Respondent State's argument that the allegations made by the Complainant are vague and inconsistent, the African Commission opines that these allegations establish a *prima facie* case. This is because on the face of it, they reveal violations guaranteed by the African Charter, and consequently fall within the *rationae materiae* of the African Commission.

58. The African Commission therefore holds that Article 56(2) of the African Charter has been complied with by the Complainant.

59. The second issue of contention in this Communication is the requirement under **Article 56(5)** of the African Charter. This Article provides that Communications should be "*Sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged.*"

⁸ Communication 33/06- *Southern Africa Human Rights NGO Network and Others v Tanzania* (2008) ACHPR para 51

60. In the instant Communication, the Complainant avers two reasons why local remedies could not be exhausted which will be dealt with by the African Commission consecutively.
61. Firstly, the Complainant states that due to the circumstances of the Complaint, it is impossible for the Victim to exhaust local remedies. He alleges that the Victim was forced to flee Zimbabwe, for fear of his life after being tortured by the authorities in the Respondent State which was provoked by his affiliation and activism as a human rights lawyer. Thus, according to the Complainant, it would be impractical for the Victim to go back to Zimbabwe and seek remedy from the national courts.
62. In response to the Complainant's argument that the Victim could not exhaust local remedies because he fled the country, the Respondent State submits that it is not a legal requirement to be physically present in the country in order to access local remedies as provided in *Section 24(1) of the Constitution of Zimbabwe, Chapter 7.06, Section 50(1) of the High Court Act, and Chapter 7.05 of the Supreme Court Act.*
63. In perusing the Complainant's submissions, the African Commission notes that there are no annexes in the Complaint as indicated by the Complainant to support his submission, which makes it difficult to ascertain the veracity of the allegations. It is noteworthy that several correspondences have been made by the Secretariat to request for additional information on Admissibility, as well as the annexes that were said to have been attached to the Complaint. However, despite several reminders, the Complainant has failed to respond. The African Commission underscores that, evidence, including medical reports, names

of persons who committed the alleged violations, and testimony of witnesses could corroborate the arguments put forward by the Complainant.

64. However, in the absence of the annexes mentioned by the Complainant, the Commission cannot help but agree with the Respondent State that the Communication is vague. The reason being that the allegations are not substantiated, and also do not provide enough ground to establish the element of fear as claimed by the Complainant. This position was also taken by the African Commission in *Obert Chinhamo v Zimbabwe*,⁹ whose facts are similar to the present Communication.

65. In *Obert Chinhamo v Zimbabwe*, the Complainant claimed that that he left his country out of fear for his life due to intimidation, harassment and torture. He described how he was treated while in detention, noting amongst other things that he was denied food, and that the conditions in the cells were bad – smelly, small, and that the toilets were overflowing with urine and other human waste.¹⁰ The Commission ruled that the Complainant simply made general allegations without corroborating them with documentary evidence or testimony of others.¹¹ The Commission further held that the Complainant:

...has not shown...the danger he found himself in that necessitated his fleeing the country. Without concrete evidence to support the allegations made by the complainant, the Commission cannot hold the Respondent State responsible for whatever harassment, intimidation and threats that

⁹ n 7 above.

¹⁰ Ibid, para 76.

¹¹ n above.

the Complainant alleges he suffered, that made him flee the country for his life.¹²

66. Furthermore, the Respondent State has argued that according to *Section 24(1) of the Constitution of Zimbabwe* (whose content has been verified by the African Commission), *the High Court and Supreme Court Act*, the Complainant need not be physically present in the country to access local remedies. At this juncture, it is worth noting that in the *Mark Chavhunduka and Ray Choto Case*, cited by the Complainant in its submissions, the applicants applied to the Supreme Court for a determination under *Section 24 of the Constitution of Zimbabwe*,¹³ meaning that they were not physically present during the time of the application.

67. The *Mark Chavhunduka and Ray Choto Case*, according to this Commission, just corroborates the argument raised by the Respondent State that the Complainant (whether he/she is the Victim or not), can be represented, without being physically present, in accordance with the national laws of Zimbabwe.

68. Moreover, in *J.E Zitha and P.J.L. Zitha (represented by Prof. Dr. Liesbeth Zegveld) v Mozambique*, the African Commission adopted the same principle stating that, it has entertained many Communications from authors on behalf of Victims. The African Commission also noted in that same Communication 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*

¹² n above.

¹³ See *Zimbabwe: Chavunduka and Choto v. Zimbabwe* · Article 19 available at www.article19.org/.../zimbabwe-chavunduka-and-choto-v.-zimbabwe.

with the provisions of Article 56 (5) or to show cause why it is impracticable to do so."¹⁴

69. The facts in the instant Communication reveal that the Victim who has fled the country is represented by the Complainant. In view of the situation at hand, where the Victim is no longer in the country, the representative of the Victim could have attempted to exhaust local remedies on behalf of the Victim.

70. The above notwithstanding, even if the representative was not in a position to exhaust local remedies for whatever reasons, any other person could have represented the Victim in the local courts as required by national laws. The African Commission therefore reasons, as was the case in *Obert Chinhamo v Zimbabwe* that physical presence is not mandatory to access local remedies, and so the Complainant cannot claim that local remedies are not available to him.¹⁵ Hence, there was no attempt to exhaust local remedies and the African Commission will not be swayed by the fact that the Victim feared for his life.

71. With respect to the second ground submitted by the Complainant for not exhausting local remedies, the Complainant indicates that domestic remedies are not available and effective because there is no prospect of success. He avers that due to the situation of the judicial system in Zimbabwe, the availability of local remedies is not sufficiently certain, which is aggravated by the prevailing trend of non-compliance with court

¹⁴ Communication 361/08- J.E Zitha & P.J.L.Zitha (represented by Prof. Dr. Liesbeth Zegveld) v Mozambique, Para 108.

¹⁵ n 7 above para 82.

orders in the country. The Complainant states that in a number of decisions rendered by the judiciary, particularly those concerning the treatment of members of the opposition party, and matters affecting the executive, there has been a deliberate practice of non-enforcement.

72. In response, the Respondent State argues that contrary to the Complainant's submissions, it has discharged its *onus* to prove that remedies are not only available, but also effective. It adds that there is no indication that the conduct of State Officials impeded the Complainant from exhausting local remedies, and that the Complainant did not attempt to exhaust them.

73. An effective remedy according to the African Commission in **Sir Dawda K. Jawara v The Gambia** must offer a prospect of success.¹⁶ The African Commission has also held on several occasions that attempts must be made to exhaust local remedies before concluding that they are not available, sufficient and effective.

74. In *Anuak Justice Council v Ethiopia*¹⁷ for instance, when the Complainant showed apprehension in exhausting local remedies, the African Commission held 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*". Similarly, in *Article 19 v Eritrea*,¹⁸ the Commission ruled that "*It is incumbent on the Complainant to take all necessary steps to exhaust,*

¹⁶ Communication 147/95-149/96: *Sir Dawda K. Jawara v The Gambia*(2000), para 32.

¹⁷ Communication 299/05 – *Anuak Justice Council v Ethiopia* (2006) para. 58.

¹⁸ Communication 275/2003, *Article 19 v The State of Eritrea* (2007), para 65.

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”.

75. Furthermore, the premise under Article 56(5) is to give the Respondent State the opportunity to redress by its own means, within the framework of its own domestic legal system, the wrong alleged to have been done to the individual,¹⁹ before taking the matter to any international body. Thus, if the Government argues that a Communication should be declared inadmissible because local remedies have not been exhausted, it has the burden to demonstrate that such remedies exist.²⁰

76. In the instant Communication, the Respondent State contends that it has discharged its *onus* to show that local remedies are available and effective, making the burden shift on the Complainant to prove otherwise. In exercising this burden, the Complainant cites the Cases of *Commercial Farmers Union v The Minister of Lands and Agriculture, land Resettlement and others*,²¹ and *Mark Chavhunduka and Ray Choto v Zimbabwe* as examples to support his argument that the courts in the Respondent State are ineffective because they do not comply or implement their decisions. The Complainant adds that Zimbabwe Lawyers for Human Rights has documented at least 12 cases since 2000 in which the State has ignored court rulings. Hence, due to the above reasons, it is the Complainant’s submission that the Victim has no prospect of success in pursuing local remedies in the Respondent State.

¹⁹ Communication 71/92 *RHADDU v. Zambia* (1996) ACHPR para 10.

²⁰ n above para 12.

²¹ Supreme Court Ruling,(132-2000).

77. The African Commission was faced with a similar situation in *Mr. Obert Chinhamo v Zimbabwe*,²² where the Complainant also argued that even if local remedies were available, they were not effective because the Respondent State has the tendency of ignoring court rulings taken against it. . The African Commission held 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*”²³.

78. Thus, granted that a remedy must offer a prospect of success, the Commission can only conclude that it is indeed ineffective if there is proof beyond reasonable doubt and balance of probability that the remedy, despite its existence, would indeed not redress the violation(s) alleged. Nonetheless, in the Communication in question, the Complainant has not made any attempt to exhaust local remedies, short of saying that they are not available or effective on the ground that the courts in the Respondent State do not comply with their decisions.

79. Accordingly, apart from establishing that the evidence before this Commission is not sufficient to provide clarity on the issues raised, the Commission is also ascertaining that the Respondent State has not been given the opportunity to investigate the allegations and provide redress within its jurisdiction.

²² n 7 above para 83.

²³ n 7 above para 84. See also Communication 308/07 – *Michael Majuru v Zimbabwe* (2008) ACHPR paras 101 - 103

80. Furthermore, the Complainant has not refuted the Respondent State's assertion that it did not impede the Complainant from exhausting local remedies. According to the African Commission therefore, the State has discharged its burden to show that local remedies are available and effective to address the alleged violations. In this regard, the Commission stands to reason that the Complainant's failure to rebut the State's argument that local remedies are available and/or effective, and the absence of evidence substantiating the allegations portray a serious element of doubt on the veracity of the Complainant's claims.
81. From the foregoing, the African Commission takes the view that available remedies in the Respondent State have not been tested by the Complainant. Thus, the requirement in Article 56(5) of the African Charter has not been met.
82. The last issue of contention in this Communication is the requirement under **Article 56(6)** of the African Charter which provides that *"Communications received by the Commission will be considered if they are submitted within a reasonable period from the time local remedies are exhausted, or from the date the Commission is seized with the matter..."*
83. This Commission notes that the requirement under Article 56(6) of the African Charter 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. In this regard, the African Commission having ruled that local remedies have not been exhausted by the Complainant in this Communication, it automatically follows that the requirement under Article 56(6) of the African Charter is not met.

Decision of the African Commission on Admissibility

84. Based on the above analysis, the African Commission 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 Extra-Ordinary Session of the African Commission held from 21 February to 1 March 2012